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erning body, no matter which of the many possible forms of health department is involved.

In conclusion, it is my opinion that when a full-time county health department is the only health department in the county the approval of the board of county commissioners of a fee schedule for services performed by the health departments makes the schedule effective within all the cities and towns located within the county.

OFFICIAL OPINION NO. 32

December 6, 1966

**STATE BOARD OF HEALTH—Air Pollution Control
Board—Authority to Proceed in Area Having
Local Air Pollution Control Legislation.**

Opinion Requested by Dr. Andrew C. Offutt, State Health Commissioner.

I am in receipt of your recent request for an opinion concerning the enforcement procedures to be followed by the Air Pollution Control Board. Your specific question is:

“What is the procedure to be followed by the Air Pollution Control Board in relation to a complaint filed against an alleged offender located within an area that has adopted some sort of local ordinance pertaining to air pollution?”

Air pollution control in the State of Indiana is established by Acts 1961, ch. 171, the same being Burns IND. STAT. ANN., §§ 35-4601 through 35-4608. This Act created the Air Pollution Control Board and prescribed the functions, powers

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and duties of both that board and the State Board of Health with relation to control of air pollution.

The Air Pollution Control Board as created is a state-wide agency that fulfills a supervisory rather than a regulatory function. The first section of the Act, Burns § 35-4601, sets out the general intent and purpose of the Act and provides, in part:

“. . . It is the intention of this act that primary responsibility for the control of the emission of air contaminants into the atmosphere shall rest with the responsible local governmental agency and that affirmative, remedial action by this state shall be taken only in those areas of this state where no local air pollution law or regulation consistent with the provisions of this act is now, or hereafter, in effect or where, after hearing, the control board determines that the local law or regulation is not being enforced adequately and, in the opinion of the control board, it is not intended that it be so enforced.”

To further insure that local governmental units would not be prevented from acting in the area of air pollution, § 8 of the Act, Burns § 35-4608, provides:

“Nothing in this act shall prevent towns, cities or counties from enacting ordinances with respect to air pollution which will not conflict with the provisions of this act and which are designed to effectuate the general intent and purpose expressed in this act.”

The powers and duties of the Air Pollution Control Board are set out in § 4 of the Act, Burns § 35-4604, which provides, in part:

“The duty and power to administer and carry out the adjudicatory provisions of this act hereinafter set forth in this section is hereby vested in the air pollution control board and such board is hereby empowered to:

“(1) Make investigations, consider complaints and hold hearings.

“(2) Enter such order or determination as may be necessary to effectuate the purposes of this act. If the control board shall find that the condition of air pollution exists, as that term is defined herein, such order may require the taking of such action as is indicated by the circumstances to cause the abatement of such conditions.”

Section 6 of the Act, Burns § 35-4606, provides, in part:

“The air pollution control board may hold a hearing with respect to any suspected violation of the provisions of this act.

“(1) upon its own motion,

“(2) upon complaint filed with the board by any person, and

“(3) upon complaint filed with the board by the appropriate officer of any town, city or county or of the state board of health.”

From this preliminary survey it is apparent that air pollution control is the primary responsibility of local governmental units, but that the Air Pollution Control Board is empowered to conduct investigations of violations of air pollution regulations, and to conduct hearings on the matter either upon its own motion or upon the proper filing of a complaint by some third party.

In areas where no local governmental unit has adopted ordinances pertaining to air pollution there is no question of the Board's authority to conduct hearings related to suspected air pollution. It is only in those areas where there is some ordinance enacted by a local unit that the Board might lack jurisdiction. Your question hypothetically presents such a situation.

Section 5 of the Act, Burns § 35-4605, provides, in part:

“The jurisdiction of the control board to receive and entertain complaints shall be limited to complaints con-

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cerning air contaminant sources located in areas in this state where no local air pollution law or regulation consistent with the provisions of this act is now, or hereafter, in effect or where, after a hearing, the control board determines the local applicable air pollution law or regulation is not being enforced adequately and in the opinion of the control board, it is not intended that it be so enforced.”

It must be noted that the limitation on jurisdiction is in terms of entertaining complaints while the Board has the authority to conduct hearings both upon the filing of a complaint or upon its own motion. This distinction is pertinent.

Section 4 of the Act, Burns § 35-4604, lists various duties of the State Board of Health in relation to air pollution. Among such duties is the provision of advice, cooperation, and technical assistance to local air pollution agencies, investigation of matters relating to air pollution, and the submission of reports to the Air Pollution Control Board. It is, therefore, apparent that the Control Board operating through the Board of Health is able in certain instances to determine the effectiveness of local air pollution ordinances. In instances where the Control Board itself determines that there is the possibility that air contamination in violation of law is occurring the Board may on its own motion conduct a hearing. In such instances there would be little doubt that the local ordinance, if any, is either insufficient or improperly administered since the Air Pollution Control Board would have been working with the local unit through the State Board of Health to attempt to curb the pollution of the atmosphere.

It is only in those cases where a third party, presumably one directly and adversely affected by the alleged pollution, files a complaint with the Control Board that the status of the local ordinance, if any, must be determined. This principle is in accord with the express intent of the Legislature and is similar to jurisdictional questions appearing in other areas of law.

