nurses' training school purposes, but in lieu thereof, and upon the further assurance that the University will continue the nurses' training program as heretofore, it is my conclusion that the Legislature intended by the emergency clause that the state aid authorized by the Acts of 1961, Ch. 105, *supra,* was to be based upon the nine-cent levy, not only with respect to taxes thereafter levied but also to proceeds received from the aggregate of the five-cent and the four-cent taxes levied in 1960, payable in 1961, so that you would be authorized to pay such state aid based upon the proceeds from such two county levies. This seems to be in harmony with what the Legislature intended to accomplish by this enactment.

OFFICIAL OPINION NO. 44

September 8, 1961

Mr. David Cohen, Chairman
Indiana State Highway Commission
12th Floor State Office Building
Indianapolis 4, Indiana

Dear Mr. Cohen:

This is in response to your request for my Official Opinion concerning the constitutionality of Chapter 112 of the Acts of 1961, as found in Burns' (1961 Supp.), Section 36-2961 *et seq.,* which reads as follows:

> "SECTION 1. Recognizing that (a) part of the national system of interstate and defense highways located in Indiana are used by persons residing throughout Indiana and the United States for intrastate and interstate travel; (b) the cost of relocation of utility facilities necessitated by construction, reconstruction, change or modification of said highways is presently subject to being borne by utility rate payers only; and (c) existing federal legislation makes available a substantial portion of the funds with which said highways will be constructed, reconstructed, changed or modified, it is hereby declared that it is inequitable for rate payers of utilities to bear the cost of relocation of utility facilities necessitated by said highway construc-

tion, reconstruction, change or modification and that such cost of relocation of utility facilities should constitute a cost of construction of all of said highway projects in Indiana.

"SEC. 2. When used in this act, the term: (a) 'Utility' shall include all privately, municipally, publicly, or co-operatively owned systems for supplying communications, power, light, heat, electricity, gas, water, pipeline, sewer, sewage disposal, drain or like service, directly or indirectly, to the public.

"(b) 'Cost of relocation' shall include the entire amount paid by a utility properly attributable to such relocation, after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility.

"(c) 'Highway' when used in this act shall mean only those routes which are included within the national system of interstate and defense highways.

"SEC. 3. The cost of relocation of a utility facility is a cost of highway construction and shall be paid by the state of Indiana in the same manner prescribed by law for the payment of other costs of construction of such highway, the provisions of any law or contract to the contrary, notwithstanding; provided, however, the cost to be paid by the state shall not exceed the amount on which the federal government bases its reimbursement for said highway construction.

"SEC. 4. In the case of any such relocation of facilities, the utility owning or operating the same, its successors, or assigns, may maintain and operate such facilities, with the necessary appurtenances in the new location or new locations, for as long a period, and upon the same terms and conditions, as it had the right to maintain and operate such facilities in their former location or locations."

As a condition of reimbursement by federal funds for state funds expended for utility relocations under the above act, it is provided as follows in Public Law 85-767, Section 1, found in 23 U. S. C. A. § 123:

> "(a) When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary system or on the Interstate System, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. Federal funds *shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State.*" (Our emphasis)

As may be seen in the letter from the General Counsel of the Bureau of Public Roads, the Bureau has taken the following position in this matter:

> "In view of the Bureau's responsibility for the proper expenditure of Federal-aid highway funds, we have adopted a policy of withholding approval of payments for utility relocation costs incurred by a State until the validity of the State law has been established to our satisfaction. We will accept, of course, a decision of the court of last resort of a State or an opinion of the Attorney General of the State, provided that it is well reasoned and takes into account those issues which can be raised against constitutionality of the statute. Accordingly, we recommend that you inform the State highway department of our policy and suggest that it either obtain an opinion of the Attorney General of Indiana or have the law tested in the courts."

As you know, immediately prior to Chapter 112 of the Acts of 1961 being signed by the Governor, and put into effect, I examined said Act and was of the opinion that it was constitutional. My Opinion to the Governor was, of course, not fully developed. This Opinion will be in substantiation of my earlier Opinion to the Governor and the basis of the conclusion reached therein is fully developed herein to meet the requirements of the Bureau of Public Roads.

