May 11, 1964

Hon. Charles B. Howard
State Representative
R. R. 1
Noblesville, Indiana

Dear Representative Howard:

In your letter requesting my Official Opinion concerning planning and zoning laws, you advise that the Town of Carmel in Clay Township, Hamilton County, adopted planning and zoning ordinances which included land outside the corporate limits of Carmel. Subsequently, there was a joinder for planning and zoning purposes between Clay Township and Carmel.

Based upon these circumstances your questions are as follows:

"1. One question becomes ‘Does the joinder wipe out any future appointments by the Judge based on the prior two mile jurisdiction?’

"2. Another question becomes ‘If not, may the Judge under Burns’ 53-734a and 53-768a when the terms of a prior appointee expires, appoint a member to either the Plan Commission or Board of Zoning Appeals who lives in the Township but lives outside the two mile extension area as existed prior to the joinder between Carmel and Clay Township?’

"3. Another question is ‘If the joinder does not wipe out future appointments, may the judge under Burns’ 53-734b and Burns’ 53-768b consider the entire population of Clay Township outside Carmel in determining whether or not to appoint more members to the Plan Commission and Board of Zoning Appeals, rather than considering just the population of the two mile area, and, if so, may he fill such additional appointments with personnel living outside of the heretofore mentioned two mile area?’

"Concerning Burns’ 53-1211, we have the following situation. Clay Township joined with Carmel for plan-
ning and zoning purposes when Burns' 53-1211 provided for the appointment by the Township Trustee of only one member from the Township to the Plan Commission. Since the joinder, Burns' 53-1211 has been amended to provide for the appointment of from one to five members by the Trustee. The question is, therefore, 'May the joinder agreement be amended to allow the Trustee to appoint more than one member from the Township to the Plan Commission under Burns' 53-1211.'"

The original Plan Commission and Board of Zoning Appeals for the Town of Carmel were formed pursuant to the Acts of 1947, Ch. 179, as amended and found in Burns' (1951 Repl., 1963 Supp.), Sections 53-701 through 53-794. Section 53-734, supra, provides that the plan adopted may include contiguous unincorporated area outside the town but not to extend beyond two miles.

In the event such contiguous unincorporated area is included in the master plan, as was done in Carmel, the judge of the circuit court, under Sections 53-734a and 53-734b, supra, appoints certain designated members to the plan commission from the unincorporated area within the jurisdiction of the master plan. Under Sections 53-768a and 53-768b, supra, the judge also appoints designated members to the board of zoning appeals from the same unincorporated area.

Clay Township later followed the statutory procedures and joined with the Town of Carmel and became a part of the town's established plan commission pursuant to the provisions of the Acts of 1959, Ch. 46, as found in Burns' (1963 Supp.), Sections 53-1201 through 53-1214. Burns' 53-1211, supra, provides that the township trustee may appoint from one (1) to five (5) persons to membership on the plan commission if the agreement between the town and the township so specifies. This provision gives rise to what might seem to be a conflict between the authority of the judge of the circuit court and the township trustee to make appointments to the plan commission.

The two positions which might be taken under such circumstances are (1) Since the joinder brings in all the township,
including the original two-mile unincorporated jurisdictional area envisioned by Burns' 53-734, *supra*, the judge’s authority to appoint any person to either the plan commission or the board of zoning appeals is repealed. (2) Since the joinder extends the jurisdictional area to all of the unincorporated area in the township, outside the town limits, then the judge has authority to appoint a person living any place within the unincorporated jurisdictional area of the township without limitation to the two-mile area provided for in Burns' 53-734, *supra*. There is perhaps a third viewpoint which might be expressed with equal logic and that view is that the judge, after the joinder, can only appoint persons who live within the original two-mile jurisdiction first acquired by the plan commission under Burns’ 53-734, *supra*.

