1965 O. A. G.

The reasoning contained herein is in accordance with the Official Opinion of a previous Attorney General, wherein he concluded that in a situation comparable to the one herein, the last approved act would prevail. 1933 O.A.G., p. 133.

In conclusion, therefore, it is my opinion that Senate Enrolled Act No. 348, approved by the Governor on March 12, 1965, prevails and will be the law upon distribution and circulation, as provided by the Indiana Constitution.

OFFICIAL OPINION NO. 12

May 18, 1965

Hon. Frederick T. Bauer
Indiana State Representative
House Majority Leader
525 Ohio Street
Terre Haute, Indiana

Dear Representative Bauer:

This is to acknowledge receipt of and answer your letter of April 13, 1965, in which you request an Official Opinion on the following factual situation:

"In the City of Terre Haute, Indiana, a Member of the Common Council of that City died approximately three weeks ago. Burns Section 48-1220 prescribes that the number of Members of the Common Council in cities of the second class shall be nine and no more.

"Pursuant to Burns Section 48-1246, a Special Meeting of the Council was called, within the prescribed number of days, in order to elect a suitable person to fill the vacancy.

"The Common Council met pursuant to the notice of said Special Meeting, but was unable to elect, by a majority vote, an individual to fill the vacant Council position. The meeting was recessed, and the Council subsequently met on several later occasions in unsuccessful attempts to fill the vacant Council seat. To date, this Special Meeting still stands in recess, and the vacancy has not been filled. There is a likelihood that the vacancy may never be filled and it now be-
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comes urgent that a decision be rendered as to whether or not the Common Council of the City of Terre Haute can lawfully conduct the legislative business of that city with only eight members serving on that Council.

* * *

"I would further appreciate an opinion as to whether or not the Common Council of the City of Terre Haute may convene in Regular Session while said Council stands in recess of its Special Meeting as above set out."

The meetings held by the common council of the City of Terre Haute to conduct the legislative business of that city are authorized by Acts of 1905, ch. 129, § 48, as found in Burns IND. STAT. ANN., § 48-1402, as follows:

"The members-elect of the common council of every city shall hold their first regular meeting on the first Monday in January after their election, at the hour of 7:30 p. m., in the council chamber. The council shall thereafter meet at least once a month, and as much oftener as the rules may require. Special meetings shall be held on the call of the mayor, or on such other call as may be provided for by the rules. A majority of all the members-elect shall constitute a quorum. It shall require a majority vote of all the members-elect to pass an ordinance. Whenever, in this act, it is required that any ordinance or resolution shall be passed or other action of the council taken by a two-thirds vote, such requirement shall be construed to mean a two-thirds vote of all the members-elect. All meetings of the common council shall be public." (Emphasis added.)

The City of Terre Haute is a second class city. Under the Acts of 1933, ch. 233, § 9, as amended, Acts of 1935, ch. 276, § 1, as found in Burns IND. STAT. ANN., § 48-1220:

"The number of members of the common council in cities of the second class, as herein defined, shall be nine [9] and no more; . . ."

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The common council of Terre Haute may transact business at any meeting when not less than 5 members of the council are present, *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 23 N.E. 72, 6 L.R.A. 315, 16 Am. St. 388 (1889).

It is my opinion that the common council of the City of Terre Haute, can lawfully conduct legislative business of that city with only eight members serving on the council, because of the death of one of the members of the council.

However, the common council of your city is enjoined by law to fill the vacancy which occurred because of the death of one of the members of the council. The Acts of 1905, ch. 129, § 45, as last amended by Acts of 1963, ch. 153, § 1, as found in Burns IND. STAT. ANN., § 48-1246, reads, in part, as follows:

"... In the event of the death, resignation or disability of the city comptroller and in cities not having a city comptroller the common council shall designate one [1] of its members to act as mayor pro tempore until a special meeting of the council to be held not less than ten [10] days nor more than fifteen [15] days thereafter, at which special meeting the council shall elect a suitable person to fill out the unexpired term of the mayor. Notice of such special meeting shall be given by the city clerk by publication once in a newspaper of general circulation printed in such city. In case of a vacancy in the office of councilman from death, resignation or other cause, the common council shall fill such vacancy at a special meeting to be held at a time not less than two [2] nor more than fifteen [15] days after such vacancy is discovered by such council of which special meeting notice shall be given by the clerk as herein required when the council is to fill a vacancy in the office of mayor. All persons so filling vacancies in elective city offices shall hold only during the unexpired term of any such officer and shall during such incumbency be entitled to the salary thereto attached. However, in any city where there shall be a tie vote for any office, such office shall be deemed to be vacant and shall be filled as in this act provided: Provided, however, In all cities
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of the second, third, fourth and fifth class where there shall be a tie vote in the common council to fill any vacancy, the mayor of such city shall cast the deciding vote.”

