

OFFICIAL OPINION NO. 1

January 10, 1945.

Hon. Otto K. Jensen, State Examiner,
Department of Inspection and Supervision,
of Public Offices,
State House,
Indianapolis 4, Indiana.

Dear Mr. Jensen:

Your letter of December 11, 1944, has been received, requesting an official opinion on the following questions:

"1. Does a majority of the members of the county council have authority to call a special meeting of such county council, causing the publication of notice of such meeting, without any action by the county auditor?

"2. Is the county auditor, in the notice of a special meeting of the county council, required to specify the matters to be considered at such special meeting?

"3. If a majority of the members of a county council file with the county auditor a request for a special meeting of such county council is it required that the purpose of such meeting be specified in such request?

"4. Does the county council have authority at a special meeting to take any official action upon any matter not specified in the notice mailed and published as provided by statute?

"5. Does the county council at a special meeting have authority to cancel or annul, in whole or in part, an appropriation previously made by such county council?

"6. If your answer to the last preceding question is in the affirmative can such action be taken at a special meeting of such county council if the notice of such special meeting did not specify that such change in the existing appropriation was one of the proposals to be considered at the special meeting?

"7. Does the county council in its ordinance making a special or additional appropriation have author-

ity to provide that the amount of such appropriation shall be deducted from the amount of some other specific appropriation or appropriations theretofore made by the county council?

"8. Does the county council in its ordinance making an appropriation for a specific purpose have authority to provide a limit for its use as to quantity or number of items purchased or to specify a maximum or minimum price for each such article?

"9. Are the members of the county council entitled to receive the compensation provided by statute for special meetings prior to the time the record of such meetings are signed by the county council?"

1. In answer to your first question I wish to advise Section 7, Chapter 154, Acts 1899, as amended by Section 1, Chapter 146, Acts 1931, same being Section 26-507, Burns' 1933, controlling the calling of special meetings of the County Council, provides in part as follows:

"* * * and there shall be such special meetings as may be called by the auditor of the county, or by a majority of the members of the council, in the manner following: The auditor, or a majority of the council joining in such call in request in writing to the auditor, shall mail a notice of the meeting to the address of each councilman at least one (1) week prior to the day of meeting and also publish such notice one (1) time in each of two (2) leading newspapers of general circulation printed and published in the county, if there be such, representing the two (2) political parties casting the highest number of votes in such county at the last preceding general election, at least one (1) week before the meeting."

From a consideration of the above Section of the Statute it is my opinion the Legislature intended a special meeting of the County Council could be called either by the County Auditor or by a majority of the Council making a request therefor in writing to the Auditor, and that the Auditor in either such event is the person required to give the notice of such proposed special meeting.

2. In answer to your second question I wish to advise County Councils were created by Chapter 154 of the Acts of 1899, same being Section 26-501, *et seq.*, Burns' 1933. This Statute as amended contains no provision requiring the notice of a special meeting of the County Council to specify therein the matters to be considered at any such special meeting.

It is to be noted the Statute governing the conduct of the Boards of County Commissioners being Chapter 20, 1 R. S. 1852, same being Section 26-601, Burns' 1933 *et seq.*, did not originally require the notice of the calling of a special session of the Board of County Commissioners to specify the purpose for which said Board was being called in session. However, by Section 1, Chapter 47, Acts 1899, same being Section 26-610, Burns' 1933, the County Auditor in calling said Board of County Commissioners into special session was thereafter required to state specifically in the call for what special purpose the call had been made, and made it unlawful for said Board to transact any business not embraced in said call. Prior to the enactment of the above Statute the Supreme Court of Indiana had consistently held the Board of County Commissioners could transact any business over which it had jurisdiction regardless of whether or not the purpose of such notice of such meeting was included therein.

Oliver v. Keightley (1865), 24 Ind. 514;
 Jussen v. Board of County Commissioners
 (1884), 95 Ind. 567;
 White v. Fleming (1887), 114 Ind. 560.

