Mr. John Morris, Commissioner
Indiana Department of State Revenue
141 South Meridian Street
Indianapolis, Indiana

Dear Mr. Morris:

This is in answer to a request of your predecessor, Edwin W. Beaman, former Commissioner, for my Official Opinion in answer to the following questions:

"Under Indiana law, cemetery owners are required to establish and maintain perpetual care funds. Such funds must be placed in the hands of trustees and only the income from the investment of such funds may be used for cemetery care.

"The Indiana Gross Income Tax Division requests an official opinion with respect to the following questions:

1. The Gross Income Tax Division has recognized the non-taxability of that part of the income of a profit or non-profit organization from sales of lots or burial rights which is set aside and placed in the perpetual care fund. Does this tax immunity extend to the income derived from the investment of the fund?

2. If the cemetery owner is a non-profit organization under Sec. 6(i) of the Gross Income Tax Act, does the immunity provided in that section of the Act extend to the trustee in charge of the perpetual care fund?

3. When the income from investments of the perpetual care fund is paid to either a profit or non-profit cemetery owner by the trustee, does that cemetery owner receive it as a beneficiary of the trust or is it received as payment for the performance of services for which the owner is obligated with respect to care of the cemetery premises?"
The section of the Gross Income Tax Law from which the answer to said questions must be derived is Sec. 6, particular reference being made to subsection 6(i), being the Acts of 1937, Ch. 117, Sec. 6(i), as amended, as found in Burns' (1957 Supp.), Section 64-2606(i). It should be mentioned at this point that the section of Burns' Indiana Statutes above referred to and contained in the 1957 Supplement is the amendment of said section as contained in the Acts of 1955, Ch. 291, Sec. 1, which was the latest amendment of said section at the time the request was made for this Opinion; however, and as will later enter into this Opinion, the 1959 session of the General Assembly further amended said Sec. 6 by enacting House Enrolled Act No. 377, Acts of 1959, Ch. 375, containing an emergency clause by which the same shall be in full force and effect from and after its passage; this 1959 amendment, approved March 14, and therefore, effective on and after said date, is now the latest amendment to Sec. 6(i).

Section 6(i) of the Gross Income Tax Law, as the same was enacted by Acts of 1937, Ch. 117, Sec. 6(i), and every subsequent amendment thereto has provided both for a class of totally gross income tax exempt organizations and institutions, such as churches, hospitals, schools, colleges and universities, and has also provided for a partially exempt group of institutions and bodies with respect to certain specified classes of receipts. Unless the cemetery is owned outright by one of the above totally exempt organizations, neither a cemetery association or a perpetual care fund for maintaining a cemetery are within the class of any of the specified institutions or organizations which are necessarily totally exempt from liability for gross income tax. The only part of said Sec. 6(i) which is germane to the problems presented is the first part thereof which bases the exempt status, not solely upon the character of the institution or recipient, but also upon the nature of the income received. Said part of Sec. 6(i) of the Gross Income Tax Law as is germane hereto is as follows:

"Sec. 6. There shall be excepted from the gross income taxable under this act:

"(i) Amounts received by institutions, trusts, groups and bodies organized and operated exclusively for religious, charitable, scientific, fraternal, educational, social and/or civic purposes and not for private benefit,
as contributions, tuition fees, initiation fees, matriculation fees, membership fees, and earnings on, or receipts from, sales of intangible property owned by them: * * *” (Our emphasis)

It may be noted that the above language has previously been construed as not including tangible property.


Therefore, the tax-exempt status herein in question relates solely to income of the perpetual care fund derived either from holding or selling intangible property.

