employee. It seems obvious that had the relationship been terminated no such permission would need to be granted. * * *"

The 1965 legislature will be the first to be seated following the effective date of the 1963 Constitution. As above noted, the provisions of Section 8 of Article IV prohibiting the employment of members by the federal or state government or political subdivision thereof are new to that constitution. The foregoing sets forth the general rule as enunciated in court decisions involving somewhat analogous situations. I am of the opinion that those authorities are controlling and require answering of your second question in the negative.

FRANK J. KELLEY,
Attorney General.

641217.1

COUNTIES: Building Fund.
BOARD OF SUPERVISORS: Allocation of Miscellaneous Nontax Revenues.
SOCIAL WELFARE, COUNTY: Special Building Fund.
FUNDS: Pledged or Encumbered for Other Purposes.

County board of supervisors may allocate without limitation as to amount miscellaneous nontax revenues not otherwise pledged or encumbered for other purposes to a special building fund. Moneys so allocated may not be expended pursuant to Act 186 P.A. 1957 which relates only to unallocated funds.

Miscellaneous nontax revenues allocated to a special building fund may not be returned to other county operating funds or used to pay operating expenses.

Meaning of "miscellaneous nontax revenues" discussed.

The County Social Welfare Board is without authority to create a special building fund or to allocate reimbursements received from indigents or from responsible relatives to any such fund.

No. 4377 December 17, 1964.

Hon. Billie S. Farnum
Auditor General
Capitol Building
Lansing, Michigan

You have requested the opinion of the Attorney General on six questions to be hereafter stated and answered but which, in the main, relate to the limitations, if any, on the power of the county board of supervisors to authorize or require the allocation or transfer of miscellaneous county revenues derived from nontax sources to a special fund, sometimes designated as the building or improvement fund. You refer to a number of statutes, to be discussed, and request an interpretation of their application to your questions.

The legislative power which includes the power to enact the laws is reposed by the Michigan Constitution in the legislature. Unlike the Federal

Constitution in which a grant of power to make a public law must be found, the fundamental concept prevalent in all Michigan Constitutions has been that the lawmaking power is vested in the legislature as the representative of the people and that the power of the legislature to enact laws is plenary except as it is limited by the State Constitution itself or the law when enacted is repugnant to the Constitution of the United States. These constitutional principles have been announced by our Supreme Court in a long line of cases. As early as 1858 our Court in the case of *Sears v. Cottrell*, 5 Mich. 250, 256, said:

> "The purpose and object of a state constitution are not to make specific *grants* of legislative power, but to *limit* that power where it would *otherwise* be *general* or *unlimited*, * * *."

A more comprehensive statement was made by the Supreme Court in the case of *Attorney General v. Preston* (1885), 56 Mich. 177, where it was said:

> "The people are the source of unlimited power. The Constitution is not a grant of power, but a limitation upon its exercise by the agents of the people who compose the legislative branch of the government. The Legislature would have the power to establish a board of supervisors in each county of the state, with such representation therein from the several townships, villages and cities constituting the county as it might deem proper, had there been nothing contained in the Constitution upon the subject. And the question is now presented, in what respect and to what extent, has the Constitution limited this power of the Legislature? In the examination of this question it is to be borne in mind that before a law can be held invalid, it must be a plain violation of some provision contained in the Constitution."[1] (p. 179)

Although the legislature is at liberty to exercise the law-making power without restraint except as limited by the State or Federal Constitutions, the people have sometimes by the language of the State Constitution made explicit their intent of directing affirmative action[2] or of establishing the policy of the state in regard to some item or thing. The policy of the state concerning local government was established by the people in the Constitution of 1963 in Article VII, Section 34, which said:

> "The provisions of this constitution and law concerning counties, townships, cities aand villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution."

The explanation of this section in the Address to the People reads:

---

[1] Similar statements may be found in *Young v. City of Ann Arbor*, 267 Mich. 241; *Huron-Clinton Metropolitan Authority v. Boards of Supervisors of Five Counties*, 300 Mich. 1; and *Oakland County Taxpayers' League v. Oakland County Supervisors*, 355 Mich. 305, and cases cited therein.

[2] "An executive residence suitably furnished shall be provided at the seat of government for the use of the governor. He shall receive an allowance for its maintenance as provided by law." *Article V, Section 24, Constitution of 1963.*

"This is a new section intended to direct the courts to give a liberal or broad construction to statutes and constitutional provisions concerning all local governments. Home rule cities and villages already enjoy a broad construction of their powers and it is the intention here to extend to counties and townships within the powers granted to them equivalent latitude in the interpretation of the constitution and statutes."

Turning now to the limitations on the county board of supervisors about which you inquire, the pertinent constitutional provisions and public acts of the legislature will be reviewed.

The Constitution of 1908 in Article VIII, Section 10, reads:

"The board of supervisors of any county may in any 1 year levy a tax of 1/10 of 1 mill on the assessed valuation of said county for the construction or repair of public buildings or bridges, or may borrow an equal sum for such purposes; and, in any county where the assessed valuation is less than 10,000,000 dollars, the board may levy a tax or borrow for such purposes to the amount of 1,000 dollars; but no greater sum shall be raised for such purposes in any county in any 1 year, unless submitted to the electors of the county and approved by a majority of those voting thereon."[3]

The corresponding provision in the Constitution of 1850 is found in Article X, Section 9, which reads:

"The board of supervisors of any county may borrow or raise by tax one thousand dollars for constructing or repairing public buildings, highways or bridges; but no greater sum shall be borrowed or raised by tax for such purpose in any one year, unless authorized by a majority of the electors of such county voting thereon."

