The Honorable Crawford Parker  
Lieutenant Governor  
Room 332, State House  
Indianapolis, Indiana  

Dear Mr. Parker:

This is in response to your letter in which you request an Official Opinion and which reads as follows:

“A number of incorporated towns, in the process of adopting a zoning ordinance, are uncertain of the statutory requirements pertaining to the form and manner of public notice required for such ordinance bearing a penalty clause.

“The City and Towns Act of 1905 (Ch. 129, Sec. 31) provides an alternative posting of notice if no newspaper is published in the town. Chapter 96, Acts of 1927 (Burns' 49-702—49-704) prescribes publication of ordinances two times in two newspapers. Ch. 41, Acts of 1953 (An Act concerning the preparation and publication of town ordinances) allows towns to adopt a new ordinance without requiring legal notice, if the ordinance is included in a code published in pamphlet form, and further allows plats, diagrams and illustrations to be incorporated into the code by reference.

“Cities are required generally to follow the same procedure except that they have specific authorization (Burns’ 48-1417, Acts 1947, Ch. 125) to incorporate maps, diagrams, charts, etc., by reference only in the legal advertisement.

“The problems faced by incorporated towns are these:
"1. Legal advertising costs of insertions (2 times in 2 newspapers) is often much more than the technical consulting costs for planning services in the small community.

"2. Maps and tables, normally a part of the ordinance, would increase the cost if publication is required.

"3. Proportionate to population and tax base of the communities, towns have a greater burden of advertising costs than the larger cities.

"The questions on which we respectfully request your official opinion are these:

"1. Can the provisions for incorporating maps and charts by reference apply to towns as well as to cities, as contained in Ch. 125, Acts of 1947 (Burns' 48-1417) ?

"2. If the answer to question 1 is in the negative, are there any similar provisions applicable to publication of town ordinances?

"3. If there is no newspaper published in the town, may that town board meet its requirements in regard to public notice by posting the ordinance in public places, as stipulated in Ch. 129, Sec. 31, Acts 1905; or, is the present requirement based upon two insertions in two newspapers, following the stipulations of Ch. 96, Acts of 1927?"

The Acts of 1947, Ch. 174, as set out in Burns' (1951 Repl.), Section 53-701 et seq., permits establishment of city, town and county plan commissions and prescribes the method for development through planning and zoning of rural and urban areas. Section 1, as in Burns' (1951 Repl.), Section 53-701, says, in part:

"Each city council, each town board of trustees and each board of county commissioners in the state may by ordinance create a Plan Commission in order to promote the orderly development of its governmental units and its environs."
Section 3 thereof (Burns' Section 53-703) defines "city," as used in the Act, to include "classified cities and towns" and "city council" to mean "the chief legislative body of a city or incorporated town." Sections 35, 37, 38 and 39, as found in Burns' (1951 Repl.), Sections 53-735 and 53-737 through 53-739 thereof, bear on the necessity for maps, plats and charts in zoning ordinances as follows:

"A master plan may include:

* * *

"Maps, plats, charts and descriptive material presenting basic information * * *"

"Prior to the adoption of a master plan, the commission shall give notice and hold a public hearing on the plan and a proposed ordinance for its enforcement.

"At least 10 days prior to the date set for hearing, the commission shall publish in a newspaper of general circulation in the city or county a notice of the time and place of the hearing."

"After a public hearing has been held, the commission may by resolution adopt the master plan and recommend the ordinance to the city council or board of county commissioners."

"Upon the adoption of the master plan and recommendation of the ordinance, the secretary shall certify a copy of the plan and ordinance to the city council or the board of county commissioners.

"At the first county council meeting after adoption of the plan the secretary or a member of the commission shall present the plan and ordinance to the city council or the board of county commissioners." (Our emphasis)

Furthermore, Sec. 59, as found in Burns' (1951 Repl.), Section 53-760, says, in part:

"The tentative report, which shall include the proposed zoning ordinance with explanatory maps, shall be made to the city council or the board of county commissioners by the plan commission." (Our emphasis)
It is to be noted that it is consistently implied in the Acts of 1947, Ch. 174 that the master plan and the proposed ordinance be two separate documents. While it is provided that the master plan may include maps and charts, it is not mandatory nor is any mention made of the propriety of their inclusion in an ordinance. It is conceivable that a zoning ordinance could be drafted so as to eliminate the need for incorporation of maps and tables.

