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en as, in the opinion of the common council, the public interest may demand.

Therefore, in answer to your specific question as to whether a city of the fifth class which had never created the office of city judge may now create that office, it is my opinion that the common council of any city of the fourth or fifth class may either create or abolish the office of city judge by an ordinance duly enacted on or before the first day of May of any year in which city elections are to be held regardless of the prior existence or non-existence of that office in that city.

OFFICIAL OPINION NO. 6

March 21, 1967

ELECTIONS—Redistricting of Wards by County Commissioners and Town Boards in Preparation for Town Election.

Opinion Requested by State Election Board of Indiana.

This is in answer to your questions concerning House Enrolled Act No. 1851, passed by the 95th General Assembly. As you noted, that original Act applies to any town in Lake County having a population of more than ten thousand according to the last preceding United States census. (The question of whether this Act may be special legislation in violation of Art. 4, § 22 of the Constitution of the State of Indiana is not considered herein.) It provides that the number of trustees shall be seven and no more, that the town shall be divided into five wards of equal population, with one trustee elected from and by the electors of each ward and two elected at large. Section 3 repeals all acts and parts of acts in

conflict. Section 4 is an emergency clause which makes the Act effective from its passage, which occurred on March 11, 1967, when the Governor signed the Enrolled Act.

Your first question is whether the town of Griffith, which was officially recorded as having a population of less than ten thousand in the 1960 official decennial census, but which was shown to have a population of over ten thousand in 1965, by a "special enumeration," is subject to the Act. For the purposes of this opinion, it will be assumed that the "special enumeration" you refer to was a special census conducted by the United States government. The first section of the Act reads as follows:

"SECTION 1. In any town having a population of more than ten thousand *according to the last preceding United States census*, and located in a county having more than two cities of the second class, *both according to the last preceding special or decennial United States census* the number of trustees shall be seven (7) and no more. The town shall be divided into five (5) wards of equal population. One (1) trustee shall be elected from and by the electors of each ward and two (2) trustees shall be elected at large." (Emphasis added.)

Although this language is somewhat ambiguous in that the "ten thousand" population classification is modified by the words "according to the last preceding United States census," and the words "both according to the last preceding special or decennial United States census" could be interpreted to apply either to "both cities of the second class," or "both towns having a population of more than ten thousand" and to "two or more cities of the second class," the omission of the word "decennial" from the first reference to the census, which is unquestionably applicable to towns in the ten thousand population classification, must be interpreted to mean the last census taken by the United States, whether it be decennial or special. 1965 O.A.G., pp. 69, 74. Therefore, the town of Griffith is subject to the provisions of House Enrolled Act No. 1851 if the "special enumeration" referred to was a census taken by the United States government.

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You next set out figures to show that the Towns of Highland, Munster and Griffith in Lake County have either a number of wards, or an imbalance of population in wards, or both, which does not comply with the new Act, and state that in none of those towns do the precinct boundaries coincide with the ward boundaries. Under this factual situation it would, of course, be impossible to conduct the election mandated by the new Act of five trustees each to be elected from and by the voters of a ward of equal population with the four other wards. You have indicated the concern of the Lake County Election Board that there is insufficient time for the proper officers or boards to make the necessary ward and precinct boundary changes before the ensuing primary election due to publication and notice requirements in prior statutes.

Since Acts 1957, ch. 168, § 1 amended The Indiana Election Code (hereinafter cited as "the Code"), Acts 1945, ch. 208, § 165, Burns § 29-4405, (which was further amended in a different particular by Acts 1961, ch. 259, § 1), the County Election Board has conducted the primary elections in which officers are nominated in all towns having a population of three thousand and over, according to the last preceding United States census, in which the boundaries of such towns coincide with the boundaries of precincts in which the town is located. These three towns meet the population classification, and although you did not so specify, it is assumed for the purposes of this opinion that the boundary of each town coincides with the boundaries of the precincts in which the town is located, as otherwise the county election board would not be conducting the primary election. That section provides that the specified towns "shall nominate . . . all officers of such town, pursuant to the laws of the state concerning the nomination of officers of cities, at a primary election. . . ." The county election board and the clerk of the circuit court of the county in which a city is located shall perform the same duties in connection with city primaries which they perform in county primaries and elections, except as otherwise specified, Acts 1945, ch. 229, § 2, as last amended by Acts 1947, ch. 29, § 1, Burns § 29-4313; see also § 155 of the Code, Burns § 29-4306.

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The next primary election for town candidates will be held May 2, 1967. Candidates may file declarations of candidacy for office not more than seventy (70) and at least forty (40) days preceding the day of the primary election, in this case by March 23, 1967, see § 87 of the Code, as last amended by Acts 1961, ch. 192, § 1, Burns § 29-3605. Since 1957, the voting precincts in elections in towns having a population of three thousand or more are those established by the county commissioners for general elections, § 171 of the Code, as amended by Acts 1957, ch. 168, § 2, Burns § 29-4411.

