

## OPINION 35

late the conduct of two businesses on the same premises, and they have the authority to suspend or revoke the license of any person who violates those regulations. Conversely, as was concluded in answer to your second question, the Consumer Loan Act does not prohibit the conduct of two businesses on the same premises. A rule adopted by the Department of Financial Institutions that would prohibit what the Act permits would not be "reasonable" nor "not inconsistent with the provision of this act." I must therefore conclude that the power of the Department in this regard is limited to prohibiting the conduct of two businesses on the same premises only in those individual instances when, after investigation, the Department determines that the joint operation of the particular business in a specified office facilitates evasion, or conceals violation, of the Act.

---

### OFFICIAL OPINION NO. 36

October 26, 1967

#### **JUDICIAL OFFICERS—CITIES AND TOWNS—Residence as Condition of Eligibility for Election to Office of City Judge.**

Opinion Requested by Hon. John J. Frick, State Representative.

I am in receipt of your recent letter inquiring whether Indiana Acts 1959, ch. 31, § 1, concerning the residence of city judges of certain second class cities, violates Article 6, Section 6, of the Indiana Constitution.

Article 6, Section 6, of the Indiana Constitution provides:

"All county, township, and town officers, shall reside within their respective counties, townships, and

towns; and shall keep their respective offices at such places therein, and perform such duties, as may be directed by law.”

The term “town” as used in the above constitutional provision is a generic term that includes cities. *City of Indianapolis v. Higgins*, 141 Ind. 1 (1894); *State ex rel. Gleason v. Gerdink*, 173 Ind. 245, 90 N.E. 70 (1909).

The above provision was interpreted by the Indiana Supreme Court in *Sarlls v. State ex rel. Trimble*, 201 Ind. 88, 166 N.E. 270, 67 A.L.R. 718 (1929), wherein the constitutionality of Acts 1921, ch. 218, which authorized a city manager form of government, was challenged on a number of particulars, including the provision in Section 62 of the Act that the city manager need not, when appointed, be an inhabitant of the city or state. The Court said, at 107 of 201 Ind.:

“None of the above sections of the Constitution, nor § 6, Art. 6, thereof (§ 163 Burns 1926) providing that ‘all county, township and town officers shall reside within their respective counties, townships and towns; and shall keep their respective offices at such places therein . . .’ is violated by § 62 of the act before us. This constitutional requirement can only reasonably be interpreted to mean that the officers mentioned shall be residents when serving as such officers, not that they shall be inhabitants of the city when appointed (or for a year preceding their election as provided in the general municipal corporations act of 1905 as amended, § 10266 Burns 1926), conceding for argument that the word ‘town,’ as used in the Constitution, is generic and includes the city here involved. See *State, ex rel., v. Gerdink, supra*; *City of Indianapolis v. Higgins* (1894), 141 Ind. 1, 9, 40 N.E. 671.”

There is no doubt that a city judge is an “officer” as that term is used in Article 6, Section 6, of the Constitution. In *Millers Nat’l Ins. Co. v. American State Bank of East Chicago*, 206 Ind. 511, 517, 190 N.E. 433 (1934), the Indiana Supreme Court examined the status of a city court and stated:

## OPINION 36

“. . . We must conclude that the tribunal is a court, presided over by a judicial officer, with the same powers as to the supervision of the conduct of trials, instructions of jury as to the law, granting new trials, and arresting judgment, that are vested in circuit courts and the judges thereof; . . .” (Emphasis added.)

See also 1960 O.A.G., p. 255, wherein the Attorney General concluded that the city judge of a city of the fifth class was an officer in towns of the constitutional prohibition (Art. 2, §9) against the simultaneous holding of two lucrative offices.

Nor can there be any doubt whether city judges are officers of the city. The office of city judge is not a constitutional office, but rather one created by statute. Acts 1933, ch. 233, § 5, as last amended by Acts 1959, ch. 107, § 1, the same being Burns § 48-1215, provides in part:

“(a) In all cities of the second class the elective officers shall be:

“(1) The mayor;

“(2) The city clerk;

“(3) The city judge; and

“(4) The members of the common council.”