The Constitution of Indiana, Art. 6, § 9, provides that vacancies in county offices shall be filled in such manner as may be prescribed by law. It was concluded in 1937 O.A.G., p. 138, that the statute, Burns IND. STAT. ANN., § 48-1246, supra, fixing the time when an election to fill a vacancy on the common council should be held is directory. It was further stated in that Opinion at p. 195, that “... this duty is a continuing one and mandate might lie if the council neglects to discharge this duty.” The manifest legislative intent of Burns 48-1246, supra, is that the common council should elect a new member to fill a vacancy in its body within the time limited by said section. This duty should be performed with dispatch. The law abhors delay by public officials toward the performance of clearly defined responsibilities. The refusal to execute this duty violates the spirit of the law and offends the confidence entrusted by the public in the members of the council. No specific remedy was placed in the statute for the obvious reason that legislative competence is a matter for the electorate and not the courts. The special meeting of the common council to fill the vacancy which exists in its body was properly convened pursuant to Burns IND. STAT. ANN., § 48-1246, supra, and that meeting was adjourned or recessed to a day certain without having filled the vacancy. The following statement is found in 62 C.J.S. Mun. Corp., § 394, p. 752:

“Adjourned meeting as regular or special. An adjourned meeting of either a regular or special meeting is but a continuation of the meeting of which it is an adjournment and any business which could have been transacted at the original meeting may be transacted at the adjourned meeting. ...”

When this special meeting reconvenes, the only business that may be transacted is the filling of the existing vacancy. The question arises as to whether or not the council may meet in regular session, pursuant to Burns 48-1402, supra, to
conduct the usual legislative business of the city during the interim. According to 4 McQuillin Municipal Corporation, §§ 13.38 and 13.39, when a special meeting is once duly organized at the time and place appointed it possesses the incidental power to adjourn to a future time and an adjourned meeting of a special meeting is but a continuation of the same meeting. In State of Indiana ex rel. Walden v. Vanosdal, 131 Ind. 388, 31 N.E. 79, 15 L.R.A. 832 (1891), the Court stated with reference to a meeting held by six [6] township trustees of Switzerland County to elect a person to fill the vacancy existing in the office of the county school superintendent:

". . . The law imposed upon the trustees the duty of electing a county superintendent, and commanded them to meet on the first Monday in June for that purpose, and, having met and organized upon that day, they undoubtedly had the right to continue their session until there was an election, even though their session extended beyond the midnight hour. If they had adjourned without appointing a day to meet again to resume their duties of electing, they would probably have had no authority to have met again for that purpose, as the statute makes no provision for another meeting for such purpose; but, as the statute commands the trustees to meet on the first day of June, and appoint a county superintendent, if they were unable to complete their work and make an appointment during that day, it would seem but a reasonable construction of the statute to permit an adjournment from day to day until an election was had. In such a case they would be compelled to adjourn without performing the duty imposed upon them by statute, or continue their session from day to day until an election was had. State v. Harrison, 67 Ind. 71; Sackett v. State, 74 Ind. 486. The latter case intimates, without deciding, what we regard as the correct rule,—that, if necessity requires it, there may be an adjournment from day to day for the purpose of securing an election—and sustains our holding in this case; . . . ." 131 Ind., at 392, 393.
For further authority on the question of continuation of special meetings until finally adjourned, see Picayune v. Mississippi Power Co., 197 Fed. 2d 444 (1952) and Hodgenville v. Kentucky Utilities Co., 215 Ky. 195, 62 S.W.2d 1047 (1933).

Since only the business of electing a person to fill the vacancy which exists in the common council may be considered at the special meeting which was called pursuant to Burns' 48-1246, supra, and since Burns' 48-1220, supra, enjoins the duty on the common council to hold monthly meetings to conduct the legislative business of the city, it is my opinion that the council may meet in regular session while its special session stands in recess.

OFFICIAL OPINION NO. 13

May 19, 1965

Hon. William E. Wilson
Superintendent of Public Instruction
227 State House
Indianapolis, Indiana

Dear Mr. Wilson:

This is in reply to your request for an Official Opinion on the following questions:

"1. In the event a retired teacher working as a substitute teacher works fifty-nine days in a given school corporation prior to earning $1,500, may such teacher continue under contract until earning a total of $1,500 without losing annuity payments?

"2. In the event a retired teacher earns $1,500 in a given corporation, prior to completing 59 days of substitute service would such teacher be permitted to complete 59 days and earn in excess of $1,500 without loss of annuity payments?

"3. Does the $1,500 limitation mean a grand total of $1,500 earned by the retired substitute teacher in