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“The board shall create a division of public health and a division of public hospitals and such other divisions as it may deem necessary.

* * *

“* * * The division of public hospitals shall operate and manage a hospital, clinic, dispensary, or facility adjunct thereto which is under the jurisdiction of the corporation. Provided, however, that the board may create a separate division to operate and manage an asylum for the poor.”

In conclusion, therefore, it is clear that if the Board of County Commissioners of Marion County makes such a transfer, the Health and Hospital Corporation of Marion County has the specific statutory authority both to accept such property and to maintain and operate the said Marion County Home, known as Julietta, as an asylum for the poor, after which transfer said corporation will have control of such asylum in accordance with the Acts of 1951, Ch. 287, supra.

OFFICIAL OPINION NO. 28

July 1, 1960

Mr. Joda G. Newsom
Chairman, State Board of Tax Commissioners
404 State House
Indianapolis 4, Indiana

Dear Mr. Newsom:

This is in response to your request for my Official Opinion concerning the legality of an item contained within an emergency appropriation ordinance passed by the Marion County Council for funds to be advanced to the Indianapolis-Marion Building Authority for a proposed municipal auditorium building. Simply stated, your question is whether that Authority is authorized to construct such a building.

It should be noted at the outset that the practice of advancing funds by a city and county on a reimbursement basis to a building authority which is organized under and governed by
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the Acts of 1953, Ch. 54, as amended, as found in Burns' (1959 Supp.), Section 26-2501 et seq., is specifically authorized for necessary preliminary expenses by Section 8 thereof, Burns' (1959 Supp.), Section 26-2508, which provides:

“All necessary preliminary expenses actually incurred by the board of directors in the making of surveys, estimates of cost and receipts, employment of engineers or other employees, the giving of notices, taking of options and all other expenses of whatsoever nature, necessary to be paid prior to the issue and delivery of bonds or the negotiation of the loan pursuant to the provisions of this act [§§ 26-2501–26-2523], may be met and paid out of funds provided by the city and county, or either of them, from funds on hand or derived from taxes levied for that purpose.

“The fund or funds of such city and county from which such payments are made shall be fully reimbursed and repaid by said board out of the first proceeds of the sale of bonds or the loan negotiated by the authority hereinafter provided for, and before any other disbursements are made therefrom, and the amount so advanced to pay such preliminary expenses shall be a first charge against the proceeds resulting from the sale of such bonds or the negotiation of said loan until the same has been repaid as herein provided. [Acts 1953, ch. 54, § 8, p. 163.]

Inasmuch as the reimbursement of such advancement is contingent upon the sale of bonds or a loan being negotiated by the authority, it is clear that a city or county could not be repaid such advancement if the contemplated project were not within the power of such body. Therefore, the legality of such an advancement hinges upon the initial questions of whether the particular building authority was organized under and is governed by that act and, if so, whether the construction of such type of building is authorized.

The Indianapolis-Marion Building Authority was created pursuant to the said Acts of 1953, Ch. 54, supra. In Book v. Indianapolis-Marion Building Authority (1955), 234 Ind. 250, 126 N. E. (2d) 5, the Indiana Supreme Court held that said 1953 statute was not violative of Article 13 or Article 11, Sec.
13 of the Constitution of Indiana. Since that case presented only those two constitutional issues, the Court's opinion does not discuss the scope of authority of such body and therefore is of little, if any, aid in determining the answer to your question. Further, there have been no other reported decisions interpreting that act.

A careful consideration of your question necessitates an examination of the purpose of a building authority created pursuant to the Acts of 1953, Ch. 54, as amended, supra, and a study of the overall plan by which such purpose is to be attained. In harmony with the Title of that Act, Section 1, Burns' (1959 Supp.), Section 26-2501 contains a legislative declaration that a body corporate and politic may be created thereunder,

"* * * for the purpose of financing, acquiring, constructing, equipping, operating and leasing to the governmental units within the territorial boundaries of the county, lands or buildings for public or governmental purposes." (Our emphasis)

This basic concept of purpose is evident throughout the entire act and it is the anticipated and continued need of governmental units for buildings for public or governmental purposes and the resulting regular and extended rental from the leasing of such buildings to such units which is expected to supply the revenue for extinguishing the obligations to bondholders whose aggregate investment therein provides the initial means for financing such construction.

"Governmental unit" is defined by Section 22(b) of said Act as amended, Burns' (1959 Supp.), Section 26-2522(b) specifically to:

"* * * mean and include the county, or any city, town, school city, school town, consolidated school corporation, civil township, or school township located within the territorial limits of the county."

