PART 8

OPINIONS OF ATTORNEY GENERAL

The following opinions make up Part 8 of this manual:

Official Opinion No. 16, 1966
Official Opinion No. 20, 1966
Official Opinion No. 21, 1966
Unofficial Opinion, Dated June 20, 1967

OFFICIAL OPINION NO. 16
September 8, 1996

COUNTY OFFICERS -- County Drainage Board -- Procedure for Collecting Assessments -- Duties of County Auditor -- Duties of County Treasurer -- Option of Landowners to Pay in Installments.

Opinion Requested by Mr. Richard L. Worley, State Examiner, State Board of Accounts.

I am in receipt of your recent letter requesting my Official Opinion on certain aspects of the Indiana Drainage Code, Acts 1965, ch. 305, the same being Burns IND. STAT. ANN., §§ 27-2001 through 27-2606.

Your questions concern the procedure for collecting assessments for the construction or reconstruction of drains, so it would be best to set out the sections of the Act providing the authority to establish such assessments prior to answering your direct questions.

Section 709, Burns § 27-2409, provides:

> "After the letting of the contract for construction or reconstruction the board shall ascertain in full cost of the improvement including the contract price, incidental expenses, damages, attorney's fees, if any; and the board shall apportion such costs to the several tracts of land assessed in proportion to the benefit percentage assigned to each tract."

Section 710, Burns § 27-2410, provides, in part:

> "(a) The list of assessments for an improvement as apportioned in accordance with the last preceding section of this article shall be certified by the board to the county auditor in each county in which there are lands to be assessed. . . .
>
> "(c) The auditor shall extend assessments for construction and reconstruction upon a book, to be known as ditch duplicate, for the full period of payment allowed for all assessments for construction and reconstruction, with interest at six per cent [6%] per annum upon all payments deferred beyond one year from the date that the certification is made."

In relation to the assessments so established you asked four questions, which will be answered in order:

> "1. Does a county drainage board have authority or is it the duty of that board to fix the number of years over which an assessment for construction or reconstruction may be amortized?"

Section 712 of the Act, Burns § 27-2412, provides:

> "All final assessments, other than annual assessments for periodic maintenance, shall be due and may be paid upon the date of certification of the final assessment to the auditor, except the owners of lands liable for **the payment of such assessments may elect** to pay the same in equal instalments of not less than fifty dollars [$50] per year, plus interest on the deferred payments, extending over a period of not more than five [5] years, the yearly payments to be made biannually at the time general taxes are payable." (Emphasis added.)

It appears, then, that the owners of lands being assessed would have the option to determine the number of years over which the assessment may be amortized, and that the Drainage Board has no authority.

There is an exception to the above rule. Section 715 of the Act, Burns § 27-2415, provides:

> "Whenever the board determines by resolution spread upon its minutes that the cost of a particular improvement is in excess of that which the owners of lands to be assessed may conveniently pay in instalments over a five [5] year period, it shall authorize the sale of bonds to finance the improvement."

The board does have the authority and the duty to determine whether the amortization period should be greater than five years. If the Board does so determine, it also has the duty to determine the exact number of years to be allowed. Section 717 of the Act, Burns § 27-2417 provides in part:

> "Whenever the board resolves to sell bonds, it shall determine . . . (2) the period over which it shall be repaid, . . ."

In summary, the Board has the authority and the duty to determine whether the assessment is to be paid within five years and, if not, to set the number of years in which it must be paid.

> "2. If the answer to question number 1 is in the affirmative, should such time limit be fixed prior to the assessments being certified to the county auditor?"

Insofar as the answer to the first question is in the affirmative, the answer to this question must also be in the affirmative. Section 717 of the Act, Burns § 27-2417, as quoted above, provides that at the time of deciding to finance the construction by bonds, the Board must also determine the period of time for redeeming such bonds. Further, clause (c) of § 710, also quoted above, provides that the auditor will extend the assessment certified to him for the full period of payment allowed. This the auditor could not do unless the Board had already made its determination.

> "3. If the answers to questions number 1 and 2, above, are to the effect that a drainage board is not authorized or required to fix the number of years over which an assessment is to be amortized prior to certification to the county auditor, upon what basis can a county auditor extend assessments on the ditch duplicate as required by paragraph (c) Section 710 and how can a county treasurer determine the amount of the assessment currently due for the purpose of stating the amount in the statement to the landowner as required by Section 711?"

As your question indicates, in those instances where the Drainage Board determines that bonds should be issued and fixes the term of years for redeeming such bonds, the auditor has no problem extending assessments on the ditch duplicate, nor does the treasurer have any problem determining the amount of the assessment currently due.

In those cases where the assessment is to be paid within the five-year period, it would appear that the auditor is to extend the assessment certified to him over the entire five-year period. This conclusion is based on the provision in § 710(c) that the auditor is to extend the assessments for the full period of payment allowed. When bonds are not issued, the landowner is automatically, by the operation of § 712, supra, allowed five years to pay the assessment. This conclusion is also supported by § 711 of the Act, Burns § 27-2411, which provides, in part:

> "(a) Within thirty [30] days after receipt of the certification of final costs for the construction or reconstruction of an improvement by the auditor he shall deliver a copy of the ditch duplicate to the county treasurer who shall, within fifteen [15] days after receipt of such copy, mail to each person owning lands assessed for the improvement a statement showing the total amount of the assessment and the instalment currently due, which statement shall state that such owner may pay the assessments in full within one year or he may pay only the instalment due within the current year with deferred payments in annual instalments with interest at six per cent [6%] per annum."

There is, however, an exception to this rule. Section 712, Burns § 27-2412, set out above, provides that such assessments are to be paid in equal instalments of not less than fifty dollars ($50.00) per year. If the total assessment is of an amount less than two hundred and fifty dollars ($250.00), then the auditor should extend the assessment on the ditch duplicate only for the number of years that would permit the payment of equal instalments in an amount greater than fifty dollars ($50.00).

> "4. If the answer to question numbered 1 is in the affirmative, is Section 712 to be interpreted to mean that the landowner's election is limited to making a decision whether to pay the assessment in full within one year or to pay the annual installments, the number of which has been determined by the drainage board?"

This question is perhaps the most difficult to answer since the Drainage Code makes no specific provision concerning the number of times the property owner may elect to pay the assessment in total or by installments.

That the property owner has such a choice at the time the first installment is due, whether or not bonds have been issued, is certain. Section 711 of the Act, Burns § 27-2411, provides in clause (a) that the county treasurer, when he first receives a copy of ditch duplicate from the auditor, will:

> ". . . mail to each person owning lands assessed for the improvement a statement showing the total amount of the assessment and the instalment currently due, which statement shall state that such owner may pay the assessment in full within one year or he may pay only the instalment due within the current year with deferred payments in annual instalments with interest at six per cent [6%] per annum."

The question is whether a property owner who chooses to pay only the installment due may later, at the time of paying another installment, choose to pay the entire balance of the assessment with the interest due thereon. In my opinion, he may make such a choice.

If bonds have not been issued and the property owners are paying the assessment in installments not to extend over five years, then refusing to accept the full payment of the amount of the assessment outstanding would, in effect, be putting the Drainage Board in the position of a money lending institution. The only reason for not permitting prepayment in such instances would be that such prepayment would not permit the Drainage Board to collect the six per cent (6%) per annum interest on that money in the future. Investing money at six per cent (6%) interest is not a proper function of the Drainage Board.