From the above authorities as interpreting the Statutes governing Boards of County Commissioners it would appear that generally no notice of the purpose of the special session of the County Council would be required to be given by the Auditor. However, Section 1 of Chapter 150 of Acts of 1935, same being Sections 64-1331 Burns' 1943 Repl. provides in part as follows:

“* * * When such state board of tax commissioners in its order shall order a reduction in the levy it shall indicate the item or items in the budget affected by such reduction, and the budget as set out by the municipal officers in the published statement or as modified on hearing by the state board shall limit the

expenditure for the year, except in cases of casualty or accident or extraordinary emergency. In the event the proper legal officers of any municipal corporation shall contemplate to meet the emergency and determine the expenditure of more money for the current year than was set out in detail in the published budget or in the budget as modified as a result of a hearing before the state board of tax commissioners, said officer shall give ten (10) days' notice by publication as herein provided for publication of the budget and proposed tax levy of such additional amount proposed to be expended, fixing a date when the same shall be considered and determined upon, and taxpayers shall have a right to be heard thereon. No such proposed additional amount shall be appropriated or expended unless and until such appropriation and expenditure shall have been approved by the state board of tax commissioners, as hereinafter provided. Upon the conclusion of such hearing, if the proper legal officers shall confirm its determination to appropriate and expend such additional amount, such officers shall file a certified copy of such determination with the county auditor of the county in which such municipal corporation is located. Upon the filing of any such determination such county auditor shall immediately certify a copy of such determination with such other information as may be necessary to present the questions involved, to the state board of tax commissioners, which shall have the power to affirm or decrease the amount of such additional appropriation of any such municipal corporation after a hearing as hereinafter required. The state board of tax commissioners shall fix a time and place for the hearing of such matter, which shall not be less than five (5) or more than fifteen (15) days thereafter, and said hearing shall be held in the taxing unit or in the county where such taxing unit is located, which proposed to make additional appropriations to the regular budget as finally determined upon. Notice of such hearing shall be given by the state board of tax commissioners to the executive officer of the taxing unit and taxpayers by a letter by the secretary or one (1) member of the

state board of tax commissioners, and inclosed in a sealed envelope with full prepaid postage, addressed to said officer at their usual place of residence at least five (5) days before the date of the hearing. The decision of the state board of tax commissioners upon the expenditure of such additional amount of money, or any part thereof as may have been determined upon, shall be final and conclusive. Any officer or officers of any municipal corporation having authority by law to make appropriations for the expenditure of public money, who shall appropriate any money for any item set forth in the published budget, or for any item as modified on the order of the state board of tax commissioners, in excess of the amount estimated to be expended in such budget, or in excess of any additional expenditure without having first given notice to the taxpayers and allowing taxpayers the right to appeal to the state board of tax commissioners, or without certifying their determination to make additional appropriations to the state board of tax commissioners, as herein provided shall be guilty of malfeasance in office and shall be liable to such municipal corporation in the amount of such excess so appropriated, together with the costs of said action and reasonable attorney fees with a penalty of twenty-five (25) per cent of such amount, recoverable in an action (or suit) instituted in the name of the state of Indiana upon the relation of any taxpayer or taxpayers in such municipal corporation."

In the case of *O'Rourke v. Board of Commissioners of Lake County* (1938), 215 Ind. 195, where the Court was required to construe the validity of a special appropriation by the County Council for increase in the salary of certain deputy county officials, on page 200 of the opinion, the Court held the last quoted Statute applied to actions by Board of County Commissioners and County Councils.