Section 14 of said Act, Burns' (1959 Supp.), Section 26-2514 requires not only that the plans and specifications of a building to be constructed pursuant to that act passed upon by the State Board of Health and State Fire Marshal but also
that they be submitted to the lessee or lessees prior to the execution of the lease. This and Section 11, Burns' (1959 Supp.), Section 26-2511 specifically contemplate the execution of a lease of the proposed building with some governmental unit "* * * prior to the actual acquisition of a site, if a site is to be acquired, and the construction and erection of such building. * * *"

Section 12 of the Act, Burns' (1959 Supp.), Section 26-2512, provides for the right of public participation in required hearings concerning such a proposed lease. After providing for a notice by publication of such hearing, this section provides in part:

"* * * All persons interested shall have a right to be heard at the time fixed, upon the necessity for the execution of such lease and whether the basis for the determination of lease rental thereunder is fair and reasonable. * * *"

If the governmental unit executes the lease, then a further notice by publication of such fact is required and said Section 12 further states:

"* * * Ten [10] or more taxpayers in said governmental unit, whose tax rate will be affected by the proposed lease and who may be of the opinion that no necessity exists for the execution of such lease, or that the method of determining the lease rental thereunder is not fair and reasonable, may file a petition in the office of the county auditor within thirty [30] days after publication of notice of the execution of such lease, setting forth their objections thereto and facts showing that the execution of the lease is unnecessary or unwise, or that the method of determining the lease rental is not fair and reasonable, as the case may be. * * *"
execution of said lease and as to whether the method of
determining the lease rental is fair and reasonable, shall
be final. * * *

It is clear from this section that the proposed lease of a
building to be constructed by the authority must be capable
of passing the test of necessity.

Section 16 of said Act, Burns' (1959 Supp.), Section 26-2516
prescribes the authority and procedure for initially "procuring
funds to pay the cost of any building to be built pursuant
to the provisions of this act or any improvement thereof
* * *." This section authorizes two such procedures, i.e.,
either the issuance of revenue bonds or the negotiation of a
loan. Under either method, the obligation of the authority is
paid from the income and revenue which the building author-
ity derives from the particular building, meaning, of course,
 lease rentals from the governmental unit-lessee.

To provide funds with which to pay said lease rentals, Sec-
tion 19 of said Act as amended, Burns' (1959 Supp.), Section
26-2519, requires the annual levy of a tax by the lessee-gov-
ernmental unit. This section reads as follows:

"Any governmental unit which shall execute a lease
contract under the provisions of this act [§§ 26-2501-
26-2523] shall annually levy a tax sufficient to produce
each year the necessary funds with which to pay the
 lease rental provided to be paid in such lease. Such
levies shall be reviewable by other bodies vested by
law with such authority, to ascertain that the levies are
sufficient to raise the amount required to meet the
rental under such lease contract. The first tax levy
shall be made at the first annual tax levy period follow-
ing the date of the execution of the aforesaid lease
contract, or if such lease contract was entered into in
anticipation of the construction and erection of the
building, the first tax levy shall be made at the first
annual tax levy period immediately prior to the date
fixed in such lease contract for the beginning of the
 lease rental, and said first annual levy shall be sufficient
to pay the estimated amount of the first annual lease
rental to be made under said lease. Thereafter the
annual levies herein provided for shall be made. Said
annual lease rental shall be paid semi-annually to the authority following settlements for tax collections. [Acts 1953, ch. 54, § 19, p. 163; 1959, ch. 280, § 4, p. 686.]

It should be observed that the creation of any building authority pursuant to the Acts of 1953, Ch. 54, as amended, supra, is by virtue of a concurrent resolution "separately adopted by the board of commissioners and county council of the county and the common council of the city constituting the county seat, declaring that there is a need for such an authority, * * *." Acts 1953, Ch. 54, Sec. 2, Burns' (1959 Supp.), Section 26-2502. A building authority so created is for the sole purpose of serving the governmental units to which said act applies, as defined in Section 22(b), supra, by providing authorized buildings for their needs, thereby acting for and on behalf of such units. The only grant of power to the building authority to lease other than to governmental units is that specifically provided in Section 9(h) of the Act as amended, Burns' (1959 Supp.), Section 26-2509(h), "to let concessions for the operation of restaurants, cafeterias, public telephones, news and cigar stands, and vending machines, * * *" which power was not specified in the original 1953 enactment and was deemed necessary to be included within the specific powers of such an authority, having been provided by amendment to the original act by the Acts of 1959, Ch. 280, Sec. 1. Except as provided by said 1959 amendment, the building authority's power "to operate" is as a landlord solely "for the purpose of * * * operating and leasing to the governmental units within the territorial boundaries of the county, * * *" as provided by Section 1, supra.

Except with respect to the operation of restaurants, cafeterias, public telephones, news and cigar stands, and vending machines, all right to use a building constructed pursuant to said act must be derived through a lease of such building to a governmental unit. Further, the power of a governmental unit-lessee to sublease a part of such leased premises is restricted to leasing to other governmental units within the territorial limits of the county. In the original enactment of 1953, the power of a governmental unit-lessee to enter into subleases was not specified and the inclusion of such power was deemed necessary; instead of providing unqualified sub-
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leasing power for such governmental unit, Section 10 of the Act was amended by the Acts of 1959, Ch. 280, Sec. 2, Burns' (1959 Supp.), Section 26-2510, as follows:

"Any governmental unit within the territorial limits of the county shall be authorized to lease all or any part of buildings from the authority, and the authority shall have the power to lease buildings or any part thereof to said governmental units. Any governmental unit which enters into such a contract of lease may sublease a part or parts of such leased premises to other governmental units within the territorial limits of the county. No such contract of lease or any sublease to another but said contract of lease and each such sublease shall be entered into for a period of more than forty [40] years, but said contract of lease and each such sublease shall be renewable for a like or lesser period. [Acts 1953, ch. 54, § 10, p. 163; 1959, ch. 280, § 2, p. 686.]