For those constructions financed by bonds, the bonds sold are regulated by § 718 of the Act, Burns § 27-2418. Clause (b) specifically provides:

> "All bonds or installment notes shall provide that the same may be called by the board for refunding or for prepayment without penalty."

There is, then, no reason why the Board should not permit the property owner to pay the full amount of the assessment outstanding at the time any installment is due since the Board in turn may use that prepayment to prepay bonds without penalty.

The conclusion that prepayment of the outstanding amount of the assessment is possible is reinforced by contrasting the provisions of the Drainage Code herein involved with the elaborate provisions made for the redemption of Barrett Law bonds issued by cities and towns to finance public improvements. For instance, Acts 1931, ch. 99, § 4, as last amended by Acts 1961, ch. 217, § 1, the same being Burns IND. STAT. ANN., § 48-4404, specifically provides that any property owner whose property has been assessed for improvements, and who has chosen to pay the assessment in installments, may later pay the entire assessment and stop the interest, but to do so he must pay a penalty that amounts to more than one year's interest on the amount he prepays. Since there are no similar provisions in the Drainage Code, the only possible conclusion is that the Legislature intended that the property owner may pay the total assessment at the time any installment is due.

The preceding answers can probably best by summarized by pointing out the procedure on a step by step basis.

(1) The County Drainage Board determines the whole cost of the construction or reconstruction and assesses that cost against the properties benefited in proportion to the benefits received by the properties.

(2) The County Drainage Board then determines whether the amount of the assessment is so large that it cannot be conveniently paid by the property owner in a five-year period. If the Board determines by a resolution spread upon its minutes that the assessment is that large, then the Board may authorize the sale of bonds, at the same time specifying the number of years to redeem the bonds. The Board must then certify the assessments to the County Auditor, specifying the allowed amortization period if bonds are to be issued.

(3) The Auditor extends the assessments on the ditch duplicate for either the period of the bond issue or the five-year statutory payment, modifying the statutory payment if the assessment is less than two hundred fifty dollars ($250.00). Within thirty days after receipt of the certification from the County Board, the Auditor must deliver a copy of the ditch duplicate to the County Treasurer.

(4) The County Treasurer within fifteen days after receiving the copy of the ditch duplicate must mail to each landowner being assessed a statement showing the amount of the assessment and the amount of the current installment.

(5) The assessed property owner may, at the time any installment is due, choose to pay either the installment then due or the entire amount of the assessment still outstanding. Similarly, the Drainage Board may at any time redeem the bonds issued to finance the construction or reconstruction.

I believe the foregoing procedure is not only in accord with the provisions of the Drainage Code, but is also the simplest method of collecting the property assessments.

OFFICIAL OPINION NO. 20
September 30, 1996

STATUTES AND RECODIFICATION -- Indiana Drainage Code -- Duties of County Surveyor Concerning Construction and Maintenance of Drains.

Opinion Requested by Hon. John W. Donaldson, State Representative.

I am in receipt of your recent request for an opinion regarding the provisions of the 1965 Drainage Code relating to the maintenance of drains.

The Drainage Code, Acts 1965, ch. 305, the same being Burns IND. STAT. ANN. §§ 27-2001 through 27-2606, is an ambitious and comprehensive piece of legislation. Unfortunately, certain specific applications of the Code, especially those pertaining to maintenance, are not always clear. Therefore, in order to answer your questions it will be necessary to construe the Act and, like the Indiana Supreme Court in State v. Griffin, 226 Ind. 279, at 284, 79 N.E. 2d 537, 540 (1948):

> ". . . in so doing we are bound by the rule that a statute must be reasonably and fairly interpreted so as to give it efficient operation, and to give effect if possible to the expressed intent of the legislature. It should not be wantonly narrowed, limited or emasculated and rendered ineffective, absurd or nugatory. If possible it should be allowed to perform its intended mission as shown by the existing evils intended to be remedied."

Prior to consideration of your questions, it would be appropriate to determine what activities are to be considered maintenance. Section 102 of the Act, Burns § 27-2002, provides two definitions which may be helpful:

> "(7) 'improvement' means (1) the construction of a new drain, and all work necessary and incidental thereto, (2) the reconstruction of a drain, and all work necessary and incidental thereto, or (3) periodic maintenance of a drain, and all work necessary and incidental thereto; . . .
>
> "(9) 'legal drain' means an open ditch or a tiled ditch, as defined in this section, or a combination of the two, which the provisions of this act make subject to the jurisdiction and control of a county drainage board;"

There can be little confusion between what constitutes the "construction" of a drain and what constitutes the "maintenance" of a drain. There could, however, be some difficulty in distinguishing between "reconstruction" and "maintenance." That confusion is eliminated by § 110 of the Act, Burns § 27-2010, which provides:

> "(a) The surveyor shall classify all legal drains in the county as (1) drains in need of reconstruction, (2) drains in need of periodic maintenance, and (3) drains which should be vacated.
>
> "(b) A legal drain is in need for reconstruction when it will not perform the function for which it was designed and constructed, or when topographical or other changes have rendered the drain inadequate to properly drain the lands affected, without extensive repairs or changes being made thereto. Such repairs or changes may be, but are not limited, to one (1) or a combination of the following:

"(1) converting, in whole or in part, an open ditch to a tiled ditch or a tiled ditch to an open ditch, or by adding an open ditch to a tiled ditch, or a tiled ditch to an open ditch;

"(2) increasing the size of the tile;

"(3) deepening or widening an open ditch;

"(4) extending the length of a drain;

"(5) changing the course of a drain;

"(6) constructing drainage detention basins and drainage control dams;

"(7) providing for erosion control and for grade stabilization structures; or

"(8) making any major change to a drainage system that would be of public utility.

"(c) A legal drain is in need of periodic maintenance when, by periodically cleaning out, spraying, removing obstructions, and making minor repairs, the drain will perform the function for which it was designed and constructed and will be adequate to properly drain all lands affected thereby under existing conditions."

"Maintenance," then, refers to those activities necessary to keep an existing and functioning legal drain in a working condition.

It could also be pointed out that there is a difference between the funds established for construction and reconstruction and the funds established for maintenance. Section 701 of the Act, Burns § 27-2401, creates a general drain improvement fund in each county, which fund shall be used to pay the cost of construction or reconstruction of a legal drain. Section 702, Burns § 27-2402, creates a maintenance fund for each individual legal drain. In other words, payment for construction and reconstruction is derived from one county-wide fund and payment for maintenance is derived from a separate fund established for the particular drain involved. The source of the two types of funds differs in that the general drain improvement fund can be augmented by appropriations from the general fund of the county or taxes levied by the county council for drainage purposes, and also by the sale of bonds.

Similarly, the method of levying assessments against owners of property benefited by drainage improvements differs between construction or reconstruction and maintenance. Sections 709 through 718 of the Act, Burns §§ 27-2409 through 27-2418, treat the assessment of benefited properties. In essence, these sections treat a construction or reconstruction as a single assessment which the property owner may pay immediately or may amortize over a period of years at six per cent interest, while the maintenance charge is treated as an annual assessment against the property.

Your questions may now be considered in the order asked.

Your first question was as follows:

1. Section 407, Acts 1965, Chapter 305, indicates that the Drainage Board may pay for appropriate maintenance from the Maintenance Fund. No where in the Acts does it define who is to do the actual maintenance work, or how it is to be done. Therefore, I would appreciate an official opinion upon the following questions as to Section 407, to-wit:

"A. Who can do the maintenance work?

"B. Must all work be let by contract?