In the case of *Hamer v. City of Huntington* (1939), 215 Ind. 594, the Court in passing upon the validity of a special appropriation by a City Council for the purchase of an additional fire engine and equipment, held such appropriation invalid, and on page 601 of the opinion said:

“* * * At the time said contract was entered into by said city additional appropriations were governed by Section 200, ch. 59 of the Acts of 1919 as finally amended by ch. 150 of the Acts of 1935, p. 532 (Sec. 64-1331, 1938 Supplement of Burns’ 1933, Sec. 15735, 1935 Supp. of Baldwin’s 1934) which act provides certain steps which shall be taken by a municipality in making additional appropriations. The act provides that officers of the city contemplating making an additional appropriation to meet an emergency *shall give ten days’ notice by publication of the purpose of such additional amount proposed to be expended* and the time when the same shall be considered and determined upon, and the taxpayers shall have a right to be heard thereon. It further provides that upon the conclusion of such hearing if such officers shall finally determine to appropriate and expend such additional amount they shall file a certified copy of such determination with the county auditor of the county in which such municipal corporation is located which determination shall immediately be certified by the county auditor, together with the necessary information to present the questions involved, to the State Board of Tax Commissioners which board shall fix a time and place for the hearing of such matter, give certain notice thereof and shall then determine the necessity of such additional appropriation. Similar provisions of other statutes of this state relating to additional appropriations have been held by this court to be mandatory. In the case of Johnson v. Lenz (1935), 209 Ind. 627, 200 N. E. 249 this court held that the provision of ch. 95 of the Acts of 1927 (Sec. 64-1331 Burns’ 1933, Sec. 15735 Baldwin’s 1934), providing for ten days’ notice to taxpayers of a hearing on such a proposed additional appropriation was mandatory and that an appropriation ordinance which was passed without any such notice was void. It is not contended that the steps as to additional appropriations required by the 1935 act, *supra*, were complied with as to the ordinance passed by said council on December 8, 1937.”

In answer to your second question it is my opinion that under the above authorities it is necessary that a notice of the calling of a special meeting of the County Council, for the purpose of considering emergency or additional appropriations, must specify therein the purpose of the calling of such meeting. If the meeting is called for some purpose other than the making of an emergency or additional appropriation it would not be necessary to specify in such notice the purpose of such special meeting.

3. Your third question, to a certain extent, is answered by the answer herein given to your question number two. If the request is made by the majority of the members of the County Council of the Auditor to call a special meeting of the County Council for the purpose of passing an emergency or additional appropriation ordinance, it would be necessary for the Council members making such request of the Auditor to specify therein the reason for the calling of such special session of the County Council, otherwise the Auditor would be unable to set forth in his notice the purpose of such special meeting. If the special session was being called for some purpose other than and not including the making of an emergency or additional appropriation it would not be necessary to include in the members' request of the Auditor the calling of such a meeting, for the reasons stated in answer to question number two (2), *supra*.

4. In answer to your question number four, it is my opinion, under the authorities cited in answer to your question number two (2), *supra*, that the County Council in special session may act upon any matter not specified in the notice mailed and published as provided by statute, except as to any action taken by them on emergency or additional appropriation ordinances. The latter could not be acted upon unless specified in such notice and publication.

5. In answer to your fifth question, it is my opinion Chapter 154 of the Acts of 1899, *supra*, does not give specific authority to the County Council to cancel or annul an appropriation previously made by such County Council. Section 24 of said Chapter 154, Acts of 1899, as amended by Section 1, Chapter 136, Acts 1903, same being Section 26-524 Burns' 1933, provides as to unexpended county funds as follows:

“When any item of appropriation shall remain unexpended at the end of the calendar year for which the same was appropriated, the amount thereof shall immediately revert to the general fund of the county, and no warrant shall be drawn on such appropriation after the end of such year: Provided, That in any and all cases where any appropriation is not used and expended during such year because of any suit that may be instituted to restrain or enjoin the expenditure of any money so appropriated (then such appropriation), shall not revert to the general fund of the county until one (1) year after the termination of such suit, if such suit shall terminate against the party or parties instituting the same.”

In the case of *Kraus v. Lehman* (1907), 170 Ind. 408, the Supreme Court held an attempt to annul or repeal an appropriation previously made by the County Council, by subsequent action of said Council, could not be done by resolution, and from the language used indicated some question in the Court's mind as to whether it could be done by a new ordinance repealing the previous appropriation, for on page 427 of the opinion the Court said:

“* / * * If the council had the power to rescind or repeal this ordinance at its special session held in October, it could exercise such power only by an ordinance, and not by a resolution.”

