From an examination of the above authorities I must conclude that the town of Sheridan has authority to repair curbs and sidewalks subject to the restrictions of the statute in question. I see no intent in the act to restrict the term “streets” to exclude curbs and sidewalks. Inasmuch as parking meters are installed directly on the sidewalk, it is reasonable to assume that the Legislature intended the fee to be used for their repair. However, Burns’ 48-513, supra, contains a limitation in that moneys from the special fund may be used only for the repair and maintenance of streets “where said mechanical parking devices are in use, and all streets connected therewith.” Therefore, repair of curbs and sidewalks would also be limited to such streets.

Therefore, in answer to your question, it is my opinion that the special fund consisting of parking meter fees in the town of Sheridan may be expended for the repair of curbs and sidewalks but this authority is limited to such repair on streets where parking meters are in use and on all streets connected therewith.
"In order to definitely establish the gross income tax liability of the City of Bluffton, the nature of the city's activity with respect to its garbage collections becomes important.

"An official opinion is respectfully requested as to whether such activity of a city is proprietary or governmental."

Although well known to you, there are doubtless some who will not grasp the significance and necessity for your having an opinion concerning whether certain activities of a city are governmental or proprietary. For that reason, reference is made to Section 1 (a) of the Gross Income Tax Act, being the Acts of 1933, Ch. 50, Sec. 1 (a), as amended, Burns' (1957 Supp.), Section 64-2601 (a). Section 1 of the Gross Income Tax Law, of which subsection (a) above referred to is part, was amended by the 1959 Session of the General Assembly by House Enrolled Act No. 222, which will become law upon its publication and will be Chapter 286 of the Acts of 1959; however, the 1959 amendment to Section 1 of the Gross Income Tax Law does not affect subsection (a) of Section 1 of that law, dealing with the statutory definition of the term "person" and "company," which provides as follows:

“(a) When used in this act, the term ‘person’ or the term ‘company’ herein used interchangeably, means and includes any individual, assignee, receiver, commissioner, fiduciary, trustee, executor, administrator, institution, bank, consignee, firm, partnership, joint venture, pool, syndicate, bureau, association, cooperative association, society, club, fraternity, sorority, lodge, corporation, municipal corporation or any other political subdivision of the state engaged in private or proprietary activities or business, estate, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.” (Our emphasis)
By reason of the above emphasized portion of said statutory definition, it is clear that, for gross income tax purposes, the Legislature has classified municipal corporations or any other political subdivision of the state in the same category as any other person or company listed in said subsection with respect to activities or business of a private or proprietary nature, as distinguished from activities of a governmental nature. Thus, by statute, cities are liable for the tax imposed by the Gross Income Tax Law with respect to receipts received by them from private or proprietary activities. This is the basis for the necessity of determining which of the activities of a city fall within the classification of being governmental, the receipts from which are thereby nontaxable, and which of its activities, by contrast, are private or proprietary, the receipts from which are thereby taxable.

From an examination of the factual material furnished from the files of the Gross Income Tax Division, it appears that with respect to the City of Bluffton, the gross income producing activity from which the receipts in question were derived may be considered as not usually prevailing and for that reason the fact pattern involved is set forth and is substantially as follows: Pursuant to an enabling statute, being the Acts of 1905, Ch. 129, Sec. 233, as found in Burns’ (1950 Repl.), Section 48-4238, the Common Council of the City of Bluffton enacted an Ordinance on June 5, 1951, by which its Board of Public Works was empowered to collect and dispose of all the garbage and rubbish in the city. Subject to the approval of the Common Council, said Board was authorized to prescribe regulations for the storage, collection and disposal thereof and the said Board of Public Works was expressly authorized to contract with a private contractor for the collection of such rubbish and garbage. Said Board was authorized “to determine and fix a fair and reasonable charge to be made against each and every owner, occupant, or lessee, subject to the approval of the Common Council of the City of Bluffton, Indiana, and, by regulation to establish a method of collection of said charges.”

Pursuant to said Ordinance, “Rules and Regulations Governing the Storage, Collection and Disposal of Garbage and Rubbish for Bluffton, Indiana” were adopted by the Board of
Public Works and approved by the Common Council on June 24, 1952. Among other things, this regulation established a “service charge” of seventy-five cents (75¢) per month for each resident, property owner, tenant or user, except that any person, firm or corporation owning or operating any business or commercial enterprise was charged not less than $1.50 per month nor more than $25.00 per month for the collection of its garbage and rubbish, which said garbage or rubbish collection charges were payable at the same time as the water, sewage and light bills were payable and were paid to the Utilities Department and were placed in the City General Fund. The Board of Works was given the authority to fix the amount to be paid by individual business establishments or commercial users within the minimum and maximum limits, taking into consideration the service required and the quantity of garbage and rubbish to be removed.