"C. If let by contract, can it be let by time and material or must it be by lump sum?

"D. Can the Drainage Board hire laborers to perform such maintenance work?

"E. Can the drainage Board use County Highway labor to perform such work?"

For convenience, subquestions B. "Must all work be let by contract?" will be answered first.

There is no section of the Act which sets out which work must be done by contract. The procedure for letting a contract is set out in several sections, including Section 704, Burns § 27-2404, which provides, inter alfa:

> "When an improvement is established by the board and the work thereon is not stayed pursuant to the provisions of article eight of this act, or whenever the board determines that maintenance work shall be let by contract, the board may contract for the work to be done as a whole or in sections."

The above language, like the many parts of the Act noted in the introductory passages, appears to distinguish between maintenance and construction or reconstruction. The above language seems to suggest that the decision as to whether maintenance should be done by the letting of a contract or otherwise rests entirely within the discretion of the Drainage Board.

A further interpretation might be advisable. The word "contract" as used in the statute refers to an agreement between parties, not the procedure by which such an agreement is reached. The Drainage Code provides two procedures for reaching the agreement of which the contract is evidence, one to be followed where the contract price is in a sum equal to or greater than two thousand dollars ($2,000.00), the other to be followed when the contract price is of a lesser sum.

Therefore, the above quoted section must be interpreted as meaning that the Drainage Board either may cause the work to be done themselves or may contract with some outside agency to perform the work at a stipulated sum.

The preceding answer leads us into the question asked in subquestion A, "Who can do the maintenance work?"

If the Board decides that the maintenance work should be contracted to some outside agent, then the Board must receive bids on the work. The procedure to be followed in soliciting bids is set out in § 705 of the Act, Burns § 27-2405, and the following section provides that the contract is to be awarded to the lowest bidder.

If the work is not to be let by contract, then the Board must cause the work to be done itself. It is my opinion that the Board causes such work to be done by the county surveyor. The surveyor is given the general power to superintend all maintenance work by § 109 of the Act, Burns § 27-2009. Further, two separate sections of the Act, §§ 602 and 702, Burns §§ 27-2302 and 27-2402, specifically authorize the surveyor to perform certain acts of maintenance without prior consultation with the Drainage Board. It is, therefore, perfectly reasonable to conclude that the Act contemplates that maintenance work not contracted out to private parties will be performed by the person whom the Act gives the duty to supervise maintenance and who is specifically authorized to perform certain acts of maintenance.

The answer to the above also answers subquestion D concerning the authority of the Drainage Board to hire laborers to perform maintenance work.

Section 106 of the Act, Burns § 27-2006, specifically authorizes the Drainage Board to employ an attorney to represent and advise the Board, and, in certain specified situations, to engage a registered engineer to assist the surveyor. No other specific authority to engage personnel is granted. Assuming the answer to subquestion A is correct, then no authority to hire laborers can be inferred from the Act.

The answer to subquestion E has more or less been determined by the preceding answers. The Drainage Board cannot themselves hire laborers, and they must work through the surveyor to maintain drains. This indicates that the Drainage Board cannot use county highway labor.

The remaining subquestion asks whether a contract must be let in a lump sum or whether it can be let by time and material. The answer to this question is specified in § 704 of the Act, Burns § 27-2404, set out above, which specifically provides:

> "When an improvement is established by the board and the work thereon is not stayed pursuant to the provisions of article eight of this Act, or whenever the board determines that maintenance work shall be let by contract, the board may contract for the work to be done as a whole or in sections."

The answer to your first question may be summarized as follows:

A. Who can do the maintenance work?

The surveyor if no contract is let; the lowest qualified bidder if a contract is let.

B. Must all work be let by contract?

Maintenance work is let by contract only if the Board determines to do so.

C. If let by contract, can it be let by time and material or must it be by lump sum?

The contract can be let by time and material.

D. Can the Drainage Board hire laborers to perform such maintenance work?

No.

E. Can the Drainage Board use county highway labor to perform such work?

No.

Your second question reads as follows:

> "2. Section 109 states that the County Surveyor shall be the technical authority and then further defines his responsibilities. In view of this Section, I submit the following question for an official opinion, to-wit:
>
> "A. Can the County Surveyor hire laborers to perform maintenance work as referred to in Section 407, Acts 1965, Chapter 305?"

The Drainage Board imposes a number of duties upon the surveyor and several of such duties pertain to maintenance.

Section 109 of the Act, Burns § 27-2009, provides that he will be the technical authority on the maintenance of all legal drains and that he will superintend all maintenance work on all improvements.

The county surveyor is also expressly given the duty to perform certain acts of maintenance in specific situations. Section 602 of the Act, Burns § 27-2302, provides, in part:

> "When any legal drain is obstructed or damaged by logs, trees, brush, unauthorized structures, trash or debris, excavating or filling, pasturing livestock, or any other manner, the surveyor shall immediately remove such obstruction and repair such damage."

Section 702 of the Act, Burns § 27-2402, provides, in part:

> "Whenever the estimate for annual maintenance as made by the surveyor for any tile drain is not more than one hundred dollars [$100] and such tile drain does not drain into a legal open drain, the board may exempt such tile drain from the provisions of this act requiring creation of a maintenance fund. Such expenses up to one hundred dollars [$100] for such tile drain in each year shall be paid from the general drain improvement fund. The surveyor may proceed to make these minor repairs without advertising or letting a contract or contracts."

In addition to the above specified duties imposed upon the surveyor, the answer to your first question indicates that the Act intends that all maintenance should be performed by the surveyor unless the Drainage Board should decide to contract with some outside party to perform that maintenance.

It is a well established principle of statutory construction that the grant of power or the imposition of a duty implies the authority necessary to exercise that power or fulfill that duty. See Newcomb v. City of Indianapolis, 141 Ind. 451, 40 N.E. 919 (1895); Hyland v. Rochelle, 179 Ind. 671, 100 N.E. 842 (1913), and cases cited on page 678 therein and 100 N.E. at 845.

Since the Act imposes duties on the surveyor it must be interpreted as also granting the authority to hire persons to perform those duties.

Any person employed by the surveyor to perform maintenance work on the legal drains of the county must be paid from the maintenance funds of the drains maintained in accord with § 407, Burns § 27-2159, which provides, in part:

> "The maintenance fund for each legal drain or unit created under the authority of this act shall be subject to the use of the board, or joint board, as the case may be, for the necessary or proper repair or maintenance of the particular drain or unit, and such repair or maintenance may be done whenever in the judgment of the board, upon the recommendation of the surveyor, the same is necessary. The payment for all such maintenance work shall be made out of the appropriate maintenance fund, . . ."

Your third question reads as follows:

> "3. Section 704, Acts 1965, Chapter 305, states '. . . whenever the Board determines that maintenance work shall be let by contract. . . .' and Section 708 says '. . . whenever the contract calls for a payment to be made to the contractor upon the completion of work, the surveyor shall inspect the work done and make written report. . . .' I submit the following question for an official opinion under these two Sections, to-wit:
>
> "A. Is the surveyor obligated to inspect and approve maintenance work done without a contract being let?

"B. Can the Board approve payments for maintenance work done other than by contract, without the approval of the surveyor?"

The answer to your third question is contained in the answers given to your earlier questions. Maintenance work may be done either by the surveyor or by some third party who has entered a contract to perform the work. There is no provision in the Drainage Code for work being done by a third party who has not entered into a contract with the Drainage Board, although the Code does set out certain procedures for entering a contract depending on whether the contract price is greater or lesser than two thousand dollars ($2,000.00). It is doubtful that any law permits a public agency to have work performed without a contract being let, although many laws do provide for an informal procedure for letting contracts in certain specified instances.

