(1855), 7 Ind. 172, 173; Walker v. Dunham (1861), 17 Ind. 483, 485; Yeager v. Board, etc. (1884), 95 Ind. 427, 430, and cases cited; Bynum v. Board, etc. (1885), 100 Ind. 90, 91; Sudbury v. Board, etc. (1901), 157 Ind. 446, 456.

"As was said in Yeager v. Board, etc., *supra*, at page 430: 'The person who accepts and assumes to act in the office takes it cum onere, not only of existing duties, but subject to such as may thereafter be legally imposed, and subject to such rights and liabilities as to compensation as the legislature has (declared) or may declare. If the legislature imposes burdensome or unremunerative duties, he must perform (them) as required or resign the office.' "

From the foregoing I am of the opinion there is no law authorizing payment of compensation to a township trustee for his services as an ex officio member of the board of trustees of the city in the operation of a joint city and township school, except the regular salary or per diem authorized by law for the township trustee.

OFFICIAL OPINION NO. 95

November 29, 1946.

Hon. John H. Nigh, Director,
Indiana Department of Conservation,
140 North Senate Avenue,
Indianapolis, Indiana.

Dear Mr. Nigh:

A letter of recent date from your predecessor asks for an official opinion upon the following statement of fact:

Recently the County Commissioners of Daviess County passed a zoning ordinance and established a Planning Commission. This ordinance is referred to as Zoning Ordinance No. 1, Board of Commissioners, Daviess County. You attach to your letter a copy of the ordinance in question.

An examination of the title of this ordinance reveals that it was enacted to promote the public health, morals, safety

and general welfare of the citizens, residents and property owners of the said county by restricting and regulating the use of the lands thereof, located without the corporate limits of cities and towns, in the captivation, producing and removal of the mineral resources thereof, including sand, gravel, natural gas, petroleum and coal. Section 1 of the ordinance provides that the ordinance is adopted to promote the physical and economic development of Daviess County, pursuant to authority vested in the Board of Commissioners by the statutes and laws of the State of Indiana.

Section 4 of the ordinance provides that all of Daviess County, Indiana, exclusive of those parts thereof within the corporate confines of cities and towns, is designated as mineral land use area. In addition, certain parts of said county are designated as Shaft or Slope Coal Mining Districts, and certain parts are designated as Strip Coal Mining Districts. By this section the board is authorized to adopt a map showing these various areas for mineral land use.

Section 5 of the ordinance provides that it shall be unlawful to establish or operate a strip coal mine or engage in strip coal mining in any part of Daviess County, other than in a Strip Coal Mining District, as designated by the map adopted by the Board of County Commissioners. It is further provided that it shall be unlawful to establish or operate a shaft or slope coal mine in any part of said county, other than in a Strip Coal Mining District, or Slope Coal Mining District. It is further provided, however, that the County Planning Commission shall have authority to grant variances in cases of practical difficulties or unnecessary hardship in order that the public welfare be secured and substantial justice done.

Section 6 of the ordinance provides that no person shall engage in the business of taking, removing, producing or mining sand, gravel, natural gas, petroleum or coal from or under any land in said county, without a written permit duly issued by the County Planning Commission. A permit is issued pursuant to a written application on a form prescribed by the County Planning Commission disclosing the name and address of the applicant, the nature and location of the business proposed to be engaged in, the means and methods to be employed in carrying on said business, and disclosing that said business will conform to the provisions and standards

of the ordinance. It is further provided that said permit may be cancelled by the Planning Commission.

Section 7 of the ordinance provides that it shall be unlawful for any person to operate a strip mine or engage in strip mining unless such person shall first enter into a cash bond with a corporate surety, conditioned that any such person carrying on such business shall, within a reasonable time, to be determined by the County Planning Commission, replace all soil, subsoil, or other strata removed in such operations and refill any ditches, trenches, or excavations made in stripping such coal, so as to minimize the hazard of floods, pollution of streams and water, accumulation of stagnant water, and the destruction of said soil for agricultural purposes. The bond shall be in the sum of $150.00 per acre for each acre of surface involved in strip mining, and shall be payable to the Board of Commissioners of Daviess County.

