Hon. Clem Smith,
State Fire Marshal,
Fire Marshal Department,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of October 31st in which you ask the following question:

"In the case of a permittee of the Alcoholic Beverage Commission where there is no dancing permit, but where the permittee employs musicians and furnishes music, does such situation result in the operation of a place of public amusement or entertainment as contemplated by Chapter 83 of the Acts of 1937 as amended by Chapter 268 of the Acts of 1943, for which a permit should be had from the State Fire Marshal Department?"

In the first place it occurs to me that whether the operator of a bar, tavern or night club holds a permit for dancing under the Alcoholic Beverage Act is wholly irrelevant so far as administration of the fire laws is concerned. The grant or refusal of such dancing permit is not based upon conditions involving the safety of the premises and hence bears no relationship to permits issued by the State Fire Marshal.

In answering your letter I am assuming that the situation you have in mind is where a permittee to dispense alcoholic beverages by the drink employs musicians and furnishes music but does not provide any other entertainment.

The pertinent provisions of Chapter 83 of the Acts of 1937 as amended by Chapter 268 of the Acts of 1943 dealing with this subject are as follows:

"On and after the first day of July, 1937, it shall be unlawful for any person, firm or corporation to operate any moving picture show, dance hall, cabaret, night club, or any other place of public amusement or enter-
tainment in any building, theatre or hall, to which the public is admitted, or to operate any other place of public entertainment or amusement within the state, unless the owner, lessee, occupant or agent of such building, theatre, hall or place of amusement or entertainment has the approval of the state fire marshal to use such building, hall or place for such purpose, and has been granted a permit, as herein provided. All inspections made by the state fire marshal by virtue of the provisions of this act shall be made in strict compliance with the provisions of this act and all of such buildings, halls, theatres and other places shall conform with the rules and regulations of the state fire marshal.”

Section 20-1001 Burns’ R. S. 1933, Pocket Supplement.

“Any person, firm or corporation desiring to operate any moving picture show, dance hall, cabaret, night club, with stage or floor show, theatre, hall or other place of public amusement or assembly, where entertainment is given, shall apply for a permit so to do, to the state fire marshal.”

Section 20-1002 Burns’ R. S. 1933, Pocket Supplement.

“Except as herein otherwise provided, no building to which the public is admitted and no audience room in which exhibitions or entertainments are given shall hereafter be open to the public unless such building, place or room is operated in full compliance with the requirements of this act, and the rules and regulations of the state fire marshal applying to such buildings, places or rooms, and unless such building, room or place has been approved, as herein provided.”

Section 20-1003 Burns’ R. S. 1933, Pocket Supplement.

“For the purpose of this act, such buildings, rooms, halls and places so to be approved shall be classified as follows:
"* * *

"(c) Class C shall include: (1) public halls, night clubs with stage or floor shows, and other places of public amusement or entertainment given in any building or part thereof, or given under tents or canvas.

"(2) places of amusement or entertainment that are under the direct supervision of the athletic commission of the State of Indiana;

"(3) halls, gymnasiums or places of assembly wherein contests, drills, exhibitions, plays or displays, dances, concerts or other types of amusement are held by schools, universities, social or fraternal organizations, lodges, farmers organizations, societies, labor unions or churches;

"(4) institutions in which the inmates are involuntarily detained; or,

"(5) any state, city or county building or property.

"(d) The several halls, gymnasiums or other places of assembly, amusement or entertainment designated as Class C in subsection (c) of this section, shall be under the direct supervision of the state fire marshal and shall be inspected at such times as the state fire marshal shall deem necessary to insure adequate safety to the public. After an inspection has been made, and if the state fire marshal shall approve such place of amusement or entertainment, a Class C permit shall be issued therefor, for which permit, an inspection fee of five dollars ($5.00) shall be paid: Provided, however, That no inspection fee or charge for this or any other service rendered by the state fire marshal's office, under this act shall be assessed against any group, society or organization listed under class C subsection (3) of this act, unless rental fees are charged or collected, and no person shall be liable under this act until after inspection and receipt of notice from the state fire marshal's office by registered mail."

Section 20-1004 Burns' R. S. 1933, Pocket Supplement.
"It shall be the duty of the state fire marshal to enforce the provisions of this act and to inspect and examine all moving picture shows, theatres, dance halls, night clubs, cabarets, assembly halls and all other places of public amusement within the state annually. If he finds any violation of any of the provisions of this act or of any rule or regulation of the state fire marshal, he shall notify the permittee, in writing, stating wherein such permittee is at fault and if such violations continue beyond a time within which such violation can be reasonably corrected he shall cause such permit to be revoked and cancelled."

