Williams v. City of Michigan City (1934), 100 Ind. App. 136, 192 N. E. 103;

Cain v. Stoley Manufacturing Co. (1933), 97 Ind. App. 235, 186 N. E. 265;

The State of Indiana v. Mutual Life Insurance Company of New York (1910), 175 Ind. 59, 93 N. E. 213, 42 L. R. A. (N. S.) 256.

Rule No. 1 of 2 Health and Safety Rules, *supra,* being susceptible of only one construction, it is my opinion that a factory, where processes produce toxic dusts or fumes, cannot adopt the use of a canteen service for its employees, whereby said employees are forced to eat at the machines or in the factory area, but must provide a lunch room or make available locker rooms, separate from the workroom area which comply with said rule.

OFFICIAL OPINION NO. 111

December 16, 1953.

Hon. C. Wendell Martin,
State Senator,
1356 Consolidated Building,
Indianapolis 4, Indiana.

Dear Senator Martin:

I have your request for an official opinion which is as follows:

> "May I please have an official opinion of your department in regard to the legality of placing advertising matter on parking meter posts in various cities and towns in the State of Indiana.
>
> "The particular signs which I have in question are 6 by 8 inches, made of one-fourth inch masonite, with beveled and rounded edges and are secured by a bracket below the head of the parking meter on the meter post.
>
> "The signs are mounted in a triangular arrangement with the sign facing the street parallel to the curb and they do not project beyond the curb."

It is well established in this state that a municipal corporation is a subordinate branch of the state and possesses only those powers expressly granted by the legislature, those necessarily or fairly implied in or incident to powers expressly granted, and those indispensable to the declared purposes and object of the municipality. City of Huntington *et al.* v. Northern Indiana Power Company (1937), 211 Ind. 502, 519, 5 N. E. (2d) 889.

It is equally well established, however, that municipalities may legally pass "Parking Meter Ordinances" and may own, maintain and operate parking meters on their streets by virtue of said ordinances. See Andrews *et al.* v. City of Marion *et al.* (1943), 221 Ind. 422, 47 N. E. (2d) 968; Greenwood v. City of Washington (1952), 230 Ind. 375, 102 N. E. (2d) 642.

In addition to this, it has generally been held that, within constitutional limitations and provided public use is not unreasonably interfered with, the legislature may authorize a private use of the streets and may permit structures in the street for business convenience that, in the absence of such authority, would be considered obstructions or nuisances. Where acting under constitutional or delegated legislative authorization, a municipality may grant a private use of its streets, unless such private use would unreasonably interfere with public use.

See 44 C. J. "Municipal Corporations," Section 3782.

It is also a general rule that:

> "* * * a municipality in its discretion may authorize its property to be used incidentally for a purpose other than that for which it is primarily purchased or constructed, if the use for incidental purposes does not interfere with the use for the primary purpose."

See 43 C. J. "Municipal Corporations," Section 2098, p. 1342.

An examination of Indiana statutes granting certain powers to municipal corporations discloses the following:

> "Every city and town, except when otherwise provided by law, shall have *exclusive power* over the

streets, alleys, water-courses, sewers, drains, bridges and public grounds within such city or town, * * *." (Our emphasis.)

Sec. 267, Ch. 129, Acts of 1905; Burns' Indiana Statutes Annotated (1950 Repl.), Section 48-503.

Section 269 of the above named Act, as found in Burns' Indiana Statutes Annotated (1950 Repl.), Section 48-505 provides that:

"Every city and town shall have exclusive power, by ordinance, to control and care for its streets, alleys and other public places, and to prevent the obstruction or encumbrance of any such street, alley or other public place, so as to impede the free use of the same for its proper purposes, and to prevent any person from going upon any sidewalk with any vehicle or animal, except in the necessary act of crossing."

Section 53 of this Act, as found in Burns' Indiana Statutes Annotated (1950 Repl.), Section 48-1407 further provides in part, that:

"The common council of every city shall have power to enact ordinances for the following purposes:

Thirty-first. "* * * To regulate the use of sidewalks * * * *To regulate and prevent the use of streets, sidewalks* and public places for *signs*, sign-posts, awnings, posts, poles, horse-troughs, scales, steps, railings, entrances or racks; *or for posting hand-bills and advertisements.* * * *" (Our emphasis.)

This statute has been construed in City of Indianapolis *et al.* v. Central Amusement Company *et al.* (1918), 187 Ind. 387, 119 N. E. 481. In that case the owners of a theater asserted the right to erect a canopy or awning over a sidewalk in front of a moving picture theater pursuant to Section 106 of the Indianapolis Building Ordinance. Said building ordinance provided that "canvas awnings of the folding or hinged class or metal awning may be erected beyond the building line when the same are not less than eight feet above the sidewalk." It was contended in this case that the building ordinance was

invalid as not within the power of the common council to enact, if it was to be construed as authorizing the construction of the awning in question. The court held on page 390 of the opinion that:

> "* * * we see no merit in this contention. Clause 31 of Section 8655, Burns 1914, Acts 1905, page 246, expressly authorizes the enactment of municipal ordinances concerning the use of streets and sidewalks and for the regulation of signs, posts, awnings and other structures in, over, or under the same, and section 106, *supra,* clearly represents a valid exercise of that power."

