Mr. Otto K. Jensen,
State Examiner,
State Board of Accounts,
State House,
Indianapolis 4, Indiana.

Dear Sir:

I have your request for an official opinion in which you ask the following questions concerning cities with a population of less than 2,000:

1. Under what statute will a town having a population of 1,914 proceed to convert to a fifth class city?
2. If the town cannot become a fifth class city under what statute will the town proceed to become a city?
3. If there are cities designated "unclassified", by what statutes are they given power to operate their city government?

In order to understand the problem, it is necessary to review the various Acts providing for the incorporation of cities. Prior to 1852, all cities were incorporated by Special Charters and there was no General Incorporation Act for cities. Section 13 of Article 11 of the 1852 Constitution provides that all corporations shall be authorized by general statute and not by special law. Since 1852, cities have been incorporated under general statutes. The first such statute is found in 1 R. S. 1852, Chapter 17. Section 77 of that Act provided that any city already chartered could, by action of the common counsel, accept the provisions of that Act. Section 1 of Chapter 33 of the Acts of 1857 repealed the 1852 Act; however, Section 89 of that Act provided that cities incorporated under the 1852 Act should automatically come under the 1857 Act. Chapter 1 of the Acts of 1865 repealed the 1857 Act and Section 94 of that Act reads as follows:

"Cities that have heretofore availed themselves of the provisions of the general law of this State for the incorporation of cities, shall be and remain municipal
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corporations under this act, and inasmuch as it is important that the cities incorporated in this State, should be enabled, at the earliest possible period, to enjoy and avail themselves of the provisions of this act, it is hereby declared that an emergency exists, requiring the immediate taking effect of this act, and the same shall, therefore, be in force from and after its passage."

Although the 1865 Act does not appear ever to have been formally repealed, it appears to have been largely superseded. Since that time there have been a number of general acts for the incorporation of cities and Acts providing methods by which towns could become cities. In 1933, Chapter 33 provided that all cities with a population of less than 3,000 should become towns; however, Chapter 97 of the Acts of 1935 made all cities which had become towns by the provisions of the 1933 Act, cities again. All of the Acts for incorporation of cities from 1852 to date have required that the municipality have a minimum population which has varied from 2,000 to 3,000. Thus, there are two sources of cities with a population of less than 2,000, i.e. cities incorporated by Special Act prior to 1852 and cities which have met population qualifications in the past but whose population has dwindled to an amount less than the minimum population now required.

There is one act which provides for the election of a town to become a city without specifically providing a minimum population. That act is Chapter 240 of the Acts of 1935. The terminology of that Act is consistent in referring to such towns becoming a city of the Fifth Class. In view of the fact that the 1935 session of the legislature passed an act concerning the population requirements of Fifth Class cities, namely Chapter 97 of the Acts of that year which has been previously referred to, and in view of the fact it has been unanimously held that acts should be construed in pari materia, particularly when passed by the same session of the legislature, it is my opinion that Chapter 240 of the Acts of 1935 must be construed to require towns to have a population of at least 2,000 before becoming a city. Thus, in answer to your questions, it is now impossible for a town to become a city unless it has a population of 2,000 or more. Cities now existing with populations of less than 2,000 will...
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vary as to the authority under which they operate and such authority will have to be determined from the manner in which they acquired existence.

If you have in mind a particular town and will furnish detailed information as to when it was organized and under what statute and all factors as to its organization, we will be able to give you more definite opinion.