

Therefore, I am of the opinion that the limitation set by the Legislature in Burns' 15-317, *supra*, does not apply to the aggregate sum appropriated under both statutes, but that all sums made available under either statute can be used in accordance with the statutory provisions.

OFFICIAL OPINION NO. 53

November 15, 1963

Mr. Edwin Steers, Sr.
Member, State Election Board
108 E. Washington Street
Indianapolis 4, Indiana

Dear Mr. Steers:

Your letter of October 21, 1963, has been received requesting an Official Opinion on the question submitted to you by the Clerk of the DeKalb Circuit Court whose letter, in part, reads as follows:

"Enclosed please find two pages from the DeKalb County Comprehensive Plan for School Re-Organization in DeKalb County. The questions that will arise in the primary election of 1964 electing members to the Board of School Trustees are underlined on enclosed page No. 69. Would you be kind enough to ask the Attorney General for his official opinion as to the following questions that will arise that are definitely not clear as set out by the County Plan.

"1. B. 'The candidate elected at large shall be the person receiving the greatest number of votes.' In other words the foregoing statement in my opinion does not state definitely whether 'The candidate elected at large is one actually on the ballot at large or whether he is one of the candidates for any particular district. Then again under Section C the following question:

"2. 'Here, under a simple majority, the candidates to receive the highest number of votes shall be

elected to four year terms, and the balance of the candidates, having received the next highest number of votes, shall be elected for two year terms to complete the number required on the Board of School Trustees.' In this quotation from the Board's Comprehensive Plan it simply says the candidates who shall serve 4 years and who shall serve two years, however, it does not say the number of candidates, whether there be 3 candidates for 2 year terms or whether there be 2 candidates for 2 year terms. Does the intent 'under simple majority' mean 3 out of 5 and 4 out of 7, etc., of the candidates?

- "3. In number 3 quotation the first paragraph 'Within the boundaries of the School District of the School Corporation'. The question here is the definition of a School District and the definition of a School Corporation, as throughout the Comprehensive Plan, one place they will use the term School District and another place they will use the term School Corporation. For example in South Central Community School combination is Auburn one district of the Corporation, Union Township one district and Jackson Twp. one district of the South Central School Corporation or is the three above mentioned the district and Corporation also or is Auburn the School Corporation of the District and Union Township a Corporation of the District and Jackson Township a Corporation of the District?
- "4. Under Qualifications, E., 'A freeholder in the School District he represents'. Under this qualification, for example, a person rooming at a Y. M. C. A. owning no taxable property but owning a cemetery lot which would not necessarily be recorded, would this person be a free holder?"

In addition to the foregoing, you submit a sample ballot for the South Central School Corporation and desire to know if it is correct as to form and request information as to

preparation of ballots for the other reorganized school corporations.

Acts 1959, Ch. 202, being "The School Corporation Reorganization Act of 1959," was amended by the General Assembly in 1961, and again in 1963, and is Burns' (1963 Supp.), Section 28-6101 *et seq.* Acts of 1963, Ch. 390, Sec. 1, amended Section 9 of said Act. It had previously been amended in 1961. The 1963 amendment under subsections (3), (4) and (5) thereof, set out certain details and options from which a selection could be made for either the election or appointments of the board of school trustees of a reorganized school corporation thereafter effected. Under subsection (13) of said 1963 amendment to Section 9 of said original Act, as found in Burns' (1963 Supp.), Section 28-6120, subsection 13, it is provided:

"The provisions of subsections (3), (4), and (5) of this section shall not apply to any community school corporation created prior to the effective date of the amendment of this section in 1963 [March 15, 1963], and any such community school corporation shall, with reference to the matters set out in such subsections, operate in accordance with the plan pursuant to which it was created and the statutes applicable thereto as though this section had not been thus amended."

An examination of the records of the State Commission for the Reorganization of Schools shows that the comprehensive plan for the reorganization of the school corporations of DeKalb County was filed with said state commission September 26, 1961, approved by said state commission, October 16, 1961, and said reorganized school corporation became effective and operating on July 1, 1962. Said comprehensive plan would, therefore, be subject to and controlled by the provisions of the law as it then existed under the 1961 amendments to said statute.

