he is such officer. If the statute has provided that the City Civil Engineer is *ex officio* a member of the Plan Commission and by virtue of that office its Secretary, I think the prohibition in Section 21 *supra* would extend to such a case. However, he is not Secretary of the Commission by virtue of his office, that duty being imposed upon him by the appointment of the Commission only. He could refuse the appointment and the Commission would thereupon be required to employ someone else at a salary fixed by them. If, however, they choose to employ the City Civil Engineer, (and the duties required of him as Secretary of the Commission are not incompatible with his other duties) it seems to me that he would be entitled to receive compensation for his services in such amount as is fixed by the Commission under the statute. Your question is answered in the affirmative."

It is, therefore, my opinion that your second question should be answered in the affirmative.

Your third question is answered by the above discussion relative to the effect of the authority in the common council to pay additional compensation to the city clerk where the city owns and operates one or more public utilities. However, the payment of such additional salary is discretionary with the council.

City of Lebanon v. Dale (1942), 113 Ind. App. 173.

OFFICIAL OPINION NO. 25

May 13, 1947.

Mr. Carter Bowser,
Fire Marshal,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of April 15, 1947, in which you ask my opinion relative to the various governmental respon-

sibilities involved in connection with the following statement of facts:

A service station with a curb installation was in continuous operation for fourteen years. The tenant's lease expired April 1, 1947 and on March 25, the tenant closed the station and sanded and plugged the tanks. On March 26, 1947 application was filed with you by the owner of the adjoining real estate asking permission to continue the operation of this service station. The file and papers submitted show that the station in question is located on East Spring Street, New Albany, which is a state highway. That at this point the highway is eighty feet wide, of which a strip fifty feet wide is paved leaving fifteen feet on each side of the curb which is occupied by a grass plot next to the curb and a sidewalk between the grass and the property line. At the place where the curb installation is located the entire fifteen feet is concrete. The pumps are located near the curb and the tanks are installed underground and entirely within the fifteen foot strip between the curb and the property line and, therefore, the entire installation is in the highway and not on the property of the person applying for a permit to continue to operate the station. The written application above referred to is entitled "Application for approval for the Reopening of a Gasoline Service Station" and omitting signatures and jurat is as follows:

"Owner *Harry Montgomery and Agnes Montgomery*
Address *1841 East Spring Street*

LOCATION OF STATION

County *Floyd* City *New Albany*
Street or Streets *1841 East Spring Street*
Highway Number *62*

PUMP AND TANK LOCATION

Are pumps ten feet or more to private or public property lines, or the State Highway right-of-way line?———

Are pumps located 85 feet or more from schools, hospitals, churches, theatres, places of public assembly and hotels? *Yes*

Type of construction of service station building? *Two story frame building*

Is there a basement beneath the service station building? *Yes*

Is there a greasing pit? *No*

Number of pumps *3* Electric *Yes* Manual ——

Number of tanks *3* Capacity *500 gallons each*

Distance of tanks from private property *Ten feet* Public property———

Highway right-of-way line *Tanks located on curb.*

TANKS

Will you comply with the code requirements? *Yes* Are tanks Underwriters' labeled? *Yes* (if not, approval will be withheld until manufacturer's certificate has been filed showing equivalent specifications.) Mechanical installation made by *Installation made a number of years ago and Mechanical installation unknown*

Electrical installation made by *Unknown*

I hereby certify that in the construction and operation of this service station, all the rules and regulations of the Fire Marshal Department will be strictly observed and obeyed."

The file shows that under date of March 26, 1947 you addressed the following letter to the applicants:

"Re: Service Station,
1841 East Spring Street,
New Albany, Floyd County.

Dear Sir and Madam:

"Your application to continue to operate a service station at the above address, which is a curb installation, is on file in this office and permission is hereby

granted to continue this operation and to replace the old pumps that are now in use and to repair such other parts of equipment as is necessary to properly maintain this station with proper safety measures.