The case of *State ex rel. Gleason v. Gerdink, supra*, concerned an appointment to fill the office of city judge, and the issue was whether that office is a town office in terms of Article 6, Section 9, of the Constitution, which provides that “vacancies in county, township and town offices shall be filled in such manner as prescribed by law.” In holding that the office of city judge was a town office the Court said, at 249 of 173 Ind.:

“It will thus be observed that there is constitutional warrant to create any kind of an office—judicial, executive, or administrative—in the smaller governmental divisions that the legislature may deem necessary to the proper administration of local affairs, . . .”

Therefore, city judges of cities of the second class are officers of the city and must reside within the city.

Acts 1959, ch. 31, § 1, the same being Burns § 4-2621, provides:

“In all counties in this state, except counties containing two or more second class cities, no person shall be eligible to hold the office of city judge in a city of the second class unless he shall have been a resident of the county in which such city of the second class is located for at least one year immediately preceding his election. Should any city judge in a city of the second class cease to be a resident of such county during his term of office, such office shall thereby at once become vacant. It shall not be required that any person to be eligible to the office of city judge in a city of the second class be a resident of such city of the second class, nor that such person shall have been a resident of such city of the second class for one year immediately preceding his election.”

Your question is whether the above statute violates Article 6, Section 6, of the Indiana Constitution. The answer to your question depends upon the interpretation to be given that statute. If that statute were to be interpreted as providing that a city judge need not reside in the city while occupying the office, then the statute is unconstitutional. If, on the other hand, the statute were to be interpreted as providing that a person need not be a resident of the city (but of the county) when elected or appointed to that office, then the statute would be constitutional.

The Legislature has the power to provide who shall be eligible to hold any office created by the Legislature. *State ex rel. Reese v. Bogard*, 128 Ind. 480, 482 (1891); *State ex rel. Workman v. Goldthait*, 172 Ind. 210, 218, 87 N.E. 133 (1909). Pursuant to that power the Legislature has both created the various city offices and prescribed certain residence requirements for eligibility. Acts 1905, ch. 129, § 43, as last amended by Acts 1921, ch. 161, § 1, the same being Burns § 48-1242, provides in part:

## OPINION 36

“No person shall be eligible to any city office unless he shall have been a resident of such city for at least one (1) year immediately preceding his election nor shall any person be eligible to the office of councilman to represent any ward unless for the last six (6) months of his residence in such city he shall have been a resident of such ward. And should any city officer cease to be a resident of such city, or any councilman representing any ward cease to be a resident of such ward, during his term of office, such office shall thereby at once become vacant.”

Thus prior to the enactment of the 1959 Act (Burns §4-2621) with which you are concerned, no person was eligible for the office of city judge in any city unless he had been a resident of that city for at least one year prior to his election. Burns § 4-2621 could be interpreted as a relaxation of this requirement for eligibility for election in the cities described in that Act. Such an interpretation is supported by the last sentence of that statute which, without referring to the general residence requirement, specifically provides that a person to be eligible for the office need not be a resident of the city for one year prior to his election. Such an interpretation would not violate Article 6, Section 6, of the Constitution. (See *Sarlls v. State ex rel. Trimble, supra*, concerning city managers.)

When an Act is susceptible to two different interpretations, one of which is unconstitutional, it must be given the interpretation that does not violate the Constitution. *Smith v. Indianapolis Street Ry.*, 158 Ind. 425, 63 N.E. 849 (1902).

Therefore, it is my opinion that the county residence provisions of Acts of 1959, ch. 31, § 1, the same being Burns § 4-2621, must be interpreted as establishing residence in the county as a condition of eligibility for election to the office of city judge rather than as permitting a person who holds the office of city judge to reside anywhere within the county, and that the statute when so interpreted does not violate Article 6, Section 6, of the Indiana Constitution, which article would require a city judge to reside in the city during his tenure in that office.