Looking first to the spirit and the intent of the law, it is apparent that the objective sought by the Legislature was to make certain that those citizens living in the unincorporated jurisdictional area would be represented both on the plan commission and on the board of zoning appeals. If the judge of the circuit court is denied his authority to appoint by virtue of the joinder then only the trustee will be in position to make appointments for those living outside the corporate limits of the town. Moreover, his appointment will be only to the plan commission and not to the board of zoning appeals, and his appointments could be limited by the agreement with the town to only one person. In the final analysis, it is obvious that to deny the judge the authority to make any appointments is to create a situation which places almost plenary authority in the town and no, or at least very little, authority in the total unincorporated area over which the plan commission and the board of zoning appeals exercises jurisdiction.

A second point worthy of mention in the interpretation of the zoning laws placed in issue by your questions, is the fact that there is nothing to indicate that the trustee’s appointments must be made from the part of the township outside the corporate limits. Thus, if the judge is denied authority to appoint and the trustee, whose authority extends throughout the township which includes the town itself, decides to appoint persons living inside the town, yet within the township, all those persons living outside the town and subject to the plan
commission and board of zoning appeals will be denied representation in most, if not all, zoning matters.

There is also a third point which is worthy of mention in this regard, that is, the fact that only the judge can appoint to the zoning board of appeals from the population outside of the town limits. If the judge is restricted to the original two-mile area provided for in Burns' 53-734, supra, then the remaining area of the township, outside this two-mile area, will not have any representation on the board of zoning appeals. Certainly it cannot be presumed that this outlying area will not have any matters of importance before the board of zoning appeals. To deny this area, outside the two-mile unincorporated area adjacent to the town, any representation on the board of zoning appeals is to discriminate against this area in favor of the town and the adjacent two-mile area.

The final consideration in this problem of possible conflict of the statutory provisions dealing with appointments to the plan commission, to the board of zoning appeals, jurisdiction over the two-mile area adjacent to the town corporate limits, and the joinder of the township with the town in an established plan commission, is the application of recognized rules of statutory construction. The courts of this state have held that where there is an apparent conflict between two statutes the primary rule of construction requires that both statutes be read so as to give force and effect to each if it is possible to do so. This rule is stated in Combs et al. v. Cook (1958), 238 Ind. 392, 398, 151 N. E. (2d) 144, where the court states on page 398 as follows:

"* * * However, if, as appellant asserts, there is an apparent conflict between the two statutes, it is our duty, if possible, to so construe them as to give full force and effect to both * * *"

The Legislature in enacting the Acts of 1959, Ch. 46, clearly stated their intention by Section 14 thereof, being Burns' 53-1214, supra, which reads as follows:

"This act is supplemental to chapter 174, Acts of 1947; chapter 258, Acts of 1953; and chapter 311, Acts of 1955, and to any future planning and zoning legisla-
tion; and confers authority upon any city or county to effect joinder with a contiguous township.”

An excellent definition of a supplemental act is found in Lost Creek School Township, Vigo County v. York et al. (1939), 215 Ind. 636, 21 N. E. (2d) 58, where the court states on page 641, as follows:

" 'A supplemental act has quite a different meaning (from an act to amend.) “It signifies something additional, something added to supply what is wanting,” ... It is that which supplies a deficiency, adds to, or completes, or extends that which is already in existence, without changing or modifying the original.’ "

The Legislature did not intend to repeal or supersede the earlier act when it provided for the joinder of the township and the town in planning and zoning. In actuality the Legislature intended to extend the planning and zoning throughout the township and to insure that citizens of the township were adequately represented. The intention was to permit the circuit court judge to appoint persons to both the plan commission and the board of zoning appeals from any part of the unincorporated area of the township. To determine otherwise would deny those living outside the two-mile area any representation on the board of zoning appeals. Moreover, since the township trustee is not limited to appointments in the unincorporated area it would be possible for him to make all his appointments from people within the corporate limits. Obviously this would result in discrimination against the citizens in the unincorporated area.