Your first question refers to the Acts of 1947, Ch. 125, Sec. 1, which is set out in Burns' (1950 Repl.), Section 48-1417, and says:

“The common council of every city of the state may, and is hereby empowered to, incorporate by reference in an ordinance or municipal code, or its amendments, standards, rules, tests, charts, maps, or regulations of nongovernmental, as well as of governmental, boards, agencies, bodies, or organizations without stating or publishing them in said ordinance or code. Said ordinance or municipal code containing such reference shall be considered as valid as though said standards, rules, tests, charts, maps or regulations were fully set out and contained in said ordinance, or municipal code, or its amendments: Provided, however, That such reference shall be to existing standards, rules, tests, charts, maps, or regulations excepting only reference to such matters of the state of Indiana, or its various departments, which need not then be in existence: Provided, further, That said ordinance or municipal code shall state that at least two [2] copies of said standards, rules, tests, charts, maps, or regulations are on file in the office of the city clerk for public inspection; and, Provided, further, That such copies shall be kept available for public inspection.” (Our emphasis)

The Acts of 1947, Ch. 125, contains no definition section comparable to that in the Acts of 1947, Ch. 174, which expressly states that the term “city” should also include “towns”; therefore, the word must be taken in its ordinary sense. [See: 2 R. S. 1852, Ch. 17, as found in Burns' (1946 Repl.), Section 1-201.]
Webster's Dictionary says that a "city"

"In most States * * * denotes a municipality ranking higher in population than a town * * *.”

That definition was accepted by the Court in Harvey v. Osborn (1877), 55 Ind. 535, and elaborated upon by our Legislature in classifying cities and towns on the basis of population. [See: Acts of 1933, Ch. 233, Sec. 1, as amended and as found in Burns' (1950 Repl.), Sections 48-1201 and 48-1202.]

Therefore, it is my opinion that the provisions of the Acts of 1947, Ch. 125, as found in Burns' Section 48-1417, supra, do not apply to towns.

The Acts of 1953, Ch. 41, as found in Burns' (1957 Supp.), Sections 48-8311 to 48-8313, say:

"The board of trustees of any town shall have the power to revise, amend, restate, codify, recodify and to compile any existing ordinance or ordinances and all new ordinances not theretofore adopted or published and to incorporate said ordinances into one [1] ordinance in book or pamphlet form and to make such changes, alterations, modifications, additions, and substitutions as said board of trustees may deem best to the end that a complete simplified code may be made to be denominated the 'Town Code of ............ (Name of town).’"  

"Such ordinances when so revised, amended, restated, codified, recodified, compiled, stated and published in book or pamphlet form, by authority of the board of trustees, need not be printed or published in any other manner. Said code thus published shall be in full force and effect two [2] weeks from the date of publication and the filing thereof in the office of the clerk of the town board of such book or pamphlet shall be presumptive evidence in all courts and places of the ordinance and of all provisions, sections, penalties and regulations therein contained and of the date of passage, and that the same is properly signed, attested, recorded and approved, and that any public hearing and notices thereof as required by law have been given."
"Any plats, plans, diagrams and illustrations which are deemed impracticable by the board of trustees to publish, may be incorporated and made a part of any town code by reference and the placing of the same on file open to the public in the office of the clerk of the town board, in a provision of the town code, shall be deemed publication of such part or parts of the town code." (Our emphasis)

While Burns' Sections 48-8311 to 48-8313 are similar to Section 48-1417, in many respects, they fail to give towns publishing ordinances individually the power to incorporate "plats, plans, and illustrations by reference" as is given to them so to do in respect of codifications, which comparable power is bestowed upon cities publishing ordinances or codes under Section 48-1417, supra: therefore, the answer to your second question is negative.

In answer to your third question, the aforementioned Planning and Zoning Law, Acts of 1947, Ch. 174, Secs. 89 and 92, as found in Burns' (1951 Repl.), Sections 53-790 and 53-793, read, in part, as follows:

"The city council or the board of county commissioners may provide penalties as set out in section 92 of this act for failure to comply with the provisions of any ordinance adopted pursuant to sections 56 through 65 of this act. * * *" (Our emphasis)

"A person who violates a provision of this act or of an ordinance or regulation enacted under its authority shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than ten dollars [$10] and not more than three hundred dollars [$300]."