It is to be noted the case of *Kraus v. Lehman*, *supra*, was decided prior to the enactment of Section 1, Chapter 150, Acts of 1935, *supra*, being Section 64-1331, Burns' 1943 Re-placement, which in part provides:

“* * * The several tax levies and rates as established by the proper legal officers of any municipal corporation and as reported by the county auditor to the state board of tax commissioners, as provided for in sections one hundred and ninety-seven and one hundred and ninety-nine (Sec. 64-1329, 64-1330) of this

act, shall stand as the tax levies and rates of such municipal corporation for the year next succeeding *for the purposes set out in the report of the county auditor* as certified to the state board of tax commissioners, subject to the right of appeal therefrom to the state board of tax commissioners. * * * In the event the proper legal officers of any municipal corporation shall contemplate to meet the emergency and determine the expenditure of more money for the current year than was set out in detail in the published budget or in the budget as modified as a result of a hearing before the state board of tax commissioners, said officers shall give ten (10) days' notice by publication as herein provided for publication of the budget and proposed tax levy of such additional amount proposed to be expended, fixing a date when the same shall be considered and determined upon, and taxpayers shall have a right to be heard thereon. No such proposed additional amount shall be appropriated or expended unless and until such appropriation and expenditure shall have been approved by the state board of tax commissioners, as hereinafter provided. * * * The decision of the state board of tax commissioners upon the expenditure of such additional amount of money, or any part thereof as may have been determined upon, shall be final and conclusive. * * *"

In answer to your fifth question, I do not believe the County Council may annul or repeal an appropriation previously made. Under the provisions of the last quoted section of the statute the appropriation was made by the County Council *for the purpose therein set forth*, which action was thereafter necessarily presented to the State Board of Tax Commissioners for their action thereon, and their decision thereon was final. If the money appropriated is not fully expended by the end of the year, it would revert to the general fund of the county under the provisions of Section 26-524, Burns' 1933, *supra*.

Where an office is created by statute, public officers may exercise only such powers as are expressly authorized by statute.

State *ex rel.* v. Goldthait (1908), 172 Ind. 210, 216, 217;
 State *ex rel.* v. Home Brewing Co. (1914), 182 Ind. 75, 91, 92;
 The State v. The Portsmouth Savings Bank (1886), 106 Ind. 435, 451;
 Dept. of Insurance v. Church Members Relief Assn. (1939), 217 Ind. 58, 60.

An exception to the above general rule is recognized where certain incidental powers are implied for the purpose of carrying out the express powers given a public officer.

43 Am. Jur., Public Officers, Sec. 250;
 State *ex rel.* v. Goldthait (1908), 172 Ind. 210, 216, 217.

However, it is my opinion a County Council may not cancel or annul an appropriation previously made by such Council as such power cannot be necessarily inferred for the purpose of carrying out any express authority given such Council by statute.

It is further submitted that if the general principle be admitted that a County Council may cancel or annul a previous appropriation, then it would be within their power to impair the obligation of contracts or other vested rights. This is a construction to be avoided.

School Town of Andrews *et al.* v. Heiney (1912), 178 Ind. 1, 6;
 State of Indiana v. Louisville & Nashville Railroad Company (1911), 177 Ind. 553, 556 to 558.

6-7. Your questions numbered six and seven are covered by the answer given to your question number five. In answer to question number seven I wish further to state the statute governing the conduct of County Councils does not

authorize the County Council to "transfer" funds specially appropriated for one purpose to be used for another purpose.

8. In answer to your question number eight, it is my opinion the County Council in making an appropriation for a specific purpose does not have authority to "provide a limit for its use as to quantity or number of items purchased, or to specify a maximum or minimum price for each such article." Section 36 of Chapter 154, Acts 1899, as amended by Section 1, Chapter 156, Acts 1933, same being Section 26-536 Burns' 1933, provides in part, "the Board of County Commissioners shall have exclusive power to purchase materials and supplies of any and every sort which are to be paid for out of the county treasury."

