

1967 O. A. G.

OFFICIAL OPINION NO. 16

June 14, 1967

**MUNICIPAL CORPORATIONS—Sewage Disposal Companies
—Operation under County Ordinance as
Contrary to State Statute.**

Opinion Requested by Hon. Harriette Bailey Conn, State Representative.

You have informed me that an ordinance of Allen County, Indiana, regulating sewage disposal systems appears to conflict with § 97c, Acts 1913, ch. 76, as added by Acts 1957, ch. 313, § 2, Burns § 54-601c, hereinafter referred to as the "Rural Sewage Disposal Section," and have requested my opinion concerning the matter. Your letter reads in part as follows:

"[S]ince 1957, when the Rural Sewage Disposal Act was enacted, the policy of the State of Indiana has been to prevent pollution of its streams by encouraging and protecting sewage disposal companies. The 1957 Act placed the operations of such companies under the exclusive regulation of the Public Service Commission, provided for the award of exclusive franchises to them as 'public utilities' with all of the attendant rights of utilities, and guaranteed them immunity from municipal takeover, even by annexation, for a period of at least 12 years.

"It has been brought to my attention that at least one county, Allen County, has a local ordinance, dating from 1954, which contains conflicting provisions, which if effective, would defeat the state policy and the provisions of the 1957 Act. Allen County Ordinance #7, as amended in 1959, ignores the status of a franchised sew-

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age disposal company as a 'public utility' operating 'public sewers,' and also has a mandatory provision providing that whenever any 'municipal sewer' comes within 150 feet of property served by a 'private sewage disposal system,' irrespective of its state franchise, 'a direct connection shall be made to said (municipal) sewer . . . and . . . sewage disposal and treatment facilities shall be abandoned.' (Section 208 of Allen County Ordinance #7.)

". . . Accordingly, I respectfully request your Official Opinion as to whether the 1957 state statute supercedes and controls the conflicting provisions of the Allen County Ordinance?"

You have submitted a certified copy of Allen County Ordinance No. 4 of 1954, as amended by Allen County Ordinance No. 7 of 1959. A copy of the first two articles thereof follows this opinion as Appendix A. The title of the ordinance recites that it is an ordinance regulating the installation, construction, maintenance and operation of private sewage disposal systems in closely built-up areas and providing penalties for violation thereof. The statutory authority for the ordinance in question is Acts 1953, ch. 80, § 3, Burns § 26-2603, which reads in part as follows:

"For the protection of public health, the board of commissioners of any county, in addition to its other powers, shall have the power and authority to adopt and enact ordinances to require persons who own or lease property in closely built-up areas and on which property is located a building or buildings used for residential or business purposes, to connect to available sewer systems, and to regulate the manner and method of disposal of domestic or sanitary sewage by private methods such as septic tanks and systems, outhouses and privies: Provided, however, That the board of commissioners of any county shall have no jurisdiction over the erection, construction, operation or maintenance of publicly owned or financed sewer systems or sanitation and disposal plants, except that this provision shall not

apply to said systems and plants for county-owned buildings.”

The county commissioners are given the power to require property owners or lessors specified in the act to connect to “available sewer systems,” which term is not further defined. They are also given the authority to regulate “the manner and method of disposal of domestic or sanitary sewage by private methods *such as* septic tanks and systems, outhouses and privies.” (Emphasis added.) The statute does not, in my opinion, authorize the county regulation by ordinance of disposal of sewage by all “private” methods, but only of disposal by private methods “such as” those listed, not including an “available sewer system” owned privately.

In 1957, after the enactment of Allen County Ordinance No. 4 of 1954, and prior to its amendment by Allen County Ordinance No. 7 of 1959, the General Assembly enacted the Rural Sewage Disposal Section previously referred to, as § 97c of Acts 1913, ch. 76, hereinafter referred to as the “Public Service Commission Act.” The latter is a general act giving exclusive jurisdiction over public utilities to the Public Service Commission of Indiana. The Rural Sewage Disposal Section includes “sewage disposal companies” as public utilities under the jurisdiction of the Public Service Commission.