The Cities and Towns Act of 1905, Ch. 129, separately provides general powers for common councils of cities and for boards of town trustees. Section 31 thereof, Clause 20, as found in Burns' (1950 Repl.), Section 48-301, delegates power to the Board of Town Trustees thus:

"To make and establish such by-laws, ordinances and regulations, not repugnant to the laws of this state, as may be necessary to carry into effect the provisions of this act, and to repeal, alter or amend the same as they
shall seem to require; but *every* by-law, ordinance or regulation *imposing a penalty for its violation* shall, except in case of emergency to be declared therein, be published in a newspaper in such town, if one be printed therein, or be posted in one [1] public place in each ward of such town, at least ten [10] days before the same shall take effect.” (Our emphasis)

In Meyer v. Town of Boonville (1903), 162 Ind. 165, 70 N. E. 146, the Court considered a predecessor of Acts of 1905, Ch. 129, Sec. 31, Cl. 20 (Burns' Section 48-301, *supra*), which was, in all material respects, identical with the instant section. It was there accepted as a primary premise that said Section considered publication and posting as alternative requisites.

If a city council, including a town board of trustees, exercises its power to provide penalties in a zoning ordinance, such ordinance would be within the provisions of Section 48-301, *supra*, unless it is superseded or limited by later legislation. Section 48-301, *supra*, must be construed in connection with the Legal Advertising Act, Acts of 1927, Ch. 96, as found in Burns’ (1951 Repl.), Section 49-701 *et seq.*, which is in pari materia with it. Section 1 (Burns’ Section 49-701) sets the prices to be paid for legal advertising. Section 2, as found in Burns’ Section 49-702, says:

“All publications, except that of annual reports of township trustees, school boards, boards of county commissioners and civil cities and towns (which publications shall be made one time only), shall be published as now required by law, unless otherwise provided for in this act, except that no publication shall be made fewer than two [2] insertions, one [1] week apart. In case any officer charged with the duty of publishing any notice required by law shall be unable to procure such advertisement at the price herein fixed, it shall be sufficient for him to post up such written or printed notices as the law requires, and such advertisement in newspapers shall be dispensed with.” (Our emphasis)

The first sentence of Burns’ Section 49-702, *supra*, specifically changes the existing law concerning “publications” to require no fewer than two [2] insertions one [1] week apart, and generally changes existing law on that subject as “other-
wise provided for” in the Legal Advertising Act, supra. The next succeeding sentence says that posting of notices “shall be sufficient,” “in case any officer charged with the duty of publishing any notice * * * shall be unable to procure such advertisement at the price herein fixed.”

Despite the general repeal of all conflicting laws expressed in Acts of 1927, Ch. 96, Sec. 10, it remains to be determined that the posting of notice provided in Burns’ Section 49-702, supra, conflicts with the notice-posting provisions of Burns’ Section 48-301, supra.

Webster’s Dictionary (2nd Edition) generally defines “publish” as:

“The above would include the specific definition of “publish” and the definition of “post” here following, thus:

“* * * Specif.: a. To promulgate or proclaim as a law or an edict * * * d. To make public in a newspaper, book, circular, or the like.” (Our emphasis)

“post—To station in a given place.”

Nevertheless, specific definitions of “post” and “publish” are not synonymous.

Burns’ Section 48-301, supra, modifies “published” with the phrase “in a newspaper” and so limits its application to the specialized meaning. The reference to “insertions” in Burns’ Section 49-702, supra, impliedly limits “published” and “publication” there used to the same specialized meaning of “published” in Section 48-301.

If the duty to publish in a newspaper (or book) must be established by law outside the Legal Advertising Act, then the Legal Advertising Act cannot be said to enlarge that duty so as to cut out allowed alternatives without expressly so stating. Burns’ Section 49-702, supra, does not charge anyone with the duty of “publishing any notice,” merely establishing what such person is permitted to do if he is unable to procure advertising at the statutory prices set in the first section of.
the Legal Advertising Act, nor does it restrict posting of notice only to the circumstances enumerated therein. In connection with Burns’ Section 48-301, supra, Clause 20, such language is surplusage, adding nothing to the permitted alternative of notice-posting, nor even limiting it.