The above-quoted portion of said Section is taken from the Acts of 1937, Ch. 117, Sec. 6(i), pp. 615, 616 and, insofar as quoted, said portion is identical with the Acts of 1955, Ch. 291, Sec. 1(i), pp. 834 and 835; thus, notwithstanding several intervening amendments to said Sec. 6, there appears no basic change in the above-quoted portion from 1937 through 1955. If other requisites exist, it would appear that the only conceivable basis for denying the tax exempt status of income derived from investments in intangibles would be from the illogical positioning of the commas appearing in the above-quoted portion. Literally construed, the 1937 version of Sec. 6(i) of the Gross Income Tax Law and of succeeding versions through 1955 can be read to mean that: “There shall be excepted from the gross income taxable under this act: * * * Amounts received by institutions, trusts, groups and bodies organized and operated exclusively for religious, charitable, scientific, fraternal, educational, social and/or civic purposes and not for private benefit, as * * * earnings on, * * * sales of intangible property owned by them: * * *” and “as * * * receipts from, sales of intangible property owned by them: * * *.” From a strict grammatical standpoint, it may be argued that the term “earnings” relates to earnings on sales of intangible property and would not mean earnings on intangible property not sold. Since the only conceivable basis for denying the tax exempt status to the income mentioned in your first question is the placement of the commas in said quoted portion, reference is made to Sutherland, Statutory Construc-
tion, 3rd Ed., Vol. 2, Sec. 4939, p. 476, which provides as follows:

"Parliamentary enactments originally were not punctuated and thus it was a necessary conclusion that the punctuation subsequently inserted was no part of the act. Today, however, the legislatures punctuate statutes prior to enactment. Nevertheless, some courts still declare that the punctuation of a statute is no part of the act.

"The better rule is that punctuation is a part of the act and that it may be considered in the interpretation of the act but may not be used to create doubt or to distort or defeat the intention of the legislature. When the intent is uncertain, punctuation, if it affords some indication of the true intention, may be looked to as an aid. In such a case the punctuation may be disregarded, transposed, or the act may be repunctuated, if the act as originally punctuated does not reflect the true legislative purpose.

"An act should be read as punctuated unless there is some reason to the contrary, and this is especially true where a statute has been repeatedly re-enacted with the same punctuation. Obviously, the punctuation of the original act as passed by the legislature and not the printed copy controls. Although it has been frequently asserted that 'Punctuation is a most fallible standard by which to interpret a writing,' it is more satisfactory to treat the rules of punctuation on a parity with other rules of interpretation. When punctuation discloses a proper legislative intent courts should give weight to its evidence. When the act as punctuated is inconsistent with the legislative intent the punctuation should be disregarded or the act repunctuated to effect the intention of the legislature."

Generally speaking punctuation should never be allowed to distort the true legislative meaning. However, as above stated, the act should be read as punctuated "unless there is some reason to the contrary, and this is especially true where a statute has been repeatedly re-enacted with the same punctuation." Notwithstanding several successive enactments of Sec.
6(i), using the same punctuation, there do appear reasons to the contrary which should justify not reading the act as punctuated.

It is to be noted that at least as far back as 1919, when the basic Property Tax Law now in force was enacted, Sec. 5 of said law, being the Acts of 1919, Ch. 59, Sec. 5, p. 200, originally exempted from the Property Tax Law in the eighth paragraph of said Sec. 5, the following:

"The following property shall be exempt from taxation:

"* * * in all cases where a cemetery association shall provide for setting aside a certain definite portion of the proceeds derived from the sale of lots as a perpetual care fund, the income of which shall be used as a perpetual care and maintenance fund, all the property and assets belonging to such corporation used exclusively for cemetery purposes; * * *

(Our emphasis)

Not only has the perpetual care fund of cemeteries been exempt from liability for property taxes at least as far back as 1919, but also said section was amended by the Acts of 1937, Ch. 262, Sec. 1, as found in Burns' (1951 Repl.), Section 64-201 (Eighth), which changed the terminology of the eighth paragraph of said Sec. 5 to exempt as follows:

"The following property shall be exempt from taxation:

"* * * in all cases where a cemetery association shall provide for setting aside a certain definite portion of the proceeds derived from the sale of lots as the perpetual care fund, the income of which shall be used as a perpetual care and maintenance fund, such fund and the income therefrom shall be exempt; * * *"

(Our emphasis)