In the Address to the People concerning the Revised Constitution being submitted to the electors for approval in 1908 it was said by way of explanation of Article VIII, Section 10, that:

"The provision of '1/10 of 1 mill' was added to enable counties of large assessed valuation to raise sufficient money to care for the buildings and bridges which the wealth and requirements of such counties entail."

The quoted section from the Constitution of 1850 had been implemented by the legislature by the passage of Act 156, Laws of Michigan 1851, an act to define the powers and duties of the boards of supervisors of the several counties, which stated in Section 7:

"It shall be the duty of such board [county board of supervisors], as often as shall be necessary, to cause the court house, jail, and public

[3] This section was omitted from the Constitution of 1963. D. Hale Brake, Director, Education Division, Michigan State Association of Supervisors, (and a delegate to the Constitutional Convention) in a monograph issued by him on May 16, 1962 entitled "The Old and the New Constitutions — A Comparison and Appraisal" made this statement: "The county debt limit was raised from 3 per cent to 10 per cent of its assessed value and the provision that only 1/10th of a mill may be raised for capital improvements was eliminated. It was felt that within the 15-mills there was no danger of a county spending too much for capital outlay." (p. 13)

offices of their county to be duly repaired at the expense of such county; but the sums expended in such repairs shall not exceed five hundred dollars in any one year, unless authorized by a vote of the electors of such county, as hereinafter provided."

C.L. 1857 § 341.

More to the point was Section 11 of the 1851 act delineating the powers of the boards of supervisors which in its Subdivision 7 authorized the board:

"7. To borrow or raise by tax, upon such county, any sum of money necessary for any of the purposes mentioned in this act: Provided, That no greater sum than one thousand dollars shall be borrowed or raised by tax in any one year, for the purpose of constructing or repairing public buildings, highways or bridges, unless authorized by a majority of the electors of such county voting therefor, as hereinafter provided."

C.L. 1857 § 345.

The foregoing quoted sections from the Act of 1851 were amended in 1913. By Public Act 85 of that year, Section 7 was amended to add to the duties of the board of supervisors the repair of all other public buildings as well as the court house, jail, and public offices of the county. There was then incorporated in Section 7 the same language as appeared in Article VIII, Section 10 of the 1908 Constitution. As thus amended Section 7 became Section 46.7 of the Compiled Laws of 1948, M.S.A. 1961 Rev. Vol. § 5.327. The proviso clauses now appearing in Section 46.7 were added by Act 169 P.A. 1952.

Section 11 of the 1851 act was amended by Act 397 P.A. 1913 which rewrote the seventh subdivision thereof to read: "To borrow or raise by tax upon such county such sums of money as may be authorized by law; * * *." The 1913 amendment was carried forward into the Compiled Laws of 1948 as Section 46.11, Subdivision Seventh, M.S.A. 1961 Rev. Vol. § 5.331, Subdivision Seventh.

The Constitution of 1908 went into effect on January 1, 1909. The legislature promptly enacted Act 41 P.A. 1909 in implementation of Article VIII, Section 10 of the new Constitution, reciting substantially the language from the Constitution as the first section of the 1909 act. It is to be noted that Sections 7 and 11 of Act 156 of the Laws of Michigan of 1851, as hereinbefore quoted, had not been amended, such conforming amendment not being made until 1913.

The 1909 act was repealed by Act 28 P.A. 1911 which amended Section 1 by adding to the authority of the board of supervisors the right to make the permissible levy for the purchase of real estate for sites for the construction of public buildings or bridges. See C.L. 1948 § 141.71 et seq., M.S.A. 1958 Rev. Vol. § 5.2301 et seq.

Act 118 P.A. 1923, being C.L. 1948 § 141.61 et seq., M.S.A. 1958 Rev. Vol. § 5.2251 et seq., is significant to your inquiry only because of the amendment made in 1941 by Act 282 which added a new Section 1a and which in turn was amended by Act 186 P.A. 1957. In its amended form Section 1a provides that the board of supervisors without submitting the same to a vote of the electors shall have the right to authorize annually

the expenditure from any funds on hand not raised by taxation a sum not in excess of 1 mill of the assessed valuation of the county for the purpose of constructing, equipping or making alterations on any of the public buildings in the county.

Lastly, reference is made to Act 177 P.A. 1943, as amended by Act 4 P.A. 1944 1st Ex. Sess. and by Act 136 P.A. 1956, being C.L. 1948 and C.L.S. 1961 § 141.261 et seq., M.S.A. 1958 Rev. Vol. § 5.2770(1) et seq., which permits the county board of supervisors and the governing body of the other political subdivisions of the state to create a fund or funds for acquiring, constructing, extending, altering, repairing or equipping public improvements or public buildings and provides for the credit and transfer of moneys to any such fund or funds when established.

An examination of the cited constitutional provisions and public acts[4] discloses that the first attempt by the legislature to authorize the county board of supervisors to expend moneys on hand not raised by taxation for public buildings in the county was in 1941 when in Public Act 282 Section 1a was added to Act 118 P.A. 1923, supra, permitting the board of supervisors without a vote of the electors to expend from any funds on hand not raised by taxation a sum not in excess of 1 mill of the assessed valuation of the county for the purpose of making alterations in any of the public buildings in the county. This was followed in 1944 by the broad provisions of Act 4 of the special session of that year which permitted the county board of supervisors to create a fund or funds for acquiring, extending, altering or repairing public improvements.