In the research and background study conducted in the formulation of this Opinion, the following cases and opinions

were studied and are hereinafter cited insofar as they have been found to be peculiarly applicable to the issues of constitutionality that might be raised in the application of Chapter 112 of the Acts of 1961 under the Indiana Constitution:

Opinion of the Justice (1957), 152 Me. 447, 132 A. 2d 440;

State Highway Comm. v. Southern Union Gas Co. (1958), 65 N. M. 84, 332 P. 2d 1007;

Minneapolis Gas Co. v. Zimmerman (1958), 253 Minn. 164, 91 N. W. 2d 642;

State v. Southern Bell Tel. Co. (1959), 204 Tenn. 207, 319 S. W. 2d 90;

State v. Idaho Power Co. (1959), 81 Idaho 421, 346 F. 2d 596;

State v. City of Austin (1960), Tex., 331 S. W. 2d 737;

Northwestern Bell Tel. Co. v. Wentz (1960), N. Dak., 103 N. W. 2d 245;

State Road Comm. v. Utah Power and Light Co. (1960), 10 Utah 2d 333, 353 P. 2d 171;

Jones v. Burns (1960), Mont., 357 P. 2d 22;

State Highway Dept. v. Delaware Power and Light Co. *et al.* (1961), Del., 167 A. 2d 27;

Attorney General's Opinions, Florida, 1958;

Attorney General's Opinions, Illinois, 1959;

Attorney General's Opinions, Arizona, 1960;

Attorney General's Opinions, New Mexico, 1960;

Attorney General's Opinions, Alaska, 1961.

Chapter 112 of the Acts of 1961, *supra,* hereinafter referred to as the Relocation Act, in substance requires the State Highway Commission to reimburse a utility for the costs involved in removing a utility facility from public right of way and locating it on a replacing facility elsewhere. Said act applies only to utility facilities which require removal because of the

construction, reconstruction or modification of highways falling within the national system of interstate and defense highways and the costs attributable to any relocation necessitated thereby are stated to be a cost of highway construction. The United States pays 90% of the costs incurred in any construction involving highways falling within the national system of interstate and defense highways, and said act provides that the cost be paid by the state for any utility relocation shall not exceed the amount on which the federal government bases its reimbursement for the highway construction.

The first question that might arise under the Relocation Act is the reasonableness of the exercise of the state's police power in determining that the cost of relocation of utility facilities is a proper cost of highway construction.

Under the common law public utilities did not acquire any absolute property right by virtue of utilizing public right of way for the location of utility facilities. Authority to so use public right of way has been granted in Indiana by statute. The Acts of 1905, Ch. 167, Sec. 38, as amended, as found in Burns' (1949 Repl.), Section 36-1705, reads as follows:

> "Corporations now formed or which may hereafter be organized for the purpose of constructing, operating and maintaining telephone lines and telephone exchanges, or for the purpose of generating and distributing electricity for light, heat or power, are authorized to set and maintain their poles, posts, piers, abutments, wires and other appliances or fixtures upon, along, under and across any of the public roads, highways and waters of this state outside of cities and incorporated towns; and individuals owning telephone lines or lines for the transmission of electricity are hereby given the same authority: Provided, That the same shall be erected and maintained in such manner as not to incommode the public in the use of such roads, highways and waters: Provided further, That no trees shall be cut along such roads or highways without the consent of the abutting property-owners: Provided, also, That no pole or appliance shall be so located as to interfere with the ingress or egress from any premises on said road, highway, or waters: Provided further, That nothing

> herein contained shall be construed as depriving the county commissioners of any county of the power to require the relocation of any such pole, poles or appliances which may affect the proper uses of such highway for public travel, for drainage or for the concurrent use of other telephone lines or lines conducting electricity. The location and setting of said poles shall be under the supervision of the board of commissioners of the county."

