

## OFFICIAL OPINION NO. 20

March 19, 1945.

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

Dear Mr. Jensen:

This will acknowledge receipt of your letter dated March 13, 1945, asking my opinion as to whether Ordinance No. 7 of the County Council of Marion County is valid under the circumstances attending its adoption as outlined in the letter of the auditor of such council, dated March 12, addressed to you, and the letter of the president of such council, addressed to the State Board of Tax Commissioners, in which was enclosed a copy of the minutes of the special meetings at which such ordinance was read and adopted.

From the facts submitted it appears that the county auditor issued notices pursuant to law calling a meeting of the county council for Saturday, March 10, 1945, at 10:00 o'clock A. M. in the commissioner's office in the Marion County Courthouse. As to what happened at that time and place there is some disagreement. The auditor states that the president of the council appeared alone at that time and recessed the meeting until 7:30 o'clock that evening. The copy of the minutes submitted by the president of the county council recites that such president appeared at 10:00 o'clock A. M. and stated that in as much as there was not a quorum present, they could not start the meeting until a quorum was present, and that a majority of the members had promised to be present at 7:30 P. M. that evening and that the meeting would convene at that time.

It further appears from the file that several days prior to the 10th the members of the county council were advised that the meeting would be held at 7:30 o'clock the evening of the 10th rather than at 10:00 o'clock A. M. as stated in the notice issued by the auditor.

The county council is not created by the constitution but it is purely a creature of the statute, and as such, has no power or authority unless granted by the statute.

“Counties are but subdivisions of the state, and county officers, including county councils, are but agents of the state. Their authority is limited to that expressly conferred on them by the Legislature. \* \* \* Doubtful language in a statute delegating authority will be construed in favor of the retention of the authority by the Legislature. *Central Union Telephone Co., et al. v. Indianapolis Telephone Co.* (1919), 189 Ind. 210, 126 N.E. 628.”

*Applegate, County Auditor v. State, ex rel. Pettijohn* (1933), 205 Ind. 122, 125.

An examination of the statutes concerning the powers and duties of county councils in holding special meetings to make additional appropriations reveals the following provisions are material to the determination of the question involved:

“The meetings of the council shall be held at the county seat, and in the office of the county auditor, unless the board of county commissioners provide some other room in which the council choose to sit. \* \* \*, 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.”

26-507 Burns' 1933; Acts 1899, Ch. 154, Sec. 7, p. 343; 1931, Ch. 146; Sec. 1, p. 520.

Since by 64-1333 Burns' 1943 Replacement, a county is included in the definition of a municipal corporation, the provisions with reference to special meetings of the council to

make additional appropriations have been modified by the Budget Statute, which provides in part as follows:

“\* \* \* 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. \* \* \*”

64-1331 Burns' 1943 Repl.; Acts 1919, Ch. 59, Sec. 200, p. 198; 1920 (Spec. Sess.), Ch. 49, Sec. 3, p. 164; 1921, Ch. 222, Sec. 3, p. 638; 1927, Ch. 95, Sec. 1, p. 247; 1935, Ch. 150, Sec. 1, p. 532.

The Supreme Court of Indiana has well stated that the purpose of the Budget Statute was to give the public the opportunity for a hearing.

“\* \* \* The purpose of the Budget Statute to procure a hearing for the taxpayers in which they will be advised of the purposes for which funds are to be expended, and the limit of the amount to be expended for each purpose, is expressed in clear and unambiguous language.”

Johnson, City Comptroller v. Lenz (1935), 209 Ind. 627, 631.

The court, in considering a case involving city appropriations, has also construed these provisions to require the fixing of a time for the hearing.

“\* \* \* 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.

\* \* \*

Hamer v. City of Huntington (1939), 215 Ind. 594, 601.

Under the plain wording of the statute, the county auditor has the right and power to issue a call for a special meeting of the council and to give notice to each councilman and to the taxpayers by publication, and, under the construction given by the Supreme Court of Indiana, it is his duty in such event to fix in the notice the time and place of the hearing. This was done in this case, and the county council was bound by this call and designation of the time and place. There was no attempt made substantially to comply with the law, and this opinion need not discuss substantial compliance with the notice. See O. A. G. Ind. 1945, p. 7 (January 10, 1945.)

Under the facts stated herein, only one councilman appeared at the time and place of the hearing for the special meeting. Therefore, no quorum was present, and the council was not in session. (26-511 Burns' 1933; O. A. G. Ind. 1944, p. 167, April 18, 1944.)

According to the evidence in the file, the absence of all councilmen but one was not caused by accident or other unpreventable circumstances, but was pursuant to a pre-existing understanding. Therefore, no question of necessary delay is presented, nor are we dealing with a case where there was a good faith effort made to comply with the plain requirements of the law. The attempted meeting was held at 7:30 o'clock that night, at a time when the auditor was not present and when it was lawful for the county officers to close their doors for business.

“\* \* \* It shall be lawful for the county offices in all counties having a population of three hundred thousand (300,000) or more, according to the last preceding United States census, to close their doors for business at one o'clock afternoon on each and every Saturday in the year, and each and every Saturday in the year shall, in addition to the legal holidays pro-

vided by law, be a legal half-holiday for said county offices."

49-603 Burns' 1933; Acts 1925, Ch. 97, Sec. 1,  
p. 269.

To sanction such conduct on the part of an administrative board which has no authority except that granted by the statute, and which is under a legal duty to give the taxpayers a hearing on such action as here involved, would be to open the door to fraud on the taxpayers and general public, as well as invite unnecessary meetings of the council not during the usual business hours of the community, with the attendant increased expenditures of public funds to pay the per diems for such meetings. Therefore, it is my opinion that Ordinance No. 7 of the county council of Marion County is invalid.

---

OFFICIAL OPINION NO. 21

March 23, 1945.

Hon. L. A. Cortner, Superintendent,  
Indiana Soldiers' and Sailors' Children's Home,  
Knightstown, Indiana.

Dear Sir:

Your letter of February 26, 1945, received in which you request an opinion on a question substantially as follows:

Where a member of the armed forces of the United States in the present war has been officially declared by the War Department to be missing in action, may this soldier's children attend Indiana University, Purdue University, and other state colleges on a tuition free basis?

The only statute granting tuition free attendance at state universities or colleges in Indiana is Section 1, Chapter 117, Acts 1941, same being Section 28-5732 Burns' 1943 Supplement. The pertinent part of this statute applicable to the question presented is as follows:

"Any person who is a pupil of the Soldiers' and Sailors' Children's Home, or any person who for five (5) years preceding application therefor, shall have had his domicil in the state of Indiana and whose father