In the event any such payment should become six months past due, this regulation further provided that the Clerk-Treasurer of the city was authorized to certify the amount of such delinquency to the Auditor of Wells County for placing the amount of such delinquency charges upon the tax duplicate of said individual person, persons, firms or corporations, to be collected as provided by law.

As also authorized by the Ordinance of June 5, 1951, the Board of Public Works of the City of Bluffton entered into a contract with a private contractor, not only for the collection of the garbage and rubbish pursuant to the rules and regulations of the city, but also for the furnishing of a site to which such garbage and rubbish was to be hauled and disposed of by land-fill method pursuant to said Ordinance and regulations; in the event of an unusual or excessive amount of rubbish or waste which might be accumulated at any residence or business or commercial house within the city, which could not be collected or hauled by the contractor in his normal operations, the contract required that this site for deposit and disposal be available to any owner or occupant of such residence or to the owner or operator of such business or commercial house for such person to have “the privilege to collect and haul with his own or other equipment and at his own expense such excessive rubbish or waste and unload the same at the
site provided by the contractor and under the supervision of the contractor." Under this contract the contractor received a fixed sum per month payable by the city and this amount was payable irrespective of the total amount of charges collected by the city from individual property owners, tenants, users or business enterprises. On July 16, 1957 the Common Council of said city enacted another Ordinance effective January 1, 1958, stated in said Ordinance as having been enacted pursuant to recommendation by the State Board of Accounts of Indiana. This latter Ordinance repeals Section VI of the 1951 Ordinance, which was the section formerly providing for the collection of garbage and rubbish by a private contractor and authorizing the fixing of a fair and reasonable charge for such collection, and in lieu thereof said 1957 Ordinance provided that on and after January 1, 1958 the operation of collecting garbage and rubbish be paid for, in toto, from a general tax levy. The instant problem, therefore, is restricted solely to certain taxable years within the period from June 24, 1952 to and including December 31, 1957 (said years being 1955, 1956, and 1957) and concerns the taxability of the receipts received by the city consisting of the charges collected for the service of garbage and rubbish collection,—there being, of course, no question as to the liability of the private contractor for gross income tax upon the receipt of the fixed sum per month paid to him by the city.

The enabling statute above referred to, being the Acts of 1905, Ch. 129, Sec. 233, as found in Burns' (1950 Repl.), Section 48-4238, provides as follows:

"The common councils of cities of the fifth class and the trustees of towns are empowered to erect crematories for the consumption of garbage by fire, and to pass by-laws and ordinances to secure the removal or cremation of slops, garbage, carcasses of dead animals and other waste or unwholesome materials from their corporate limits, and to appoint or contract with persons for such removal or cremation, and to provide that the persons appointed or contracted with shall have the exclusive right to remove or cremate the same, and to enact such penalties for the violation of such by-laws and ordinances as may be necessary and in
accordance with the provisions of this act.” (Our emphasis)

From the above statute, it is clear that the City of Bluffton, being a city of the fifth class, had the express authority to enact the foregoing ordinance and to contract with a private contractor for the removal of garbage and rubbish from the city. However, it should be noted that the right of the city to engage in this operation in such manner is not necessarily material in the determination of the question of tax liability involved. Notwithstanding the express statutory authority above quoted and the recognition as far back as the case of Walker v. Jameson (1894), 140 Ind. 591, 37 N. E. 402, that the removal of garbage and rubbish from a city is clearly recognized as a proper exercise of the police power of such city, nevertheless it has been expressly held that the proprietary activities of cities, the gross receipts from which are subject to the tax imposed by the Gross Income Tax Law, may include receipts from activities which are an exercise of the police power of such city. Reference is made to the case of Department of Treasury v. City of Linton (1945), 223 Ind. 363, 60 N. E. (2d) 948, in which it was held that the gross receipts of that city from its operation of water, electric and gas utilities were derived from proprietary activities and thereby subject to the tax imposed by the Gross Income Tax Law. In said City of Linton case, at p. 369, the Indiana Supreme Court had the following to say:

“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. * * *

Thus, although it may be argued that the city’s collection of garbage and rubbish is expressly authorized and conducted as a health measure and thereby is a proper exercise of the police power of the city, such argument is not a conclusive test as to whether such activity be that of a governmental nature or of a private and proprietary nature.