The statute authorizing the county commissioners to change the boundaries of precincts reads in part as follows:

“Except as hereinafter otherwise provided, every order of the board of county commissioners establishing, changing or dividing election precincts shall be made not later than the February session of the year in which a *general election* will occur, and the precincts shall remain as they are established at such February session, or previously. . . . All election precincts hereafter created in cities shall be so defined and bounded that they do not include territory of more than one ward in such cities. The common council of cities shall have no power to change any ward boundaries after January first in each year in which an election of city officers is to be held, until after such election has been held. The boards of county commissioners shall, wherever necessary, define election precincts in cities so as to comply with the provisions of this section.” (Emphasis added.) Code, § 78, Burns § 29-3502.

The words “general election” when used in the Code mean “the election provided to be held in the state . . . in every even-numbered year,” Code, § 2, as amended by Acts 1965, ch. 261, § 1, Burns § 29-2802. Therefore, the town election in 1967 is not a “general election” within the meaning of the Code, and the county commissioners may change precinct boundaries at any time prior to their February session of

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1968. The only notice of change of precincts required of the county commissioners is that of immediate publication in two newspapers of general circulation, notice to the clerk of the circuit court, the board of registration and the state election board, Election Code, § 82, Burns § 29-3506.

Town boards are empowered by Acts 1959, ch. 240, § 9, Burns § 48-110, to establish the boundaries of town wards, and this power may be exercised, according to that statute, "at any time not less than sixty days preceding the *election* of town officers." (Emphasis added.) The ensuing primary election is not an "election of town officers," but is a nomination of candidates for town office. That section provides:

"If the terms and conditions of section 8 have been reasonably complied with an ordinance may be introduced incorporating said town. Such ordinance shall divide the area of the proposed town into not less than three nor more than seven wards, having due regard for the equitable distribution of the population of the area among said wards and shall appoint a resident inspector for each ward for the purpose of conducting, forthwith, an election of officers for said town in accordance with the laws and procedures for the election of town officials. Thereafter the board of trustees of any town incorporated under the provisions of this act, or under any other act, may, at any time not less than sixty days preceding the election of town officers, redistrict the town in like manner. The procedure for the passage of the ordinance provided for herein shall be that procedure which is used to govern the promulgation and passage of ordinances by cities and may be appealed as provided in Chapter 245 of the Acts of the Indiana General Assembly of 1933 as the same has been amended or supplemented: Provided, That if the land encompassed by the proposed town lies within two or more counties, the circuit or superior courts of any affected county shall have jurisdiction of such appeal at the option of those appealing. *Any party to the proceedings before the county commissioners shall have the right of appeal.*" (Emphasis added.)

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The 1933 Act cited therein may be found in Burns § 48-4501.

Although it might be argued that an ordinance of the town trustees redistricting the town into wards could be appealed as provided in the 1933 Acts, the last sentence of the section, as quoted above, makes it clear that the ordinance which may be so appealed and which must be promulgated as a city ordinance is the ordinance of the county commissioners incorporating the town, and not action of the town trustees in redistricting. Therefore, this section does not provide for either a remonstrance or an appeal from the town trustees' redistricting, although the General Assembly cannot, of course, completely foreclose any resort to the courts by a citizen whose rights are infringed, *Hagemann v. City of Mount Vernon*, 238 Ind. 613, 154 N.E. 2d 33 (1958). Acts 1905, ch. 129, § 31, cl. 20, as last amended by Acts 1957, ch. 258, § 1, Burns § 48-301, which empowers boards of town trustees to make and establish by-laws, ordinances and regulations, does not require publication of ordinances before their effective date except in the case of ordinances imposing penalties, which would not appear to be necessary in an ordinance establishing ward boundaries.

Whether the provisions in section 78 of the Code, Burns § 29-3502, forbidding common councils of cities to change any ward boundaries after January first in a year in which city officers are elected applied to town trustees pursuant to section 165 of the Code, as amended, Burns § 29-4405, *supra*, prior to the enactment of House Enrolled Act No. 1851 need not be considered. It is clear that the new Act has amended or repealed prior law to the extent to which it conflicts, *Houtchens v. Lane*, Ind., 206 N.E. 2d 131, 134, 5 Ind. Dec. 241, 245 (1965), so that trustees of towns now may redistrict the wards of the towns concerned in order to comply with the new law.

Therefore, the town boards and county commissioners are required to meet prior to the deadline of March 23, 1967, for filing declarations of candidacy and to redraw the boundaries of precincts and wards within any towns to which House Enrolled Act No. 1851 applies, pursuant to that Act.