Based upon the above and foregoing discussion it is my opinion that the answers to your first and second questions are as follows:

1. The joinder does not repeal or supersede the authority of the judge of the circuit court regarding appointments to the plan commission and the board of zoning appeals.

2. By virtue of the provisions of Burns’ 53-1201 et seq., supra, the judge of the circuit court now has authority to appoint citizens to the plan commission and the board of zoning appeals even though such appointees reside in the town-
ship outside of the two-mile area immediately adjacent to the town. Thus, the judge can appoint anyone living in the township so long as they do not live within the corporate limits of town.

Your third question concerns the number of appointments the judge of the circuit court may make pursuant to the authority in Burns' 53-734a, 53-734b, 53-768a and 53-768b, supra. Burns' 53-734a and 53-768a, supra, are mandatory provisions relating to the appointments to be made to the plan commission and the board of zoning appeals. These provisions, insofar as they are applicable here, read as follows:

53-734a "When a city plan commission exercises jurisdiction outside of the incorporated area of the city as provided for in section 34, the judge of the circuit court of the county in which the unincorporated area is located shall appoint two [2] additional citizen members to the city plan commission.

"The citizen members shall reside in the unincorporated area * * *" (Our emphasis)

53-768a "When a city plan commission exercises jurisdiction outside of the unincorporated area of the city as provided in section 34, the judge of the circuit court of the county in which the unincorporated area is located, shall appoint one [1] additional citizen member to the board of zoning appeals.

"The citizen member shall reside in the unincorporated area, and shall be appointed for a term of four [4] years * * *" (Our emphasis)

Burns' 53-734b and 53-768b, supra, deal with additional appointments to the plan commission and the board of zoning appeals based upon the population of the unincorporated jurisdictional area located outside the town limits. The pertinent part of these provisions read as follows:

53-734b "The judge of the circuit court may also appoint as members of the plan commission of an incorporated
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town additional representatives from the *unincorporated jurisdictional area*, in addition to the requirements of section 34a, if in his discretion the additional representation is justifiable. The number of appointments shall be determined as follows: two [2] citizen members, if the population of the jurisdictional area appears to be between fifty [50] and one hundred per cent [100%] of the population of the town itself; and four [4] citizen members, *if the population of the jurisdictional area appears to be greater than that of the town itself.*” (Our emphasis)

53-768b “In addition to the requirement of section 68a the judge of the circuit court may also appoint additional representatives from the *unincorporated jurisdictional area* as citizen members of the board of zoning appeals of an incorporated town, if in his discretion additional representation is justified. The number of such additional citizen members so appointed shall be as follows: two [2] citizen members, if the population of the unincorporated jurisdictional area appears to be between fifty per cent [50%] and one hundred per cent [100%] of the population of the incorporated town itself; and three [3] citizen members, *if the population of the unincorporated jurisdictional area appears to be greater than that of the incorporated town itself.*” (Our emphasis)

Your attention is invited to the emphasized portion of the statutes quoted which shows quite clearly that the Legislature intended for the representation, and the number of representatives, be based upon the population of the “jurisdictional area” outside the limits of the town. With the joinder of the township with the town, no stretch of the imagination could restrict or limit the population factor to the original two-mile area since the jurisdictional area of the plan commission and the board of zoning appeals would, after the joinder, reach to all areas of the township.

Therefore, in answer to your third question, it is my opinion that in making appointments to the plan commission and the board of zoning appeals, pursuant to the authority given, the
judge of the circuit court must consider the entire population of the township situated outside the corporate limits of the town.

The final question concerns the possible amendment of the joinder agreement to permit the township trustee to make additional appointments to the plan commission pursuant to the authority contained in Burns' 53-1211, supra. When this act was originally passed, in 1959, the Legislature provided that the town and township could agree, as a condition to the joinder, that the trustee could make one appointment to the plan commission. Section 11 of the act (Burns' 53-1211, supra) was later amended in 1961 and the section now provides that the trustee can appoint from one (1) to five (5) persons to the plan commission depending on the agreement between the town and the township.