All drainage work performed by a third party who has entered into a contract with the Drainage Board must be inspected and approved by the surveyor before payment is to be made. Section 707 of the Act, Burns § 27-2407, provides, in part:

"(a) The contract between the board and a successful bidder shall provide: . . .

"(2) that no claim for payment under the contract will be approved by the board until the work for which the claim is presented has been approved by the surveyor; . . ."

The following section specifies the procedure to be followed by the surveyor in indicating his approval of the work done. All maintenance work not let by contract is done by the surveyor himself and so inspection and approval are automatic.

OFFICIAL OPINION NO. 21
September 30, 1966

STATUTES AND RECODIFICATION -- COUNTY OFFICERS -- Indiana Drainage Code -- Duties of County Surveyors Concerning Minor Repairs.

Opinion Requested by Mr. William J. Andrews, Acting Director, Department of Natural Resources.

I am in receipt of a letter from your predecessor containing several questions pertaining to the 1965 Indiana Drainage Code, Acts 1965, ch. 305, the same being Burns IND. STAT. ANN., §§ 27-2001 - 2606. The questions basically concern "minor repairs," which repairs must be considered maintenance in view of the language used by § 110 of Acts 1965, ch. 305, the same being Burns IND. STAT. ANN., § 27-2010, which provides, in part:

> "(c) A legal drain is in need of periodic maintenance when, by periodically cleaning out, spraying, removing obstructions, and making minor repairs, the drain will perform the function for which it was designed and constructed and will be adequate to properly drain all lands affected thereby under existing conditions."

The answers to the questions will, therefore, be based on those provisions in the Code relating to the maintenance of legal drains.

The questions also concern the function of the County Surveyor in relation to the maintenance of legal drains. These matters are discussed at length in an official opinion recently issued to Representative John W. Donaldson on this subject, the same being O.A.G. No. 20, 1966, p. 123, ante. The analysis and conclusions reached in that opinion are so closely allied to the questions posed in this letter that that opinion should be considered part of the instance opinion, and should be read prior to considering the answers presented herein.

Opinion No. 20, 1966 to Representative Donaldson notes that the County Drainage Board has the discretion to decide whether maintenance work on a given legal drain should be let by contract or performed by the County Surveyor under the standards set out in the Act. I concluded that any maintenance work let by contract must be let in accordance with the procedures set out in §§ 705 and 706 of the Drainage Code, Burns §§ 27-2405, 27-2406.

Prior to answering the questions set out in the letter from your predecessor it might be helpful to extract from the Drainage Code certain provisions relating to maintenance.

Section 1098; Burns § 27-2020:

> "(a) The surveyor shall classify all legal drains in the county as (1) drains in need of reconstruction, (2) drains in need of periodic maintenance, and (3) drains which should be vacated. . . .
>
> "(e) The surveyor shall submit a written report to the board setting forth his classification of legal drains in order to priority for action thereon by the board, and this report may be made from time to time during the process of classification. The board may adopt the classifications as made by the surveyor, and his order of work priority, or may modify the same. If 10% of the landowners request the board to classify or reclassify a drain affecting their land, the board shall, after giving of notice to all affected landowners as in Section 112 provided, conduct hearing thereon, and adopt a proper classification thereof.

"(f) When the classification has been adopted by the board, or when a partial classification has been adopted, the board shall consult with the surveyor and shall prepare and make public a long range plan for (1) the reconstruction of legal drains classified under paragraph (a)(1) of this section, (2) the establishment of annual maintenance assessment for legal drains classified in need of periodic maintenance under (a)(2) of this section, and (3) the vacating of legal drains classified under paragraph (a)(3) of this section, which plan shall set forth the approximate date each drain will be referred to the surveyor for report. In fixing such dates the board shall give consideration to the work load of the surveyor and the estimation by the surveyor of the time it will take to prepare each report. The long range plan may be amended or changed at any time by the board, and shall be reconsidered and brought up to date once each year."

Section 401; Burns § 27-2153:

"When the board has referred a legal drain classified in need of periodic maintenance to the surveyor he shall prepare a maintenance report, and shall include therein the estimated annual cost of periodically maintaining the drain and the name and address of each owner, if known, and the legal description of the land of each owner. . . ."

Section 402; Burns § 27-2154:

"When the board has received the maintenance report of the surveyor it shall prepare a schedule of assessments, which shall contain (1) a description of each tract of land determined to be benefited and the name and address of the owner thereof, which name, address and description shall be taken from the surveyor's report, (2) the per cent of the estimated cost of periodically maintaining the drain to be assessed against said tract of land, the percentage to be based upon the benefit to each tract of land resulting from the improvement, and (3) the dollars and cents amount annually assessed against each tract of land for such periodic maintenance. The per cent allocated to all lands benefited shall total one hundred per cent [100%].

Section 702; Burns § 27-2402:

"A maintenance fund is hereby created for each legal drain located in each county, or if two or more legal drains are combined into a unit pursuant to article four of this act, then for each such unit. . . .

"The county auditor shall set up a separate ledger account for each legal drain or unit whenever the drainage board shall fix an annual assessment for the periodic maintenance of such drain or unit against lands benefited, and the county auditor shall, in each year in which assessments are to be made, extend such assessments upon the ditch duplicate."

Section 710, Burns § 27-2410:

"(b) Whenever the order of the board establishing an annual assessments for periodic maintenance shall become final said annual assessment shall be certified to the county auditor in each county in which there are lands to be assessed, which annual assessment shall be collected each year until charged or terminated by the board."

Section 711, Burns § 27-2411:

"(b) The treasurer shall each year add to the tax statements of the person owning the lands affected by an assessment, designating it in a manner distinct from general taxes, the full annual assessment for periodic maintenance and all construction and reconstruction assessments due in the year the statement is sent."

Section 408; Burns § 27-2160:

> "(b) The board may at any time increase or decrease the amount annually assessed against the lands of all owners affected by an improvement if the board determines that the estimation made by the surveyor of the cost of periodically maintained the drain was either insufficient or excessive."

The above statutes clearly reveal the legislative intent to keep drains in a working condition through periodic maintenance. Such maintenance is to be a continuing yearly process for each legal drain. The surveyor's maintenance report contains an estimate of the annual maintenance cost of each legal drain; the annual assessment for maintenance is to be levied every year until further action by the Drainage Board.

With the preceding discussion and O.A.G. No. 20, 1966 as background, we may now examine the specific questions in the letter.

Question one reads as follows:

> "1. Can a county drainage board authorize the county surveyor to proceed to have made a particular kind or kinds of minor repairs on legal drains, and order the cost to be paid from the General Drain Improvement Fund of the County if no maintenance fund has yet been established for each legal drain that is to receive such repair, with the requirement that when and if a maintenance fund is established and is sufficient, that the General Drain Improvement Fund will be reimbursed from the appropriate maintenance fund?"

The question actually contains two separate questions, which I shall consider as follows (a) the authority given the surveyor to make minor repairs, and (b) the fund from which the cost of such repairs are to be paid. As to part (b) there is no doubt but that the Drainage Board may pay the cost of proper minor repairs from the General Drain Improvement Fund if the maintenance fund for the legal drain involved has not yet been established. Such a contingency is provided for both in the section creating the General Drain Fund § 407; Burns § 27-2159, and in § 305, Burns § 27-2401 authorizing the use of the maintenance fund.