The foregoing constitutional provisions and statutory enactments were considered and applied by the Michigan Supreme Court in the case of *Oakland County Taxpayers' League v. Oakland County Supervisors,* 355 Mich. 305, decided in 1959. As will hereinafter appear in more detail, that case basically held that a county board of supervisors may use surplus funds, consisting principally of miscellaneous county revenues derived from the statutory fees paid to the county clerk, county treasurer, register of deeds, sheriff, and to the probate and circuit courts and accumulated from sources other than direct taxation, for the construction of a county court house.

Your questions will be stated and answered in sequence.

Question 1

"May a county allocate and transfer any and all non-tax revenues received by the county to the special fund authorized by Act No. 177 of 1943, as amended, and use all such moneys for the purposes authorized in the Act, and without a vote of the people? If there are any limitations on the amounts which can be allocated and transferred to the special fund and/or used for the authorized purposes, what are these limitations? May these moneys be accumulated in the special

[4] Since your stated questions relate to county buildings as distinguished from county highways and bridges, this opinion is accordingly similarly limited and no consideration has been given to Article VIII, Section 26 of the Constitution of 1908, Article VII, Section 16, Constitution of 1963, or to Act 398 P.A. 1919, particularly Section 13, and related statutes. C.L. 1948 § 254.51 et seq., M.S.A. § 9.1211 et seq.

fund for a period of several years and then be expended, without limitation as to amount, for the purposes authorized by Act 177 of 1943, as amended, or the purposes authorized by Act 186 of 1957?"

"[T]he special fund authorized by Act No. 177 of 1943, as amended," to which you make reference in your first question, when first authorized by the 1943 enactment was a fund "for the purpose of appropriating, providing for, setting aside and accumulating moneys to be used for acquiring, extending, altering or repairing public improvements, * * *." Act 177 of the Public Acts of 1943 related only to cities and villages and permitted the legislative body of the city or village to create and establish by ordinance a fund or funds.

Public Act No. 177 of 1943 was amended as to the title and body of the act by Act No. 4, Public Acts of the Extra Session of 1944, which expanded the authority theretofore granted to cities and villages by authorizing "political subdivisions" to create and establish a fund for the same purposes quoted above from the 1943 act. Act 4 of the Extra Session defined the term "political subdivision" to mean "any county, city, village, township, school district or other local unit of this state."

The foregoing statutes were last amended by Act 136 P.A. 1956 which also amended the title and which had for its major objective the enlarging of the purposes for which the moneys accumulated in the special fund could be used. This was accomplished in the 1956 act by amending the purpose clause to read as follows: "for the purpose of appropriating, providing for, setting aside and accumulating moneys to be used for acquiring, *constructing,* extending, altering, repairing, *or equipping* public improvements *or public buildings,* * * *." (The underscored words were added by the 1956 act.)

The 1956 act further amended Section 3 of the predecessor act so that the section would read: "The legislative or governing body of any political subdivision may allocate to said fund miscellaneous revenues received *and credited to the general fund,* * * *." (Underscored words added by the 1956 amendment.) Act 136 P.A. 1956 became effective on August 11, 1956. On April 5, 1957 the Attorney General issued his Opinion No. 2931.[5] Involved in that opinion was the legality of the action of a board of supervisors in approving the transfer of approximately $25,000.00 from the county general fund to a separate county building fund. The $25,000.00 sum had been derived from the sale of the county infirmary property plus proceeds from sheriff fees and register of deeds fees. The Attorney General relying upon the language of the 1956 amendment to Act 177 P.A. 1943, as amended, ruled that nontax derived funds such as proceeds from the sale of a county building, registers' fees, sheriffs' fees and other unpledged and unencumbered funds fall within the provisions of Act 177 of the Public Acts of 1943, as amended, and may be allocated for building purposes even though having first been paid into the county general fund.[6]

[5] O.A.G. 1957-58, Vol. 1, p. 148.

[6] In Opinion No. 2931 the Attorney General cited and discussed five antecedent opinions which to some extent enlighten your questions and which were as follows:

Opinion No. 2771 issued October 15, 1956, O.A.G. 1955-56, Vol. 2, p. 605, in which it was concluded that a balance accumulated in the county general fund may

Notice should be taken that the Attorney General's Opinion No. 2931 dealt with the action of the board of supervisors in transferring moneys from the county general fund to a separate county building fund, viz., special fund. The problem involved in that opinion was the legality of allocating miscellaneous revenues theretofore deposited in the general fund to the special building fund. The Attorney General relied upon the authority conferred by Act 136 P.A. 1956 which is, as stated in its title "An act to provide for the creation of a fund or funds in political subdivisions for acquiring, constructing, extending, altering, repairing or equipping public improvements or publc buildings; to provide for appropriations, credits and transfers to said fund or funds; and to provide for the disbursement thereof."

---

not be lawfully transferred by the board of supervisors to a building fund even though such transfer was approved by a vote of the majority of taxpaying electors of the county. There is no statutory authority to divert moneys raised by taxation for general fund purposes to a building fund.

Opinion No. 0-2812 issued October 27, 1944, O.A.G. 1945-46, p. 105, ruling that prior to the adoption of Act 4 P.A. 1944, Extra Session, there was no legal authority for a county board of supervisors to transfer moneys from the general fund to a building fund but after the passage of the 1944 act the board of supervisors could allocate to a building fund moneys thereafter deposited in the general fund representing the proceeds of fees collected by county offices.

