

This section appears as section 28-1328 of Burns Indiana Statutes, Annotated (1933), and so far as I have been able to determine has not been amended, modified or repealed. In my opinion, it governs as to the question submitted, which is therefore answered in the negative.

**ACCOUNTS, STATE BOARD OF: Taxation—appropriation
to be valid must provide funds if not in treasury.**

September 1, 1937.

Hon. W. P. Cosgrove,
State Examiner,
Division of Accounting and Statistics,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of August 26 in which you submit the following questions:

“1. If there is an appropriation, can a public official contract debts against the county within the limits of the appropriation even though the rate established by the county council will not raise sufficient revenue to pay the obligation and this is known at the time the obligation is contracted?”

“2. Is it necessary to ask for an appropriation the following year to cover claims allowed by the commissioners and contracted within the appropriation if not paid within the year contracted because of a deficiency in revenue?”

In answering your first question I proceed on the assumption that at the time the annual budget was approved by the county council they approved certain amounts as proper expenditures but fixed the rate for taxation at a figure so low that it would not and could not produce revenue sufficient to meet the authorized expenditures. The question therefore arises as to whether or not such procedure constitutes a valid appropriation.

Section 26-520, Burns Indiana Statutes, 1933 Revision, provides the manner in which the county councils shall proceed with reference to appropriation ordinances. After the various

county officers have submitted their itemized estimates of the amount of money required for each particular office these estimates are presented to the county council at their regular meeting in September and the county auditor shall prepare ordinances in proper form, fixing the rate of taxation for the taxes to be collected in the ensuing year and also making an appropriation for items for such calendar year for the various purposes for which all of the above estimates are required. The statute then provides that:

“The council at said meeting shall act upon such ordinances, and, by adopting the same or amended or substituted ordinance, *fix the tax rate* within the limit prescribed by law, *and make the appropriations*. Each ordinance shall be read upon at least two (2) separate days before its final adoption.”

It will be noted that the statute requires the tax rate to be fixed and the appropriations made in the manner as above set out, and while the statute does not specifically so state, it is my opinion that it was the intention of the legislature that the tax rate should be fixed before the appropriation is made. I am led to this conclusion for the following reasons:

Courts have frequently been called upon to define and have defined the word “appropriation” in the following language:

“‘Appropriation’ is the setting apart from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and for no other. *State v. Moore*, 69 N. W. 373, 376, 50 Neb. 88, 61 Am. St. Rep. 538 (citing *Ristine v. State*, 20 Ind. 328; *Clayton v. Berry*, 27 Ark. 129; *Stratton v. Green*, 45 Cal. 149; *State v. La Grave*, 41 Pac. 1075, 23 Nev. 25, 62 Am. St. Rep. 764; *State v. Wallichs*, 12 Neb. 407, 11 N. W. 860; *State v. Wallichs*, 16 Neb. 679, 21 N. W. 397); *Proll v. Dunn*, 22 Pac. 143, 145, 80 Cal. 220.”

Our own Supreme Court has further defined the term “appropriation” in the following language:

“Appropriation, as applicable to the general fund in the treasury, may, perhaps, be defined to be an authority from the legislature given at the proper time,

and in legal form, to the proper officers to apply sums of money out of that which may be in the treasury, in a given year, to specified objects or demands against the state.”

Ristine, Auditor, etc. v. State, etc., 20 Ind. Rep. 328 at 338.

The question therefore arises as to whether or not there can be a valid appropriation of money where such money is not in the treasury and no provision has been made to procure such monies.

Our courts have frequently announced the proposition that appropriations cannot be made unless funds are available for such purpose and in the case of *Advisory Board v. State, ex rel., Smith*, 166 Ind. 237, we find this statement:

“Unless there were such funds, the advisory board could not make an ‘appropriation’ thereof. *Board, etc., v. State, ex rel.*, (1901), 156 Ind. 550, 554, 555; *State, ex rel., v. Fisher* (1901), 157 Ind. 412, 413.”

This question has also been passed upon by the Supreme Court of Nevada in the case of *State v. La Grave*, 62 Am. St. Rep. 764, wherein the following language appears:

“It is said that fixing the maximum amount to be paid each company and directing the controller to draw his warrant for the amount and the treasurer to pay it constitutes an appropriation.

“These matters alone do not accomplish that end. *To constitute an appropriation there must be money placed in the fund applicable to the designated purpose.* The word ‘appropriate’ means to allot, assign, set apart, or apply to a particular use or purpose. An appropriation, in the sense of the constitution, means the setting apart a portion of the public funds for a public purpose.”

