

1963 O. A. G.

OFFICIAL OPINION NO. 1

January 15, 1963

Hon. John W. Donaldson  
State Representative  
1081½ North Lebanon Street  
Lebanon, Indiana

Dear Representative Donaldson:

This is in answer to your letter of December 21, 1962, wherein you request an Official Opinion based on two questions pertaining to the office of city judge in the City of Lebanon, Indiana, a city of the fifth class.

In your letter you advise that the common council of said city duly passed and adopted Ordinance No. 67 and that the same was approved by the mayor on March 23, 1959. This ordinance created the office of city judge for said city in accordance with the authority granted in the Acts of 1933, Ch. 233, Sec. 8, as last amended by the Acts of 1959, Ch. 107, Sec. 4, and found in Burns' (1962 Supp.), Section 48-1219.

Your specific questions, as stated in your letter, are as follows:

"1. Does the City Council of the city of Lebanon, Indiana, a fifth class city, have the authority to repeal or amend ordinance number 67 and abolish the Lebanon City Court?

"2. In the event that the ordinance number 67 is repealed, could the Mayor of the city of Lebanon again exercise the functions of a City Judge?"

The Acts of 1959, Ch. 107, Sec. 4, *supra*, provides, in part, as follows:

"SEC. 4. Section 1 of the fifth above entitled act is amended to read as follows: Section 1. Section 1 of the above entitled act is amended to read as follows: Section 1. Section 8 of the above entitled act is amended to read as follows: Sec. 8. In all cities of the fifth class the elective officers shall be:

(1) The mayor;

## OPINION 1

- (2) The clerk-treasurer;
- (3) The members of the common council; and
- (4) The city judge.

Such officers shall be elected in accordance with the provisions of the state election laws.

*“The provisions of this section shall not be construed as creating the office of city judge in cities of the fifth class: Provided, That any city of the fifth class may, by proper ordinance of the common council passed and adopted on or before the first day of May of the year in which election of city officers are held, create the office of city judge: Provided further, That the mayor of any city of the fifth class shall be ineligible to hold the office of city judge during the tenure of his office as mayor.”* (Our emphasis)

Your first question pertains to whether the common council has authority to repeal or amend the ordinance creating the office of city judge under the provisions of Burns' 48-1219, *supra*. An examination of the Acts of 1959, Ch. 107, *supra*, shows that said act contains no reference to any power to amend, change or repeal ordinances enacted to create the office of city judge. Likewise, the act contains no restriction or prohibition against amendment, change or repeal.

The legislative authority of every city is vested in a common council, specific examples of this authority are set forth in the Acts of 1905, Ch. 129, Secs. 47, 52 and 53, as found in Burns' (1950 Repl.), Sections 48-1401, 48-1406 and 48-1407, which provide in whole, or in part, as follows:

48-1401. “The legislative authority of every city shall be vested in the common council.”

48-1406. “The common council of every city shall have power to pass all ordinances, orders, resolutions and motions for the government of such city \* \* \*”

48-1407. "The common council of every city shall have the power to enact ordinances for the following purposes:

"Fifty-third. To carry out the objects of the corporation, not hereinbefore particularly specified \* \* \*"

The Acts of 1945, Ch. 241, Sec. 1, as found in Burns' (1950 Repl.), Section 48-8308, reads as follows:

"The common council of every city shall have the power to revise, amend, restate, codify, recodify, and to compile any existing ordinance or ordinances and all new ordinances not theretofore adopted or published and to incorporate said ordinances into one ordinance in book or pamphlet form and to make such changes, alterations, modifications, additions, and substitutions as said common council may deem best to the end that a complete simplified code may be made to be denominated the 'Municipal Code of \_\_\_\_\_ (nameing [naming] the city).'"