Whereas the 1919 Act refers in terms to that portion of the proceeds derived from the sale of lots as was transferred to a perpetual care fund, the 1937 amendment made it clear if there were any doubt, that, so far as liability for property taxation, not only the perpetual care fund as originally construed was to be exempt but also the income from such fund
was likewise to be exempt from liability for property taxes. The above change was made by the same session of the Legislature in 1937, which first enacted that part of Sec. 6(i) of the Gross Income Tax Law with which this Opinion deals; also the language relative to the exemption from liability for property taxes of the perpetual care fund and the income therefrom as contained in said 1937 amendment to the Property Tax Law has been retained in successive amendments and is unchanged from the 1937 amendment and may be found in Burns' 64-201 (Eighth), supra. Before passing to another point, it may be observed that it would seem to be most inconsistent for the same session of the Legislature to have expressly exempted the income of the perpetual care fund of cemeteries from the liability for property taxation while at the same time denying the same income exempt status so far as liability for gross income tax.

It would further seem that the terminology "earnings on" as contained in Sec. 6(i) of Gross Income Tax Law would be superfluous as applied to intangible property, if it were necessary that the intangible property be sold in order for exemption to apply, since said section also expressly exempts "receipts from, sales of intangible property" owned by the class of institutions therein specified; in other words, the exemption of receipts from sales of intangible property would clearly include earnings on sales of intangible property, so that it is reasonable to believe that the Legislature intended the term "earnings on" to have some other and additional meaning aside from the necessity of the selling of the intangible property concerned. Further, the word "earnings" is not ordinarily used in connection with a sale of property, but rather the term "proceeds" usually denotes the moneys or funds derived from sales of intangible property.

Reference is made to the Indiana General Cemetery Act, being the Acts of 1939, Ch. 142, as amended, as found in Burns' (1957 Supp.), Section 21-1001 et seq. Particular attention is drawn to Sec. 13 of the Indiana General Cemetery Act, being the Acts of 1939, Ch. 142, Sec. 13, as found in Burns' (1950 Repl.), Section 21-1013, which expressly provides that the accumulation and holding of the funds constituting the "perpetual care fund" of cemeteries "shall be and be deemed to be for a charitable and eleemosynary purpose."
By this section, the Legislature has removed all doubt as to the classification into which the perpetual care fund and income therefrom is to be categorized by means of its having classified this fund and accumulations thereto as being for charitable purposes. Therefore, it is clear that the portion of Sec. 6 (i) of the Gross Income Tax Law herein quoted is applicable, said perpetual care fund falling within the classification of a trust organized and operated exclusively for charitable purposes and not for private benefit. It has always been clear, since the enactment of the Indiana General Cemetery Act of 1939, that the receipts from sales of intangible property owned by the perpetual care fund are free from the tax imposed by the Gross Income Tax Law. The purpose of the perpetual care fund is, by statute, for the care of the cemetery and the Indiana General Cemetery Act specifically requires the investment of all moneys in the perpetual care fund in the type of security specified by the Acts of 1939, Ch. 142, Sec. 16, as found in Burns' (1950 Repl.), Section 21-1016. Further, only the income from such fund can be devoted to the care of the cemetery as provided in Acts of 1939, Ch. 142, Sec. 12, as amended, as found in Burns' (1957 Supp.), Section 21-1012, so that it would be inconsistent with the legislative intent in providing for the care of cemeteries to apply the Gross Income Tax Law to the income from required investments of the fund.

Whatever doubt may have existed heretofore has been removed by the 1959 General Assembly. This session of the Legislature, while concerning itself with another amendment to Sec. 6 of the Gross Income Tax Law, had the instant problem called to its attention, as a result of which the punctuation has been changed so as now to obviate any further problem. This last amendment to Sec. 6(i) of the Gross Income Tax Law, being House Enrolled Act No. 377, Acts 1959, Ch. 375, now provides, in part, as follows:

"Sec. 6. There shall be excepted from the gross income taxable under this act: * * *

"(i) Amounts received by institutions, trusts, groups and bodies organized and operated exclusively for religious, charitable, scientific, fraternal, educational, social and/or civic purposes and not for private benefit, as contributions, tuition fees, initiation fees, matriculation fees, membership fees, and earnings on, or re-
It is clear by the change in punctuation afforded by the above-quoted portion of the 1959 enactment that the exemption applies to "earnings on, * * * intangible property owned by them: * * *" as well as to "receipts from sale of, intangible property owned by them: * * *"

In view of the history of this problem, it is my opinion that the change effected above is not to be considered as in fact changing the law, but as merely reflecting and fixing the intent and understanding of the Legislature as to what the law had been since 1937. Therefore, in answer to your first question, it is my opinion that the tax immunity afforded to the perpetual care fund of cemeteries by the Gross Income Tax Law applies, not only with respect to receipts from sales of intangible property owned by the fund, but also to earnings derived from the investment of intangibles owned by such perpetual care fund.