Section 10 of the ordinance provides that any person violating any of the provisions of the ordinance shall be punished as for maintaining a common nuisance by fine or not less than $10.00 nor more than $100.00, and shall, for a second or subsequent violation, be punished by a fine of not less than $50.00 nor more than $500.00.

You have also submitted for our examination a copy of a map prepared by the Daviess County Planning Commission which was adopted by the Board of County Commissioners of Daviess County in the ordinance in question. On this map are designated the areas in which there shall be no mining, either strip or shaft, and the areas in which strip mining may be done and those in which shaft mining may be done. The map shows that both strip and shaft mining are prohibited in Elmore, Steele and most of Washington townships. It further shows that shaft mining is permitted in all other parts of the county. However, strip mining is permitted only in small isolated areas throughout the county and is confined by such map primarily to Reeve Township located in the south east part of the county.

You ask for my official opinion with reference to the following questions:

1. Is this ordinance a valid police regulation?

2. Is it a valid delegation of authority to issue permits by the Planning Commission?

3. Is it in conflict with state statutes relative to strip mining?

Chapter 239 of the Acts of 1935 (Burns' 1933, Sec. 26-2301 *et seq.*,—1945 Pocket Supp.), authorizes the creation of a County Planning Commission, to be appointed by the Board of County Commissioners, for the purpose of providing healthful, convenient, safe and pleasant living conditions in the several counties of the state, and authorizes said commission to propose a master plan creating land use areas in the county. Section 9 of said act (Burns' 1933, Sec. 26-2309—1945 Pocket Supp.) specifically authorizes the County Planning Commission to draft ordinances for the purpose of carrying out the master plan or any part thereof, including zoning or land use regulations and the making of official maps for the county. This statute also authorizes the Board of County Commissioners of a county to adopt such an ordinance.

In the case of Board of County Commissioners v. Sanders (1940), 218 Ind. 43, the Indiana Supreme Court discussed and held valid the very statute under which the ordinance in question was adopted. In that case the court sustained an ordinance of the Board of County Commissioners of Vanderburgh County which provided for a building code to be followed in the county, the issuance of permits and the charging of a fee for inspection purposes. The court discussed the provisions of the statute (Burns' 1933, Sec. 26-2301 *et seq.*), and, also, discussed the provisions of the Vanderburgh County ordinance, regulating building activity. As to the purpose of the statute, the court said at page 54 of 218 Ind.:

> "It is reasonable to assume that the Legislature in passing this act took cognizance of the well-known fact that rural areas, adjacent to cities, were rapidly developing as community centers. Tracts of land were being platted into divisions and subdivisions for the purposes of meeting the demand of many urban inhabitants to move and live in a less congested community. This movement from the thickly populated areas of our

> cities to the suburban districts created problems somewhat akin to the city problems such as sanitation, sewage disposal, plumbing, regulation of buildings and businesses of various kinds. This is specifically set forth in Section 9, *supra*. It is provided in said section that the commission may submit to the board of county commissioners drafts of ordinances that in their judgment would be for the benefit and well being of the rural and suburban areas including *zoning* and *land use regulations*. This necessarily implied power on the part of the board of commissioners to pass and adopt ordinances of this nature. It will be noted that the ordinance here in question is made to govern and to apply only to the erection of structures and buildings on lots of recorded subdivisions and tracts of land of 2 acres or less lying outside the city limits. We conceive of no reason why the Legislature cannot confer power upon boards of county commissioners to regulate the construction, repair, and alteration of buildings in suburban areas and to confer upon them the power to zone and regulate building activity in such areas. * * *"

Thus it appears that the Indiana Supreme Court has already sustained the validity of an ordinance regulating building activity in suburban areas. The next question is whether the county ordinance regulating strip mining in the county would be sustained as a valid ordinance. The answer to this question is to be determined from an application of the general principles concerning the validity of zoning laws.