"This station does not comply with the regulations as now in vogue, but since it was in operation prior to the adoption of these regulations, it may continue in operation with such repairs and replacements as may be necessary from time to time.

"This shall serve as a tentative permit for you to continue operation with the understanding that such repairs and replacements of equipment shall be approved equipment and the installation from a mechanical standpoint must be in accordance with the rules and regulations now in force, a copy of which is hereby attached.

Very truly yours,

Carter Bowser
State Fire Marshal"

I am advised that the applicant is not proposing to continue the use of the old equipment or installation, but has made an entirely new installation of all new equipment.

The following rules of the State Fire Marshal became effective February 21, 1946:

"Section 209: Pumps. * * *

"(c) Pumps located in any portion of a public street are held to be unlawful. No curb pump for the dispensing of Class 1, 2 or 3 liquids shall be installed at or along the edge of or on any sidewalk, street or highway. All pumps must be at least 10 feet from all property lines, either public or private. Measurements to be made from the nearest edge of pump."

"Section 218: Approval of Plans. (a) Before any new construction, addition, remodeling or reopening of any closed station is undertaken, drawings or blue prints made to scale shall be submitted in duplicate to the State Fire Marshal for his approval.

> Drawings shall carry the name of the person, firm or company proposing the installation, the location with reference to city, village or town, and shall in addition show the following:
>
> "* * *
>
> "(1) Any service station discontinuing operation for a period of thirty (30) consecutive days shall be reinspected by the State Fire Marshal and his approval given in writing before said service station is to begin operation."

Said rules also provide under Part I as follows:

> "The State Fire Marshal shall have authority to grant exceptions or variances of the provisions of these rules and regulations upon application in writing by the owner or lessee, or his duly authorized agent, when there are practical difficulties in the way of carrying out the strict letter of these rules and regulations in order that the spirit of these rules and regulations shall be observed and public safety secured and substantial justice done. The State Fire Marshal may grant exceptions or variances in which event the decision of the State Fire Marshal thereon shall be entered upon the records of the Department and a signed copy shall be furnished the applicant."

It has been held that the operation of a gas filling or service station constitutes a private use.

In the case of Rowe v. City of Cincinnati, *et al.* (1927), (Ohio) 159 N. E. 492, the lessee of contiguous ground, with the knowledge of the city and officials, installed gasoline pumps on the sidewalk in front of said premises. The city adopted an ordinance requiring the removal of all pumps and equipment from the street or sidewalk. The court said:

> "The permit did not give the plaintiff any vested right in the street, and, when his permit was revoked, the city had a right to order the pumps removed at any time. He did not have any property right in the street, and, therefore, there was no taking of property without due process of law. This is a penal ordi-

nance and the city had the right to arrest and fine him for a violation thereof. All questions as to the validity of the ordinance and the rights the plaintiff had in the use of the street could be raised by him, in an action at law.

"The law is that, when a legal remedy is given, equity will not interfere by injunction, but the rights of the parties must be worked out in the law action.

"Counsel for plaintiff, in oral argument, claimed that these pumps served a public purpose, in that the public could purchase gasoline at the curb, instead of driving over the sidewalk into private property.

" 'The gasoline tanks, while no doubt useful to many persons using the public streets, constitute a non-essential and private use—a use for the gain of the owner of the stand, and not a use in a public or even quasi public capacity.' Kahabka v. Schwab, 205 App. Div. 368, 199 N. Y. S. 551.

"The use of the sidewalk, by the owner of an abutting lot is governed by the statute. Section 12639, General Code, makes it an offense, punishable by fine and imprisonment, to set any article to use or let for profit on any avenue, walk, or sidewalk, constructed according to law. A municipality, under this statute, would not have any authority to grant a permit to use an avenue, walk, or sidewalk of the city for private business purposes, and, where such articles as gasoline pumps are on the sidewalk, the municipality violates section 3714, General Code, in not causing them to be removed at once, and in not keeping the street open, in repair, and free from nuisance.