In view of the above provision and the absence of any other provision authorizing subleases by a governmental unit to a sublessee, the act is deficient in specifically providing the power to enter into subleases such as would be expected, if not necessary, to private promoters of conventions, musical concerts, evangelistic crusades, entertainment and recreation of the type for which such a municipal auditorium building would be adapted and intended to be used. If the governmental unit-lessee could not sublease to private interests for the promotion of such events, the full use of such a municipal auditorium building would be seriously curtailed unless the governmental unit were itself to attempt actually and completely to promote all such events, which would be cumbersome and, therefore, probably undesirable even if authorized. This deficiency is not considered as a controlling element in determining the answer to your question if the act authorizes the construction of such a building. However, it would seem to be very important to proponents of this building to have this question clarified by the Legislature, since it would be foolish to erect such a structure if it could not be used extensively for the various types of activities normally associated with such a building.

Keeping in mind the foregoing consideration of the purpose of such a building authority and of the overall plan for the
accomplishment of such purpose, the answer to your question turns upon whether a municipal auditorium building is included within "buildings for public or governmental purposes" as that and comparable language is used in Section 1 and the Title of the Act.

The power of the Legislature to authorize the construction of a municipal auditorium building to be financed ultimately by funds derived from the levy of taxes has been considered on several occasions by the highest courts of other states. The general effect of said court decisions in summary form is stated in the first sentence of the annotation entitled "Auditorium or stadium as public purpose for which public funds may be expended or taxing power exercised" appearing in 173 A. L. R. 415 which reads as follows:

"In view of the public functions which an auditorium or stadium serves, it has generally been held that the construction or maintenance of such structures constitutes a public purpose for which public money may be appropriated without infringing constitutional, statutory, or charter inhibitions or limitations against appropriation of public money for private uses, or against using the taxing or borrowing power to raise funds for other than public purposes, and without exceeding the charter or corporate powers by municipalities."

Following this statement, court decisions on the general subject are listed from eleven (11) states, dating as far back as 1905 in the case of Denver v. Hallett, 34 Colo. 393, 83 P. 1066. Since the date of said annotation there have been other such decisions but none by Indiana courts. Among the leading cases on the general subject are:

Meyer v. Cleveland (1930), 35 Ohio App. 20, 171 N. E. 606;


Each of these cases upheld the power of the municipality or municipal corporation to erect such a structure. The Ohio case above cited concerned the Cleveland Municipal Stadium, the Court tracing the history of stadiums in Greece as far
back as 600 years before the Christian era and noting that as of the date of the decision (1930) that in the forty-eight states of the United States there were then ninety-three municipal stadiums either erected or in the process of erection.

The South Carolina opinion above cited is considered a leading case, the complete opinion thereof preceding the annotation in American Law Reports above mentioned. The South Carolina Supreme Court unanimously held, as found in 173 A. L. R. 397, at pp. 410, 411:

"That a publicly owned and operated auditorium serves a useful public purpose will not be gainsaid in this day. It is common knowledge that large assemblages are frequently in the public interest and court-houses and school auditoriums are often no longer able to accommodate them in these times of large centers of population, easy and inexpensive travel and short work hours. This court apparently has not had the direct question before, but others of high standing have held an auditorium to be a proper public purpose and we agree. Anderson v. Thomas, 166 La 512, 117 So 573; Adams v. City of Durham, 189 NC 232, 126 SE 611. (The North Carolina Court later drew the line against a hotel which was proposed to be constructed by an issue of bonds in Nash v. Town of Tarboro, 1947, 227 NC 283, 42 SE 2d 209, citing Haesloop v. City Council of Charleston, 123 SC 272, 115 SE 596); Robbins v. Kadyk, 312 Ill 290, 143 NE 863; Halbruegger v. St. Louis, 302 Mo. 573, 262 SW 379. Earlier decisions are reviewed in the annotation in 12 Ann Cas 1112 in which our tangent case of Jones v. City of Camden, 44 SC 319, 23 SE 141, 51 Am St Rep. 819, is cited.

"That the General Assembly by passage of the questioned legislation has, in effect, found and declared the proposed auditorium to be a public purpose is important in our conclusion that it is. Indeed, such a finding will not be disturbed by the court unless it is clearly wrong. McNulty v. Owens, Mayor, et al., 188 SC 377, 199 SE 425, and prior authorities there cited."