The general rule in connection with the constitutionality of zoning ordinances is stated accurately and concisely in McQuillin Municipal Corporations (2d Ed.), Revised Vol. 3, Sec. 1043, p. 493, as follows:

> "Concerning the constitutional validity of zoning laws and regulations thereunder, apart from those authorizing the employment of the delegated power of eminent domain, the fundamental question is the extent to which public authority may go in restricting the use of private property under the police power in order to safeguard the public welfare even in its most com-

> prehensive sense. Zoning laws are to be tested by developed and developing legal principles relating to the legitimate exercise of the police power. Speaking generally, the questions in all such cases are, first, whether the ordinances emanate from ample grant of power by the state to the city or town; second, whether they have any reasonable tendency to promote the public safety, health or morals, and recent cases rightly include the public comfort, welfare and prosperity; and third, whether the power in the given case has been reasonably exercised with due regard to property rights."

The foregoing quotation indicates that to be valid the zoning law, or land use regulation, must have a reasonable tendency to promote the public safety, health, morals, or public welfare, and if it has no such relationship but is enacted under the guise of police power for the purpose of oppression or discrimination, it will be held invalid. However, the demarcation between a valid exercise of the police power and an invalid exercise of the police power is not clear and must be determined upon the facts in each specific case.

This is aptly illustrated in the case of Village of Euclid v. Ambler Realty Company (1926), 272 U. S. 365, which is recognized as a landmark case on the matter of the validity of zoning laws. In that case, Justice Sutherland said as follows at page 386:

> "Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect to the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of

> our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall."

In speaking of the particular ordinance which was under review in that case, Justice Sutherland said as follows, on page 387:

> "The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the build-

> ing or of the thing considered apart, but by considering it in connection with the circumstances and the locality. Sturgis v. Bridgeman, L. R. 11 Ch. 852, 865. A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

In the foregoing case, the Supreme Court of the United States held that they could not declare the ordinance in question to be invalid on its face. In that case the city of Euclid, which contained a population not exceeding 10,000, had adopted a zoning ordinance which created certain use districts within its borders. Most of the property contained therein consisted of farm lands and unimproved property, and did not contain a great many residences. The complainant in that case owned 68 acres of land from which he was restricted from using for industrial use, in spite of the fact that it adjoined two railroads and was just a few miles from the industrial district of Cleveland, Ohio.

In determining that it could not say, as a matter of law, that the ordinance was invalid as to the complainant, but that such matter could only be determined by all of the facts showing the locality and circumstances surrounding the complainant's property, the court said as follows, at page 395:

> "If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Cusack Co. v. City of Chicago, *supra,* pp. 530-531; Jacobson v. Massachusetts, 197 U. S. 11, 30-31.
>
> "It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular con-

> ditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable. But where the equitable remedy or injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality. * * *."

All that I have before me is the ordinance in question. I do not have all of the facts concerning its application in the county or within its various areas, the traffic conditions, the fire hazards, the population figures, and the many other matters which go to the question of whether the ordinance in question would be a valid exercise of the police power in particular sections of the county.

It is true that some of the older cases, and even some of the new ones, have held that a zoning ordinance which prohibits a person from taking deposits from his land, such as sand, gravel and coal, are invalid. In the case of Penna. Coal Co. v. Mahon (1922), 260 U. S. 393, the Supreme Court of the United States held that a statute was invalid which prohibited the mining of coal in a city in such a way as to cause subsidence of any human habitation or public street or building. In that case, the owner of land containing coal deposits had deeded the surface with the express reservation of the right to remove all the coal beneath. The court said in that case, at page 414:

> "It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects

> the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, 'For practical purposes, the right to coal consists in the right to mine it.' Commonwealth v. Clearview Coal Co., 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does."