The term “sewage disposal service” is defined as:

“. . . any public utility service whereby . . . sewage . . . of any single territorial area is collected, treated, purified and disposed of in a sanitary manner, and includes all sewage treatment plant or plants, main sewers, submain sewers, local and/or lateral sewers, intercepting sewers, outfall sewers, force mains, pumping stations, ejector stations and all other equipment and appurtenances necessary or useful and convenient for the rendition of such service.” § 97c (a) (1)

Municipally owned sewage collection and treatment systems are specifically excluded from the definition of “public utility” in the Public Service Commission Act, Acts 1913, ch. 76, § 1a, as added by Acts 1955, ch. 37, § 1, as amended by Acts 1957, ch. 313, § 1, Burns § 54-105.

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“‘[S]ewage disposal company’ means any natural person, firm, association, corporation or partnership owning, leasing or operating any sewage disposal service within the rural areas of this state, and all provisions of this act pertaining to a ‘public utility’ shall apply with equal force and effect to a ‘sewage disposal company’” § 97c (a) (2).

“Rural area” means any Indiana territory lying outside the corporate limits of a municipality, section 97c (a) (3), which is defined in section 1a of the Public Service Commission Act as “any city or town of the State of Indiana.”

The Allen County Ordinance provides, as authorized by statute, that it applies to “closely built-up areas,” which are by definition outside the corporate limits of a city or town, Burns § 26-2603, § 101 of the ordinance. Therefore, the ordinance covers sewage disposal activities in at least some of the territorial area in which sewage disposal companies may operate under an exclusive certificate from and under the supervision of the Public Service Commission of Indiana.

In regard to the Public Service Commission’s jurisdiction, section 97c (b) provides:

“It is hereby declared to be in the public interest to provide for the orderly development and rendering of sewage disposal service in rural areas within the State of Indiana . . . and that such operation be under the control, regulation and supervision of the Public Service Commission of Indiana, and such sewage disposal companies shall not be subject to regulation by any municipality or county government . . . with the exception that said sewage disposal company shall be subject to the comprehensive plan, zoning, and subdivision requirements and regulations of the governmental units having jurisdiction in the area; Provided, however, that all functions, powers and duties of the State Board of Health and the Stream Pollution Control Board shall remain unaffected by this section.”

Subsection (c) of section 97c prohibits without a certificate the operation of sewage disposal companies commencing after the effective date of the Rural Sewage Disposal Section.

Section 97c (j) provides even greater protection to private investors in sewage disposal companies :

“To encourage the installation of sewage treatment plants, and sewers, mains, stations, and all other equipment and appurtenances for rendering sewage disposal service in rural areas in close proximity to municipalities, and to insure that a sewage disposal company which has made such installation in such area can recover the cost of its investment, in the event that the area or areas or any part thereof included within the territory granted under a certificate of territorial authority shall be annexed by any municipality at any time within twelve (12) years from the date that such certificate was granted, a sewage disposal company operating under such certificate shall continue to operate under such certificate of territorial authority, subject to the exclusive jurisdiction and regulation of the commission, for the unexpired portion of such period of twelve years. . . .”

The intention of the General Assembly to regulate the entire field of rural sewage disposal service by privately owned public utilities, to give exclusive jurisdiction over such operations to the Public Service Commission, as opposed to municipal or county regulation, and to protect the investment of such a sewage disposal company for at least twelve years against even municipal annexation, is quite clearly expressed. The General Assembly has enunciated with precision and clarity that the public policy of the state requires sanitary methods of sewage disposal in order to protect the health of its citizens and that such policy will be furthered by the organization and development of sewage disposal companies franchised by the Public Service Commission. The Rural Sewage Disposal Section obviously is an attempt to make sewage disposal systems constructed and operated by such companies “available” to rural areas as an alternative to privately owned and operated septic tanks and similar methods of disposal. The 1953 statute, Burns § 26-2603, authorizing the county commissioners to order connections to “available sewer systems” must, when read with the Rural Sewage Disposal Section enacted in 1957,

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be interpreted to include sewage disposal systems operated by companies franchised by the Public Service Commission of Indiana as "available" sewage disposal systems under the 1953 Act.