"It follows that the permit to erect these gasoline pumps in the sidewalk did not vest any property right in the plaintiff. See Wabash R. Co. v. Defiance, 52 Ohio St. 262, 40 N. E. 89; Heddleston v. Hendricks, 52 Ohio St. 460, 40 N. E. 408."

In the case of City of Tell City *et al.* v. Bielefield (1898), 20 Ind. App. 1 the appellee had obtained a license from the city to erect a set of scales in the street to be used for

public and private purposes and did so erect such scales. The marshal and the street commissioner then took down and removed the scales over the protest of the appellee. The court upheld the action of the marshal and said at page 4:

> "'It is true that under clauses 11, 29, and 33 of section 3541, Burns' R. S. 1894 (3106 R. S. 1881), cities have power to establish and regulate public markets. But this can give no right to establish such markets in the streets of the city.' Also see Simms v. City of Frankfort, 79 Ind. 447. Subdivision 31 of said section 3541, Burns' R. S. 1894, which give to cities the right to regulate the selling, weighing, and measuring of hay, wood, coal, and other articles, could under no circumstances be held to extend to a city the right to obstruct a street by the establishment of scales thereon, nor could it confer the right upon the city to license any one to place any obstruction on the highways of the city. Appellee having no legal right to erect the scales in appellant's streets, the removal of the same by appellant, if done in a proper and careful manner, cannot be complained of. * * *"

In the case of City of Richmond v. Smith (1897), 148 Ind. 294, with the permission of the city, persons had market stands in the street next to the curb. The court held that the statute giving the city the power to establish and regulate public markets gave it no right to establish such markets in the streets of the city. The court said at page 297:

> "It is not necessary as we think, to give reasons or cite authority to show that such a use of a public street as contemplated in the case before us, cannot be authorized. * * *"

In the case of Hines, Mayor, *et al.* v. Jenkins *et al* (1929), 237 Ky. 676, the court upheld the right of the city to compel removal of curb gasoline pumps and said at page 677:

> "The owners of these pumps are exercising rather extraordinary privileges; they are engaging in private business in the public streets and are using public property for their private purposes. What we say

> here is not to be confused with what we have said about the regulation of gasoline filling stations conducted on private property, often referred to as 'drive-in,' stations. These pumps installed by Jenkins *et al.* are within the street itself."

It is to be noted that the court in the above case clearly makes a distinction between curb pumps installed in the highway and drive-in stations on the private ground of the operator.

In the case of Mayor and Aldermen of Savannah v. Markowitz (1923), 155 Ga. 870, the court said at page 873:

> "In the case of Laing v. Americus, 86 Ga. 756 (13 S. E. 107), this court held that 'Without express statutory authority, a municipal government cannot grant to any person the right to erect and maintain in a public street a structure, such as a permanent fish-box, for his private and exclusive use,' In delivering the opinion of the court in that case Bleckley, Chief Justice, said: 'It is not pretended that the municipal government of Americus had any express statutory authority to farm out the public streets to fish dealers or to any one else. Without such authority, they could not grant to any citizen the right to maintain a permanent structure for private use in any of the streets. 2 Dill. Mun. Corp. § 660. Any license, therefore, which the city granted to the plaintiff to occupy the street with his fish-box, was necessarily temporary and revocable. Even if both parties had intended it to be permanent, such intention would be of no effect. So far from there being a cause for complaint that the structure was allowed to stand only fifteen months, it was a matter of indulgence to the plaintiff, and something to which he had no legal right, that it was allowed to be placed there at all. His real grievance is that he made a mistake in supposing that he was securing a right which the city authorities had no power to confer upon him. In dealing with public agents, every person must take notice of the extent of their powers at his peril; and only by gross neglect to inform himself could any one having the requisite