Part (a) of question one concerning the authority of the County Surveyor is more difficult to answer. The purpose of the enactment of the Code was to establish an orderly and systematic procedure for providing adequate drainage in the State of Indiana.

Section 109 of the Code, Burns § 27-2010, provides that the surveyor shall classify all legal drains in the county and that he will submit a report showing the classification and suggesting order of priority for action by the board. The board then consults with the surveyor and establishes a long range plan for the creation of an adequate drainage system within the county.

The plan includes the approximate date the individual legal drains are to be referred back to the surveyor for his detailed report on that drain. Section 401 of the Act, Burns § 27-2153, describes the report to be prepared by the surveyor for those drains classified as being in need of periodic maintenance, and the following section provides the procedure to be followed by the board for establishing assessments on the basis of that report. Section 702 of the Act, Burns § 27-2402, provides that after the assessments have been established the county auditor shall set up the maintenance fund. The appropriate sections have been set out earlier in this opinion.

The various provisions of the Drainage Code clearly demonstrate that the Legislature realized both that it is impossible to establish a maintenance schedule for legal drains simultaneously and that certain drains should have such a schedule established before other drains.

Therefore, insofar as the question inquires as to the power of the Drainage Board to authorize the surveyor to make a certain type of repair on all drains whether or not the drain has been incorporated into the maintenance procedure, the answer must be in the negative. It is the board itself and not the surveyor who determines the order in which maintenance programs are to be established.

However, the board can authorize the surveyor to proceed to make those minor repairs which are included in a maintenance schedule on drains which have been incorporated into the maintenance system, for the reasons stated in O.A.G. No. 20, 1966.

The second question reads as follows:

> "2. If the answer to question (1) is in the affirmative can the drainage board give the surveyor blanket authorization to have such repairs made on any legal drain as the need arises or must there be a specific action by the board on each legal drain before minor repairs may be made?"

Insofar as the answer to question one was in the affirmative, that answer also answers this question. The board must take the appropriate action to incorporate a legal drain into the maintenance system before maintenance work, including minor repairs is to be performed. After the surveyor submits his maintenance report, including his estimate of the annual cost of maintaining the drain, the board may proceed to determine to place the maintenance of that legal drain under the surveyor or to let contracts to accomplish the maintenance work.

It would then be the responsibility of the surveyor or the contractor, to make all the minor repairs necessary to maintain the drain in a working condition.

The third question reads as follows:

> "3. Also, if the answer to question (1) is in the affirmative, what are the dollar limits to the cost of each such minor repair?"

The Drainage Code contains no provisions concerning the amount of money that may be spent annually in maintaining a legal drain. Presumably, any "minor repair" whose cost is sufficiently great as to cause doubt concerning the authority of the board to effect such a repair would be a project so large as to be properly classified as reconstruction. Section 704 of the Act, Burns § 27-2404, does provide a formula setting the limit on the amount that can be spent for the reconstruction of a drain.

If the maintenance work on a drain is to be performed by a contractor the dollar amount of the contract will determine the procedure that must be followed in awarding the contract. Section 705 of the Act, Burns § 27-2405, provides that if the amount of the contract is to be over two thousand dollars ($2,000), the board must solicit bids through a newspaper advertisement, while bids for contracts for a lesser amount may be solicited by mailing invitations to no less than three interested bidders.

The fourth question reads as follows:

> "4. Also, if the answer to question (1) is affirmative, can these minor repairs be contracted for on the basis of informal bids? Can employees of the county in the surveyor's office make such repairs?"

Both parts of the above question, have been answered herein and by O.A.G. No. 20, 1966.

However, there is an implication in this question, and to a certain extent in the first question, which should be considered. I would state the question as follows:

> "Can the county drainage board place the responsibility for making certain minor repairs on all drains entirely on the surveyor and vest the surveyor with the power to contract with third parties to perform such work?"

The answer must be in the negative. The procedure for awarding contracts set out in §§ 704 through 707 of the Act, Burns §§ 27-2404 through 27-2407, consistently assigns the duty and responsibility to the Drainage Board. There is no basis to conclude that the power to contract for repairs can be delegated by the Board.

The fifth question reads as follows:

> "5. Assuming bids for minor repairs may be invited as outlined in Section 705 of the Drainage Code, can a Drainage Board solicit unit price bids for minor repairs on legal drains and thereafter contract for such necessary repairs to be made on each legal drain on the basis of such unit price bids?"

I would restate this question as follows:

> "Can the drainage board let bids on the maintenance for a given legal drain and then use some measure of that bid, such as cost per foot, as the price for which contracts on other legal drains will be let without readvertising or bidding for contracts for maintenance work on such other drains?"

If this restatement of the question is correct, then the answer must be in the negative. The purpose for a competitive bid statute is to assure that the work will be done at the lowest price and under the best terms and conditions possible and to avoid collusion and favoritism in the public interest. This purpose can be fulfilled only if such bidding procedures are closely followed. The lowest and best bid for one drain may not be the lowest and best bid that would be received on a different drain. Furthermore, § 705 of the Act, Burns § 27-2405 clearly states:

> "(a) Whenever the board is ready to let contracts for an improvement it shall publish . . ." (Emphasis added.)

The sixth question reads as follows:

> "6. May a Drainage Board have minor repairs made by only entering into a simple type contract, such as a written letter, and without requiring a bid bond or a performance bond?"

The answer to the sixth question is also in the negative.

As was pointed out in the earlier answers, any time the board determines that maintenance work should be done by contract with third parties the board must solicit bids from interested bidders. Section 705 of the Act, Burns § 27-2405, specifically provides:

> "(c) Each bidder shall deposit with his bid a certified check payable to the board in the sum of five per cent [5%] of the bid, or a bond payable to the board with sufficient sureties conditioned upon the bidder's executing a contract in accordance with his bid if accepted by the board and providing for the forfeiture of five per cent [5%] of the amount of the bid upon his failure to do so."

Section 706 of the Act, Burns § 27-2406, provides, in part:

> "(b) Upon execution of the contract the successful bidder shall give a bond, in amount fixed by the board but not less than the amount of the bid, payable to the board, with a corporate surety licensed to do business in the state of Indiana . . ."

The next section of the Act specifically sets out certain provisions which must be contained in the contract.

In view of the provisions contained in these sections of the Drainage Code I must conclude that all contracts are to be formal contracts supported by bond.

> "7. If the answer to question (1) is in the negative, what are the applicable provisions in the Indiana Drainage Code and the circumstances, if any, whereby a County Drainage Board may authorize minor repairs to be made to a drain prior to the time that a maintenance fund is established, and without the burden of advertising for bids and the letting of contracts?"

I believe that the answer to the above question is contained in the answers to the previous questions.

The eighth question reads as follows:

> "8. Can the County Commissioners, when functioning as a County Drainage Board with respect to legal drains pursuant to the provisions of the Indiana Drainage Code, Chapter 305, Acts of 1965, exercise the rights and powers of county commissioners with respect to public works pursuant to the provisions of Burns Indiana Statutes Annotated, Section 53-108, when such rights and powers are not in conflict with express provisions of the Indiana Drainage Code?"

The County Commissioners do not function as the County Drainage Board. The County Drainage Board is an agency separate and distinct from other county agencies. The powers and duties of the County Drainage Board are specifically set out by statute. While the membership of the County Drainage Board is in most instances limited to persons who are county commissioners, when those persons assemble as the County Drainage Board they are not assembling as the Board of County Commissioners.