Boards of county commissioners are created by statute. *State ex rel. Workman v. Goldthait*, 172 Ind. 210, 87 N.E. 133 (1909), and like other statutory boards and officers, have only such powers as are expressly conferred upon them by statute, or as may be implied from those expressly granted, *Tomlinson v. Marion County Plan Comm'n*, 234 Ind. 88, 122 N.E. 2d 852 (1955); *Board of Comm'rs v. Sanders*, 218 Ind. 43, 30 N.E. 2d 713, 131 A.L.R. 1048 (1940). The General Assembly may enlarge or curtail the powers of the board of commissioners as it sees fit, *Gordon v. Corning*, 174 Ind. 337, 92 N.E. 59 (1910). When the Public Service Commission of Indiana has been given jurisdiction of a certain matter by the General Assembly, a board of county commissioners may not usurp that jurisdiction, *Cincinnati, I. & W.R.R. v. Board of Comm'rs* (1922), 192 Ind. 1, 134 N.E. 782. Any ordinance which violates a statute of the State of Indiana or is in excess of the enacting body's authority is void. *Local Union No. 26 v. City of Kokomo* (1937), 211 Ind. 72, 5 N.E. 2d 624, 108 A.L.R. 111; *State ex rel. Hunter v. Winterrowd* (1910), 174 Ind. 592, 596, 91 N.E. 956, 92 N.E. 650.

Thus, it is apparent that the Board of Commissioners of Allen County may not regulate the construction or operation of sewage disposal companies franchised by the Public Service Commission of Indiana; that it may not exclude sewage disposal companies franchised by the Public Service Commission from a class of "available" sewage systems to which connections are ordered; and that any ordinance provisions in excess of its authority are invalid.

In the Allen County Ordinance, the words "sewage disposal system" are defined broadly to include "any arrangement of devices and structures used for receiving, treating and disposing of sewage." Section 107. The definition is so broad as to make it clear that the board of county commissioners intended to exercise its statutory jurisdiction over every type of sewage disposal within the area, to the degree to which such au-

thority is granted for a particular type of system by Burns § 26-2603.

The difficulty with the ordinance arises from the fact that in the definition section, the words "public sewer" rather than "available sewer system" are used, and, further, are narrowly defined.

" 'Public Sewer' shall mean any sewer constructed, installed, maintained, operated and owned by a municipality or a taxing district established for that purpose." § 103.

All other sewage disposal systems, which would literally include franchised sewage disposal companies, are described as "private sewage disposal systems":

" 'Private sewage disposal system' shall mean septic tanks *or any other sewage disposal system* not constructed, installed, maintained, operated and owned by a municipality or a taxing district established for that purpose." § 103. (Emphasis added.)

All private sewage disposal systems must comply with the regulations of the ordinance in Article III and IV concerning construction and operation, and:

"Wherever a public combined or sanitary sewer becomes available and is within 150 feet of the property line of the residential or business property, served by a private sewage disposal system or privy, situated within the County of Allen, State of Indiana, a direct connection shall be made to said sewer and any septic tanks, seepage pits, out-houses, privy pits and similar sewage disposal and treatment facilities shall be abandoned and filled in a safe and sanitary manner, as directed by the County Health Officer." § 208.

In other words, every residential and business property within the area is required either to have and maintain a sewage disposal system regulated by the county or to dispose of its sewage by connecting to any publicly owned sewer system which comes within a certain number of feet of the property

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line. It is also clearly shown by the ordinance as a whole that the systems to be subjected to and which must meet the standards of the ordinance regulating "private" systems are those which are used by an individual property owner, or perhaps by a combination of property owners, to dispose of sewage by means of septic tanks or systems, or by outhouses or privies. The required standards, contained in Articles III and IV are clearly inapplicable to the type of sewage disposal system which a sewage disposal company franchised by the Public Service Commission of Indiana is required to maintain. Further, it is clear that the board of county commissioners intended to require that methods of sewage disposal such as septic tanks be discontinued throughout the territory subject to the ordinance just as soon as another more sanitary method becomes available.