This authority squarely supports the proposition that before there can be a valid appropriation there must be money on hand or available for the designated purpose. In other words, the authorities seem to hold that there can be no appropriation, no setting apart, no designation of a particular sum to a particular use unless such sum is actually available or to become available. It seems to have been the intention of the

law making body to prevent the expenditure of public monies and to forbid the incurring of obligations until the money to meet such expenditures was available. Hence our statute provides that:

“No Board of County Commissioners, officer, agent or employee of any county shall have power to bind the county by any contract or agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of the obligation attempted to be incurred, and all contracts and agreements, express or implied, and all obligations of any and every sort beyond such existing appropriation are declared to be absolutely void.”

Sec. 26-525, Burns Ind. Stat. 1933 Rev.

This same proposition is announced in the case of Williams v. City of Michigan City, 100 Ind. App. 136; Lund v. Board of Commissioners, 47 Ind. App. 175, and Van Der Veer v. State, ex rel., Herron, 97 Ind. App. 1, in which the following language appears:

“There being no valid appropriation out of which appellant’s claim could be paid, it follows that the payment of the same was unlawful * * *.”

It is my opinion, therefore, that there can be no valid appropriation of public funds in excess of anticipated revenues for the collection of which provision has been made.

This brings us, therefore, to the second question which asks the procedure necessary for the payment of claims which have been deemed a legitimate expenditure but for which no funds are available or to become available. This procedure is designated by the legislature, Section 26-532, Burns Indiana Statutes, 1933 Revision, which reads as follows:

“The county council shall have the exclusive power to authorize the borrowing of money for the county, but the total amount of county indebtedness shall not exceed an amount equaling two (2) per cent of the taxable property of such county, less the total of all mortgage exemptions, as the same may appear on the tax duplicate for the year in which such loan shall be

effected. The ordinance authorizing such loan may direct the issue of bonds or other county obligations, negotiable or otherwise, bearing interest at a rate not exceeding six (6) per cent per annum, and running not to exceed twenty (20) years. It shall be lawful to provide that the bonds of any series may mature by instalments payable annually, or otherwise, if deemed for the public interest. It shall be lawful to issue and sell bonds for any lawful corporate purpose, including the building of county bridges, except that no bonds shall be issued or sold to pay for any current expenses of such county incurred after the passage of this Act. Temporary loans may be authorized to meet current running expenses to an amount not exceeding the revenue for the current year, and only as an anticipation of such revenue. It shall be the duty of said council each year to levy an annual tax within the rate prescribed by law, sufficient to pay all current running expenses of the county, including such temporary loans and interest on county indebtedness, and shall also make a levy as heretofore required to be made by the county commissioners under section 5753 (Sec. 26-1006 herein) of the Revised Statutes of 1881, if the county have any bonded indebtedness. If for any reason the amount of revenue in any year should fall short of the sum expected to have been raised, and thereby a deficit shall be incurred for current running expenses, then it shall be the duty of said council to provide for such deficit in the next tax levy. Whenever any bonds are authorized the ordinance shall state the purpose for which said bonds are issued, so that the record may show that such bonds are issued either for the purpose of paying any county indebtedness incurred before the passage of this Act or for county expenses authorized by law other than current running expenses, or for the payment of bonds issued for said lawful purposes after the passage of this Act."

It will be noted from a reading of the above statute that it is the duty of the county council each year to levy an annual tax sufficient to pay all current running expenses of the county. In other words, the rate fixed should be sufficient

to provide the funds to meet authorized expenditures. However, the statute provides that:

“If for any reason the amount of revenue in any year should fall short of the sum expected to have been raised, and thereby a deficit shall be incurred for current running expenses, then it shall be the duty of said council to provide for such deficit in the next tax levy.”

This particular sentence seems to be a complete answer to your second question. To summarize, it is my opinion, therefore, that there can be no valid appropriation of money in excess of funds on hand or provided for. When such funds have been exhausted and additional funds are needed to pay for the necessary functions of government the county council should, by an emergency appropriation, approve such additional expenditures and provide the means for raising the money.

AUDITOR OF STATE: Authority to adopt regulations defining gasoline in administration of gasoline tax account.

September 1, 1937.

Honorable Laurence F. Sullivan,
Auditor of State,
State House,
Indianapolis, Indiana.

Dear Mr. Sullivan:

I have before me your letter calling attention to certain procedural aspects of the law of the state with reference to the collection of the four cents per gallon motor vehicle fuel tax imposed on the use of all motor vehicle fuel used in this state.

The Act provides in the first place for the imposition on the use of all motor vehicle fuel used in this state for any purpose a license fee of four cents per gallon without limitation as to the exact use to be made of the motor vehicle fuel.

Burns Indiana Statutes, Annotated (1933), Section 47-1501.