sponsible for making the levy to effect the repayment of the poor relief advances failed in their mandatory duty, the county auditor should then do what such other officers had failed to do.

If the appropriate township's officers had failed to make the levy and the matter having been submitted to the county tax adjustment board was left unchanged, the duty of the county auditor to make the levy would be clear and literally within the language of section 12291, supra. I can see no difference in principle between the above case and the case submitted by you, where the township officers make the mandatory levy and the county board of tax adjustment strike it out. The same result follows—the officers charged initially with the duty of making the levy have failed in the performance of their mandatory duty. I call your attention in this connection to the language of the court in the case of Wayne Township v. Brown, supra, on page 847. The court said:

"In case of an emergency in any municipal corporation, such as for the relief of the poor, the board of tax adjustment not only has the power, but it becomes its imperative duty, to fix such tax levy for such municipal corporation as is necessary to meet such emergency. This duty cannot be side-stepped, or evaded on the theory that it would raise the tax levy above the one dollar or one dollar and half rate. The legislative body purposely made the exception to take care of emergencies that might exist in any municipal corporation." (Our italics.)

In my opinion, under the conditions set out by you, it is the clear and mandatory duty of the county auditor to make the necessary levy as provided by section 12291 of Burns Annotated Indiana Statutes of 1926.

TAX COMMISSION: Water works sinking fund—whether council may transfer part of same to general fund of city.

November 4, 1933.

Hon. Philip Zoercher, Chairman,
State Board of Tax Commissioners,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter submitting the question as to whether a civil city of the second class which owns and oper-
ates a waterworks plant may legally transfer any part of the receipts from the operation of said plant to the general fund of the city, while some of the obligations incurred in the purchase and construction of the plant are outstanding. In answering the above question, I am assuming that the waterworks plant was obtained pursuant to chapter 164 of the Acts of 1927.

Sections 18 and 19 of the above act, provide for the creation of a “waterworks district bond fund” which is made up of any surplus of the proceeds from the sale of bonds issued pursuant to the act; the proceeds of a special tax levy authorized by section 19 and, when so ordered by resolution of the board of trustees, in lieu of the proceeds of the tax levy, a specific amount of the surplus revenues from the operation of the plant. Section 19, further provides that “if the board shall adopt such resolution, then it shall be unlawful for said board to use any part of the amount so set aside, out of its net revenues for any purpose, other than the payment of such bonds and the interest thereon.”

Acts of 1927, page 496.

Said section further provides as follows:

“At any amount of net revenues derived from the operation of the waterworks plant and system under the jurisdiction of said board, not required for the payment of the principal and interest on the outstanding waterworks district bonds, shall be paid over to the city and deposited in the sinking fund established for the purpose of redeeming and retiring any bonds then outstanding, which said city may have theretofore issued on account of, or for the benefit of, its municipal waterworks plant and said payment shall continue so long as any of such municipal bonds shall be outstanding.”

(Our italics.)

Acts of 1927, page 496.

Section 21 of said act, provides for the establishment of a “waterworks maintenance and general expense fund” which is made up of the proceeds of a special levy authorized thereby when necessary and “all revenues collected by the board of trustees, derived from the operation of the waterworks.”

It is expressly provided by the above section that:
“All revenues collected by the board of trustees, derived from the operation of the waterworks under the jurisdiction of said board, shall become and be a part of said ‘waterworks maintenance and general expense fund’ and shall be deposited, held and used as in this section provided, except such part thereof as said board shall set aside from time to time in the sinking fund herein provided for to meet and pay the bonds issued pursuant to this act, OR WHICH MAY FROM TIME TO TIME BE PAID OVER BY SAID BOARD INTO THE SINKING FUND OF SAID CITY TO MEET AND PAY THE MUNICIPAL BONDS WHICH SAID CITY MAY HAVE HERETOFORE ISSUED ON ACCOUNT OF OR FOR THE BENEFIT OF ITS MUNICIPAL WATERWORKS.” (Our italics and capitals.)