The court also concluded as follows, at page 415:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * *"

The following cases also support the principle announced in the case of Penna. Coal Co. v. Mahon:

> Town of Harrison v. Sunny Ridge Builders, Inc. et al (1938), 8 N. Y. S. (2d) 632;
> People v. Linabury (1924), 209 N. Y. S. 126;
> Pacific Palisades Ass'n. v. City of Huntington Beach (1925), 196 Calif. 211, 237 Pac. 538, 40 A. L. R. 782;
> De Felice v. Zoning Board of Appeals, etc. (1943), 130 Conn. 156, 32 A (2d) 635; 28 A. L. R. 1330, 40 A. L. R. 788, 86 A. L. R. 802.

The foregoing cases cited above hold that under certain circumstances, ordinances prohibiting the digging of sand, gravel, or the removal of top soil or loam are invalid. However, the more recent cases indicate a more liberal trend toward sustaining ordinances prohibiting the taking of deposits from lands in certain areas.

In the case of Town of Burlington v. Dunn (1945), 318 Mass. 216, 61 N. E. (2d) 243, the Supreme Court of Massachusetts held to be valid a zoning ordinance of a small town within commuting distance of Boston, which prohibited the removal of top soil from a vacant lot by the owner thereof. In sustaining the validity of said ordinance, the court said as follows, at page 246:

"In our opinion the by-law is a valid constitutional regulation of the defendants' use of their land. We may take judicial notice of the fact that Burlington is a small town, generally residential in character, located within commuting distance of Boston. There are approximately fifty residences within a radius of half a mile from the premises. The defendants have commenced to remove the soil by scraping it into piles with a 'bulldozer' and taking it away by means of a steam shovel and trucks. The stripping of the top soil from a tract of land is not only likely to produce disagreeable dust and noise during the process, which may be prolonged, but, more important, after it is completed it leaves a desert area in which for a long period of time little or nothing will grow except weeds and brush. It permanently destroys the soil for agricultural use and commonly leaves the land almost valueless for any purpose. The effect of such an unsightly waste in a residential community can hardly be otherwise than permanently to depress values of other lands in the neighborhood and to render them less desirable for homes. If this process should be repeated upon tract after tract of suburban land the cumulative effect might well become disastrous to certain localities. The town must continue to maintain roads and public services past such blighted areas in spite of the fact that taxable values are destroyed and development retarded. All this concerns the public welfare in the constitutional sense. * * *"

Other more recent cases following the same principle announced in the case of Town of Burlington v. Dunn, 61 N. E. (2d) 243, are as follows:

People v. Hawley, 207 Cal. 395, 279 P. 136;
People v. Calver Corporation, 286 N. Y. 419, 36 N. E. (2d) 644, 136 A. L. R. 1376;
West Brothers Brick Co., Inc. v. Alexandria, 169 Va. 271, 192 S. E. 881;
Terrace Park v. Errett, 6 Cir., 12 F. (2d) 240;
Marblehead Land Co. v. Los Angeles, 9 Cir., 47 F. (2d) 528;

K. & L. Oil Co. v. Oklahoma City, D. C., 14 F. Supp. 492;
Building Commissioner of Medford v. C. & H. Co. (1946), 65 N. E. (2d) 537.

A careful analysis of both lines of cases cited above, clearly emphasizes the correctness of the principle laid down in the case of Village of Euclid v. Ambler Realty Company (1926), 272 U. S. 366, first discussed in this opinion, to the effect that one cannot say as a matter of law whether a particular ordinance is valid or invalid until he has before him the facts and circumstances of the particular case. In this case, an examination of the map designating the areas in which mining has been prohibited or limited solely to shaft mining to the exclusion of strip mining raises a serious doubt as to whether such designated areas may be supported under the exercise of the police power of the county to protect the health, safety or public welfare of the people of the county. Also, there is a serious question as to the validity of the ordinance as applied to those designated areas in view of the equal protection clauses of both the Federal and Indiana Constitutions. The map shows that in one area shaft mining is permitted while in the same area or an adjacent area strip mining is not permitted.