> capacity to deal in fish fall into the error of supposing that he could acquire for his own exclusive use the right to occupy permanently 67 cubic feet of space in a public street. It matters not that a permanent structure for private enjoyment in a street or highway is confined to a part little used, or not used at all; it becomes a nuisance as an encroachment upon the public right. Elliott, Roads & Streets, 477, *et seq.;* Wilbur v. Tobey 16 Pick. 177; Emerson v. Babcock, 66 Iowa 257; The State v. Burdetta, 73 Ind. 185. * * *"

In the case of Reed v. Seattle (1923), 124 Wash. 185, the court said:

> "Nor does the fact that an oiling station is a convenience to the public traveling in automobiles authorize the leasing of a part of the public highway for such a purpose. * * *"

In the case of Kahabka v. Schwab *et al.* (1923), 199 N. Y. Supp. 551 at page 553 the court said:

> "The gasoline tanks, while no doubt useful to many persons using the public streets, constitute a non-essential and private use—a use for the gain of the owner of the stand, and not a use in a public or even *quasi* public capacity. Neither in the provisions of the charter nor any other statute to which our attention has been called have we found authority to authorize the city to divert the public streets to such private use. On this point, Mr. Justice Hubbs said in the Hofeller Case:
>
> " 'It is conceded that a municipality has no right or authority to grant a license for the use of the public streets in an unlawful and illegal way, and that if the news stands in question are unlawful and constitute obstructions it makes no difference whether or not they were authorized by the city of Buffalo or how long the city has permitted them to be so used, for a city holds the streets for the public use of all the people. Shipston v. City of Niagara Falls, 187 App. Div. 424.' "

In the case of Keyser v. The City of Boise (1917), 30 Idaho 440 the court said at page 444:

> "* * * It follows that anyone obtaining a permit from the city, for the private use of a public street, as in this case, takes the same with notice that it is subject to revocation at the will of the city, and, indeed in this view, it matters not whether the use is made in accordance with a permit or without one, the use is merely permissive in either event, and revocable at any time without notice. If the person making such private use of a street goes to expense he does so at his own risk, and he will not be heard to complain that his property is being taken without due process of law.
>
> "The holder of a permit to install an obstruction in a public street or thoroughfare, for a private purpose, acquires no property or contractual right by reason of the issuance to him of such permit, and whenever the city authorities, in their discretion, deem it necessary as a proper police measure, to vacate and revoke such permit, the holder of the same has no alternative, but must comply with the order of revocation. * * *"

See also:

Silvester v. Princeton (1927), N. J. L., 139 Atl. 517-518;

Wood v. Richmond (1927), 148 Va. 400;

Edaburn *et al.* v. City of Creston (1925) 199 Iowa 669-671;

Orrin Realty Corp. v. Addyman, Mayor (1932), 255 N. Y. Supp. 714;

State v. Berdetta (1880), 73 Ind. 185.

It is apparent from the above authorities that the cases arising under zoning ordinances and involving only businesses established on private property prior to the adoption of the zoning ordinance do not apply to private business established or operated in and on the public streets, highways and sidewalks. The above authorities announce the

rule that in the absence of express legislative authority a city cannot give a valid permit to use a public street or sidewalk for a filling station and even where a permit is given it is a mere revocable license. Where there is no such permit it is there at sufferance only.

As to the effect of the fact that the pumps had been on the sidewalk for many years, it was said in McRoberts v. Vogel (1934), 100 Ind. App. 303 at page 309:

> "Paraphrasing what was said in City of Lawrenceburgh v. Wesler (1894), 10 Ind. App. 153, 37 N. E. 956, we say that 'once a highway always a highway,' (which was a maxim of the common law and is the law today) where such highway was established by monuments, unless such highway has been abandoned by correct legal procedure. The control, improvement, and maintenance of the highway are among the functions of the sovereign's officers. The failure of such officers to discharge the duties devolving upon them can not deprive the public of its right to use all such highway nor will the failure to use by the public be treated as an abandonment even if such non-user extended over the entire period covered by the statutes of limitations. Wolfe v. Town of Sullivan (1892), 133 Ind. 331, 32 N. E. 1017; Cheek v. City of Aurora, *supra;* Sims v. City of Frankfort (1881), 79 Ind. 446; Brooks v. Riding, *supra.* Further adopting the language of Ewbank *et al.*, Trustees v. Yellow Cab Company *et al.* (1926), 84 Ind. App. 144, 149 N. E. 647, we conclude it to be the law that the governmental authorities, broad and comprehensive as their powers are, can not devote the highway to private purposes."

I find no legislative authority empowering a city in this state to authorize its streets and sidewalks to be used for the private business of a filling station.

In the case of City of Indianapolis v. Link Realty Co. (1931), 94 Ind. App. 1 at page 13 it is said:

> "A municipal corporation in this state, which, of course, includes its executive, legislative and administrative departments, possesses only such powers as

are expressly granted to it by the Legislature and those powers which are necessarily or fairly implied or incidental to the powers expressly granted and those powers that are essential to the declared objects and purposes of the municipality; and all persons dealing with a municipal corporation are charged with notice of such limited powers and with knowledge that no rights can be acquired by them based upon any act of the municipal authorities where there is a want of power to so act. City of South Bend v. Chicago, etc., R. Co. (1913), 179 Ind. 455, 101 N. E. 628, Ann. Cas. 1915 D 966; Scott v. City of La-Porte (1903), 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; Bartles v. City of Garrett (1929), 89 Ind. App. 349, 166 N. E. 437.

"Section 10341 Burns' 1926 provides that: 'It shall be the duty of the board of public works to have general supervision over the streets, alleys, sewers, public grounds and other property of the city, unless otherwise provided in this act, and to keep the same in repair and good condition,' etc. Section 11186 Burns' 1926, provides that: *'Every city and town, except when otherwise provided by law, shall have exclusive power over the streets . . . within such city or town.' Section 10340 Burns' 1926, cl. 13, confers upon the Board of Public Works the power 'to direct the removal of any or all structures in the streets, alleys or public places of said city and remove the same, at the expense of the person maintaining the same on their (his) failure to make such removal.'* Section 10284 Burns' 1926, cl. 49, among other things, confers upon the common council the power to enact ordinances 'to prohibit the laying of any railroad track across or upon any street, alley or public place without permission first obtained therefor from the department of public works and to provide for the taking up and removing of any track so laid without notice, and charge the expense thereof against the offending person or corporation.' * * *" (Our emphasis).

In Lewis, Eminent Domain (3d ed.) Section 173, it is said:

> "It is a general rule that use of streets cannot be granted for private purposes. * * *"

Section 48-505 Burns' 1933 is as follows:

> "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 48-503 Burns' 1933 provides in part as follows:

> "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, * * *."

Section 48-1902 Burns' 1933 provides in part as follows:

> "The board of public works shall have power:
>
> "* * *
>
> "Thirteenth. To direct the removal of any or all structures in the streets, alleys or public places of said city and remove the same, at the expense of the person maintaining the same, on their failure to make such removal."

Section 2 of Chapter 256 of the Acts of 1937, as amended in 1945 (State Highway Act—Burns' 36-2902, 1945 Supp.) provides in part:

> "* * * Upon the completion of any such street, it shall be the duty of said commission to maintain the roadway of said street so constructed by said commission, including the curbs and gutters, catch basins and inlets, within the limits of such street or high-

way, that form integral parts of such street or highway, and it shall be the duty of such city or town to maintain the sidewalks and grass plats thereof and the connecting drainage facilities therefor. * * *"

Section 113 of Chapter 48 of the Acts of 1939 (Section 47-2127 Burns' 1940 Replacement) provides in part:

> "No person, firm or corporation shall construct any private entrance, driveway, or approach connecting with any highway in the state highway system, or the state maintained route thereof through any incorporated city or town, nor shall any curb along such highway be cut or removed without the written permit of the state highway commission, and then only in accordance with the regulations and requirements of said commission.
>
> "* * *
>
> "Such regulations and requirements may include the minimum distance that gasoline pumps, buildings and other structures, to which such private entrances, driveways or approaches make a connection, may be placed next to the property-line of the state highway, or next to the outside edge of sidewalks along said routes through incorporated cities and towns."