In the case of *Vesenmeir et al. v. City of Aurora, etc.* (1953), 232 Ind. 628, 632, 633, 115 N. E. (2d) 734, the court said:

"As a general rule a municipality which has been given the power to enact ordinances has, as a necessary incident thereto and without any express authorization in the statute, the power to modify or repeal such ordinances unless the power so to do is restricted in the law conferring it. The power is subject to the limitation that the repeal or change cannot be made so as to affect any vested rights lawfully acquired under the ordinance sought to be modified or repealed. *Welch et al. v. Bowen* (1885), 103 Ind. 252, 2 N. E. 722; *Lowe v. McKnight* (1931), 202 Ind. 565, 174 N. E. 424; *Terre Haute and Logansport Railroad Co. v. City of South Bend* (1896), 146 Ind. 239, 45 N. E. 324; *City of Michigan City v. Brossman* (1938), 105 Ind. App. 259, 11 N. E. 2d 538; *Mahuron v. City of*

## OPINION 1

*Salem* (1950), 120 Ind. App. 247, 91 N. E. 2d 648; 37 Am. Jur., Municipal Corporations, § 197, p. 834; 62 C. J. S., Municipal Corporations, § 435b, p. 835. The rule does not apply where the ordinance has been enacted under a narrow, limited grant of authority to do a particular designated thing in the manner and at the time fixed by the legislature, and which excludes the implication that the council was given any further authority over the subject than to do the one act. *Simpson v. State ex rel.* (1913), 179 Ind. 196, 99 N. E. 980; 62 C. J. S., Municipal Corporations § 435b, p. 835.”

The provisions of Burns' 48-1219, *supra*, include the words “by proper ordinance of the common council passed and adopted *on or before the first day of May of the year in which elections of city officers are held \* \* \**” (Our emphasis) These words are clearly indicative of a legislative intent to authorize a procedure whereby the office of city judge may be created before the first day of May, *in any year in which elections of city officers are held*. In my opinion it was the legislative intent that the right of the common council to make a determination as to the continuance of the office of city judge is a continuing right and is not exhausted by being exercised once, but may be exercised as often as the public interest may demand. In view of this continuing grant of authority the exception to the general rule, set forth in *Simpson v. State ex rel. Eisler et al.*, *supra*, would be inapplicable in the instant case.

Therefore, in answer to your first question, it is my opinion that the City of Lebanon, a city of the fifth class, does have authority to repeal or amend Ordinance No. 67 and thus abolish the office of city judge in said city. This power to amend or repeal is subject to the limitation set forth in *Vesenmeir et al. v. City of Aurora etc.*, *supra*, that the repeal cannot be made so as to affect any vested rights lawfully acquired under the ordinance sought to be repealed.

In your second question you ask whether the mayor may again exercise the functions of city judge in the event Ordin-

ance No. 67 is repealed. The Acts of 1933, Ch. 233, Sec. 8a, as added by the Acts of 1959, Ch. 107, Sec. 5, as found in Burns' (1962 Supp.), Section 4-2615a, provides as follows:

"On January 1, 1960, the city courts in all cities of the fourth and fifth class shall be abolished unless the common council of any such city has by ordinance, duly enacted on or before the first day of May, 1959, created the office of city judge: Provided, that the city court in any city of the fourth and fifth class, abolished pursuant to the provisions of this section, may be recreated by the enactment of an ordinance creating the office of city judge pursuant to the provisions of section 8 [§ 48-1219] of this act."

The Acts of 1959, Ch. 107, Sec. 4, *supra*, is amendatory to the Acts of 1933, Ch. 233, Sec. 8, as amended by Acts of 1949, Ch. 26, Sec. 1. Thus, when the Acts of 1959, Ch. 107, *supra*, became effective, the authority for the mayor of a city of the fifth class to act as city judge ceased to exist. In accordance with the provisions of Burns' 4-2615a, *supra*, city courts in all cities of the fourth and fifth classes were abolished on January 1, 1960, unless the common council created the office of city judge on or before the first day of May 1959. This was done in the instant case by the enactment of Ordinance No. 67. However, such creation was necessarily required to be in accordance with the provisions of the original Section 8, as amended in 1959. This section as now shown in Burns' 48-1219, *supra*, contains the following mandatory proviso:

"\* \* \* *Provided further, that the mayor of any city of the fifth class shall be ineligible to hold the office of city judge during the tenure of his office as mayor.*" (Our emphasis)

Therefore, in my opinion, the answer to your second question is that in the event Ordinance No. 67 is repealed the mayor of the City of Lebanon cannot again exercise the functions of a city judge in view of the specific mandatory provisions of the Acts of 1959, Ch. 107, Sec. 4, *supra*.