Acts 1947, ch. 306, § 1, as last amended by Acts 1961, ch. 121, § 1, the same being Burns IND. STAT. ANN., § 53-108 is concerned with the awarding of contracts for public works and the authority of the various agencies involved to perform some or all of the public improvement itself. This is a general statute applicable to all public contracts. The provisions of the Drainage Code are specific provisions applicable only to drainage improvements. It is a principle of statutory construction that when a general statute and a specific statute treat with the same subject matter, the specific statute is controlling. The Drainage Code provisions relating to the letting of contracts and the performance of work by the Drainage Board must be followed. Therefore, it is my opinion that the answer to the question must be in the negative.

The next three questions were premised upon an affirmative answer to question eight and therefore, need not be considered further.

Subsequent to submitting the opinion request containing the above questions a further request posing the following additional question was submitted:

> "Does the County Drainage Board have jurisdiction over a legal tile drain which was constructed pursuant to a drainage statute of the State of Indiana which was repealed by the Indiana Drainage Code, and which drain lies partially within municipal corporate limits but was not constructed by the municipality?"

Acts 1965, ch. 305, § 501, the same being Burns IND. STAT. ANN., § 27-2201 provides:

> "Each legal drain in the county shall be under the jurisdiction of the board and subject to the provisions of this act, except and to the extent as hereafter provided in this article."

The following five sections specify the drains that are exempt from the jurisdiction of the board. In general terms those five exceptions are:

1. drains located within a conservancy district under certain specified conditions;

2. private and mutual drains (such drains are defined in § 102 of the Act, Burns § 27-2002, and are basically drains established by the consent of the owners of the land through which such drains run and not pursuant to any drainage statute);

3. drains constructed by a city or incorporated town under certain conditions;

4. drains to be in the future constructed by a city or incorporated town under certain conditions;

5. drains under the jurisdiction of a drain maintenance and repair district insofar as maintenance is concerned.

The drain described in the question would be under the jurisdiction of the County Drainage Board unless it came within the exemptions above. The applicable County Board must make individual determinations based upon all the facts and the application of § 501.

In conclusion, the recodification of the drainage laws of Indiana by the Indiana Drainage Code must be liberally construed if it is to accomplish the worthwhile purpose for which it was enacted. I have dealt in considerable detail in answering the questions posed herein and in the preceding opinion in the hope that they will insure uniformity of interpretation throughout the state in implementing this important statute.

OFFICIAL OPINION NO. 11
August 15, 1975

Honorable Harry C. Thompson
Indiana State Senator
4725 Stringtown Road
Evansville, Indiana 47711

Dear Senator Thompson:

This is in response to your request for my official opinion on the following question:

> "Under what circumstances may drainage detention basins and drainage control dams be built by county drainage boards, and do these boards have the power of eminent domain?"

ANALYSIS

The Indiana Drainage Code, Indiana Code of 1971, 19-4-1-1 et seq., creates a drainage board in each Indiana county and sets forth procedures both for the construction of new drains and for the reconstruction, maintenance, or vacating of existing drains. Code section 19-4-1-10 requires the county surveyor, who is a member of the drainage board, to classify all existing legal drains in the county either as drains in need of reconstruction, drains in need of periodic maintenance, or drains which should be vacated and to submit this classification to the drainage board. The construction of drainage detention basins and drainage control dams, the subject of your request here, is one of the repairs expressly authorized by Code section 19-4-1-10 where the surveyor has classified a drain as being in need of reconstruction.

The criteria to be followed by the surveyor in making his initial classification as to whether an existing drain is in need of reconstruction are set out in Code section 19-4-1-10(b), which provides, in part, the following:

> "A legal drain is in need of reconstruction when it will not perform the function for which it was designed and constructed, or when topographical or other changes have rendered the drain inadequate to properly drain the lands affected, without extensive repairs or changes being made thereto."

If the board concurs with the surveyor that a specific drain is in need of reconstruction, the surveyor then must make the further determinations as to what method of reconstruction should be used. Code section 19-4-3-1 (a) provides, in part, the following:

> "When the board has referred a legal drain to the surveyor for a reconstruction report the surveyor shall determine and set forth in his report the best and cheapest method of reconstructing the drain so that it will adequately drain all lands affected."

Thus, the construction of drainage detention basins and drainage control dams is authorized when that is the cheapest and best method of adequately draining the affected lands.

In the event the drainage board adopts the surveyor's recommendation to construct drainage detention basins and drainage control dams, the question arises as to what property interest the board has in the land on which these improvements are constructed. The Indiana Drainage Code does not grant the power of eminent domain to the drainage boards. It does, however, create a right-of-way on which these improvements can be constructed. Code section 19-4-6-1 provides, in part, the following:

> "The surveyor, or the board, or any duly authorized representative of either the surveyor or the board, in the performance of any duty required or permitted under the provisions of this act [19-4-1-1 - 19-4-10-5], shall have the right of entry over and upon lands lying wihtin seventy-five (75) feet of any legal drain, the seventy-five (75) feet to be measured at right angles to the center line of any legal tile ditch, and to be measured at right angles from the existing top edge of each bank of a legal open ditch as determined by the surveyor. Spoil bank spreading resulting from an improvement to a legal open ditch may extent beyond said seventy-five (75) foot right-of-way if in the opinion of the surveyor the same is necessary and provisions has been made in the engineers report therefor prior to the hearing thereon."

Compensation for any damages which the landowner sustains as a result of the reconstruction and use made of the right-of-way is provided under Code section 19-4-3-2 which reads, in part, as follows:

> "[T]he board shall: . . . (2) determine the amount of damages sustained by any owner as a result of the improvement, and shall prepare a schedule of damages containing the name and address of each owner determined to be damaged and a description of the owner's land as shown by the surveyor's report, the amount of each owner's damages, and an explanation of the injury upon which the determination was based. The surveyor shall in his report add the damages to all lands as determined by the board to his estimated costs and expenses of the improvement and the result shall constitute the total estimated cost of the improvement."

If the landowner does not agree with this assessment of damages, Code sections 19-4-3-6 and 19-4-8-1 et seq. authorize him to seek judicial review of the findings of the board.

Thus, under the Drainage Code, the land used for a drain remains the property of the original owner, and the statute presumes the benefits conferred on that land exceed any damages to it. It is true that the right-of-way provisions noted above, which require measuring from the drain tile or, in the case of an open ditch, from the ditch bank, seem to apply especially to methods of reconstruction other than the construction of drainage detention basins and drainage control dams. Nevertheless, the General Assembly plainly has not provided a separate procedure to be used where drainage detection basins and drainage control dams are to be constructed and has not granted to a drainage board the power of eminent domain.

CONCLUSION

It is, therefore, my Official Opinion that under the Indiana Drainage Code a county drainage board may construct drainage detention basins and drainage control dams when that is the cheapest and best method of adequately draining affected lands. However, the Indiana General Assembly has not given the power of eminent domain to county drainage boards.

OFFICIAL OPINION NO. 32
December 8, 1975

Honorable Woodrow Wilson
Indiana State Senator
Monroeville, Indiana

Dear Senator Wilson:

This is in response to your request for my official opinion in answer to the following questions:

"1. Are assessments for reconstruction and/or annual maintenance of legal drains property taxes? If so, are they subject to the property tax freeze and the 20% Property Tax Replacement, as authorized by the 1973 tax package?

"2. Are school corporations authorized, under IC 1971, 6-1.1-22-15 or any other statute to withhold delinquent ditch assessments from monies due an employee of the school?"