The last above-quoted paragraph has reference to the fact that the South Carolina statute in question was enacted particu-
larly for the specific auditorium building involved, its title being:

"An Act to provide for the Erection, Control and Use of an Auditorium and Community Center for Greater Greenville Sewer District in Greenville County * * * ."

This particular South Carolina statute appears to be substantially similar to the Indiana Acts of 1927, Ch. 139, as amended, as found in Burns' (1950 Repl.), Section 48-2521 et seq., which is entitled:

"An act authorizing cities of the first class to establish, erect, maintain and operate coliseums; authorizing the leasing, acquiring, maintaining and operating of coliseums by cities of the first class cooperating with private corporations; providing for the organization of boards of managers for such coliseums and defining the powers and duties of such boards; providing for the method of procedure in the leasing or acquiring of such coliseums and the sites therefor and the issuance of bonds, and levying of taxes to pay costs of acquiring, leasing, maintaining or operating; providing for other matters incidental to the leasing, acquiring, maintenance and management of such property and repealing certain laws."

Referring to the type of statute whose title is quoted above, there is every reason to presume that Indiana courts would follow the case precedents heretofore cited from other states which would seem to justify the Legislature's exercise of its power in enacting such legislation, assuming that all other provisions of the statute were constitutional.

However, the Indianapolis-Marion Building Authority does not operate under the Acts of 1927, Ch. 139, as amended, supra, but rather derives its being and powers from the Acts of 1953, Ch. 54, as amended, supra. The problem under the said 1953 statute is not whether the Legislature has the power to authorize the construction of a municipal auditorium building, but rather whether it has so authorized such type of building in its enactment of said statute, as amended, in its now present
form. For the reasons hereinafter stated, it is my opinion that this act does not authorize such type of structure.

First. As heretofore noted, Section 12 of the Act, Burns’ (1959 Supp.), Section 26-2512, requires that the lease of a building constructed or to be constructed by such a building authority must be capable of passing the test of necessity. This standard of “necessity for the execution of such lease” is not the creation of this Opinion, but such standard (together with the question of the fairness and reasonableness of the basis for determining the proposed lease rental) is a theme running throughout said Section 12, supra. This question of necessity is an issue to be resolved initially at the original hearing, is a basis for appeal to the State Board of Tax Commissioners and if such an appeal is taken presenting the question of the necessity for the execution of such lease, said board must make a finding on that question, the statute stating:

“* * * The decision of the state board of tax commissioners * * * upon the necessity for the execution of said lease * * * shall be final.”

It is difficult, if not impossible, to conceive of a lease by any governmental unit of sufficient duration to induce the investment of adequate capital for the erection of a municipal auditorium building, which lease could conscientiously be justified as being a necessity. Yet the State Board of Tax Commissioners must find such necessity to exist as to all appeals to it on that question concerning leases governed by the Acts of 1953, Ch. 54, supra.

This statutory standard of necessity for the execution of such a lease accords with the Legislature’s own specific definition of the term “building” in Sec. 22(g) of the Act, as amended, Burns’ (1959 Supp.), Section 26-2522(g), which includes only the following types of structures:

Any building, or portion thereof, for the housing of:

(1) public offices
(2) courts
(3) facilities for the detention of prisoners
(4) governmental and public activities and functions involved in the carrying on of public business
The limited scope of structures as above outlined is indicative of the Legislature's awareness of the need of some counties, cities and towns for new or additional office facilities, new courthouses, new or additional jail facilities, and hospitals or additions thereto for the ever increasing numbers of physically or mentally ill or retarded persons. All of such types of structures could clearly be considered as necessary, depending upon the condition and sufficiency of existing buildings of such types.

However, the long term lease of a municipal auditorium building by any governmental unit could hardly be justified on the basis of necessity. Therefore, since such a building is within the power of the Legislature to authorize, the act would need to be amended to provide the power to enter into the lease of a municipal auditorium building whenever such a lease is found to be in the best interests of the citizens of the community to provide for the education, entertainment and recreation of the residents of the unit and to promote the public welfare. Such a basis of justification would be more accurately factual than to purport to justify such a lease on the basis of necessity as the act now requires.

Second. The Acts of 1953, Ch. 54, authorizes the building authority to construct buildings "for public or governmental purposes." Although Sec. 22 of the Act as amended, Burns’ (1959 Supp.), Section 26-2522 contains specific statutory definitions of seven terms used in the act, the all important meaning of the term "for public or governmental purposes" is not defined.
are authorized to conduct as necessarily being "for public or governmental purposes," even though they may be public in one sense. For example, reference is made to the Indiana "Gross Income Tax Act of 1933" as amended. Section 1(a) of said taxing statute, since the amendment thereto by the Acts of 1937, Ch. 117, Sec. 1, Burns' (1959 Supp.), Section 64-2601(a), has specifically provided that a "municipal corporation or any other political subdivision of the state engaged in private or proprietary activities or business" is included within the meaning of a "person" who is subject to the provisions of that act. This provision gave rise to the following decisions, well known to officials of cities and towns schooled in their tax problems:

Department of Treasury v. City of Linton (1945), 223 Ind. 363, 60 N. E. (2d) 948;

Department of Treasury v. City of Tipton (1945), 223 Ind. 373, 60 N. E. (2d) 957;

Department of Treasury v. City of Michigan City (1945), 223 Ind. 432, 60 N. E. (2d) 947;

Department of Treasury v. City of Evansville (1945), 223 Ind. 435, 60 N. E. (2d) 952.