While the fund referred to is not previously designated as a sinking fund, the language in italics, supra, apparently refers to that provision in section 19, supra, which authorizes the board to set aside a “specific amount” of its surplus revenues to pay the principal and interest on the waterworks bonds which are payable in the following calendar year; and the language in capitals apparently refers to the “sinking fund” to be accumulated for the purpose of paying the municipal bonds which said city may have “heretofore” (that is before the passage of the act) “issued on account of or for the benefit of its municipal waterworks.”


Clearly, the first fund is a designated fund and cannot pursuant to said act be used, except for the purpose for which it is designated, namely to pay bonds and interest issued pursuant to the act payable in the following calendar year. I think this must be clear and any attempt of the legislature to subsequently divert such fund while such obligations are unpaid, would impair the obligation of the contract embodied in the bond.

As to the second fund, it also is a designated fund, but I do not see how holders of bonds issued prior to the enactment of the act can claim any binding contract rights therein. In other words, I think the legislature would have the right so
far as chapter 164, supra, is concerned, to provide for a different use for that fund without interfering with any contract rights arising out of said act.

I desire now to call attention to chapter 129, of the Acts of 1933. Acts of 1933, page 743. Section 1 of said act provides as follows:

“That where there is a public fund or funds in the custody of any department of any city, and where any such fund, or any part thereof, is not being used for the purpose for which it was created, and where there is actual need for all or any part of the money in such fund for use in some other fund in order that such city may carry on its necessary governmental functions, the common council of such city may transfer such fund or funds or any part thereof to the general fund of such city to be used for the usual purposes thereof, as by ordinance provided. Such transfer shall be authorized only after the common council shall have given ten days’ notice by posting written or printed notices thereof in at least three public places in such city stating the time and place when and where such common council will meet to consider the proposed transfer.”


In my opinion, the above language is sufficient to authorize the transfer of such part of the last described fund as is “not being used for the purpose for which it was created,” upon following the procedure therein set out. This opinion, however, is based upon and has reference only to the rights in the waterworks revenues of holders of bonds issued prior to the enactment of chapter 164 of the Acts of 1927, acquired and held by them pursuant to chapter 164 of said Acts of 1927. If said prior bonds, pursuant to the act under which they were issued, were issued upon a specific pledge of certain parts of the waterworks revenue for the payment thereof, then of course, any diversion of such revenues would constitute an impairment of that contract. I do not have before me any of these bonds or copies thereof and for that reason, the opinion must be accepted with the above reservation.

I call your attention also to the fact, that the transfer of funds as provided in chapter 129 of the Acts of 1933, is dis-
cretionary with the common council of the city. The state board of tax commissioners, in my opinion, would not be authorized to substitute its judgment for the judgment of the common council of the city involved. The making of such a transfer does not in any sense devolve upon such board.

Your attention also is called to section 2 of the 1933 act, supra, which provides that such a transfer may be prevented by a remonstrance by three per cent of the resident taxpayers other than those who pay poll tax only.

CONSERVATION DEPT.: Hunting and fishing—right of legislature to discriminate as to certain areas or waters—delegation of powers to conservation department.

November 7, 1933.

Hon. Kenneth M. Kunkel, Director,
Fish and Game Division,
Conservation Department,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of October 3, 1933, enclosing a copy of a resolution passed at a recent state meeting of the Indiana division of the Izaak Walton League of America and asking my opinion concerning matters contained therein. That portion of the resolution material to your inquiry reads as follows:

"NOW, THEREFORE, BE IT RESOLVED, That the league in convention assembled favors the enactment of timely and fitting legislation, placing absolute power and authority, in conjunction with the recommendations of recognized sportsmen’s organizations, in the department of conservation of the State of Indiana to open and close hunting and fishing seasons at its discretion, to open and close various streams, lakes, and parts thereof to fishing and various areas and counties to hunting, and in short to clothe the department with the weapon of authority to provide an abundance of fish and game."

You ask whether an act embodying these proposed changes would be constitutional.