In addition to the City of Linton case which involved the particular section and precise terminology of the Gross Income Tax Law here involved and which held that the receipts from water, gas and electric utilities operated by said city were subject to Gross Income Tax as having been derived from proprietary activities, there are three companion cases in which the Indiana Supreme Court considered the question of classification of certain activities of cities as being either governmental or proprietary in order to determine whether the receipts therefrom were subject to the Gross Income Tax Law. Reference is made to the case of Department of Treasury v. City of Tipton (1945), 223 Ind. 373, 60 N. E. (2d) 957, holding that receipts consisting of charges for the use of a municipally owned swimming pool were derived from a proprietary activity and therefore were subject to the tax imposed by the Gross Income Tax Law; also the Department of Treasury v. City of Michigan City (1945), 223 Ind. 432, 60 N. E. (2d) 947, holding that receipts from the use of city owned park tennis courts were derived from a proprietary activity and therefore subject to the tax imposed by the Gross Income Tax Law, but also denying tax liability with respect to receipts of that city derived from the operation of its fire department, wherein it received gross income from the service of said fire department furnished to another town for compensation, on the basis that said activity is not private or proprietary; and lastly is the case of Department of Treasury v. City of Evansville (1945), 223 Ind. 435, 60 N. E. (2d) 952, wherein the receipts of that city from the operation of its markets, its wharf, its golf course, its airport and its ceme-
teries were all derived from private and proprietary activities and thereby were subject to the tax imposed by the Gross Income Tax Law.

In none of the said four cases is the nature of the activity of the collection of garbage and rubbish the subject of the Court's consideration, apparently for the reason that said service is often and perhaps usually provided from the general revenues of the city derived from general tax levies; in such situations, there is no specific receipt by the city as and for the consideration of rendering garbage and rubbish disposal services. However, the above four cases are helpful in determining what the answer to your question should be and particularly is the City of Evansville case of great aid by formulating a standard by which to determine whether the activities involved by your question are governmental or private and proprietary. In the said Evansville case, 223 Ind. 435 at pages 440 and 443 the following standards are set forth as an aid in determining whether a given activity of a city be governmental or private and proprietary:

"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."

Applying the above "tests" to the facts heretofore stated, it would appear that the activity involved is not that of a duty imposed by the Legislature upon the city for the advantage of the state as a whole, but is the exercise of a permissive privilege given the city by which it acts primarily for the special benefit of its own local compact community. It is believed to be rather common knowledge that, unlike the services of police and fire protection and of public education which are usually required or furnished on a more nearly broad state-wide basis, the service of garbage and rubbish collection is seldom, if ever, performed by any governmental unit outside the corporate limits of incorporated cities and towns. The fact that a charge was made by the city for the service, which included the furnishing of a place of deposit or dump by the contractor for use by residents of the city with respect to collections which the contractor could not normally make, is some indication that the activity should be regarded as a somewhat usual business enterprise, comparable to private scavenger service afforded by private contractors to residents of suburban areas.

Perhaps the most specific court opinion on the classification of city-provided garbage and rubbish collection service is an
Illinois decision in the case of Gravander v. City of Chicago (1948), 399 Ill. 881, 78 N. E. (2d) 304 at page 307, wherein the Supreme Court of Illinois reiterates the history and cogent legal reasoning why this activity should be held to be proprietary, stating:

"As was said in Schmidt v. City of Chicago, 284 Ill. App. 570, 1 N. E. 2d 234, 238, 'In so far as we know, government as an attribute of its sovereignty never assumed the removal and disposition of garbage throughout the state at large. Such always has been and on farms and in the sparsely settled communities of the state, still is essentially and primarily a work that is performed by private citizens. However, as more populous centers developed, it became impractical in most cases for private citizens to properly attend to this function and it became necessary for the municipalities to assume it on account of the complexity of life and conditions peculiar to such municipalities. It is clear upon principle and authority that the city of Chicago in the collection and removal of the garbage of its citizens acts in the discharge of a special power granted it by the Legislature, in the exercise of which it is a legal individual, as distinguished from its governmental function when it acts as a sovereign, and the fact that the discharge of this duty might incidentally benefit the public health does not make the removal of the garbage a public function.'

"We think there is much logic and reasoning in the above rule. It is true there is some authority in other States that have held to the contrary and it has been said the fact that States have not been accustomed to collect and dispose of garbage and rubbish does not show that such acts are not done for the State or for the benefit of the public. We think, however, the better rule is that under conditions and facts as presented in this case, the collection and removal of garbage is a corporate and not a public function. We are not unmindful, as we have heretofore pointed out, that the division or classification of these functions is far from
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being well defined, and is in many instances vague and indefinite, and much confusion prevails. For this reason the courts have frequently said that the only thing that can be done is to determine each case on its own particular facts. The mere fact that the public at large might benefit indirectly therefrom is not sufficient to make the function a governmental one, for almost all affairs of purely local concern produce some indirect results on the general safety, health, and welfare.

