Each of the foregoing answers is based upon the assumption that these people have acquired a legal residence in the area now comprising the Federal Penitentiary, at Terre Haute, Indiana, and the Vigo Ordnance Plant and that they are not temporarily living there with a legal residence at some other place. If their legal residence is in some other place in this State the ordinary laws regarding transfers of pupils would control.

OFFICIAL OPINION NO. 67

November 9, 1948.

Mr. Lefler R. Anderson, Chairman,
Indiana Alcoholic Beverage Commission,
201 Illinois Building,
Indianapolis 9, Indiana.

Dear Sir:

I am in receipt of your request of October 15, 1948, asking my official opinion as follows:

"Section 4, Chapter 148 of the Acts of 1947, on page 459 states the following:

"'For the purpose of this section the term "residential district" is hereby defined to mean and include an area composed of all territory within a radius of five hundred feet of the premises described in the application being considered for a permit and in which area seventy-five per cent or more of the territory is used for residential purposes as opposed to commercial, business or manufacturing purposes.'

"Considering the foregoing, the Commission requests an official opinion on the following questions:

"1. What territory, if any, within the five hundred feet radius may be excluded from the computation?

"2. If, as the statute directs, all territory within the five hundred feet radius must be included in the computation, would streets and alleys be considered residential or commercial and business?"
"3. If the area, or a part of it, within the five hundred feet radius has been zoned for business use by the municipality, would not all of such area so zoned and not in actual residential use, especially the streets and alleys, be considered business or commercial for the purposes of the computation?"

You will note from the above statute that it defines the entire area within a radius of five hundred feet of the permit premises as a residential district. However the determination as to whether the district is residential or not is made by a comparison only of that part used for residential purposes as opposed to commercial, business or manufacturing purposes. Therefore, only that part of the district which is actually used for residential, commercial, business or manufacturing purposes is considered in determining the ratio in order to decide whether the entire area is to be denominated a residential district. All territory not actually used for residential, business, commercial or manufacturing purposes is excluded for purposes of determining the ratio.

In Mitchell v. Melts (1942), 220 N. C. 693, 800, 18 S. E. (2d) 406, 411, the statute for purposes of speed limits defined a residence district as, "The territory contiguous to a highway not comprising a business district, where seventy-five per cent or more of the frontage thereon for a distance of three hundred (300) feet or more is mainly occupied by dwellings, or by dwellings and buildings in use for business purposes." The court held that any measurement which included a street intersection would be improper.

In Wallace v. Kramer (1941), 296 Mich. 680, 690-692, 296 N. W. 838, 842, the court held that the frontage to be considered under a similar definition was that available for the erection of buildings and that cross streets, sidewalks and parkways between the sidewalks and curbs should not be included in the computation.

The purpose for which the property in the district may be zoned or intended is not determinative in computing the ratio. The statute bases the ratio entirely upon the use to which the land is presently put.

I am, therefore, of the opinion that in determining whether seventy-five per cent of the territory within five hundred feet
of the permit premises is used for residential purposes as opposed to commercial, business or industrial purposes you should exclude religious and non-profit educational properties, vacant lots, streets, alleys and parkways between streets. You would include on the one hand all property which is actually used for residential purposes, consisting of all lots and parts of lots upon which either single or multiple residences are located and all land incident to such residential occupancy. In the other part of the ratio all property in use for commercial, business or industrial purposes, including land incidental to such purposes as parking lots maintained for the benefit of the business or as commercial ventures. If upon a comparison of these two sides of the ratio, the residential property equals or exceeds seventy-five per cent then the entire area is a residential district.

Specifically answering your questions:

(1) It occurs to me that this question is perhaps a little too broad to warrant a categorical answer. There may be a fact situation arising in the future which we do not anticipate which would necessitate a revision of any specific answers given. However, at the beginning of this opinion it was pointed out that all territory which is not actually used for the purposes enumerated in the statute or incidental to those purposes, should be excluded. That would, of course, exclude vacant lots, property where the use is neither residential nor commercial such as religious, non-profit, educational uses, streets, alleys, parks and parkways. Other situations may appear in the future which will require exclusion.

(2) I can say definitely, however, that streets and alleys should be excluded entirely, not being used for either residential or commercial purposes.

(3) I am further of the opinion that the question of zoning has very little importance since a property zoned for business might actually be used for residential purposes. The test is actual use and not intended use. Thus vacant lots zoned for business would be treated as any other vacant lots and be excluded from the computation until such time as they are devoted to either residential or commercial uses.