However, there may be peculiar facts and circumstances in these designated areas which do not appear in the facts or on the map submitted to us which require mining to be absolutely prohibited or limited to shaft mining in order to protect the health, safety and welfare of the people of the county. I, therefore, am unable to give you a definite answer of "yes" or "no" to your first question since the validity of the ordinance as applied to each area in the county would have to be tested by all of the facts and circumstances in the particular case.

In answering your second question as to whether there is a valid delegation of authority for the issuance of permits by the Daviess County Planning Commission, reference should again be made to the statutes under which the ordinance in question was enacted. An examination of those statutes (Burns' 1933, Sections 26-2301 to 26-2309) reveals that the legislature expressly created a statutory county board which is an entity separate and distinct from the Board of County

Commissioners. The legislature then provided that the members of this statutory county planning board should be appointed by the Board of County Commissioners, and provided for the terms of office, compensation and qualifications to be met by the members of the county planning board.

It was further provided that the county planning board be empowered to adopt rules and regulations necessary for its conduct and required it to keep records of its proceedings. The legislature further provided that the county planning commission should be authorized to hire employees and fix their compensation with the approval of the Board of County Commissioners.

The legislature also provided that the powers of the county planning commission should include cooperation with the state planning board in making surveys and investigations and assembling data and the formulation of plans for the conservation of the natural resources of the county. It was further specified that it was the duty of the county planning commission to adopt a master plan for the physical and economic development of the county, including the mineral use of lands. It was further provided that the county planning commission shall have such powers as may be appropriate to enable it to fulfill its functions and duties to promote county planning and to carry out the purposes of the act.

However, the legislature specifically delegated to the Board of County Commissioners the authority to adopt ordinances for the purpose of carrying out the master plan or any part thereof, including zoning or land use regulations, which had been proposed by the county planning commission. (Burns' 1933, Section 26-2309.)

It is a general rule that the legislature cannot delegate legislative authority, but the exception to this rule is that the legislature may delegate legislative authority to political subdivisions, such as counties and municipal corporations governing matters of local concern. In such cases legislative authority may be delegated to county boards.

Pittsburgh, etc. R. Co. v. City of Hartford City (1908), 170 Ind. 674, 683;

Zoercher v. Agler (1930), 202 Ind. 214;

11 American Jurisprudence, Section 223, page 934.

Upon the foregoing authorities it is clear that the legislature had the authority to authorize the Board of County Commissioners to enact the ordinance in question providing for land use regulation, such as strip mining and shaft mining. While there is no express authority in the statutes in question authorizing the Board of County Commissioners to provide for the issuance of permits before a person may engage in strip mining or shaft mining activities, it is also settled that where the legislature has authorized a political subdivision of government, such as a county or a municipality, to regulate a certain activity, this power impliedly includes the power to issue licenses or permits in carrying out this activity.

Baldwin v. State (1924), 194 Ind. 303, 306;
Tomlinson v. City of Indianapolis (1896), 144 Ind. 142, 145.

From the foregoing authorities, it is apparent that since the legislature in this case authorized the Board of County Commissioners to adopt an ordinance including land use *regulations* and to adopt a master plan prepared by the county planning commission, including provisions regulating the use of mineral lands in the county, the Board of County Commissioners, therefore, had authority to include in the ordinance in question provisions for the issuance of permits.

When the legislature has delegated to political subdivisions of the state the authority to legislate on matters of local concern, it is also established that such a political subdivision may not redelegate that legislative authority to any other agency, for such political subdivision is subject to the same restrictions upon delegation of legislative authority as rests upon the state legislature. (11 American Jurisprudence, Section 224, page 937.) Accordingly, it must be determined whether the Board of County Commissioners of Daviess County has delegated legislative authority to the county planning commission in connection with the issuance of permits to engage in strip mining and shaft mining activities.

In determining whether there has been an unconstitutional delegation of legislative authority, the general rule is that a legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or

state of things upon which the law makes, or intends to make, its own action depend.

Hollingsworth v. State Board of Barber Examiners (1940), 217 Ind. 373;

Kryder v. State (1938), 214 Ind. 419;

Edwards v. Housing Authority of City of Muncie (1939), 215 Ind. 330;

Financial Aid Corporation v. Wallace (1939), 216 Ind. 114.