As the portions of the Act quoted above indicate, the Legislature intended that air pollution be regulated by local ordi-

nance if possible. This can be done only if violations are brought to the attention of the local unit for correction. Any one injured by the emission of contaminants must try to correct the injury through the local governmental unit. It is only in those instances where the local unit does not attempt to control air pollution that the Air Pollution Control Board can intervene.

A person aggrieved by the emission of air contaminants should attempt to cause the regulation of such contaminants through his local governing unit, and only where this is not possible may he resort to the Air Pollution Control Board. This is somewhat analogous to the situation of a person who wishes to resort to a court of equity. A court of equity will not intervene unless it is first established that there is no adequate remedy at law. *Owens v. Downs*, 121 Ind. App. 294, 98 N.E. 2d 914 (1951). Similarly, where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before courts will act, *Board of Directors of St. Francis Levee Dist. v. St. Louis-S. F. Ry.*, 74 F. 2d 183 (8th Cir. 1934) and the jurisdiction of the United States Supreme Court may not be invoked until state remedies are exhausted, *Carter v. Illinois*, 329 U.S. 173, 91 L. Ed. 172, 67 S. Ct. 216 (1946). In all of the above analogous instances the party wishing to invoke the jurisdiction of the court must show the court that the jurisdiction would be properly exercised.

Such, it appears, is also true in relation to air pollution. The party filing a complaint with the Air Pollution Control Board and thereby attempting to invoke the jurisdiction of that Board must show that he is properly before the Board. The complainant's primary source of relief is his local governing unit and until he demonstrates to the Board that relief is unobtainable from that quarter the Board cannot assist him. This means that the complainant, in his complaint, must allege and state facts supporting the allegation that he attempted to solve the problem through his local governmental unit, and that the local governmental unit is not enforcing the pertinent ordinances. If the facts stated in the complaint are not sufficient to show that the local unit is not enforcing the ordinance, then the Air Pollution Control Board must

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dismiss the complaint. If the facts stated in the complaint, if true, are such that the Board could find that the local unit is not enforcing its air pollution ordinance, then the Board may conduct a hearing. At the hearing the allegations concerning the lack of enforcement of the local ordinance must be proven, and the Board must have as one of its findings of fact that the local unit is not enforcing the ordinance. If the Board does not find that the local unit is not enforcing the ordinance then the Board must dismiss the complaint. The taking of evidence as to non-enforcement and the taking of evidence on the charge of air pollution may be accomplished at the same hearing or in separate hearings as the Board may determine.

Inherent in your question is the further question of the extent to which a local ordinance can preclude the jurisdiction of the Air Pollution Control Board. That is, will the Air Pollution Control Board ever have jurisdiction over an air contaminant problem in an area where the local governmental unit has enacted and conscientiously enforces a comprehensive air pollution ordinance?

Section 2 of the Act, Burns § 35-4602, provides, in part:

“(e) ‘Air contaminant source’ is any and all sources of emission of air contaminants, whether privately or publicly owned or operated. Without limiting the generality of the foregoing, this term includes all types of business, commercial and industrial plants, works, shops and stores, and heating and power plants and stations, buildings and other structures of all types, including single and multiple family residences, apartments, houses, office buildings, public buildings, hotels, restaurants, schools, hospitals, churches and other institutional buildings, automobiles, trucks, tractors, buses and other motor vehicles, garages and vending and service locations and stations, railroad locomotives, ships, boats and other water-borne craft, portable fuel-burning equipment, incinerators of all types, indoor and outdoor, refuse dumps and piles, and all stack and other chimney outlets from any of the foregoing.”

In view of the wide range of possible sources of air contaminants listed above it is doubtful that any local governmental unit would have the authority to regulate all such sources. Therefore, since the Legislature expressed the desire that all such sources be regulated as well as the desire that the regulation be primarily through local governmental units, the only possible conclusion is that the legislative intent was to have the local unit regulate the emission of contaminants to as great an extent as possible, but that the Air Pollution Control Board regulate those sources outside the authority of the local unit.

The alternative conclusion, that the Air Pollution Control Board has no authority in an area where a local ordinance is in force, would frustrate the expressed legislative intent. If such were the true interpretation, then a local governmental unit could adopt and enforce an ordinance regulating the emission of air contaminants from some minor source such as hospitals, and the adoption and enforcement of this ordinance would prevent the Air Pollution Control Board from regulating air contaminants from factories. The only possible interpretation of the Act is that the air contaminant source must be included within the ordinance or the Air Pollution Control Board has the same jurisdiction over that source as if there were no ordinance.

Therefore, in answer to your first question, it is my opinion that if the Air Pollution Control Board in the course of its work determines that an ordinance enacted by a local governing unit is not being enforced, the Board may conduct hearings relating to air contaminant sources located within the geographical area of that unit, but that a person who files a complaint concerning air pollution with the Board must show that the local ordinance is not being enforced before the Board can exercise jurisdiction in the matter.

It is my further opinion that the local ordinance must cover the particular contaminant source involved or the jurisdiction of the Air Pollution Control Board is unquestioned.