The meaning of the word "regulate" has been considered by the Supreme Court of Indiana several times and it has generally been held that:

> "The primary meaning of the word 'regulate' is to lay down the rule by which a thing shall be done." The State v. Lowry and Lewis v. The State (1905), 166 Ind. 372, 389, 77 N. E. 728.
>
> "To regulate is to direct by rule or restriction." Kraus v. Lehman *et al.* (1908), 170 Ind. 408, 416, 83 N. E. 714; Board of Commissioners of Newton County v. State, *ex rel.* Bringham (1904), 161 Ind. 616, 69 N. E. 442."

In the case of Duckwall and Others v. The City of New Albany (1865), 25 Ind. 283, the court had before it a question as to the validity of a city ordinance which declared that it was unlawful for any person to maintain a public ferry across the Ohio river to or from any point within the city limits, without first obtaining a license from the common council. In holding the ordinance invalid, the court said at pp. 284-285 of its opinion:

> "The validity of the city ordinance depends upon the power conferred upon the city by the 33d section of the act to provide for the incorporation of cities, &c. 1 G. & H. 223. That section declares that the common council of a city shall have power to regulate ferries across streams passing through or bordering upon the corporate limits of such city, designate the kind of

boats to be used, the time and place of landing, and the rates of ferriage. The meaning of the word 'regulate,' as ordinarily used, is 'to subject to rules or restrictions.' Webster's Dic. Or. as Worcester defines it, 'to adjust by rules or method, to direct, to put in good order, to dispose, to rule, to govern.' The meaning proper to be given to the word in the section cited, may be determined somewhat by its use in other sections. From that use, we may determine whether the power to regulate includes the power to prohibit unless authorized by a license from the city authorities.

"By section 35, the common council have power to regulate or prohibit the use of hand organs, or instruments of an annoying character, in the streets. To prevent or regulate the use of firearms. To direct the location of markets, and to regulate the same. To regulate the use of coaches, &c., to or from points within the city, for hire or pay. To regulate all inns, taverns, or other places used or kept for public entertainment; also, all shops or other places kept for the sale of articles to be used in and upon the premises. To regulate the time and place of bathing in the rivers or other public waters of said cities. To regulate the ringing of bells and crying of goods, and to restrain hawking and peddling. To establish and regulate public pounds. To regulate the management of all public property, markets and market spaces, and sales of meat, fish and vegetables; to prevent, by ordinance, the offense of regrating and forestalling. To regulate and protect fire engines, &c. To regulate the selling, weighing and measuring of hay, wood, coal and other articles. To establish and construct wharves, docks, piers and basins, and to regulate landing places and fix the rates of landing, wharfage and dockage. To regulate or prohibit runners at wharves, steamboat landings and railroad depots. To regulate the speed of horses, carriages &c. *It thus appears that the words 'to regulate,' are used in the city charter not as the synonym, but rather as the correlative of the words 'to prohibit,' 'to prevent,' 'to restrain,' 'to establish,' 'to construct,' or 'to direct the location of'* * * *." (Our emphasis.)

I have examined the various other provisions of Section 53 of Chapter 129 of the Acts of 1905, *supra,* granting the city the power to regulate and prevent the use of the streets and sidewalks for signs, sign-posts, posting handbills, and advertising, and I find a marked degree of similarity between that statute and the statute under consideration in Duckwall v. City of New Albany, *supra.* I am therefore of the opinion that the word "regulate" is used not as the synonym, but as the correlative of the word "prevent" and that in regard to advertising and signs upon the streets and sidewalks the city has two distinct powers, viz: the power to regulate, and the power to prevent.

In this connection I would call your attention to the case of Gordon v. City of Indianapolis (1932), 204 Ind. 79, 183 N. E. 124, in which there was brought into question the validity of a city ordinance regulating and prohibiting the sale of certain classes of merchandise at public auction. The court said, at p. 82 of the opinion:

> "The word 'regulate,' strictly interpreted, is not synonymous with 'prohibit,' in that it implies the continued existence of the subject-matter to be regulated; but as it is used in the statute to which we have referred, and the law as generally declared by the courts, it may be defined as authority reasonably to control or restrain by invoking the conditions under which sales of property at auction may be made."

It would appear, therefore, that the use of the word "regulate" in Clause 31 of Section 53 of Chapter 129 of the Acts of 1905, *supra,* would imply the continued existence of the subject of the clause; to-wit: advertising on sidewalks, and that a city has the power to regulate the same, or in the alternative, to prohibit.

Therefore, I believe that a municipality has the power to regulate the use of the sidewalks for advertising so long as such use is consistent with the use for which the sidewalk was dedicated, providing however that there are no state statutes prohibiting the same.