If the ordinance is literally construed, however, it regulates franchised sewage disposal companies which the county is not authorized by Burns § 26-2603 to regulate, and it also is in violation of the Rural Sewage Disposal Section of the Public Service Commission Act, and therefore is invalid:

Municipal ordinances must be construed by the usual rules of statutory construction, *Woerner v. City of Indianapolis* (1961), 242 Ind. 253, 270, 177 N.E. 2d 34, *cert. den.* (1962), 368 U.S. 989; *Zorger v. City of Greensburg*, 60 Ind. 1 (1877).

In construing statutes,

"... the intention of the lawgiver is to be deduced from a view of the whole, and of every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms." *Zorger v. City of Greensburg*, 60 Ind. at 5.

The construction of the whole must be made in the light of the purposes of the act. The court has a duty to construe an act susceptible to a reasonable and intelligent construction in such a way as to give effect and validity to every provision of the act, and a construction which would invalidate such a statute must be avoided. *Tinder v. Music Operation, Inc.* (1957), 237 Ind. 33, 142 N.E. 2d 610. Therefore, statutes

should be construed in such a manner that they are in harmony with the constitution, which would mean, as applied to municipal ordinances, that an ordinance should be construed to be in harmony with the statutes of the state.

“It is well settled that we should construe statutes in harmony with constitutional provisions, rather than in a fashion repugnant to them, when that can reasonably be done. . . . Otherwise a construction contrary to constitutional provisions would compel us to invalidate the statute.” *Town of Markleville v. Markle* (1962), 242 Ind. 322, 327, 179 N.E. 2d 279.

Further, although the general rule is that the courts cannot supply defects or omissions in a statute to carry out the Legislature’s intention when the statute is free from uncertainty or ambiguity, there has been an exception even there imposed by the Indiana Supreme Court during the last century, as explained in *Woerner v. City of Indianapolis* (1961), 242 Ind. 253, at 261 *et seq.*, *supra*, wherein the court construed a municipal ordinance according to the rules of statutory construction:

“. . . we now consider the law to be well settled that although the language employed in the enactment may be technically free from uncertainty or ambiguity, in construing the acts of the legislature courts may provide minor omissions or make minor substitutions in the enactments of the legislature where (1) such action is necessary in order to give vitality to or prevent absolute absurdity in the acts of the legislature; (2) an omission has occurred or a correction is necessary because of clerical or typographical error; (3) the legislation, as enacted, was obviously not within the comprehension of the legislative body, and (4) the legislative intention, with respect to the enactment, is clear.” 242 Ind. at 263-264.

In my opinion, the ordinance in question can and must be reasonably construed to include within the definition of “public sewers” all franchised sewage disposal companies not subject to regulation by the county. Thus construed, the ordinance

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accomplishes the purposes intended by the board of county commissioners, is not in violation of the Rural Sewage Disposal Section of the Public Service Commission Act, and conforms to Burns § 26-2603, which authorized the enactment of the ordinance.

APPENDIX A to OFFICIAL OPINION NO. 16

ORDINANCE NO. 7

ALLEN COUNTY ORDINANCE
PRIVATE SEWAGE DISPOSAL SYSTEMS
ORDINANCE NO. 4—1954 AMENDED,
BEING ORDINANCE NO. 7—1959

An ordinance regulating the installation, construction, maintenance and operation of private sewage disposal systems in closely built-up areas and providing penalties for violations thereof.

BE IT ORDAINED AND ENACTED by the Board of Commissioners of the County of Allen, State of Indiana, as follows:

ARTICLE I

DEFINITIONS

Unless the context specifically indicates otherwise, the meaning of terms used in this ordinance shall be as follows:

SECTION 101: "Closely built-up areas" shall mean and include any areas situated outside the corporate limits of any city or town upon which areas are located either residential or business buildings; Provided, however, That it shall not include any tract of land, situated outside the corporate limits of any city or town, consisting of ten acres or more and upon which tract of land is located only one building which building is used for residential purposes; Providing further, That it shall not include any tract of land situated outside the corporate limits of any city or town which tract of land is used for farming or agricultural purposes.

SECTION 102: "Sewage" shall mean any one or a combination of human excreta and waste water from water closets, laundries, sinks, bathing facilities, and other objectionable waste waters or liquid wastes from filling stations and industries.