Your second question is answered merely by referring to the fact, as contained in the Indiana General Cemetery Act, that the trustee is merely the fiduciary or custodial agent of the fund and as such is exempt from liability under the Gross Income Tax Law to the same extent as the trust or perpetual care fund itself is exempt. The fact as to whether the cemetery is a for-profit or non-profit organization is not determinative in fixing liability for gross income tax on account of receipts derived from investing funds of the perpetual care fund in intangibles. Although prior to 1937, cemetery associations and companies which were organized and operated exclusively for the benefit of their members were granted total immunity by reason of the Acts of 1933, Ch. 50, Sec. 7, by reason of the amendment contained in the Acts of 1937, Ch. 117, Sec. 6(i), such associations are not necessarily granted total immunity by reason of a non-profit status, but such tax exempt status applies to the particular types of income which the Legislature has said shall be exempt from the Gross Income Tax Law. This is made evident, in that said portion of said section does not exempt the institution, association or trust, itself, but "amounts" received by charitable, etc. institutions, "as contributions, tuition fees, initiation fees, matric-
ulation fees, membership fees, and earnings on, or receipts from sales of, intangible property owned by them: * * *

Therefore, when reference is made to the tax exemption extended to the trustee in charge of the perpetual care fund, it is meant that the trustee has the same but no greater tax immunity under the Gross Income Tax Law than the fund itself enjoys and it is because of the character of the fund and the nature of the income that the trustee in charge of such fund has immunity.

In discussing your third question, it should be noted that the Indiana General Cemetery Act does not define the business of the owner of the cemetery as being of a charitable nature, but expressly confines the classification of "a charitable and eleemosynary purpose" as being applicable to the "accumulation and holding of the funds as authorized by sections 12 and 18 of this act, or contributions thereto * * *." If the Legislature had intended all phases of the business of operating a cemetery to be automatically classified as being for charitable purposes, it is believed that the General Assembly would not have precisely limited the classification of "charitable" to the "accumulation and holding of the funds" as authorized by said sections. As heretofore noted from the original Gross Income Tax Law, being the Acts of 1933, Ch. 50, Sec. 7, as compared with the Acts of 1937, Ch. 117, Sec. 6(i), there appears to be a definite intention to narrow the exemptions afforded by the Gross Income Tax Law as formerly provided by the said 1933 Act. From the 1937 version of the exemption section of the Indiana Gross Income Tax Law to date, cemetery associations have not in terms been exempted by the statute as was formerly the case, but such exemptions as cemetery associations may enjoy are by reason of the dual cumulative requisites, first, that the association be organized and operated exclusively for charitable purposes and not for private benefit, and second, that the amounts claimed as subject to exemption be of the class of income therein authorized to be exempted. Section 6(i) of the Gross Income Tax Law, as is ordinarily the case in construing exemption statutes, expressly requires a restrictive interpretation for it is provided at the conclusion of said section as follows:

"* * * Provided, further, That it is not the intention of the foregoing language to exclude any gross
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income from taxation under this subsection except as is specifically set out herein."

The third question does not provide expressly the nature of the consideration for which the owner receives money from the perpetual care fund and, in the absence of a particular fact pattern setting forth the substantial and material manner of operation, it is impossible to furnish an opinion which would necessarily be applicable in all instances. It may, however, be stated that, unless the cemetery is owned and operated by an entity enjoying total exemption such as a church, the ordinary rules of determining taxable or non-taxable status under the Gross Income Tax Law of income received by the owner would apply.