Opinion No. 650 issued December 30, 1947, O.A.G. 1947-48, p. 525, ruling that the special fund authorized by Act 177 P.A. 1943, as amended by Act 4 P.A. 1944, Extra Session, was not a fund of the same nature as the building fund authorized by Section 5.671 et seq. M.S.A. (sinking fund for public buildings and sites). Concerning the special fund authorized by Act 177 P.A. 1943, as amended, it was said in Opinion No. 650 that "years after its original establishment, [it could] be used on appropriate action by the then board of supervisors for some purpose entirely foreign to the erection of the building contemplated by the board of supervisors and by the people at the time the fund was set up."

Opinion No. 1436 dated August 28, 1951, O.A.G. 1951-52, p. 337, contained a general discussion of the allocation of fees and other revenue to special funds to be used in the construction and repair of county buildings. The basic conclusions stated in the opinion were that Article VIII, Section 10, Constitution of 1908, was a limitation on the power of the legislature and not a grant of authority and consequently since Article VIII, Section 10, applied only to the use of money derived from taxes levied upon the assessed valuation of the county or to borrowing the legislature was not under any other limitation in this regard and was free under Article VIII, Section 8, Constitution 1908, to grant the power to county boards of supervisors to spend money not raised by taxation; that statutory fees for services rendered by county officers were normally to be considered as charges for services rendered and as such were not taxes; that miscellaneous funds derived from non-tax sources if not otherwise pledged or encumbered for other purposes by statute may be used for construction, alteration and repair of public improvements without a vote of the people.

In *Supplemental Opinion No. 1436A* issued October 25, 1951, O.A.G. 1951-52, p. 374, the Attorney General made a further ruling that where a statute specifically requires that moneys received by a county shall go into a specific fund, that money is "pledged or encumbered for other purposes" within the meaning of Section 141.263 C.L. 1948, and is not available for building construction, repair or alteration.

In 1957 the legislature amended Act 118 P.A. 1923, as amended, by the passage of Public Act 186. This amendment was adopted by the legislature at the request and instigation of Oakland County officials.[7] In 1957 the title of the act amended by P.A. No. 186 read: "An act to authorize counties to raise by loan, expend from unallocated moneys on hand, or borrow money for permanent improvements and to issue bonds of the county to secure the repayment thereof and validating proceedings heretofore taken authorizing the issuance of county bonds." That title was in the form as amended by Act 282 P.A. 1941 which had added the words "expend from unallocated moneys on hand," at the time Section 1a was added as hereinbefore recited. Thus under the 1957 amendment the authorization to the county board of supervisors was to expend from any funds on hand not raised by taxation a sum not in excess of 1 mill of the assessed valuation of the county but by reference to the title of the act it is clear that the expenditure under Act 186 P.A. 1957 was limited to unallocated moneys on hand and did not relate to expenditures from moneys theretofore allocated to a special improvement or building fund.

Before answering your first question, further consideration must be given to Section 3 of Act No. 177 P.A. 1943 and the history of the amendments to that section. As initially enacted, Section 3 of Act 177 P.A. 1943 reads as follows:

> "The legislative body of any city or village may allocate to said fund miscellaneous revenues received, including revenues received by said city or village under the provisions of Act No. 155 of the Public Acts of 1937, as amended, if said revenues are not otherwise pledged or encumbered for other purposes."[8]

Section 3 as amended by Act 4 P.A. 1944 First Extra Session was as follows:

> "The legislative or governing body of any political subdivision may allocate to said fund miscellaneous revenues received, including revenues received by said political subdivision under the provisions of Act No. 55 of the Public Acts of 1937, as amended, if said revenues are not otherwise pledged or encumbered for other purposes."

The last amendment to Section 3 was by Act No. 136 P.A. 1956 to revise its provisions as follows:

> "The legislative or governing body of any politcial subdivision may allocate to said fund miscellaneous revenues received and credited to the general fund, including revenues received by said political subdivision under the provisions of Act No. 155 of the Public Acts of 1937, as amended, being sections 211.351 to 211.364, inclusive, of the Compiled Laws of 1948, and also revenues received from the sale of lands owned by the political subdivision and which are no

---

[7] See *Oakland County Taxpayers' League v. Oakland County Supervisors*, supra, at page 322.

[8] Act No. 155 of the Public Acts of 1937 created the State Land Office Board and provided for the sale of certain lands held by the State and for the disposition of moneys received therefrom. Act No. 155 P.A. 1937 appears at C.L. 1948 § 211.351 et seq., M.S.A. 1960 Rev. Vol. § 7.951 et seq.

longer needed for public purposes, if said revenues are not otherwise pledged or encumbered for other purposes."

The "said fund" to which miscellaneous revenues could be allocated under authority of Section 3 of original Act 177 P.A. 1943 was the improvement fund to be created by the city or village under the authority of Section 1 of that Act. Act 4 P.A. 1944 First Extra Session did not change the original concept of Section 3 by the amendment which it made to that section and to other sections of Act 177 P.A. 1943. All that Act 4 did was to make the provisions of original Act 177 of 1943 applicable to counties, townships, school districts and other local units as well as to cities and villages. At this stage in the legislative history of these two acts, the purpose and intent of Section 3 was clear. It permitted the allocation of miscellaneous revenues received to the improvement fund except where such revenues were otherwise pledged or encumbered for other purposes. The restraint imposed by the "pledged or encumbered for other purposes" clause of Section 3 was considered and applied by the Attorney General in opinions numbered 1436 and 1436A cited supra in footnote 6. It was the conclusion of the Attorney General in those opinions that whenever a statute specifically required that moneys received by the county be deposited or credited to a specific fund of the county, then the moneys so received were "pledged or encumbered for other purposes" within the meaning of foregoing Section 3 and consequently did not constitute miscellaneous revenues received subject to allocation to the improvement fund. Included within the funds to which the Attorney General made his opinions applicable was the county general fund. The practical effect of those opinions was to leave the provisions of Act 177 P.A. 1943 as amended in 1944 impotent except for gifts made to the county and possibly revenues received from the sale of county property. The Attorney General recognized this and said "the remedy lies in future legislation."