The Supreme Court of Indiana prior to the enactment of this legislation recognized that highways could properly be utilized for purposes other than vehicular or pedestrian travel. The Court took the position that the public easement was not limited to the particular use in vogue when the easement was acquired, but included such other uses of utility and general convenience as might later be discovered or developed.

> Magee v. Overshiner (1897), 150 Ind. 127, 49 N. E. 951;
>
> Coburn v. New Tel. Co. (1901), 156 Ind. 90, 59 N. E. 324.

Prior to the enactment of the Relocation Act, there was no statutory provision for reimbursement to a utility for its costs in relocating a facility due to the construction or modification of a highway. There is, however, nothing to prevent the state from abrogating the common law and providing for reimbursement in such cases. In so doing, the state is recognizing an equitable right in the utilities to be protected against an expense occasioned by a relocation of their facilities because of an exercise of the state's police power.

As was stated by the Montana Supreme Court in Jones v. Burns (1960), 357 P. 2d 22, 28, in a case testing the constitutionality of a substantially similar act:

> "* * * It has been pointed out time and time again that a state could abrogate its common law in this respect and provide for reimbursement to utility companies when they are required to remove their facilities from public ways by an exercise of the state's police power. (Cites.) By changing the common law the state

does not necessarily give the utility companies a vested property right to place their facilities in the public ways which they never had before; it merely recognized an equitable and just right in the utility companies to be protected against any loss they might suffer in the event they are required to remove their facilities from the public ways by an exercise of the state's police power.

* * *

"The question whether costs incurred in relocating utility facilities can be properly considered as part of the cost of constructing highways has been considered by many authorities, including Congress. It was the opinion of Congress in enacting 23 U. S. C. A. § 162, that the conditions which existed and flourished while the common law on this subject was being formulated had changed, and that relocation costs necessitated by Federal-aid highway construction should be considered as a part of the cost of constructing these highways and borne by the state rather than the utility companies. 2 U. S. Code Cong. & Ad. News, 85th Cong., 2d Sess., pp. 2396-2397 (1958).

"Many legislatures by their enactments have expressly found that relocation expenses are an integral part of the cost of highway construction. See *Minneapolis Gas Co. v. Zimmerman,* 253 Minn. 164, 91 N. W. 2d 642, 650, note 10.

"The highest courts of five states, Utah, Texas, North Dakota, New Hampshire, and Minnesota, have expressly declared that the cost of relocating utility facilities in connection with a highway improvement program can be properly considered as a part of the cost of constructing the highway. * * *"

The Indiana Legislature in enacting Section 3 of the Relocation Act has expressly declared that "The cost of relocation of a utility facility is a cost of highway construction." In my opinion this is a reasonable exercise of the state's police power in connection with the general welfare, and, as heretofore noted, an opinion also adopted by the Congress of the

United States and approved by a majority of the courts of last resort in states where this question has been under consideration. Therefore, it is my opinion that the Legislature properly determined that the cost of utility facility relocations should be a cost of highway construction.

Provisions of the Indiana Constitution which might be argued as being contravened by the Relocation Act, would be the following: Art. 1, Sec. 23; Art. 1, Sec. 24; Art. 4, Sec. 22(7); Art. 4, Sec. 23; and Art. 11, Sec. 12.

The Indiana Constitution, Art. 1, Sec. 23 states as follows:

> "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

and is commonly referred to as the "privileges and immunities" section.

The Indiana Constitution, Art. 4, Sec. 22, reads, in part, as follows:

> "The General Assembly shall not pass local or special laws, in any of the following enumerated cases, that is to say:
>
> * * *
>
> "[7] For laying out, opening and working on highways, and for the election or appointment of supervisors;"

and is commonly referred to as the "class" section.

The Indiana Constitution, Art. 4, Sec. 23 reads as follows:

> "In all the cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

and is generally called the "general law" section.