As in the ordinary case of funds held by a fiduciary, the trustee not only has the custody of the fund but also, to the extent authorized by law, is the agent or means by which the fund is both invested and disbursed, including the disbursement of income derived from the investment of the fund as authorized. Likewise, in this instance, in the handling of the perpetual care fund of cemeteries, it must be presumed that the trustee is doing his duty not only to preserve and invest the fund, but also to confine disbursements therefrom to the express purpose for which the fund is created, i.e. for the purpose of paying for the perpetual care of the cemetery. Therefore, in the absence of further facts, it can only be presumed that if payments from the income of the perpetual care fund are made by the trustee to the owner, such receipts should be considered as and for the consideration for services rendered by the owner in providing the perpetual care for the cemetery, unless otherwise shown; this must be so, since the only statutory basis by which any person should receive receipts from the income of such fund would be for the performance of services in providing perpetual care of the cemetery.

The very purpose of the requirement and creation of the perpetual care fund is that the principal, which permanently remains intact, except as provided, be invested "and the income only thereof shall be devoted to the perpetual care of said cemetery * * *," Acts of 1939, Ch. 142, Sec. 12, as amended, as found in Burns' (1957 Supp.), Section 21-1012. This act expressly defines the term "perpetual care" in the Acts of
1939, Ch. 142, Sec. 1(l), as amended, as found in Burns' (1957 Supp.), Section 21-1001(l), which provides as follows:

“(l) ‘Perpetual care’ means the cutting of the grass upon and the raking and cleaning of cemetery plots at reasonable intervals, the pruning of shrubs and trees thereon, and the general preservation of the cemetery plots, and the cemetery grounds, walks, roadways, boundaries, and structures, to the end that said grounds shall permanently remain and be reasonably cared for as cemetery grounds.”

It is obvious from the foregoing definition of “perpetual care” that the payments made from the income of the fund for perpetual care are clearly paid for and in consideration of services performed by the owner or whoever is obligated to provide the care for said premises. Inasmuch as gross income tax exemptions are individual rights which are non-assignable and not for the benefit of others with whom the exempted person, trust or institution does business, it follows that the owner of the cemetery and any other person caring for the same is liable under the Gross Income Tax Law for the tax thereby imposed with respect to receipts received by such owner or person for services rendered in caring for cemetery premises.

In conclusion, and by way of recapitulation, my answers to your questions are as follows:

1. The tax immunity afforded by Sec. 6(i) of the Gross Income Tax Law extends to income derived from the investment of moneys of the perpetual care fund in intangibles, irrespective of whether such intangibles are sold or held,—such immunity applying to both receipts from sale and interest and dividends received from such intangibles.

2. The trustee in charge of the perpetual care fund is, as such, afforded the same tax exemption as applies to the perpetual care fund itself and the income accruing thereto and therefrom.

3. Subject to qualifications heretofore stated, any person, whether the owner of a cemetery or otherwise and whether organized for profit or not-for-profit, is liable for the tax imposed by the Gross Income Tax Law with respect to receipts
received for services rendered in providing the care of cemetery premises, even though such receipts are paid from the income from the investment of the perpetual care fund of such cemetery.

OFFICIAL OPINION NO. 4
April 16, 1959

A. C. Offutt, M. D.
State Health Commissioner
Indiana State Board of Health
1330 West Michigan Street
Indianapolis 7, Indiana

Dear Dr. Offutt:

I am in receipt of your letter concerning full-time county health departments; and I understand your questions to be substantially as follows:

1. Under Acts of 1949, Ch. 157, Sec. 611, as found in Burns' (1949 Repl.), Section 35-812, who may decide what sums of money may be necessary for the maintenance of a county full-time health department?

2. Under the above act, can the county council of a county be mandated to appropriate said funds for the full-time local health department?

3. Under Acts of 1949, Ch. 157, Sec. 628, as found in Burns' (1949 Repl.), Section 35-829, may the boards of health of each full-time local health department fix the compensation of all officers or employees without regard to the action of the county commissioners, county council, county tax adjustment board, and other boards of review in the several counties?

The Supreme Court of Indiana has answered questions similar to those presented here. The Court has, in effect, set out two rules:

1. The Legislature has the power by statute to require county councils to make specific appropriations. If the county