In 1956 by the enactment of Act 136 the legislature amended Section 3 of the former acts so that the part here pertinent read "may allocate to said fund miscellaneous revenues received and credited to the general fund." The restriction appearing in the former acts that the miscellaneous revenues could not be allocated if otherwise pledged or encumbered for other purposes was retained without amendment. The purpose of the amendment to Section 3 made in 1956 seems apparent. It was to permit the allocation of miscellaneous revenues received although such revenues had been credited to the general fund and to that extent the statute modified the former rulings of the Attorney General.

It is impractical in this opinion to undertake any detailed analysis of the various funds of the county to which moneys are to be deposited when received. It is common knowledge that there are earmarked funds to which specific revenues must be credited by virtue of statutory provisions and which, consequently, do not find their way to the general fund. Examples of this type are the drain fund and the county social welfare fund.[9]

[9] The fund to which collections are credited is not necessarily controlling. The dog fund may not be separately identified but the county collections from dog licenses are deposited in the county general fund in a subaccount. Nonetheless such revenues would be encumbered because under the provisions of the dog law they are committed to the payment of damages for injuries by dogs to livestock.

Customarily the statute which requires the deposit of the receipts in a designated fund also limits their expenditure to the purposes stated in the statute by which the fund is created. Revenues so required to be deposited in designated funds or credited thereto with corresponding restrictions on expenditures are revenues which are pledged or encumbered for other purposes and not available for allocation to an improvement or building fund by action of the legislative or governing body of the political subdivision.

The foregoing interpretations give effect and meaning to the provisions of Section 3 as originally enacted and as amended in 1944 and in 1956. In my opinion the clause "and credited to the general fund" as added to Section 3 by the 1956 amendment should be read as if written "although credited to the general fund." I find nothing in the history of these enactments to indicate that the legislature by the 1956 amendment intended to make the "pledged or encumbered" clause applicable only if the miscellaneous revenues had been credited to the general fund. To so interpret the 1956 amendment would be to change the entire concept appearing in Section 3 of former Act 177 P.A. 1943 as amended by Act 4 P.A. 1944 First Extra Session. I believe that the legislature by the 1956 amendment only intended to make clear that the crediting of revenues to the general fund did not in and of itself make such revenues pledged or encumbered but as to the other funds intended to leave the former rule in effect.

Answering your first question, it is my opinion that a county, acting through its board of supervisors, may allocate and transfer any and all nontax revenues received, which are not otherwise pledged or encumbered for other puropses, to a special fund established pursuant to the authority conferred by Act 177 P.A. 1943 as amended and use all such moneys in the special fund for the purposes authorized in the Act without a vote of the people. This is the holding of our Supreme Court in the *Oakland County case*, supra. There was involved there the action of the board of supervisors of Oakland County in transferring and allocating over a period of years miscellaneous nontax revenues to a special improvement fund. It was proposed to use the accumulated balance toward the cost of a county court house. It was argued that to divert miscellaneous county revenues from the respective funds in which they had accrued to a special building fund would provoke an increase in the county tax levy not otherwise necessary if the fund balances had not been so depleted. The Supreme Court held in the majority opinion that the surplus miscellaneous revenues which had been transferred to the special building fund were expendable for the construction of the court house and that the action of the county board of supervisors in making the transfer and in proposing to expend from the special fund had been authorized by the legislature. Subsequent to the opinion of the Supreme Court in the *Oakland County case* the trial judge entered his decree ordering that the sum of $1,192,427.18, being the accumulated balance on hand in the special building fund and derived from miscellaneous revenues and from tax levies of less than one tenth of 1 mill "may be used by the Board of Supervisors for the construction, repair, alteration and equipping of County buildings."

There remains unanswered that portion of your first question wherein you ask if the moneys accumulated in the special fund for a period of years may be expended without limitation as to amount for the purposes authorized by Act 186 of 1957. You are advised that in my opinion none of the moneys accumulated in a special building fund under the authority of Act 177 P.A. 1943 as amended may be expended pursuant to or for the purposes authorized by Act 186 P.A. 1957. This is for the reason as before stated that the 1957 act relates to the expenditure from *unallocated* moneys on hand. The action of a county board of supervisors in assigning or transferring surplus miscellaneous revenues from the county general fund or from other county funds to a special building fund is under the law an act of allocation and thereafter such special fund may not be regarded as representing unallocated moneys on hand. In the case of *Central Eureka Mining Company v. United States* (1956), 138 F. Supp. 281, 295, it was said:

> "To allocate means to distribute or to assign. Allocation is the act of distributing or of putting one thing to another."

Question 2

> "May the moneys allocated and transferred to the special fund authorized by Act No. 177 of 1943, as amended, be used or removed from this special fund for any other purposes than those authorized by the Act? For example, may these moneys, or any part of them, be removed from the special fund, returned to other county operating funds (such as the county General Fund), and used in such county operating funds for county expenses other than those authorized by Act No. 177 of 1943, as amended?"