SECTION 103: "Public Sewer" shall mean any sewer constructed, installed, maintained, operated and owned by a municipality or a taxing district established for that purpose. A county drain installed for the purpose of carrying surface water runoff and subsoil drainage shall not be considered a public sewer under this definition.

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SECTION 104: "Sewer" shall mean a pipe or conduit for carrying sewage.

SECTION 105: "Combined sewer" shall mean a sewer receiving both surface water runoff and sewage.

SECTION 106: "Sanitary Sewer" shall mean a sewer which carries sewage and to which storm, surface and ground waters are not intentionally admitted.

SECTION 107: "Sewage disposal system" shall mean any arrangement of devices and structures used for receiving, treating and disposing of sewage.

SECTION 108: "Private sewage disposal system" shall mean septic tanks or any other sewage disposal system not constructed, installed, maintained, operated and owned by a municipality or a taxing district established for that purpose.

SECTION 109: "Person" shall mean any individual, firm or corporation.

SECTION 110: "Insanitary" shall include any condition or manner that may: Give rise to a public health hazard by being accessible to insects, rodents or other possible carriers which may come in contact with food or drinking water or which may in any other way tend to transmit, generate or promote disease; Give rise to a nuisance due to odor or unsightly appearance; Contaminate any water supply; Pollute or contaminate any body of water used for public or domestic water supply purposes or for recreational purposes; Violate laws regulating water pollution or sewage disposal.

ARTICLE II

PRIVATE SEWAGE DISPOSAL SYSTEMS

SECTION 201: Where a public sanitary or combined sewer is not available, all persons owning or leasing property in closely built-up areas shall comply with the following provisions of this ordinance for private sewage disposal systems.

SECTION 202: It shall be unlawful for any person to place, deposit or permit to be deposited in any insanitary manner upon public or private property within the County of Allen, State of Indiana, or in any area under the jurisdiction of said County, any human excrement or sewage. No property shall be occupied which does not have sewage disposal facilities which are adequate in the opinion of the County Health Officer.

SECTION 203: Any business buildings situated, or to be constructed, within the County of Allen, State of Indiana, which are not connected to a public sewer system, and no public sewer system is available, there shall be established, installed or constructed and maintained a private sewage disposal system which shall comply with the standards of and be approved by the Indiana State Board of Health.

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SECTION 204: Any privy situated within the County of Allen, State of Indiana, shall be the sanitary type and shall be constructed and maintained in a clean condition so that insects and rodents cannot enter the privy structure or privy vault. Said privies shall be located so as not to endanger any water supplies to contamination.

SECTION 205: All private residential sewage disposal systems and privies shall be installed, constructed and maintained in an approved manner as described in Bulletins S.E. 8 and 11 of the Indiana State Board of Health and amendments and supplements thereto, and as hereinafter provided in Section Numbers 303, 304 and 305 of this ordinance. Said Bulletins are herewith incorporated by reference as a part of this section and one copy of each certified by the County Commissioners' signatures shall be filed in the office of the County Auditor and one copy in the office of the County Health Officer for public inspection.

SECTION 206: Should any defect exist or occur in any private sewage disposal system or privy which would cause said sewage disposal system or privy to fail to meet the requirements of Section 203, Section 204 and Section 205 of this ordinance or cause an insanitary condition, the defect shall be corrected immediately by the owner or agent of the owner, occupant or agent of the occupant. Failure to do so shall be a violation of this ordinance and the violator shall be subject to the penalties prescribed in Section 601 of this ordinance.

SECTION 207: Whenever there is to be any alteration of structures or change in use or occupancy that would result in overloading an existing private sewage system, said system shall be enlarged or replaced.

SECTION 208: Wherever a public combined or sanitary sewer becomes available and is within 150 feet of the property line of the residential or business property, served by a private sewage disposal system or privy, situated within the County of Allen, State of Indiana, a direct connection shall be made to said sewer and any septic tanks, seepage pits, out-houses, privy pits and similar sewage disposal and treatment facilities shall be abandoned and filled in a safe and sanitary manner, as directed by the County Health Officer.

SECTION 209: Whenever a new business building or subdivision is developed in an area where a public combined or sanitary sewer is available a connection shall be made to said sewer if such connection can be made at a reasonable cost.