* * *

As stated in the above quotation, there is a lack of uniformity concerning whether the collection of garbage and rubbish is a governmental or proprietary activity. Opinions from other jurisdictions holding the opposite view are often based upon the general proposition that all activities which are justified as a proper exercise of police power are, therefore, governmental. However, in Department of Treasury v. City of Linton, supra, our Supreme Court held that the exercise of the police power as well as the power of eminent domain and the taxing power of a municipality in connection with the operation of a particular function are not conclusive.

In Department of Treasury v. City of Evansville, supra, the Supreme Court held that income to the City of Evansville from operating and conducting its market, its wharf, its golf course, its airport and its cemeteries, was subject to gross income tax. The Court used the following reasoning at page 444:

"* * * In all of these activities it is acting primarily for its own compact community rather than for the state at large. Each of these activities is of a general business nature frequently engaged in by private persons or corporations. In each instance the city is exercising a permissive privilege given by statute and is not performing a duty imposed by the legislature. In all of these activities consideration in the form of money flows to the city from those who are the immediate and direct participants and beneficiaries of the activities."

You will note that the collection of garbage by the City of Bluffton as practiced at the times in question satisfied each of
the above tests and therefore it would seem that Indiana courts would follow the reasoning in the above quoted Illinois decision.

In addition to the case law heretofore cited and quoted, mention is made of the protest of the City of Bluffton against the proposed assessment of Gross Income Tax, said protest being dated December 5, 1958. It is to be noted that the basic grounds of said protest, so far as it is directed against the assessment of Gross Income Tax upon receipts from the garbage and rubbish collection service, are that the Light and Water Department of the city acted only as a collection agency for the private contractor, that any tax due from the garbage collection service should be assessed against and paid by the contractor, that the city did not elect to maintain its own system but rather used the City Utility Department merely as a collection agency, which practice was stopped in compliance with recommendation of the State Board of Accounts; also, that neither the City of Bluffton nor its utility department received title to any of the charges for collection at any such times, except for the purpose of acting as a collecting agent for the contractor. It is to be noted from these contentions contained within said protest that the city, in effect, has forsaken any claim that it received said receipts from the performance of a governmental activity, because if the city had no right, title or interest in such revenues but was acting only as a collection agency for the contractor, then the activity would clearly be that of the contractor as a private and proprietary undertaking. However, the contended claim of agency is not borne out by the facts. The terminology of the ordinance, the rules and regulations and the provisions of the contract between the city and the private contractor all militate against the idea that the city was acting merely as a collection agency for the contractor. Pursuant to the ordinance of 1951, it was the Board of Public Works of the City of Bluffton which was authorized and empowered to collect and dispose of the garbage and rubbish within the city and the provisions of Section VI of that ordinance specifically provide that said Board shall either undertake to perform the service authorized by said ordinance or to provide for said service by contract with a private contractor. The words of this section clearly indicate that, under any and all conditions, it was the
Board of Public Works acting as the principal which was considered as providing the service and the amount charged to the users for the service was collectible irrespective of whether the city or the contractor did the actual work involved. The charges collected from said users were not earmarked for the contractor nor equated with the amount paid by the city to the contractor. The charges collected were, by regulation, placed in the general fund of the city and not considered in any sense as a trust fund or other special fund, as would be the case if the city were merely acting as a collecting agent.

The contract was between the city and the contractor for a specified monthly amount, irrespective of the total amount of charges collected by the city. It seems clear, that instead of the city being an agent for the contractor, that the contractor in fact was the agent of the city, acting for and on the city’s behalf, so that the receipts derived from the users of the service did belong to the city itself. With respect to this contention, I must therefore conclude that there appears to be no basis for concluding that the city was merely acting as an agent of the contractor in collecting said charges.

In conclusion, it is my opinion that your question should be answered by stating that, under the particular facts presented with respect to the City of Bluffton, the receipts received during the period from 1951 to 1958 as charges for the service of collecting garbage and rubbish and for furnishing a dump should be considered as belonging to said city and as having been derived from a proprietary activity conducted by a private contractor as the agent of such city; therefore, it is my further opinion that said city is subject to the tax imposed by the Gross Income Tax Law upon said receipts, as well as the agent’s receipts from the performance of his contract likewise being subject to taxation under said law.