The answer to your second question is a negative one. Section 1 of Act 177 of 1943 as last amended by Act 136 P.A. 1956 authorizes the establishment of a special fund or funds for the purpose of appropriating, providing for, setting aside and accumulating moneys to be used for acquiring, constructing, extending, altering, repairing or equipping public improvements or public buildings. Section 2 as amended by the 1956 act contains the following pertinent language:

> "Notwithstading the provisions of any law or the charter of any city or village, moneys accumulated in said fund shall not be transferred, encumbered or otherwise disposed of, except for the purpose of acquiring, constructing, extending, altering, repairing or equipping public improvements or public buildings, which a political subdivision may by the provisions of its charter or the general law be authorized to acquire, construct, extend, alter, repair or equip."

It is evident to me that the legislature did not intend that the special fund authorized by Act 177 P.A. 1943 as amended should be or become a slush fund to which miscellaneous county revenues could be allocated and subsequently recaptured by return of the whole or a part thereof to the county general fund or other operating funds of the county during the next or some succeeding calendar year. If the provisions for the allocation of miscellaneous county revenues to the special fund are considered to be transitory and not irrevocable, then a device has been concocted which

will permit political subdivisions of the state, including the county, to deplete the balances in their operating funds by annual allocation to a special fund and thereafter to request and possibly obtain a higher tax rate from the county tax allocation board to meet proposed budgets. Under the Property Tax Limitation Act, being Act 62 P.A. 1933 as last amended by Act 278 P.A. 1964, the county tax allocation board is required by Section 11 thereof to approve a minimum tax rate for the county of 3 mills if required by the proposed budget and if the other conditions of the act have been met.[10] I do not believe that the legislature ever intended to condone or permit a scheme whereby a county board of supervisors could reduce the balances in the operating funds of the county by allocating miscellaneous county revenues to a special fund for the purpose of presenting a budget to the county tax allocation board asking for an allowance of more than the minimum tax rate because funds on hand had been depleted. Should this occur and if the allocations to the special fund are not irrevocable then a county board of supervisors after the tax rate has been fixed could obtain not only the resultant tax revenues but could also divert moneys from the special fund to the county general fund or other operating funds to augment and swell the amounts obtained from tax collections. Certainly the legislature did not intend to subject the taxpayer to this kind of treatment.

Question 3

"Does Act No. 186 of 1957 (Act No. 118 of 1923, as amended) in any way limit the amounts of miscellaneous non-tax revenues which can be allocated, transferred to, and accumulated in the special fund authorized by Act No. 177 of 1943, as amended, or limit the amounts which can be expended from the special fund each year? If so, what are the limitations?"

Act 186 P.A. 1957 had for its sole purpose the amendment of Section 1a which had been added by Act 282 P.A. 1941 as an amendment to Act 118 P.A. 1923. As thus amended Section 1a reads:

"The board of supervisors without submitting the same to the vote of the electors shall have the right or power to authorize annually the expenditure from any funds on hand not raised by taxation a sum not in excess of 1 mill of the assessed valuation of the county for the purpose of constructing, equipping or making alterations in any of the public buildings in the county if said board of supervisors shall by resolution of a majority of the total membership of said board au-

---

[10] Article VII, Section 2, Constitution of 1963, authorizes any county to frame, adopt, amend or repeal a county charter in a manner and with powers and limitations to be provided by general law. No such general law has been passed as of this date. Senate Bill No. 1370 introduced in the regular session of 1964 was a bill to provide for the establishment of charter counties. The bill passed the Senate but died in the House of Representatives. At the same session House Concurrent Resolution No. 73 (House Journal No. 56, page 1209) was adopted creating a special committee of the legislature to study county home rule. It is recognized that the existing right of a county to receive a tax rate allocation from the county tax allocation board may be altered in any county which adopts a county charter pursuant to a general law if and when such a law is enacted.

> thorize the same: Provided, That no such monies shall be expended without the vote of the people if said monies are to be raised by taxation."

Section 1a authorizes an annual *expenditure* from nontax moneys to an amount not in excess of 1 mill of the assessed valuation of the county. The expenditure is limited to the three purposes of constructing, equipping or making alterations in public buildings in the county. As stated in my answer to Question 1, the 1957 act relates to the expenditure of unallocated moneys on hand. I do not read this statute as in any way controlling or limiting the amount of miscellaneous nontax revenues which can be allocated and accumulated in the special fund authorized by Act No. 177 of 1943 as amended. I believe the authority granted to the county board of supervisors to expend annually in conformity with Act 186 P.A. 1957 is independent of the authority granted to the board of supervisors to allocate to a special building or improvement fund pursuant to Act 177 P.A. 1943 as amended. As I have already said, there is no limitation on the amount which can be accumulated in the special fund which may be established under Act 177 P.A. 1943 as amended, nor is there any limitation under that act on the amount which may be expended from the special fund in any one year. I do not read the limitation of 1 mill of the assessed valuation of the county appearing in Act 186 P.A. 1957 as having any reference to the amount which may be expended annually from the balances on hand in the special building or improvement fund.

Question 4

> "If Act No. 186 of 1957 is used as a basis for authorizing *expenditures* for 'constructing, equipping, or making alterations' of county buildings, would the non-tax moneys to be used have to be placed in the special fund authorized by Act No. 177 of 1943, as amended, before they could be expended for the purposes authorized by Act 186 of 1957, or could such moneys be expended for these purposes directly from the county funds to which they were originally credited when received?"

My answer to your third question also answers your fourth question. In my opinion it is not necessary that the nontax moneys which the board of supervisors contemplates expending under the authority of Act 186 P.A. 1957 be first placed in the special building or improvement fund before the expenditure can be made.

The expenditure under Act 186 P.A. 1957 is limited to the purpose of constructing, equipping or making alterations in any of the public buildings. A correlated restriction appears in the second proviso of Act 169 P.A. 1952 to which your attention is directed and which reads as follows:

> "Provided further, That the amount of money spent for the repair of county buildings in any 1 fiscal year from funds not raised by taxation and under control of the board of supervisors for current operating expenses, shall not exceed the total amount of such money collected in that year, unless submitted to the electors of the county and approved by a majority of those voting thereon."

