

**BOARD OF ACCOUNTS: Sewage Treatment Plants—**  
 whether same is a public utility within the provisions of  
 Section 48-1233 of Burns' Indiana Statutes Annotated  
 1933; whether the common council has the authority to  
 provide an additional salary for civil city engineers to be  
 paid by such public utility.

March 14, 1942.

Mr. Otto K. Jensen,  
 State Examiner,  
 State Board of Accounts,  
 State House,  
 Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your inquiry of February 21, 1942, in which you ask the following questions:

1. Is a sewage treatment plant a public utility within the purview of Section 48-1233 of the Amendments to Burns' Statutes of 1933?

2. May the Common Council pass an Ordinance authorizing the City Civil Engineer to receive a salary of \$600.00 per year in addition to the annual salary otherwise authorized, this salary to be received from the funds of the public utility owned and operated by the City? This additional compensation would be for actually assuming a superintendency of the sewage plant and would be in payment of duties over and beyond the usual required duties of the City Civil Engineer.

A public utility has been defined as a business which supplies the public with some commodity or service. The distinguishing characteristic of a public utility is the devotion of the business or service to the public use. It is apparent that a sewage disposal or treatment system is devoted to the use of the public generally or to that part of the public which is so situated as to avail itself of such facilities. The term "public utility" has been extended to include a great number of different types of service, and it has been held specifically to include a sewage treatment or disposal plant. (*Payne v. The City of Racine* (1935), 259 N. W. 437, 217 Wis. 550.)

An opinion issued in 1937 from this office held that a sewage disposal plant, if operated as a revenue producing service was properly classed as a public utility. (Opinions of Attorney General, 1937, p. 346.) If this sewage treatment plant is so operating, then your first question is answered in the affirmative.

In answering your second question, it must be pointed out that there is a distinction between the increase of the salary of a city civil engineer under the provisions of Section 48-1233, Burns' Indiana Statutes Annotated 1933 (1941 Supp.), and the employment of a city civil engineer as superintendent of the city operated sewage treatment plant. This office has held that a city civil engineer could not be paid a separate salary as superintendent of a sewage disposal plant. (Opinions of Attorney General, 1937, p. 346.) In that instance, the city sought to employ the city civil engineer and pay him a salary which would be in addition to any salary received under the provisions of the above cited statute.

As pointed out in the answer to the first question, the operation of a sewage disposal plant as a revenue producing service would qualify the city as a city within the exception in the statute cited by you, which exception reads as follows:

“\* \* \* except that the common council of any city which owns and operates a public utility or utilities shall, by ordinance duly enacted on or before the first Monday in September, 1933, and thereafter on or before the first day of April in the years in which elections for election of city officers are held, provide that the mayor, city attorney, city civil engineer, city controller, and clerk-treasurer of such city may receive, from the funds of such utility or utilities, a salary in addition to the annual salary herein otherwise authorized, which additional salary shall not exceed the sum total of six hundred dollars (\$600) per year.”

(Burns' Indiana Statutes Annotated 1933 (1941 Supp.), Section 48-1233; Acts 1933, Chap. 233, Sec. 21, p. 1042; 1941, Chap. 19, Sec. 1, p. 51.)

It must be pointed out that more than one public utility does not qualify the officers for any sum in addition to the

\$600.00 permitted by the statute. If the sewage treatment plant is the first public utility operated by the city in question and no provision has been made for the payment of the additional salary, the common council, before the first day of April, 1942, should pass an ordinance providing for such an increase, which shall not be more than \$600.00 and may not be less than 80% of such sum as required by the provisions of Section 48-1238, Burns' Indiana Statutes Annotated 1933.

The language of the statute has been construed to be mandatory by an official opinion of the Attorney General issued in 1935 (Opinions of Attorney General, 1935, p. 60). If the common council has failed to fix such additional salaries and provide for the payment of the same within the time directed by the statute, such council may, of its own volition, fix such additional salaries and may provide for the payment thereof out of the funds of the public utility. If the common council in such case refuses to take such action, an officer entitled to such additional compensation may maintain an action mandating the council to so fix the additional sum and to provide for the payment thereof.

Summarizing, the sewage treatment plant, if operated on a revenue producing basis, in such a utility as to qualify the city within the exception in the statute cited in your first question, and, if no additional salaries have been provided by the common council of such city because of operation of this or any other public utility, the council has the power to pass an ordinance increasing the salaries of the officers as set out in such statute in an amount not to exceed \$600.00 and not to be less than a minimum of \$480.00 per year.