By way of analogy to the operation of a municipal auditorium building, the holdings of the above cases were that the operation by a city of water, gas and electric utilities, municipally-owned swimming pools, tennis courts, markets, wharves, golf courses, airports and cemeteries were private and proprietary activities as distinguished from public or governmental. In determining into which classification such activities would fall, the Indiana Supreme Court recognized that in one sense such activities may be considered as public, stating in said City of Linton case, 223 Ind. at page 369, as follows:

"It may be true that the police power and the power of eminent domain and the taxing power may be exercised only for public uses but it does not follow that such use is not in the exercise of a private and proprietary function or activity. The police power may be exercised in behalf of purely private corporations which are being conducted for the profit of private individual stockholders. Under our statutes many privately owned
utility corporations have the right of eminent domain. They may take private property by condemnation without the consent of the owner. They can do this because the use they will make of the property is a public use, but at the same time, no one will deny the operation of the utility is private and proprietary. So it follows that a use, whether by a municipal corporation or a private corporation, may be public in one sense and still be private and proprietary in another sense, and the police power and the right of eminent domain are not conclusive tests. * * *"

However, the Court adopted the other view that not every-thing which a municipal corporation may do is necessarily public or governmental, but instead that such a corporation may act in a dual capacity, as stated in the said City of Evansville case, 223 Ind. at pages 440 and 443:

"The rule is universally recognized that municipal corporations exist and act in a dual capacity—one public or governmental and the other private or proprietary. In its public or governmental capacity, it acts as the agent of the state for the benefit and welfare of the state as a whole, but when acting for the peculiar and special advantage of its inhabitants, rather than for the good of the state at large, the city is spoken of as acting in a private or proprietary capacity. (Citing cases) * * *

"By the authorities first cited above the test seems to be whether the activity is primarily for the advantage of the state as a whole or for the special local benefit of the compact community involved. In the Logansport and Borgman cases last above cited, a test seems to be whether the activity is of a business nature which is generally engaged in by private persons or corporations. The reported cases have applied other tests. It is proper to consider whether the activity is in performance of a duty imposed upon the municipality by the sovereign power, or is in the exercise of a permissive privilege given by the sovereign power. In the first instance the activity would be public and governmental and in the second instance the activity would be private
and proprietary. *Aiken v. City of Columbus* (1906), 167 Ind. 139, 146, 78 N. E. 657; *City of Kokomo v. Loy* (1916), 185 Ind. 18, 112 N. E. 657; *City of Indianapolis v. Butzke* (1940), 217 Ind. 203, 208, 27 N. E. (2d) 82. The fact that a charge was made by the city to those who acquired merchandise or service from the activity in question, has been held to be a proper consideration in determining whether the activity is governmental or proprietary. *City of Kokomo v. Loy*, supra; *City of Indianapolis v. Butzke*, supra. It is also held that the conduct of city police and fire departments, schools and hospitals are governmental activities. *City of Kokomo v. Loy* (1916), 185 Ind. 18, 23, 24, 112 N. E. 657; *City of Indianapolis v. Butzke* (1940), 217 Ind. 203, 208, 209, 27 N. E. (2d) 82.”

From the above quotation it appears that the Court did not consider the term “public” as embracing all activities of a city, but rather considered that term as being synonymous with “governmental,” each of said terms being in contradistinction to the statutory term “private or proprietary.” The Legislature in effect has confirmed the correctness of the Court’s interpretation of the statutory language involved in said decisions, for since 1945, the date of the said cities and towns decisions, Section 1 of the Indiana “Gross Income Tax Act of 1933” has been amended in 1947, 1953, 1955, 1957, and 1959, each of said amendments retaining the statutory provision upon which said cases were founded.

See: Acts of 1947, Ch. 370, Sec. 1(a)
Acts of 1953, Ch. 200, Sec. 1(a)
Acts of 1955, Ch. 263, Sec. 1(a)
Acts of 1957, Ch. 315, Sec. 1(a)
Acts of 1959, Ch. 286, Sec. 1(a)
Burns’ (1959 Supp.), Section 64-2601(a)

Based upon the above judicially pronounced tests stated in the City of Evansville case, no one could seriously contend that the construction of a municipal auditorium building is of such marked necessity that the Legislature would require such
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a structure as "a duty imposed upon the municipality by the sovereign power." Rather the grant of such power would ordinarily be considered "a permissive privilege given by the sovereign power."