There is nothing in the statute, dealing with the joinder, which would indicate that this agreement is anything other than a contract between two parties. While there are, in some instances, specific rules applicable to contracts by and between governmental units there is no reason to believe that such rules are in issue here. For this reason the general contractual rule would prevail and this rule is stated at 6 I. L. E. Contracts § 191 as follows:

"Parties who are competent to make a parol or a written contract may by agreement modify or change any of its terms * * *"

In the absence of statutory provisions prohibiting the change contemplated by Burns' 53-1211, supra, it is evident that the Legislature intended the parties to further agree that the trustee could make additional appointments to the plan commission in accordance with whatever agreement was made under the authority of the statute.

It may be advisable to point out that termination of the agreement is provided for in Burns' 1213, supra, and certain problems are presented if the parties desire to terminate the contract. If the trustee is not permitted to make additional appointments by a modification of the contract there seems to be little remedial relief available to those in the township
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State ex rel. Clemens v. Kern et al. (1939), 215 Ind. 515, 20 N. E. (2d) 514;

State of Indiana v. Mears (1938), 213 Ind. 257, 12 N. E. (2d) 343.

In ascertaining the legislative intent, an act must be construed in its entirety and together with other legislative enactments which are in pari materia to such act.

Schulz v. Graham; Kercheval (1955), 234 Ind. 243, 126 N. E. (2d) 1;

Wedmore v. State of Indiana (1954), 233 Ind. 545, 122 N. E. (2d) 1;

Starr v. City of Gary (1934), 206 Ind. 196, 188 N. E. 775;

Fleenor v. State of Indiana (1928), 200 Ind. 165, 162 N. E. 234.

The Acts of 1935, Ch. 105, Sec. 1, as found in Burns' (1948 Repl.), Section 28-624, reads as follows:

"The township trustee, board of school trustees or board of school commissioners of any township, town or city of this state shall provide a school library for their respective school corporations, containing such textbooks as may be adopted by the board of the department of education and the legally authorized local officials, in sufficient numbers and of such gradation as will meet the needs of each resident pupil, classified in each of the grades one to eight [1-8], inclusive, of the elementary schools, if a petition, signed by at least fifty-one [51] per cent of the registered voters of any such school corporation requesting the establishment of such a library be filed with the township trustee, board of school trustees or board of school commissioners of such school corporation, as hereinafter provided." (Our emphasis)

The statutory provision relative to the form of "petition," referred to above, is found in the Acts of 1935, Ch. 105, Sec. 136.
desiring additional representation on the plan commission unless they can look to the authority of the circuit judge, already discussed herein, to make such appointments.

In answer to your final question, it is my opinion that the parties do have authority to amend or modify the contract provided for so that the township trustee will have authority to make more than one appointment to the plan commission pursuant to Burns' 53-1211, supra.

OFFICIAL OPINION NO. 27

May 29, 1964

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

Dear Mr. Wilson:

This is in reply to your letter requesting an Official Opinion on certain questions which have developed in connection with a reorganization of schools in Sullivan County. The specific questions, as stated by you, are as follows:

"1. May the new boards drop the levy for free textbooks, since the new corporations have been formed, as they will drop a cumulative building fund levy. If not, is the new board mandated to furnish to all children as is now furnished to the children of one township?

"2. May the textbooks that have been purchased be used as a part of the textbook rental program?"

A. Before attempting to set out pertinent statutory provisions of the statutes involved, I would point out that the fundamental rule in the construction of Indiana statutes is to ascertain the intent of the Legislature as therein expressed.

Roth v. Local Union No. 1460 of Retail Clerks Union et al. (1939), 216 Ind. 363, 24 N. E. (2d) 280;