Notice is taken that the proviso in the 1952 act relates to the repair of county buildings; whereas Act 186 of 1957 relates to constructing, equipping or making alterations. Repairs and alterations are not synonymous terms. In the case of *Ten-Six Olive, Inc. v. Curby*, 208 F. 2d 117, the United States Court of Appeals made this distinction:

> "An alteration must be distinguished from a repair. Alteration denotes a substantial change, while repair means to restore to soundness or work done to keep property in good order."

In *Mozino v. Wellsburg Electric Light, Heat & Power Co. et al.*, 131 S.E. 717, the Supreme Court of Appeals of West Virginia said:

> "* * * it is generally held that repair does not mean to alter or change condition, or replace with new or different material." (cited cases omitted)

While not entirely responsive to your fourth question, your attention has been directed to the foregoing distinctions for the purpose of demonstrating that the limitation on the amount which may be expended will under those acts be determined by the nature of the project for which the expenditure is to be made.

Question 5

> "The matter of the use of miscellaneous *non-tax* revenues is referred to in Act No. 177 of 1943. I will appreciate, if possible, your explanation and definition of what such miscellaneous non-tax revenues consist of in county government."

The expression "miscellaneous nontax revenues" covers such a variety of items and is of such scope as to make impractical if not impossible any attempt to catalogue the derivative sources. Generalization can be made with some clarity as to what are taxes and what are fees but it must be recognized there will be miscellaneous county revenues which are derived from sources other than fees and which will require decision on an ad hoc basis.

The Supreme Court of New York in the case of *Hanson v. Griffiths, Surrogate, et al.* (1953), 124 N.Y.S. 2d 473, 476, made a distinction between taxes and fees in these words:

> "Generally speaking, taxes are burdens of a pecuniary nature imposed generally upon individuals or property for defraying the cost of governmental functions, while, on the other hand, charges are sustainable as fees where they are imposed upon a person to defray or help defray the cost of particular services rendered for his account."

Justice Cooley in his work on *Taxation*[11] stated his opinion in this way:

> "Fees required to be paid by individuals to public officers ordinarily are not considered to be taxes. * * *.
>
> "On the other hand, if the object of the fee is to provide general revenue rather than to compensate the officers, and the amount of the fee has no relation to the value of the services, the fee is a tax. In other words, a charge fixed by statute for the service to be performed by

[11] *Cooley, The Law of Taxation, Fourth Edition, Vol. 1*, pg. 108, § 33.

an officer, where the charge has no relation to the value of the services performed and where the amount collected eventually finds its way into the treasury of the branch of the government whose officer or officers collect the charge, is not a fee but a tax."

Seligman in his *Essays in Taxation, Second Edition,* 1897, supplies the following definitions (p. 304):

"A tax is a compulsory contribution from the person to the government to defray the expenses incurred in the common interest of all, without reference to special benefits conferred.

"A fee is a payment to defray the cost of each recurring service undertaken by the government primarily in the public interest, but conferring a measurable special advantage on the fee-payer."

It has sometimes been said that a test to be applied is the nature of the legislative power being exercised, i.e., is the charge imposed pursuant to the police power.[12] Advocates of this method of testing conclude that charges imposed under the police power are normally not taxes and cite as examples such things as license fees to sell intoxicating liquor (*Sherlock v. Stewart,* 96 Mich. 193) and license fees to keep dogs (*Van Horn v. People,* 46 Mich. 183) but the distinction between fees and taxes is not synonymous with the distinction between the police power and the taxing power; many classes of fees, like court fees, and fees for copies of legal documents cannot possibly be put under the police power.[13]

Professor Seligman in his work on Taxation[14] devotes one chapter to the classification of public revenues. He discusses the distinctions between fees and taxes and makes these enlightening observations.

(p. 275)

"A fee, then, is a manifestation of the taxing power. It is a compulsory contribution for a service in which the element of public purpose must be present; but it differs from a tax in several important points.

"First, a tax is levied as a part of a common burden; a fee is assessed as a payment for a special privilege.

* * *

(p. 276)

"A second distinction between fees and taxes is that a fee does not normally exceed the cost of the particular service to the individual.

* * *

(p. 278)

"A third distinction between fees and taxes may be found in the conditions attached to the service which the government performs. It may be said that in the case of a fee the government does some particular thing in return, while in the case of a tax it gives no special service."

---

[12] Opinion No. 1436, dated August 28, 1951, O.A.G. 1951-52, pp. 337, 342.

[13] *Seligman, Essays in Taxation,* supra, p. 273.

[14] See footnote 13.

Professor Seligman reaches this conclusion:

(p. 281)

"* * *: a fee is a payment for a service or privilege from which a special measurable benefit is derived, and normally does not exceed the cost of the service; a tax is a payment where the special benefit is merged in the common benefit, or is converted into a burden. A fee remains a fee, whether levied under the taxing power or the police power; and a tax is no less a tax when classified under the police power than when put under the taxing power."

The variety in the approaches, outlined above, by text writers and courts in undertaking to explain the distinction between taxes and fees serves to emphasize the difficulty in answering your question by direct definition. Some help to a solution will be found in analyzing the items of miscellaneous revenues involved in the *Oakland County case,* supra.