The Legislature's awareness of these tests as stated in said City of Evansville decision is clearly seen by reference to the "Airport Act of 1945," being the Acts of 1945, Ch. 190, as amended, Burns' (1950 Repl.), Section 14-412 et seq. The amendment to Section 12 of that Airport Act as effected by the Acts of 1949, Ch. 109, Sec. 8, Burns' (1950 Repl.), Section 14-425, was explicitly and solely for the purpose of declaring the acquisition, establishment, construction, improvement, equipment, maintenance, control and operation of municipal airports,

"* * * to be a governmental function of general public necessity and benefit, and shall be for the use and general welfare of all the people of the state of Indiana, as well as of the people residing in any such municipality." (Our emphasis)

It should be noted that the above quoted legislative declaration within said Airport Act has not been judicially considered. In other jurisdictions there is a marked division of authority as to the effect of such a legislative declaration, particularly where the question of a municipality's immunity from tort liability is involved. For instance, in Rhodes v. City of Asheville (1949), 230 N. Car. 134, 52 S. E. (2d) 371, the North Carolina Supreme Court held the operation and maintenance of a municipal airport to be a proprietary function notwithstanding a statutory declaration to the contrary, stating that the Legislature's declaration that the operation of the airport was in furtherance of a governmental function "did not make it so, for that is a judicial and not a legislative question." By contrast, in the case of Kirksey v. Fort Smith (1957), 227 Ark. 630, 300 S. W. (2d) 257, 66 A. L. R. (2d) 627, the Arkansas Supreme Court held a provision identical to the North Carolina statute that the operation of a municipal airport constitutes a government function to be within the province of the Legislature to determine stating:

"The question whether a municipal function is governmental or proprietary is ordinarily determined in
accordance with the public policy in the jurisdiction in which it arises. 63 C. J. S., Municipal Corporations, Sec. 747. It is also generally recognized that the public policy of a state is to be found in its Constitution and Statutes. See 11 Am. Jur. Constitutional Law, Sec. 139, where the author states: ‘In order to ascertain the public policy of a state with respect to any matter, the acts of the legislative department should be looked to, because a legislative act, if constitutional, declares in terms the policy of the state and is final so far as the courts are concerned.’

Therefore, assuming that the Indiana Legislature has the right to declare the construction and operation of a municipal auditorium building to be a governmental function, but without expressing any opinion upon the effect of such a declaration, it is noticeable that no such declaration appears in the Acts of 1953, Ch. 54, as amended, in its present form. In the absence of such a declaration, a municipal auditorium building would not be included within the phrase “for public or governmental purposes,” especially in the light of the legislatively accepted judicially pronounced meaning of such terminology.

Third. Further comporting with the reasons heretofore stated is the precise statutory definition of the terms “building” or “buildings” as provided by the Acts of 1953, Ch. 54, Sec. 22(g), as amended, as found in Burns’ (1959 Supp.), Section 26-2522(g) which reads as follows:

“The following terms, wherever used or referred to in this act, shall have the following meaning, unless otherwise indicated by the context:

* * *

“(g) ‘Building,’ or ‘buildings,’ and words of like import as used in this act, shall be construed to mean any building, or portion thereof, for the housing of public offices, courts, facilities for the detention of prisoners, and governmental and public activities and functions involved in the carrying on of public business, a hospital, or an addition to a hospital, or any of the foregoing, and shall include the site therefor if a site is to be acquired, the equipment thereof, heating
facilities, sewage disposal facilities, landscaping, walks, drives, parking facilities, and such other structures, facilities, appurtenances, materials and supplies which may be deemed necessary by said board to render such building suitable for use and occupancy for the purpose for which constructed."

Clearly the type of structure constituting a municipal auditorium building is not within the above statutory definition of "building" or "buildings," which is the meaning to be ascribed to such terms throughout the act (including its title), unless the context otherwise requires. The fact that the statutory definition of "building" or "buildings" is so precise and detailed in the enumeration of the particular types of structures which are to be included within the meaning of those terms makes the rule of "expressio unius est exclusio alterii" especially applicable. Under this rule the specific reference to certain types of structures means that such types are exclusive and infers that types not mentioned were intended to be omitted.


Examination of the complete context of the Act does disclose a single mention of the word "auditoriums" in Section 9 of the Act, being the Acts of 1953, Ch. 54, Sec. 9, as amended, Burns' (1959 Supp.), Section 26-2509. It is granted that the word "auditoriums" is one of varied meanings, one of which is a building. As stated in Webster's New International Dictionary (Second Edition) that term is generally defined as follows:

"Auditorium—1. The part of a church, theater, or other public building, assigned to the audience. In ancient churches the auditorium was the nave, where hearers stood to be instructed; in monasteries it was an apartment for the reception of strangers.

"2. A room or hall for lectures, concerts, etc.; also, a building especially designed or used for such purposes."