In this connection I would call your attention to certain state statutes which are as follows:

Section 21 of Chapter 18 of the Acts of 1933, as amended, Burns' Indiana Statutes Annotated (1949 Repl.), Section 36-121 relates to state highways and provides, in part, as follows:

> "* * * It shall be unlawful for any person to construct or maintain any sign or advertising device of any character within one hundred (100) feet of the right of way of such highway, and which obstructs the view of such highway of a person travelling such highway for a distance of five hundred (500) feet or less from such sign or device as he approaches the same. * * *"

Section 37 of Chapter 48 of the Acts of 1939, Burns' Indiana Statutes Annotated (1952 Repl.), Section 47-1908 provides in part as follows:

> "(a) No person shall place, maintain or display upon or in view of any highway any unauthorized sign, signal, marking or device which purports to be or is an imitation of or resembles an official traffic control device or railroad sign or signal, or which attempts to direct the movement of traffic, or which hides from view or interferes with the effectiveness of any official traffic control device or any railroad sign or signal, and no person shall place or maintain, nor shall any public authority permit, upon any highway any traffic sign or signal bearing thereon any commercial advertising. This shall not be deemed to prohibit the erection upon private property adjacent to highways of signs giving useful directional information and of a type that cannot be mistaken for official signs.
>
> "(b) No person shall place, maintain or display any advertising sign, signal or device on or over the roadway of any highway.
>
> "(c) No person shall place, maintain or display any advertising sign, signal or device on any highway in cities between the curb and sidewalk and, in case curb and sidewalk join, no person shall place, maintain or display on the sidewalk any advertising sign, signal or

device closer than ten (10) feet from the curb line, and overhanging signs shall not overhang the curb.

"(e) No person shall place, maintain or display any advertising sign or device of any permanent or semi-permanent character on any highway right-of-way outside or inside the corporate limits of any incorporated city or town."

Chapter 18 of the Acts of 1933, as amended, *supra,* has been discussed by the Appellate Court of Indiana in Town of Argos v. Harley *et al.* (1944), 114 Ind. App. 290, 49 N. E. (2d) 552, wherein the question was presented as to whether the State Highway Commission had assumed jurisdiction of a city street which had been taken over by the State Highway Commission so as to relieve the city of liability for defects in sidewalks adjacent to such highway.

The court held that the use of the word "street" as used in Section 16 of the Act was confined to that portion of the roadway devoted to the use of vehicular traffic and said at p. 301:

"* * * Such a construction will leave undisturbed that great body of the law, as laid down by our statutes and their judicial interpretation, pertaining to the powers of towns over their sidewalks and their liabilities to the public in reference thereto * * * such a construction will preserve and protect home rule over a matter purely local in character and in which the State at large has no interest. Responsibility will be placed where it logically belongs and where it has always been our theory of government to keep it. A duty will be imposed on local government that local government is best able to discharge to the interests of its citizens."

The court also held, at page 297 of the opinion, that:

"* * * the power of the state to delegate control over streets to the municipalities in which they lie necessarily carries with it the power to withdraw such control any time the state deems it to the interest of the public to do so."

You will note that Section 37 of Chapter 48 of the Acts of 1939, *supra,* in sub-section (c) makes specific reference to curbs and sidewalks adjacent to highways. This section prohibits the placing of any advertising sign on any highway in cities between the curb and sidewalk and, in case the curb and sidewalk join, an advertising sign cannot be placed on the sidewalk within ten feet from the curb line. Since this statute makes specific reference to curbs and sidewalks I am of the opinion that the reasoning in the Town of Argos case, *supra,* is not applicable and that the legislature has withdrawn control of cities over advertising on sidewalks adjacent to state highways, to the extent stated in Section 37 of Chapter 48 of the Acts of 1939, *supra.*

Some phases of the question which you have submitted to me involve a determination of fact which this office is unable to make, for instance whether the sign would obstruct the view of the highway and so forth.

Therefore, my answer to your question is as follows:

(1) Cities are empowered to regulate advertising on sidewalks within their corporate limits which sidewalks are adjacent to streets that are not state highways, providing the same is consistent with the use for which the sidewalk was dedicated and does not unreasonably interfere with the free use of the sidewalk for the purposes for which it was intended.

(2) In cities, advertising signs on sidewalks adjacent to highways, as defined by Section 14 of Chapter 48, Acts 1939, Burns' Indiana Statutes Annotated (1952 Repl.), Section 47-1814, where curb and sidewalk do not join may be placed on the sidewalk, but may not be placed between the curb and the sidewalk. If the curb and sidewalk join, advertising signs on sidewalks must be ten feet from the curb line pursuant to Section 37, Chapter 48 of the Acts of 1939, *supra,* and overhanging signs must not overhang the curb.

(3) Advertising signs of a permanent or semi-permanent character may not be placed on a state highway right-of-way inside the corporate limits of a city.