In the light of the foregoing authorities it is necessary to examine the ordinance in question to see whether the issuance of permits by the county planning commission as provided for in the ordinance is a delegation of legislative authority to the county planning commission. The ordinance itself provides for the issuance of written permits by the Daviess County Planning Commission. It is provided that such permits shall only be issued on written application on a form prescribed by the commission disclosing the name and address of the applicant, the nature and location of the business in which the applicant engages or proposes to engage, the means and methods employed or to be employed in carrying on said business, and disclosing that said business will conform to the provisions and standards established and empowered by the ordinance. It is also provided that said permit shall state the terms and conditions upon which the same is issued and may be cancelled by the planning commission for violation of such terms and conditions, after reasonable notice and hearing.

From the foregoing analysis of the ordinance in question it is apparent that while the Board of County Commissioners undertook to provide for the issuance of permits by the county planning commission and apparently attempted to formulate a law which would only give to the county planning commission the duty of ascertaining certain facts to fit the law, it is equally apparent that there are no fixed standards or guides set forth in the ordinance governing the issuance and cancellation of the permits to engage in strip mining or shaft mining activities.

It is true that the ordinance requires the issuance of a permit upon application being filed, but it does not set forth any standards or guides by which the county planning commission

would be guided in determining to whom permits should be issued. Moreover, the ordinance has left it entirely to the county planning commission to determine upon what terms and conditions the permits will be issued, and has also left to the county planning commission the complete discretion in determining when such permits should be cancelled.

It is well settled that license legislation which vests in public officials discretion to grant or refuse a license to carry on an ordinarily lawful business, profession or activity without prescribing definite rules and conditions for the guidance of the officials in the execution of their discretionary power is invalid.

> 33 American Jurisprudence, Section 60, page 377;
>
> Hollingsworth v. State Board of Barber Examiners (1940), 217 Ind. 373, 379;
>
> Kryder v. State (1938), 214 Ind. 419, 425.

Based upon the foregoing authorities, it is therefore my opinion that the ordinance in question which authorizes the Daviess County Planning Commission to grant licenses and cancel them in their own discretion without any established guide or standard established by the legislature is invalid.

While it is true that the Indiana Supreme Court in the case of Board of Commissioners of Vanderburgh County v. Sanders (1940), 218 Ind. 43 upheld the validity of an ordinance of Vanderburgh County in which the Vanderburgh County Planning Commission was authorized to issue permits to engage in building activities, it does not appear either in the opinion of the court or in the briefs filed in the case that the specific question of the delegation of authority to issue permits by the county planning commission was raised or was in issue in that case. The only question raised in that case was whether the statute conferred any authority either expressed or implied for the county planning commission in that case to enact the questioned ordinance. This is shown by the statement of the court at page 55 of 218 Ind. as follows:

> "* * * There is no contention upon the part of appellee that the ordinance is invalid for any reason except that the statute, as he interprets it, confers

no authority either expressed or implied to pass such an ordinance. * * *"

The foregoing case, therefore, does not decide the question of delegation of authority, and as heretofore indicated, it is my opinion that there was an invalid delegation of authority to the Daviess County Planning Commission to issue permits in this case because of the failure of the legislature to prescribe definite standards governing the issuance of cancellation of said permits.

In answering your third question, reference should be made to our state statutes on strip mining. Chapter 68, Acts of 1941 (Burns' 1940, Repl., Sec. 46-1501 *et seq.*), provides for the regulation of strip mining by the State Department of Conservation. Section 1 of this act (Burns' 1940 Repl., Sec. 46-1501), provides that this act shall be deemed an exercise of the police powers of the state, for the protection of the property, the economic welfare and the health of the people of the state by providing for the conservation and improvement of areas of land subjected to "strip mining"; to aid thereby in the protection of game, bird and wild-life; to enhance the value of such land for taxation, to decrease soil erosion, the hazard of floods, the pollution of lakes and streams, and generally to restore the use and enjoyment of such lands.