See also: Denver v. Hallett (1905), 34 Colo. 393, 83 P. 1066;
In view of such varied meanings, it is important to observe the manner in which the word "auditoriums" was used in Sec. 9, supra, Burns' (1959 Supp.), Section 26-2509, which section in its entirety reads as follows:

"The board of directors of the authority shall have power to finance and construct buildings for the joint or separate use of any one [1] or more of the governmental units within the territorial limits of the county and to lease said buildings in whole or in part, or space therein to said governmental units in accordance with the provisions of this act [§§ 26-2501-26-2523]. Said board shall have the government, management, regulation, control and operation of any buildings financed and constructed pursuant to the provisions of this act and shall have the power to improve, reconstruct, repair and maintain said buildings and all additions thereto. The board shall also have full power, acting in the name of the authority, as follows:

"(a) To sue and be sued, plead and be impleaded; Provided, however, That any and all actions against the authority shall be brought in the circuit court of the county in which the authority is located.

"(b) To condemn, appropriate, lease, rent, purchase and hold any real estate, regardless of whether the same be then held for a governmental or public use, and materials or personal property needed or deemed useful in connection with buildings constructed or to be constructed pursuant to this act.

"(c) To acquire by gift, devise, or bequest real estate and personal property to hold, use, expend or dispose of such real and personal property for the purposes authorized by this act.

"(d) To enter upon any lots or lands for the purpose of surveying or examining the same with the view of determining the location of any such building.

"(e) To design, order, contract for and construct, reconstruct and maintain such buildings and to make
all necessary or desirable improvements to the grounds and premises under its control.

“(f) To determine, allocate, and adjust space in said buildings to be used by any governmental unit.

“(g) To construct, maintain and operate auditoriums, public meeting places, and parking facilities in conjunction with or as a part of said buildings.

“(h) To operate any such buildings, to receive and collect all moneys due on account of such operation or otherwise relating to such buildings and to expend such moneys for proper purposes; and in connection herewith [therewith] to let concessions for the operation of restaurants, cafeterias, public telephones, news and cigar stands, and vending machines, and to employ such managers, superintendents, architects, engineers, attorneys, auditors, clerks, foremen, custodians, and other employees, as may be necessary for the proper carrying on and operation of any such buildings and to fix the compensation of all such employees; Provided, however, That no contract of employment shall be made for a longer fixed period than four [4] years, but may be extended or renewed from time to time thereafter.

“(i) To make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act.

“(j) To provide coverage for its employees under the provisions of the workmen’s compensation act [§§ 40-1201–40-1414] and the Indiana unemployment compensation act [§§ 52-1525–52-1563b].” (Our emphasis)

The emphasis supplied in the above quoted section discloses that the primary purpose of a building authority, in harmony with Section 1 and the Title of the Act, is to:

“* * * construct buildings for the joint or separate use of any one [1] or more of the governmental units within the territorial limits of the county * * *.”

Thereafter is the provision for the leasing of “said buildings” followed by subsections (a) through (j) containing specific
powers *incident* to the primary purpose of the building authority above stated. That these additional powers are but incidental to the main purpose is evidenced by the reference to "said buildings" four times in said section and the reference to "such buildings" or "any such buildings" in several instances—buildings referring to those mentioned in the first sentence of the section and meaning buildings as defined by Sec. 22(g), *supra*, Burns' (1959 Supp.), Section 26-2522(g).

A study of the grammatical construction of Sec. 9, *supra*, in its entirety indicates that the word "auditoriums" as used in Sec. 9(g), *supra*, Burns' (1959 Supp.), Section 26-2509(g), was meant to describe a particular facility which the authority could incorporate into the plans of a building, but as a part thereof and not as the primary purpose for the building. This conforms with the first and more usually accepted meaning of "auditorium" as indicated in the definition heretofore quoted from Webster's New International Dictionary (Second Edition). In view of the known varied meaning of that term, if the Legislature had intended otherwise, a statutory definition of "building" to include a municipal auditorium building or a definition of "auditorium" to include such a structure seems most probable.

The more logical interpretation of Sec. 9(g), *supra*, Burns' (1959 Supp.), Section 26-2509(g), is that the Legislature meant auditoriums consisting of rooms which are a part of a building constructed and used primarily for public business. Such auditorium facilities are to be a part of buildings such as public office buildings or courthouses for primary use by public participation in the conduct of governmental affairs and would properly be a part of hospitals for lectures on medical subjects and for entertainment of patients. Simply stated, this subsection authorizes auditoriums and public meeting places "as a part of said buildings" and parking facilities "in conjunction with" said buildings. Clearly the specific authorization of "parking facilities" evidences the Legislature's awareness of the acute need of parking space in connection with obtaining the services rendered from public office buildings, courthouses and hospitals and was not intended to apply only to municipal auditorium buildings and public meeting places, which would result if the other interpretation of "auditoriums" were intended.
Fourth. Another factor recognizing the lack of authority for the construction of a municipal auditorium building by such building authority is the following. In the 1959 session of the Legislature there was introduced House Bill No. 159, Sec. 5 of which would have amended Sec. 22 of Ch. 54 of the Acts of 1953, among other things, to extend the definition of "building" or "buildings" specifically to include:

"* * * a building or buildings for use as a coliseum, auditorium, convention or exhibition hall, civic center, or any one or more of such uses, which are hereby declared to be in the public interest and to promote the public welfare. * * *"

This proposed amendment was obviously designed to supply the lack of authority to build a municipal auditorium building so apparent in the 1953 version of the act. This bill passed the House of Representatives by a vote of 72 to 6, was passed by the Senate by a vote of 42 to 0, and signed by the Governor on March 13, 1959, becoming Ch. 280 of the Acts of 1959.