1953 O. A. G., pages 392, 393, No. 79, considering the publication of city ordinances, said:

“It has been held that the publication of ordinances in book or pamphlet form is not sufficient under the Legal Advertising Act which, to that extent, supersedes the 1905 Act and that ordinances containing penalties must be published as required by the Legal Advertising Act of 1927, supra. See Bartley v. Chicago & E. I. Ry. Co. (1939), 216 Ind. 512, 24 N. E. (2d) 405.”

The 1905 provisions concerning publication of city ordinances containing penalties differed from the analogous provisions concerning towns in that cities were permitted to publish in newspapers and books or pamphlets (as well as posting notice under certain conditions), whereas towns were not, by that Act, granted power to “publish” elsewhere than in newspapers. “Publication” in books like “publication” in newspapers can be distinguished from posting of notice and neither the Bartley case nor the 1953 O. A. G., No. 79, supra, establish a precedent for holding that Burns’ Section 49-702, supra, supersedes that part of Burns’ Section 48-301, supra, establishing posting of notice as alternative to publication in a newspaper.

Sections 3 and 4 of the Legal Advertising Act (Burns’ Sections 49-703 and 49-704) apply specially to “annual reports” in the former and to ordinances “affecting * * * town * * * business” in the latter. Clearly, Section 49-703, concerning annual reports is inapplicable to the subject of this opinion. A zoning ordinance is not so obviously excluded from classification as town business under Section 49-704.

The “business” of a city was characterized in Meyer v. Town of Boonville, supra, thus:

“* * * But when the town or city enters into a contract with a second party, having such franchise, to light its streets and public grounds and buildings, or
to heat its public buildings and offices by steam, hot water or otherwise, or to furnish gas for that purpose, it exercises a *business* and not a legislative power.” (Our emphasis)

In Town of Gosport v. Pritchard *et al.* (1901), 156 Ind. 400, 406, 59 N. E. 1058, it was said:

“* * * It is settled that the power of municipal corporations to contract for lighting the streets and alleys is not a legislative power, but purely a *business power* * * even if * * * in the form of an ordinance, being the exercise of a purely *business* and not legislative power, the same would be effective, without an emergency clause, although not published.” (Our emphasis)

In Bradford v. City of Columbus (1948), 118 Ind. App. 408, 411, 78 N. E. 457, the Court said:

“The phrase ‘affecting * * * city * * * business’ in § 49-704, *supra*, in our opinion limits the application of the Act to the ordinary business affairs that are common to municipal corporations. If this is not true the foregoing phrase is mere surplusage. The annexation of territory to a city is not such business as is contemplated by this Act. Peck v. Wm. M. Birch Co. (1923), 80 Ind. App. 58, 67, 139 N. E. 696.

* * * * * * *

“Therefore, the provisions of § 49-704, *supra*, are not applicable to annexation ordinances. The provision of § 48-701, Burns’ 1933, requiring publication ‘in a daily newspaper, etc.’ is controlling in such actions.” (Our emphasis)

It is established that annexation is not city or town business covered by Burns’ Section 49-704 and it would seem that zoning ordinances are similarly excluded.

Giving effect to Burns’ Sections 48-301 and 49-702, *supra*, it is my opinion that posting of an ordinance imposing penalties in one public place in each ward of a town would be legal
notice alternative to newspaper publication consisting of "two insertions, one week apart."

Therefore, in summary, and in answer to your first question, it is my opinion that the statute referred to in your question, which provides for incorporating maps and charts by reference, cannot be construed to apply to towns as well as to cities.

In answer to your second question, it is my opinion that there are no statutory provisions whereby incorporation of maps and charts by reference may be used in publication of town ordinances; therefore, such ordinances must be drafted so as to obviate the necessity for maps and charts, or else said maps and charts must be set out in full in such ordinances.

In answer to the first part of your third question, it is my opinion that a town board may meet its requirements in regard to public notice of ordinances containing penalties by posting the ordinances in one public place in each ward of the town, at least ten days before the effective date.

In answer to the second part of your third question, it is my opinion that when a town ordinance containing penalties is published, it must not be published by fewer than two insertions, one [1] week apart, but is unnecessary that duplicate publication be in two [2] different newspapers.

OFFICIAL OPINION NO. 38
September 12, 1957

The Honorable William E. Babincsak
State Representative
1856 South River Drive
Munster, Indiana

Dear Representative Babincsak:

I am in receipt of your recent letter requesting an Official Opinion on the following questions:

"1. Is there now any schedule of fees provided by law which the County Surveyor may legally charge for those services which he is bound by law to render?"