ANALYSIS
I.

The imposition of property taxes is governed by the provisions of the Indiana Code 1971, Title 6, Article 1.1. The general intent of the statutes is to impose a levy on the valuation of property for the express purpose of financing governmental functions.

The Indiana Drainage Code, Code Sections 19-4-1-1 et seq., creates a drainage board in each Indiana county and sets forth procedures both for the construction of new drains and for the reconstruction, maintenance, or vacating of existing drains. Code section 19-4-7-9 provides that the payment of the entire cost for the construction, reconstruction, and maintenance of legal drains is to be apportioned to the several tracts of land that are assessed in proportion to the benefit percentage assigned to each tract. The statute provides that bonds issued to finance an improvement are not the general obligation of the county, the drainage board, or any person but give rise to a lien upon the benefited lands in the ratio of the assessment. The collection of the drainage assessment is normally processed by the county treasurer in conjunction with the real property tax. Although Code Section 19-4-7-11 provides for the inclusion of the drainage assessment in the annual property tax assessment statement which is mailed to property owners by the county treasurer, it requires the indication that a drainage assessment is distinct from general taxes.

The drainage assessment is not a tax levied upon all nonexempt property for the support of governmental functions but rather is an attempt to recover the costs of construction, reconstruction and maintenance of legal drainage from the property owners specifically benefited. Because the drainage assessment is not a tax, it is not subject to the property tax freeze or the property tax replacement credit provided in Code Sections 6-1.1-21-1 et seq. This interpretation is supported by the fact the legislature, in creating the Property Tax Replacement Fund, specifically excluded special assessments from the term "taxes." Further, Code section 6-1.1-1-17 defines "special assessment" to include a drainage assessment.

II.

Your next question is whether a school corporation is authorized to withhold ditch assessments from money due its employees. Code Section 6-1.1-22-15 provide as follows:

> "If the county treasurer finds that a person whose name is certified to him under section 14 [6-1.1-22-14] of this chapter is delinquent in the payment of his taxes, he shall certify the name of that person and the amount of the delinquency to the official of the political subdivision who is to make payment to the person. The disbursing officer shall periodically make deductions from money due the person and shall pay the amount of these deductions to the county treasurer."

Code Section 19-4-7-11(c) of the Indiana Drainage Code states:

> "For the purposes of the collection of any assessment the word 'assessment' shall be regarded as taxes within the meaning of, and the manner of collection shall be in accordance with, the Property Tax Collection Act of 1963 as the same may be amended from time to time or replaced, **except that an assessment will not be the personal obligation of the owner of the lands affected by the assessment and only the land actually affected by an assessment shall be sold for delinquency**, and except further that an annual **assessment** for periodic maintenance which is twenty-five dollars [$25.00] or less shall be paid at the first time each year when general property taxes are payable." (Emphasis mine)

Thus, the Drainage Code, supra, clearly provides that the assessment will not be the personal obligation of the owner of benefited lands; only the land actually affected by an assessment shall be sold for delinquency. Specifically Code section 19-4-7-13(a) states that the lien of a ditch assessment shall attach to the lands assessed.

Although a school corporation is a political subdivision within the meaning of Code section 6-1.1-1-12, it may not withhold monies due to an employee to satisfy a delinquent drainage assessment.

CONCLUSION

It is, therefore, my Official Opinion (1) that assessments for reconstruction and/or annual maintenance of legal drains are not property taxes and accordingly are not subject to the property tax freeze and property tax replacement credit provided by the 1973 tax package. It is also my Official Opinion (2), that school corporations are not authorized under IC 1971, 6-1.1-22-15, or any other statute, to withhold delinquent drainage assessments from monies due an employee of the school.

OFFICIAL OPINION NO. 23
December 2, 1977

The Honorable Lillian Parent
Indiana State Representative
482 E. Broadway
Danville, Indiana 46122

Dear Representative Parent:

This is in response to your request for an official opinion in regard to the Indiana Drainage Code. You ask whether engineering costs involved in classifying legal drains by the county surveyor pursuant to the Code should be charged to the drain maintenance fund, the general drain improvement fund, or the county surveyor's office.

ANALYSIS

The county surveyor has the duty under the Indiana Drainage Code to:

> ". . . classify all legal drains in the county as (1) drains in need of reconstruction, (2) drains in need of periodic maintenance, and (3) drains which should be vacated, . . ." Indiana Code, Section 19-4-1-10.

Engineering costs incurred by the county surveyor in so classifying legal drains are not to be charged to the drain maintenance fund, as such fund is expressly for:

> ". . . repair or maintenance of a particular drain or unit, . . . upon the recommendation of the surveyor . . ." Indiana Code, Section 19-4-4-7.

Nor may the general drain improvement fund of the county be used, as it is for:

> ". . . the cost of construction or reconstruction of a legal drain, . . ." Indiana Code, Section 19-4-7-1.

Rather, the engineering work involved in classifying legal drains is within the general duties of the county surveyor.

> "Under the directions of the board of county commissioners, they shall have charge of all surveying and civil engineering work of the county in which they are severally located. . . ." Indiana Code, Section 17-3-58-2.

Thus, such costs are an expense of the county surveyor's office.

CONCLUSION

It is, therefore, my Official Opinion that costs of classifying legal drains by the county surveyor pursuant to the Indiana Drainage Code are not chargeable to the drain maintenance fund or general drain improvement fund created by the Code. Such work is within the general duties of the county surveyor and the costs are an expense of the county surveyor's office.

June 20, 1966

Mr. John C. Williams
County Surveyor, Henry County
Court House
New Castle, Indiana

Dear Mr. Williams:

Your letter of April 21, 1966, inquires as to whether the language of Acts of 1965, ch. 305 § 602, as found in burns IND. STAT. ANN. (1965 Supp.), § 27-2302, which reads, in part, as follows:

> "When any legal drain is obstructed or damaged by logs, trees, brush, unauthorized structures, trash or debris, excavating or filling, pasturing livestock, or any other manner, the surveyor shall immediately remove such obstruction and repair such damage. . . ."

means that the surveyor shall immediately remove such obstruction, repair such damage without asking for bids or without consulting the Drainage Board as required under Acts of 1965, ch. 305, § 407, as found in burns IND. STAT. ANN. (1965 Supp.), § 27-2159, which reads in part as follows:

> "The maintenance fund for each legal drain or unit created under the authority of this act shall be subject to the use of the board, or joint board, as the case may be, for the necessary or proper repair or maintenance of the particular drain or unit, and such repair or maintenance may be done whenever in the judgment of the board, upon the recommendation of the surveyor, the same is necessary. . . ."

Since only the first sentence has been quoted of Burns, supra, § 27-2302, the remaining language of the provision should be examined as required under the rules of statutory construction to ascertain the legislative intent. The rule is stated in the case of Johnson v. City of Indianapolis, 174 Ind. 691, 93 N. E. 17 (1910), and is as follows:

> ". . . In construing a statute, the object or purpose of the court is to discover the intention of the Legislature. For such purpose an examination of the entire statute, as well as parts thereof, may be resorted to in order to discover the legislative intent. . . ."