This statute was held valid by the Attorney General. See Ind. O.A.G. 1941, page 405.

I do not find where the State Highway Commission has adopted regulations including the minimum distance that gasoline pumps may be placed next to the property line of a state highway.

The statute relating to the jurisdiction of the State Fire Marshal to make the rules above quoted appears in Section 20-807 Burns' 1933. This section provides in part:

> "For the purpose of preventing fires and fire losses or in the interest of public safety to life and property or safety to adjoining property from fire or explosion, and for nothing else, and to the extent of such pre-

vention and safety and no farther, the state fire marshal shall, not inconsistent with any existing law or laws of the state of Indiana, make and promulgate rules and regulations for the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of highly inflammable materials and rubbish, gunpowder, dynamite, crude petroleum or any of its products, explosives or inflammable fluids or compounds, * * * and all storage of oil or other fuels therefor or in connection therewith; and as to or in connection with any other buildings, or any other property, real or personal, or places or things, stationary or movable, finished or unfinished, occupied or unoccupied, or conditions as, in his opinion, are necessary for the public safety to life or property or safety to adjoining property from fire or explosion. * * *"

Based upon the foregoing statutes and authorities, it is my opinion:

1. That the City of New Albany has jurisdiction over the part of the highway between the curb and the property line and the power to direct the removal of the structure in question.

2. That no question of taking property without due process or compensation is involved as it is a private business and no right to use the public highway for a private business can be given, especially in the absence of legislative enactment, and I find no such legislative enactment.

3. The "tentative permit" of the Fire Marshal, above quoted, only has the legal effect of saying that so far as the Fire Marshal is concerned it is not a hazard to the public safety or adjoining property from fire or explosion and does not give the applicant a legal right to use that part of the public highway for a private business. The question of the ownership of the location or the right as between the applicant and the owner or one having control was not and could not be determined by the Fire Marshal. That question is left between the applicant and the owner or one having control thereover, in this case, the city. That Rule 209: (c) of the Fire Marshal is valid, that if the "tentative per-

mit" be regarded as a variance, its effect is only as above stated.

4. No opinion is expressed upon the effect of a rule of the State Highway Commission if one were adopted under Section 20-807 Burns', above quoted, as none has been found, but see:

Hollywood Theatre Corporation v. City of Indianapolis *et al.* (1940), 218 Ind. 556.

OFFICIAL OPINION NO. 26

May 15, 1947.

Mr. Ross Teckemeyer,
Executive Secretary,
Public Employes' Retirement Fund,
307 Board of Trade Building,
Indianapolis 4, Indiana.

Dear Mr. Teckemeyer:

I am in receipt of your request for an official opinion as follows:

> "In your official opinion can an agricultural agent, employed pursuant to an act of the Legislature, be eligible for membership in the Public Employes' Retirement Fund and also voluntarily participate in the Federal Civil Service Pension Plan?
>
> "If your answer to the foregoing question is in the negative, can a county agricultural agent participate in the Public Employes' Retirement Fund if he does not choose to participate in the Federal Civil Service Pension Plan, or since the Federal Civil Service Pension Plan is available to the agricultural agent, is he prohibited from participation in the Public Employes' Retirement Fund?"

The office of the county agricultural agent is established by the Acts of 1913, Chapter 24, Section 12, page 37, as amended, by the Acts of 1937, Chapter 224, Section 1, page