The Supreme Court of North Dakota, in the case of Northwestern Bell Tel. Co. v. Wentz (1960), 103 N. W. 2d 245, in considering the constitutionality of that state's Utility Reloca-

tion Act, which is substantially similar to our Relocation Act, said the following at page 256, in regard to those sections of the North Dakota Constitution concerning "privileges and immunities," "classes" and "general laws":

> "The statute expressly applies to 'all co-operatively, municipally, publicly or privately owned utilities, for supplying water, sewer, light, gas, power, telegraph, telephone, transit, pipe line, or like service to the public or any part thereof.' This appears to us to be all-inclusive and it has not been pointed out that there are any exclusions. It is a general law of uniform operation as provided by Section 11 of the Constitution.
>
> "Further it appears that the law applies uniformly and generally throughout the state and wherever the national system of interstate and defense highways or urban extensions thereof qualifying for federal aid may be located, and is equally applicable to all kinds of utilities whether co-operatively, municipally, publicly or privately owned. Thus all who are similarly situated are similarly treated. We do not believe it contravenes Section 20 of the Constitution.
>
> "The reimbursement statute is not a special law within the meaning of Sections 69 and 70 of the Constitution. It operates alike on all places and persons that come within its provisions.
>
> "Appellant argues that because the reimbursement law is operative only insofar as the interstate highway system is concerned and therefore selects only those utilities that may be affected by an interstate system of the type described in the statute, and which system is but a small part of the entire highway system or systems within the state, that therefore it constitutes an arbitrary classification favoring only a few because of their accidental location. However, we feel there is reasonable classification adopted. We are not concerned with the wisdom of the legislation. Legislative discretion, as to classification, must be looked at from the standpoint of the legislature enacting it; it is primarily a legislative question. It is not subject to review by the courts except to the extent of determining

> whether the classification adopted is arbitrary, unreasonable and unjust. The classification of these highways under the interstate system separately from other routes of the state highway system is based upon substantial distinctions which set this type of highway apart from the others. It reflects a reasonable classification. It bears alike upon all persons and things upon which it operates and it contains no provision that will exclude or impede this uniform operation upon all citizens, subjects and places within the state provided they are brought within the relations and circumstances specified in the statute. * * *"

The Indiana Supreme Court has held in considering the application of the "privileges and immunities" section, that the question of classification under that section is primarily for the Legislature and does not become a judicial question unless it clearly appears that the Legislature classification is not based on substantial distinctions with reference to the subject matter, or is manifestly unjust or unreasonable. See: Fairchild v. Schanke (1953), 232 Ind. 480, 113 N. E. (2d) 159.

In regard to the "class" section the Indiana Supreme Court has held that a law is not local or special when it applies to all who come within its provisions generally and without exception, rests upon an inherent and substantial classification, and its operation is the same in all parts of the state under the same circumstances and conditions. See: Ciraceno v. State (1931), 202 Ind. 663, 177 N. E. 436. In the case of the "general law" section of the Indiana Constitution, the Supreme Court has said that a law is general and uniform if all persons under the same conditions and in the same circumstances are treated alike. See: Perry Twp. v. Indianapolis Power and Light Co. (1945), 224 Ind. 59, 64 N. E. (2d) 296.

In my opinion the language and reasoning in the Wentz case, *supra*, set out above, is sound and in light of the decisions of the Indiana Supreme Court reflects accurately the position of the State of Indiana in this regard.

The Indiana Constitution, Art. 1, Sec. 24 is as follows:

> "No ex post facto law, or law impairing the obligation of contracts, shall ever be passed."

Utilities occupying highway rights of way at the present time do so pursuant to permits issued by the State Highway Commission which permits contain a provision that any relocation necessitated by the public's use of said highway shall be at the sole expense of the utility occupying the right of way under the permits. In the case of Minnesota Gas Co. v. Zimmerman (1958), 253 Minn. 164, 91 N. W. 2d 642, the Minnesota Supreme Court, in considering that state's constitutional prohibition against impairment of contracts and the constitutionality of Minnesota's Relocation Law, said the following at page 655:

> "* * * In the first place, the preexisting contract established by plaintiff's applications to occupy the right-of-way and the occupancy permits issued by the state, created a contractual relation between two parties, the state and the plaintiff. No third parties have acquired any rights under or pursuant to the contract. It is elementary that where all parties to a contract mutually agree, by conduct or express words, to amend, rescind, or abrogate a contract, in whole or in part, such mutual action does not impair the obligation of contract within the prohibitory clauses of either the Federal or state constitutions. Initially the contract was entered into in behalf of the state by the commissioner of highways. Thereafter, the legislature—which is the highest representative authority through which the state can act—had the power by statutory enactment to amend the contract with the other contracting party's consent where no rights of third parties had in the meantime intervened. * * *"

The Indiana Supreme Court in County Department of Public Welfare v. Potthof (1941), 220 Ind. 574, 580, 44 N. E. (2d) 292, stated the following:

> "* * * While the contract clause of the Constitution protects parties dealing with the State, it does not, of course, affect the validity of statutes releasing obligations due the State. * * * A State has no vested rights which are immune from its legislative control."

Finally, the Indiana Constitution, Art. 11, Sec. 12 states as follows:

> "The State shall not be a stockholder in any bank, after the expiration of the present bank charter; nor shall the credit of the State ever be given, or loaned, in aid of any person, association or corporation; nor shall the State hereafter become a stockholder in any corporation or association."

The obvious purpose of this constitutional provision is to prevent the donation or giving of public money for other than a public purpose. When a similar constitutional provision was argued before the Texas Supreme Court in the case of State v. City of Austin (1960), 331 S. W. 2d 737, 742, the Court decided thusly:

> "Article 6674w-4 (The Texas Utility Relocation Law) obviously does not involve a gift or loan of the credit of the state unless it can be said that payment of relocation costs amounts to a grant of public money in violation of Article III, Section 51. The purpose of this section and of Article XVI, Section 6, of the Constitution is to prevent the application of public funds to private purposes; in other words, to prevent the gratuitous grant of such funds to any individual or corporation whatsoever. See *Byrd v. City of Dallas,* 118 Tex. 28, 6 S. W. 2d 738. Statutes analogous to House Bill 179 have been upheld against this or similar constitutional attacks by the appellate courts of at least five other jurisdictions. (Cites.)
>
> * * *
>
> "In considering this question, it should be noted that no net gain accrues to the utility from the relocation of its facilities in the manner and under the conditions prescribed by the statute. 'Cost of relocation' is defined as including the entire amount paid by the utility properly attributable to such relocation after deducting any increase in value of the new facility and any salvage value derived from the old facility. As pointed out by the Supreme Court of Minnesota, the reimbursement merely restores the utilities to the position in which they were prior to the relocation of their facilities. *Minneapolis Gas Co. v. Zimmerman, supra.* It

also is clear that if not reimbursed for their non-betterment costs, respondents will be subjected to substantial expense as a direct result of the highway improvement program.

"Respondents benefit from the statute only in the sense that they are relieved of a financial burden which they could be required to bear. The question to be decided then is whether the use of public funds to pay part or all of the loss or expense to which an individual or corporation is subjected by the state in the exercise of its police power is an unconstitutional donation for a private purpose. We think not provided the statute creating the right of reimbursement operates prospectively, deals with the matter in which the public has a real and legitimate interest, and is not fraudulent, arbitrary or capricious. * * *"

As heretofore expressed, it is my opinion that the Relocation Act does operate prospectively, deals with a matter in which the public has a real and legitimate interest, and thus involves a public purpose as opposed to a private purpose.

In conclusion, it is my opinion that Chapter 112 of the Acts of 1961 is valid under the Constitution and laws of Indiana, and that the payment by Indiana to the utility company pursuant to said Act is not in violation of a contract between them.

OFFICIAL OPINION NO. 45

September 22, 1961

Honorable Allan E. Bloom
State Representative
303 Standard Building
Fort Wayne 2, Indiana

Dear Representative Bloom:

This will acknowledge receipt of your request for my Official Opinion relative to the legal capacity of a member of a board of zoning appeals or planning commission to contract with the municipality which he serves or the county in which said municipality is located.