From an examination of the record in the trial of that case it appears that the following sources were considered as constituting "miscellaneous nontax revenues" which could be transferred by action of the county board of supervisors to a special building fund:

1. Rental income from county real estate.
2. Rental income from the use of county equipment.
3. Justice Court "Costs" received from justices of the peace prior to the payment of justice court "fees" by the county.
4. Justice and circuit court surety and appearance bond forfeitures to the county.
5. The fees, license and permit collections made by various county officers and offices.
6. Private contributions received by counties to apply on a general or specific cost of county government.
7. County income from county operated facilities such as parking lots, markets, garages, pay phones and sales machines.
8. Health, welfare and medical assistance refunds from tuberculosis and social welfare recipients.
9. Income from county farms operated by county social welfare departments.
10. Income from rentals and sales at county parks.
11. Income from rentals and sales at county airports.
12. Proceeds of sales of tires, repair parts, and materials by Road Commissions and other county departments.
13. County fair board income from rentals of space, concessions, ticket sales.
14. Income from sales of county supplies.
15. Receipts from board of county jail prisoners, telephone calls, gasoline tax, overpayments, and other sources.
16. Interest earned and received on county deposits and investments.
17. Income from sale of county junk.

18. Royalties received by counties from oil wells, etc. on county property.
19. Income from sales of dogs, etc. by counties.
20. Income from gambling raid (sheriff) moneys.

The above enumeration is used here to illustrate the basis of the action in former years. All of the items enumerated do not have my approval. As will appear from my answer to your sixth question, the first item would not be available for allocation to the special building fund if the county real estate involved from which the rental income was received was under the jurisdiction of the county social welfare board. Likewise items 8 and 9 would not be subject to allocation as miscellaneous county revenues because they are under the jurisdiction of the county social welfare board. My purpose in including the foregoing enumeration is to furnish a guide for your consideration when conducting county audits. It must be understood where funds are created by a statute or revenues are required to be deposited or credited to specific funds by statute, the language of the statute controls and the statute should be consulted. Further, you should be always mindful that the legislature can amend the statute at any session and that new statutory provisions may be enacted. The answer to your fifth question must therefore depend at any given time upon the source of the nontax revenues and upon the provisions of the then applicable statutes.

Question 6

"Under Act No. 177 of 1943, may a County Social Welfare Board, without specific authority given to it by its Board of Supervisors, create a special fund from reimbursements received from indigents and/or relatives or reimbursements for relief funds expended?"

Your question does not identify the type of "special fund" which you anticipate the county social welfare board might create. I assume that you have in contemplation a special fund devoted to the same purposes as the special fund permitted under Act 177 P.A. 1943 as amended except that the expenditure therefrom would have to be restricted to the acquiring, constructing, extending, altering, repairing or equipping of public improvements or public buildings under the jurisdiction of the county social welfare board.

The county social welfare board is created by Section 46 of the Social Welfare Act,[15] being Act 280 P.A. 1939 as amended. Section 73 of that Act, as last amended by Act 113 P.A. 1955, provides that the county treasurer is designated as the custodian of any and all moneys provided for the use of the county department of social welfare. The county treasurer is required to create and maintain a child care fund. By the same section the county treasurer is required to create and maintain a social welfare fund. The said Section 73 specifically states by enumeration the moneys to be deposited in each of these respective funds. It is there said:

"Moneys in said child care and social welfare funds shall remain separate and apart from all other funds at the disposal of the county

[15] The Social Welfare Act appears at C.L. 1948 § 400.1 et seq., M.S.A. 1960 Rev. Vol. § 16.401 et seq.

government and shall not be transferred to or mingled with other funds of the county. Said funds shall be used exclusively for carrying out the purposes of this act: * * *."

In the enumeration of moneys to be deposited in the county social welfare funds the following appears:

"(c) all refunds and collections arising out of reimbursements to the county department of social welfare; and (d) all funds made available to the county department from any other source whatsoever."

These provisions appear to me to be broad enough to cover any rental income received from property conveyed by a person receiving hospitalization under the provisions of the Social Welfare Act. Also income from farms operated by the county social welfare department would be similarly covered. Amounts received as refunds or as reimbursement from responsible relatives would be required to be deposited in the county social welfare fund. Accordingly, under the language of Section 73 all such moneys could only be expended for the purposes of the Social Welfare Act.

I answer your sixth question as I have interpreted it by saying that there is no authority under the law for the county social welfare board to create a special building or improvement fund by transferring to such a fund reimbursements received from indigents and/or relatives or reimbursements for relief funds expended. Act 177 P.A. 1943 as amended permits only the legislative or governing body of a political subdivision to create a special building fund and the county social welfare board does not fall in either of those categories. Neither does the Social Welfare Act itself authorize the county social welfare board to create such a fund. Therefore statutory authority is lacking and the county social welfare board may not create a special building fund either with or without specific authority from the county board of supervisors.

FRANK J. KELLEY,
Attorney General.

641217.2

GOVERNOR: Power to appoint State Treasurer, acting State Treasurer and acting Auditor General.
Power to reorganize executive departments.
STATE TREASURER: Status of incumbent.
AUDITOR GENERAL: Status of incumbent.
LEGISLATURE: Power to reorganize executive departments.

There is presently no vacancy in the office of State Treasurer and the Governor is without lawful authority to fill such office at this time.

The Governor is without power to fill the constitutional office of State Treasurer until the legislature by act or the Governor by appropriate order has initially allocated executive and administrative offices and agencies into not more than twenty departments and has created a department of which the State Treasurer is the single executive head, or the legislature on or after January 1, 1965 abolishes the powers and duties of the incumbent State Treasurer and creates a statutory office of State Treasurer to be filled by appointment of the Governor.