Section 20-1009 Burns' R. S. 1933, Pocket Supplement.

It will be noted that the language of Section 1, supra, (20-1001 Burns' R. S. 1933, Pocket Supplement) is broad. It applies to cabarets, night clubs or any other places of public amusement or entertainment. The language of that section, however, is limited to some extent by the language of Section 4, supra, (20-1004 Burns' R. S. 1933, Pocket Supplement) which classifies the various places of public amusement or entertainment.

As stated in the opinion of the Attorney General rendered August 5, 1937, 1937 O.A.G. page 456 at page 459, in an interpretation of Section (c) prior to its amendment:

"It is apparent that by section one of said Act that general powers are granted the State Fire Marshal to regulate the enumerated places of public amusement, which would, in my opinion, include the amusements of which you speak in your letter, if it were not for parts C and D of section 4. These provisions are exceptions to the general powers granted the Fire Marshal in the first section of the Act and subjects the Act to the rule of statutory construction that, if there is an apparent conflict in the provision of a statute, the specific provisions take precedence over the general provisions of the Act. * * * ."

The same principle would apply to the provisions of Section 4 as amended. Hence in determining whether the type
of situation set forth in your inquiry requires a permit we must look to Section 4 (20-1004, Burns' R. S. 1933, Pocket Supplement). Since it clearly does not fall within classes A and B the language of Section 4 should then be considered.

The applicable part of the classification as set forth in Class C of Section 4 is "night clubs with stage or floor shows, and other places of public amusement or entertainment ** *. At the outset, it appears that no general rule can be made which will determine all situations with which you will be confronted. The following considerations are presented merely as some guide to varying circumstances.

What constitutes a night club? In a general sense the difference between a bar or tavern and a night club is probably one of degree. Hence, elements of fact in each case must be considered. The closest approach to a definition of "night club" is found in Meraux & Nunez v. Houck, 13 So. (2d) 233, 1942 (La.). At page 239 the court said:

"There is evidence in the record that the restaurant, bar and lounge or recreational place operated in the administration building by Houck was in keeping with the custom of modern airports as a convenience to its patrons and a necessary adjunct thereto. The testimony shows that this type of business was not one that fell in the category of a night club as that term is usually applied and understood. There were no floor shows, entertainers or orchestra. ** *"

It does not occur to me, however, that the mere presence of music will change a bar or tavern into a night club within the meaning of the Act.

The next question is, even assuming the establishment is a night club, does the presence of paid musicians constitute a floor show? Normally in common language a floor show entails more than music alone. Since "floor show" has no well defined legal or technical meaning, the words should be taken in their common sense or meaning. In casualty insurance practice I am informed that the facility of a dance floor is essential to a floor show. Consequently, I am of the opinion that the mere presence of music by paid musicians will not bring an establishment within Class C.

Third, what is an "other place of public amusement or entertainment?"
The purpose of Chapter 83 of the Acts of 1937, which deals with places of public amusement or entertainment, appears to be for the regulation of those places where crowds are apt to gather for the purpose primarily of amusement and entertainment. It is not contended that a restaurant which serves no liquor and yet has music is a place of public amusement and entertainment. Thus in determining whether a given establishment is a place of public entertainment and amusement the inquiry should be primarily whether that is the chief aim. The presence or absence of music should make little difference except as one of the facts to be considered. By the same token if the primary purpose of the establishment is not for public amusement or entertainment, the presence or absence of music should not be controlling. Consequently, in determining whether a retailer of alcoholic beverages who employs musicians should come within Class C of the Act can not be decided by the mere presence of paid musicians. The determination should rather be made on whether the music is incidental or the primary attraction and will depend upon the facts present in each case.

The principles herein set forth are strengthened when we consider that the issuance of a permit to a Class C permittee adds no additional public safety factor. By the provisions of Section 4, subsection (d) the Fire Marshal is not required to inspect regularly, but may inspect at such times as he deems necessary to insure adequate safety to the public in cases of Class C permits, and no safety devices are required by the Act in addition to those which may normally be required of any building where the public may enter.

Under other provisions of Indiana law the Fire Marshal is given ample authority to make regulations, make inspections of property and place orders thereon, when needed for the prevention of fires and fire losses. See Section 2, Chapter 192, Acts of 1913 as amended (20-802 Burns' R. S. 1933 Supplement). Since Class C adds nothing so far as public safety is concerned it should not be broadly construed. See Given v. State, 160 Ind. 552 (1902).

My conclusion is, in view of the foregoing factors, that the presence of paid musicians and furnishing of music alone, is not sufficient to require of a retailer of alcoholic beverages, a Class C permit from the Fire Marshal.