Accordingly under the above quoted rule the balance of the language contained in Burns, supra, § 27-2302, will be set out and it reads as follows:

> ". . . If, however, the obstruction or damage is caused by an owner of land affected by the drain the surveyor shall first mail a notice to such owner by United States mail, return receipt requested, requiring the owner to remove the obstruction and repair the damage, and upon a failure of such owner to so do within ten [10] days after receipt of such notice, the surveyor shall perform such work and the cost thereof shall be paid for out of the annual maintenance fund of such drain if one has been established, and if no such fund has been established then out of the general drain improvement fund.
>
> "If the obstruction or damage has been caused by the acts or omissions of an owner of land affected by the drain the board may, after a hearing brought on by written notice served on such owner, add an amount, sufficient to pay for such damage to the next annual assessment made against the lands of such owner, and the board shall certify such assessment to the auditor like any other assessment. If the obstruction or damage is caused by the acts of omissions of a person other than the owner of lands affected by the drain, the board may institute suit against such person in any court of competent jurisdiction and shall be entitled to recover the reasonable value of removing the obstruction and repairing the damage plus a reasonable attorney fee for the board's attorney."

It becomes apparent from a complete reading of Burns, supra, § 27-2302, that the legislature had in mind three circumstances under which injury or obstruction to a drain might occur. These instances may be enumerated as follows:

(1) Where the obstruction or damage is caused by certain enumerated objects or any other cause.

(2) Where the obstruction or damage is caused by an owner of the lands affected by the drain.

(3) Where the obstruction or damage is caused by a third person not an owner of the land affected by the drain.

In view of the fact that the obstruction and damage to the drain might in all three instances be of the same nature and extensiveness and the exact cause of the obstruction or damage not readily ascertainable, it seems inconsistent to believe that the legislature intended the surveyor in the first instance to move immediately to repair the damage and yet in the other two instances there is not requirement for immediate action.

It would seem that under Burns, supra, § 27-2302, that if at least there is not some conflict in its provisions there appears to be some inconsistencies. Thus, assuming there is an obstruction or damage to a drain it only seems reasonable to assume that in order to make at least two of the provisions of Burns, supra, § 27-2302 operative there would first have to be a fact determination as to the cause of the obstruction and damage. Such determination would necessarily militate against any idea of immediacy in removing the obstruction or repairing the damage.

If any conclusion is reasonable, then I am of the opinion that upon the discovery of obstruction or damage to a drain, that your procedure would be to consult with the Drainage Board as to the proper course of action.

In further support of my conclusion, I direct your attention to a rule of statutory construction as stated in the case of Grether v. Indiana State Board of Dental Examiners, 239 Ind. 619, 159 N. E. 2d 131 (1959), which is as follows:

> ". . . that where general and specific statutes conflict in their application to a particular subject matter, it will be deemed to have been the legislative intent that the specific provisions rather than the general provisions control."

Since Burns, supra, § 27-2302 appears under the general provisions of the 1965 Drainage Code and Burns, supra, § 27-2159 is found under the specific provisions of that code applying the rule of statutory construction quoted above, the latter provision would prevail and therefor where an obstruction or damage to a legal drain occurs it is my opinion that you should consult with the Drainage Board before undertaking any action.

The views expressed herein are the personal opinions of the writer and are not to be construed as being the opinions of the Attorney General nor as being a precedent of the Attorney General's office.

Very truly yours,

/s/ James F. Jefferson
Deputy Attorney General

JFJ/sb

June 20, 1967

Richard L. Worley, State Examiner
State Board of Accounts
912 State Office Building
Indianapolis, Indiana

Dear Mr. Worley:

Receipt is acknowledged of your recent letter posting several questions with regard to Acts of 1965, ch. 305, secs. 710 and 711, (Burns IND. STAT. ANN., secs. 27-2410 and 27-2411). Burns sec. 27-2410 reads as follows:

> "(a) The list of assessments for an improvement as apportioned in accordance with the last preceding section of this article shall be certified by the board to the county auditor in each county in which there are lands to be assessed.
> (b) Whenever the order of the board establishing an annual assessment for periodic maintenance shall become final said annual assessment shall be certified to the county auditor in each county in which there are lands to be assessed, which annual assessment shall be collected each year until changed or terminated by the board.
> (c) The auditor shall extend assessments for construction and reconstruction upon a book, to be known as ditch duplicate, for the full period of payment allowed for all assessments for construction and reconstruction, with interest at six per cent (6%) per annum upon all payments deferred beyond one year from the date that the certification is made."

Burns sec. 27-2411 reads as follows:

> "(a) Within thirty (30) days after receipt of the certification of final costs for the construction or reconstruction of an improvement by the auditor he shall deliver a copy of the ditch duplicate to the county treasurer who shall, within fifteen (15) days after receipt of such copy, mail to each person owning lands assessed for the improvement a statement showing the total amount of the assessment and the instalment currently due, which statement shall state that such owner may pay the assessment in full within one year or he may pay only the instalment due within the current year with deferred payments in annual instalments with interest at six per cent (6%) per annum.
> (b) The treasurer shall each year add to the tax statements of the person owning the lands affected by an assessment, designating it in a manner distinct from general taxes, the full annual assessment for periodic maintenance and all construction and reconstruction assessments due in the year the statement is sent.
> (c) For the purposes of the collection of any assessment the word 'assessment' shall be regarded as taxes within the meaning of, and the manner of collection shall be in accordance with, the Property Tax Collection Act of 1963 (ch. 20-23 of title 64), as the same may be amended from time to time or replaced, except that an assessment will not be the personal obligation of the owner of the lands affected by the assessment and only the land actually affected by an assessment shall be sold for delinquency."

Your first question asks whether the date of certification to the county auditor by the drainage board marks the beginning of the year within which a landowner may pay his assessment in full, or at his option, only the instalment due within the year. Sec. 27-2410 (c) reads that there shall be interest at 6% "upon all payments deferred beyond one year from the date that the certification is made." This seems clearly to make the date of certification the starting point in time within which payments may be made.

Your second question asks whether there is any interest charged on the whole of the assessment or any installment thereof within the first full year following the date of certification to the county auditor by the drainage board. The above quoted language of Burns Sec. 27-2410 (c) indicates that your question should be answered in the negative.

Your third question is whether the period for which interest is to be computed on any installment deferred beyond one year from the date of certification to the county auditor begins one year after the date of certification to the county auditor by the drainage board. Sec. 27-2410 (c) also applies here and indicates an affirmative answer.

Your fourth question asks whether asks whether the interest on payments deferred beyond one year is computed on the balance due from time to time. This would be the normal and logical way to compute the interest.

Your fifth question asks whether the annual installments should be collected semi-annually with due dates the same as general property taxes, i.e., the first Monday in May and the first Monday in November.

Sec. 27-2411 (c) states that:

> "For the purposes of the collection of any assessment the word 'assessment' shall be regarded as taxes within the meaning of, and the manner of collection shall be in accordance with, the Property Tax Collection Act of 1965 * * *."

The Property Tax Collection Act of 1963 is found in Acts of 1963, ch. 280, (Burns IND. STAT. ANN. sec. 64-2036 et seq.), and sec. 64-2058 reads in part as follows:

> "Taxes for the year 1963 and each year thereafter shall be due and payable in two (2) equal installments on or before the first Monday in May and the first Monday in November of the next year."

Thus, the annual installments should be collected semi-annually with the due dates the same as general property taxes, i.e., on the first Monday in May and on the first Monday in November.

The opinions expressed above are the personal opinions of the undersigned and should not be construed as an official opinion of the Attorney General nor as a precedent of this office.

Very truly yours,

JOHN J. DILLON
Attorney General of Indiana

/s/ Michael Sara
Deputy Attorney General

MS:sl

GO TO TABLE OF CONTENTS