In 1937 Opinions of the Attorney General, page 434, in holding the County Council could not restrict the County Board of Public Welfare as to the salaries to be paid investigators, but could only make available so much money for said purpose without any restrictions therein, said on pages 439 and 440 of the opinion:

"* * * As was said in the case of *Blue v. State, supra*; 'Neither the County Council nor the courts can assume the authority and discretion expressly delegated to the Board of County Commissioners.' Applying this statement to the questions asked, the County Council cannot assume the authority and discretion delegated to the 'county director with the approval of the county board.'

"It is also stated in the *Blue* case that the 'budget statute contemplates only an estimate or approximation of the amount of money required for any branch of the government.'

"*Blue v. State, supra*, 1 N. E. (2d) 123.

"In a matter involving the right of a court to fix the salary of a page at \$750.00 and the County Council appropriated but \$500.00, an action was brought to mandate the auditor to pay the salary for the remainder of the year, after he had paid out the amount appropriated. While the court held the court had inherent power to appoint the page and fix the salary, yet the amount appropriated being exhausted, another ap-

appropriation would have to be made before the auditor could pay. The court said:

'Where the amount of the appropriation was exhausted the auditor could not be mandated to issue an order for payment of page's services. The County Council must be first mandated.'

"Dunn v. State ex rel., 204 Ind. 390.

"It seems clear that when a County Council makes an appropriation for assistants, investigators, etc., whose number and salary are in the discretion of the County Director of Public Welfare, with the approval of the County Board, any attempt by the council to limit the number of the staff is ineffective and beyond its power. Such an attempt should, in my opinion, be disregarded as forming no part of the appropriation."

From the authorities referred to in the above opinion of the then Attorney General of Indiana, it is my opinion the County Council may only appropriate money for a specific purpose and must leave to the Board of County Commissioners the duty of determining the number, quantity, quality and price of items purchased by said Board of County Commissioners from bids submitted as required by law, within the limits of the amount so appropriated by the County Council.

9. In answer to your ninth question, I wish to advise the salary of a county councilman is fixed at ten dollars per day for attending a special session of the County Council. In the case of State *ex rel.* Van Der Veer v. Butcher (1933), 205 Ind. 117, the Court in holding the auditor as clerk of the County Council could not be mandated to make corrections in the journal of the County Council, but that such action could only be filed against the County Council; in substance held on page 120 of the opinion, that it is a duty of the Auditor, as *ex-officio* clerk of the Council to record the votes of the Council on appropriation measures, to prepare the minutes of the meeting of the County Council, and to copy the same in the journal; that after such record is made in the journal it becomes the County Council's record. This case further holds *there is no statutory provision requiring the records of the proceedings of the County Council to be signed.*

I am therefore of the opinion, since the records of the County Council are not required to be signed by the members of the Council, and that the pay for services of the members of the County Council is not conditioned upon their signing the official record of the said Council, that the pay of said members of the County Council could not be withheld pending their signing the record or journal of such Council.

OFFICIAL OPINION NO. 2

January 11, 1945.

Hon. Maurice N. O'Bannon, Superintendent,
Muscatatuck State School,
Butlerville, Indiana.

Dear Sir:

Your letter of December 27, 1944, received requesting an official opinion as to whether a sheriff of one of the counties in this State who has in his custody one of the boys who escaped from your institution, could return said boy to your institution on your request, thereby enabling the sheriff to collect a transportation fee for this service from the county.

Section 22-1743 Burns' 1943 Supplement, being Section 4 of Chapter 119, Acts 1939, provides in part as follows:

“* * * All persons admitted to such institutions shall, until properly discharged from the same, be under the custody and control of the superintendent thereof, and such superintendent, subject to such regulations as the trustees see fit to adopt, may restrain and discipline any patient in such manner as he may judge is demanded for the welfare of the patient and the proper conduct of the institution. Furloughs and discharges may be given to the patients as provided by such regulations.”

Under the above statute the superintendent of your institution, under authority given him by the Board of Trustees of said institution could request said sheriff to return said boy to the custody of your institution.