Section 3 of the act (Burns' 1940 Repl., Sec. 46-1503), provides that it shall be unlawful for any person to engage in strip mining of coal, where such person mines in excess of 250 tons a year, without first obtaining from the Director of the Department of Conservation a permit to do so. By Section 4 of the act (Burns' 1940 Repl., Sec. 46-1504), permits are issued upon written applications for which an annual fee is charged, based upon the number of acres mined. Other sections of the act require maps to be furnished and reports to be made to the Department of Conservation. Section 5 of the act (Burns' 1940, Repl., Sec. 46-1505) requires every person who has engaged in strip mining operations, in excess of 250 tons a year, to restore the surface of the land mined and to plant it in trees and shrubs. Other sections of the act authorize the Director of Conservation to revoke permits for strip mining and to make rules and regulations to carry out the purposes of the act.

It is a well established principle of law that where the state has passed a law covering a particular subject matter and has taken unto itself the exclusive control of it, then a local law or ordinance upon the same subject must give way to the state law.

Medias v. City of Indianapolis (1939), 216 Ind. 155, 165;

Local 26, National Brotherhood of Operative Potters v. City of Kokomo (1937), 211 Ind. 72, 80, 81;

Spitler v. Town of Munster (1938), 214 Ind. 75, 77;

Hollywood Theatre Corp v. City of Indianapolis (1941), 218 Ind. 556, 560 and 561.

A comparison of the provisions of the state statutes with the ordinance in question on strip mining indicates that there is not an absolute and irreconcilable conflict between the two. By the terms of the ordinance the Board of County Commissioners would be authorized in certain circumstances to completely prohibit strip mining in certain areas. The state statute does not undertake to completely prohibit strip mining, but only requires persons engaging in strip mining operations, exceeding 250 tons per annum, to obtain a permit and file a bond with the Department of Conservation to insure that the area strip-mined would be restored to certain conditions. Thus, where the Board of County Commissioners undertakes to absolutely prohibit strip mining in certain areas it would not be in conflict with the state statutes. However, as already pointed out, such an action to be valid would have to have a reasonable relationship to the protection of the health, safety and public welfare of the people of the county, and could not arbitrarily discriminate between strip mining operations and shaft mining operations.

However, a comparison of the provisions of the state statutes with the provisions of the ordinances in question *permitting* strip mining under certain conditions indicates that they are in conflict as to strip mining operations in excess of 250 tons per annum. Both the ordinance and the state statutes require the obtaining of a permit and of a bond to insure

that after strip mining operations have been completed, the property will be restored to certain conditions. The common purposes of these provisions as included in both the ordinance and the state statutes have been expressly stated to be for protecting the property, the welfare and health of the people of the state and county by providing for the conservation and improvement of areas of land subjected to strip mining and to decrease soil erosion, the hazards of floods and generally to restore the use and enjoyment of such lands.

Accordingly, it is my opinion that on the *permissive* use of lands for strip mining in excess of 250 tons per annum, the ordinance and state statutes are in conflict and the state statutes prevail over and supersede the ordinance in question on the obtaining of a permit and the furnishing of a bond to insure the restoration of the property to certain conditions after strip mining operations are completed.

OFFICIAL OPINION NO. 96

November 29, 1946.

Hon. Ross Techemeyer,
Executive Secretary,
Public Employes' Retirement Fund,
Board of Trade Building,
Indianapolis 4, Indiana.

Dear Sir:

I am in receipt of your letter of October 25, 1946, in which you call attention to the impending transfer of the United States Employment Service to the Indiana Employment Security Division. You call attention to the fact that the employment service was operated by the state until January 1, 1942, when it was transferred to the federal government by the Governor at the request of the President, at which time the state employes became employes of the federal government. The employes of the federal government are now to become employes of the state and these employes fall into three classes:

(a) Employes who were employes on January 1, 1942, and who have continued to serve under the federal govern-