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OFFICIAL OPINION NO. 25

April 22, 1953.

Hon. Harold W. Handley,  
Lieutenant-Governor of Indiana,  
331 State House,  
Indianapolis, Indiana.

Dear Lieutenant-Governor:

I am in receipt of the request for an official opinion in regard to organization of park boards in third class cities. The material accompanying your letter makes it clear that you are particularly interested in determining whether or not a third class city may organize a park board pursuant to Chapter 58 of the Acts of 1909, or whether that act was superseded by Chapter 155 of the Acts of 1937.

The general statute applicable to the control and management of parks in cities of the third class is found in the Acts of 1905, Chapter 129, Section 140, the same being Burns' Indiana Statutes Annotated 1933 (1950 Repl.), Volume 9, part 2, Section 48-5701 which provides as follows:

"Control.—In cities of the third and fourth classes, the board of public works shall have charge, control, and management of all public parks and pleasure grounds belonging to any such city, together with the approaches thereto; and shall have power to receive, purchase and condemn land for public parks as in the case of lands, received, purchased, or condemned for the use of any such city for any other public purposes. Such board of public works, in every such city, is also given all the executive powers and is required to perform all the executive duties prescribed in sections two hundred and fifty-eight and two hundred and fifty-nine (Secs. 48-5801, 48-5802) of this act in relation to the purchase or condemnation, control, management, and care of public parks, and for the employment of a superintendent and help necessary for that purpose. In cities of the fifth class, such control, management and care of public parks, and the right to purchase or institute proceedings to take lands therefor, shall be vested in the common council of any such city and com-

mittees and officers and employees appointed or employed by such committees, subject to the approval of such council: Provided, Such committee shall receive no compensation for such services, except their fixed salary as such councilmen. (Acts 1905, Ch. 129, Sec. 140, p. 219.)”

It can be seen from an examination of the language in the above quoted statute that this is a general statute concerning the management and control of parks. Four years later after the passage of the above quoted statute the legislature passed an act concerning third and fourth class cities, and provided that a common council, by ordinance, may create a board of trustees for the control and management of public parks in such third class cities. The provisions of this act are found in the Acts of 1909, Chapter 58, Section 1, the same being Burns' Indiana Statutes Annotated 1933 (1950 Repl.), Volume 9, part 2, Section 48-5703 which provides as follows:

“Third and fourth class cities—Board of trustees.— Any city of the third or fourth class, by an ordinance to be enacted by the common council of such city, may create a board of trustees for the control and management of the public parks of such city; on which board shall be imposed all the duties and conferred all the powers that now and heretofore have been or that hereafter shall be imposed and conferred by law upon the boards of public works of the cities of such classes for the aforesaid purposes. The members of such board shall be residents of the county in which such city is situated. Such board shall not receive any recompense. Such ordinance shall prescribe the number of members of such board and shall fix the tenure of office of such members. The members of the board and their successors perpetually shall be appointed by such council; and all vacancies in such board shall be filled by such council. (Acts 1909, Ch. 58, Sec. 1, p. 155.)”

In 1937 the legislature passed an act relating to public parks in cities of the third class and provided that in a city of the third class the common council may by ordinance create a board of trustees for the control and management of public parks. This provision is found in the Acts of 1937, Chapter

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155, Section 1, the same being Burns' Indiana Statutes Annotated 1933 (1950 Repl.) Volume 9, part 2, Section 48-5718. Concerning the membership of the board of trustees, their selection and salaries, provision was made for the payment of an annual salary, while the 1909 Act, Section 1, *supra*, specifically provided that the board created under its provisions should not receive any recompense. The provisions of the 1937 act concerning salary is found in the Acts of 1937, Chapter 155, Section 2; Acts of 1943, Chapter 54, Section 1, same being Burns' Indiana Statutes Annotated 1933 (1950 Repl.) Volume 9, part 2, Section 48-5719 which is as follows:

“Board of Trustees—Members—Selection—Salaries—Expenses.—Such board shall be composed of four (4) citizens of such city, not more than two (2) of whom shall be members of the same political party, and each shall be a freeholder of such city, and who shall be selected and elected by the common council of such city. Each member may receive an annual salary of not less than sixty dollars (\$60.00) nor more than one hundred twenty dollars (\$120), payable monthly, and the president may be paid an annual salary of not less than one hundred dollars (\$100) nor more than three hundred dollars (\$300), payable monthly; all such salaries to be fixed by the common council; the members of said board may be allowed such reasonable expenses as may be incurred in connection with the discharge of his or her duties as a member of the board, and which may include the expense of the members or employees of the board in attending meetings or conventions held for the purpose, wholly or in part, of discussing matters relating to parks. Each member of such board, before entering upon his duties, shall take and subscribe the usual oath of office, and cause the same to be filed with the city clerk. Failure to so qualify within ten (10) days of election shall be deemed a refusal to serve and a new election shall be had at the next regular meeting of the common council to fill the vacancy. (Acts 1937, Ch. 155, Sec. 2, p. 829; 1943, Ch. 54, Sec. 1, p. 137.)”

All subsequent sections of the Acts of 1937, Chapter 155, Sections 3, 4 *et seq.*, the same being Burns' Indiana Statutes

Annotated 1937, Volume 9, part 2, Sections 48-5720, 48-5721 *et seq.*, pertain to the powers and duties of the board of trustees and in substance make the board of trustees so created a body corporate and politic, enumerate its powers specifically and is quite broad in its provisions covering the operation, management and control of public parks in third class cities.

A close examination and comparison of the 1909 act and the 1937 act shows that as they apply to third class cities, the 1937 act covers the same subject matter covered by the 1909 act. It has been repeatedly held that repeals by implication are not favored and that if possible, two statutes which appear to be in conflict will be construed so as to avoid the conflict. And in this case both the 1909 and the 1937 acts are permissible so that it would be possible to construe them each as providing an optional procedure. However, there are two reasons which might lead to the conclusion that the 1909 act is no longer available to cities of third class. First, the rule appears clear in Indiana that if a new statute covers the subject matter of a prior statute and is evidently intended to revise the prior act or a part thereof, the new statute supersedes that part of the old statute completely covered, e. g. *State ex rel. O'Donnel v. Tuckinger* (1937), 211 Ind. 361, 7 N. E. (2d) 182. This is apparently merely one of the manifestations of the over-riding rule of statutory construction that the intent of the legislature should be ascertained and followed. Similar to this rule is the rule that a special statute enacted subsequent to a general statute supersedes the general statute to the extent of any conflict. See *Western and Southern Indemnity Co. v. Cromer* (1937), 104 Ind. App. 219, 10 N. E. (2d) 440.

The second reason which might lead to this conclusion is that Sec. 14 of the 1937 act specifically provides: "All laws or parts of laws, in conflict herewith are hereby repealed."

A repeal clause of a statute, like any other provision, is subject to the rules of statutory construction and the intent of the legislature will prevail. See *State ex rel. Milligan v. Ritter* (1943), 221 Ind. 456, 48 N. E. (2d) 993, and *Indianapolis Union Railroad Company v. Waddington* (1907), 169 Ind. 448, 82 N. E. 1030. It might be said that the only statute which could possibly be considered to be in conflict with the

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1937 law would be the 1909 law. However, as previously pointed out, these statutes are not inconsistent. Repeals by implication are not favored and result only when the intention of the legislature is clear and where the later act is so repugnant to and inconsistent with another act that it must necessarily be assumed that the legislature did not intend both acts to stand. E. g. Lake County Department of Public Welfare v. Nichol's Estate (1948), 223 Ind. 467, 62 N. E. (2d) 156.

Thus in my opinion, a third class city may organize a park board pursuant to Chapter 58, Acts of 1909.

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### OFFICIAL OPINION NO. 26

April 23, 1953.

Hon. Robert D. Harris,  
State Representative,  
R. R. No. 6  
Kokomo, Indiana.

Dear Sir:

Your letter requesting an official opinion has been received and reads as follows:

"I have been questioned as to the legality of a member of the Kokomo High School faculty serving in the House of Representatives.

"As a member of the House, he votes on appropriations to raise his own salary and likewise on all other school matters. He also receives salaries from two state supported agencies, schools and legislature, which comes from the Auditor of State.

"For example, if one school teacher can serve in the legislature and appropriate their own budget, suppose that every member were a school teacher, they could appropriate any amount of money and raise their own salaries to any amount they might desire.

"I would also like to have an opinion as to the legality of a school principal serving on the City Council. The City Council appropriates all school money. Can this man legally serve in this capacity?"