House Bill No. 171, amending the same Sec. 22 of Ch. 54 of the Acts of 1953 by including "a hospital or any addition to a hospital" within the meaning of the term "building" or "buildings," was also passed and approved by the Governor on March 7, 1959, becoming Ch. 48 of the Acts of 1959.

Each said act contained an emergency clause, whereby it became "in full force and effect from and after its passage," whereby Ch. 48 became effective prior to the effective date of Ch. 280. Therefore, Sec. 22 of Ch. 54 of the Acts of 1953 had already been amended by Ch. 48 of the Acts of 1959 when Ch. 280 became effective, thereby rendering Sec. 5 of Ch. 280 of the Acts of 1959 a nullity, as shown by the annotation following Burns' (1959 Supp.), Section 26-2522(g). This effect is by reason of the well settled authority in Indiana,

"* * * that an act which attempts to amend a non-existent law or section, is itself void and of no legal effect."

Griffin Telephone Corp. v. Public Service Comm. et al. (1956), 236 Ind. 29 at page 34, 138 N. E. (2d) 150, and cases there cited.
As stated in Draper v. Zebeec (1942), 219 Ind. 362, at page 387, 37 N. E. (2d) 952, 38 N. E. (2d) 995:

"From the earliest times it has been uniformly held that an act of the Legislature which attempts to amend a section of a statute which has already been amended is unconstitutional and void * * *.*

In 1958, when the basic question had been previously presented of whether a municipal auditorium building could be constructed by the Indianapolis-Marion Building Authority pursuant to the provisions of the Acts of 1953, Ch. 54, I issued a release on October 30, 1958, noting that attorneys for that authority and also bond counsel concurred in the opinion that the act was not broad enough to permit such construction. I also noted that attorneys for the City of Indianapolis were to prepare amendments for submission to the 1959 Legislature to clarify this point and offered the facilities of my office to assist the Indianapolis-Marion Building Authority in clarifying the legal problems obstructing the early erection of such an auditorium building. On the basis that the deficiencies in the Act might be supplied by the 1959 Legislature, I deferred issuing an Opinion in answer to a question, which had been propounded by Governor Handley on behalf of proponents of such municipal auditorium building. However, because of the failure in securing necessary amendments in the 1959 Legislature, the situation is basically the same as before.

I am not justified in approving the legality of this item in the appropriation ordinance of Marion County on the theory that the latest expression of the Legislature as indicated in Sec. 5 of Ch. 280 of the Acts of 1959 might be construed to have authorized such construction if it had become the law. I cannot do what that Legislature tried and failed to accomplish. For me to purport to so do would be for me to attempt to legislate. Nor am I justified in approving the legality of this item on the presumption that because the 1959 Legislature apparently overwhelmingly approved such construction that the 1961 Legislature will therefore correct all deficiencies. We are here dealing with the financing of a proposed project dependent upon the absolute legality thereof in order for municipal bonds to sell on the open market in substantial quantities sufficient to provide the total funds for such con-
struction. We are also dealing with a project which will materially affect the tax rate of property owners in the City of Indianapolis and Marion County, even though the operation of such a municipal auditorium building may be expected to produce substantial income from conventions and other private uses, if the Legislature amends the Act so as to permit subleasing to private promoters.

Therefore, for the various reasons herein stated, it is my opinion that the item contained within the emergency appropriation ordinance passed by the Marion County Council for funds to be advanced to the Indianapolis-Marion Building Authority for a proposed municipal auditorium building is not legal under the statute in its present status. I have gone to great lengths in this opinion to emphasize various infirmities in the law for the sake of the proponents of a municipal auditorium building because the success of such a project should not be encumbered by unnecessary doubts, if a majority of the citizenry of the City of Indianapolis and Marion County or of any other city and county desire such a structure.

OFFICIAL OPINION NO. 29
July 25, 1960

Hon. Robert S. Webb
Chairman, Public Service Commission of Indiana
401 State House
Indianapolis 4, Indiana

Dear Mr. Webb:

This is in reply to your request for an Official Opinion stated as follows:

"The undersigned, Chairman of the Public Service Commission of Indiana, desires an official opinion concerning the proposed movement of coal by rail from Aurora, Indiana, to destinations in Indiana, particularly the Indianapolis area.

"Coal involved in this movement would be produced at coal mines in States other than Indiana and would move by Ohio River barges to the Aurora Terminal Company, Inc., Aurora, Indiana.