The pertinent provisions of the 1961 amendments to Chapter 202, of the Acts of 1959, are the amendments to Sections 5 and 9 of the Act. Acts 1961, Ch. 231, amended Section 5 of the original Act and under subsection (8) thereof provided, in part, as follows:

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“(8) The comprehensive plan shall show as to each of the community school corporations covered thereby:

“(a) The name of the community school corporation;

“(b) The boundaries of the community school corporation;

“(c) The number of members on the board of school trustees, the designation of the officers of such board of school trustees, whether the board of school trustees shall be elected or appointed and if elected whether they shall be elected at the primary or at the general election, and, subject to the provisions of subdivisions (3) and (4) of section 9 of this act, the manner in which such board of school trustees shall be elected or appointed: Provided, however, That the total number of school trustees shall not be less than three (3) nor more than seven (7);

* * *

“(e) Limitations on residence, term of office and and other qualifications required of the members of such board of school trustees: Provided, however, That no plan shall provide for an appointive or elective term of more than four (4) years, but any member may succeed himself in office * * *”

Section 9 of Acts of 1959, was amended by Acts of 1961, Ch. 302, and under Section 2, subsection (3), thereof provided, in part, as follows:

“(3) Whenever the plan approved by the County Committee and the State Commission provides for the election of members of the board of school trustees of the community school corporation, at the time provided by law for the filing of notice of candidacies for the primary election next following the creation of the community school corporation as provided herein, nominations for members of the board of school trustees of the community school corporation shall be made by a petition signed by the candidates and ten (10) regis-

tered voters residing within the boundaries of the community school corporation, which shall be filed with the clerk of the circuit court in the county, or in case the community school corporation is a united school corporation then with the clerk of the circuit court in each county having territory within the boundaries of the united school corporation, and such nominations shall be listed on one (1) separate ballot as other names are listed but without party designation.

“Voting and tabulation of votes shall be conducted in the same manner as voting and tabulation in primary elections are conducted, and the candidates elected at large shall be the persons having the greatest number of votes. In the event of a tie vote for any of said candidates, the judge of the circuit court, or in case of a united school corporation the judges of the circuit courts of the counties having territory within the boundaries of the united school corporation, shall select one (1) of said candidates who shall be declared and certified elected.

* * *

“At the first primary election wherein members of the board of school trustees shall be elected hereunder, *one-half (1/2) of the candidates where the number of members of the board of school trustees is an even number or a simple majority of the candidates where the number of members of the board of school trustees is an odd number*, who receive the highest number of votes shall be elected for four [4] year terms and the balance of the candidates necessary to complete the number required on the board of school trustees receiving the next highest number of votes shall be elected for two [2] year terms. *All candidates for membership on the board of school trustees shall be voted upon by the voters residing within the boundaries of the community school corporation only and shall be elected for four [4] year terms after the first election provided herein.* All board members shall take office and assume their duties on the first day of July after their election * * *” (Our emphasis)

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Page 69 of the comprehensive plan, under clause B and C, contain the provisions referred to in your first three (3) questions, and reads as follows:

“B. Voting and tabulation of the votes shall be tabulated in the same manner as voting and tabulation in the primary elections are conducted. *The candidate elected at large shall be the person receiving the greatest number of votes.* In case of a tie vote for any of said candidates, the judge of the circuit court shall select one of said candidates who shall be declared and certified elected.

“C. At the first primary election after the formation of school districts, the members of the Board of School Trustees shall be elected. *Here, under a simple majority, the candidates to receive the highest number of votes shall be elected to four year terms, and the balance of the candidates, having received the next highest number of votes, shall be elected for two year terms to complete the number required on the Board of School Trustees. All candidates for membership on the Board of School Trustees shall be voted upon by the voters residing within the boundaries of the school district of the school corporation in which they will serve, and shall be for four (4) year terms after the first election provided herein, and shall take office and assume their duties on the first day of July after their election.*” (Our emphasis)

Page hh of said comprehensive plan makes provisions for the four reorganized school corporations in the county, as follows:

“a. The Northwest reorganized district shall have seven (7) member board, composed of one member from each township, one (1) member from Waterloo town, one (1) member-at-large from Fairfield, Richland, and Smithfield Townships, and one (1) member-at-large from Waterloo and Grant Township.

“b. The Garrett-Keyser-Butler district shall have a five (5) member board, composed of one (1) member

from each township, two (2) members from the city of Garrett, and one (1) member-at-large.

“c. The South Central reorganized district shall have a five (5) member board, composed of one member from each of the two townships, two members from Auburn City and one (1) member-at-large.

“d. The Eastern DeKalb County reorganized district shall have a seven (7) member board, composed of one member from Troy, Stafford, and Newville Townships, one (1) member from Spencer Township, one (1) member from Concord Township, one (1) member from Wilmington Township, and one (1) member from Butler City, and one member-at-large from Troy, Stafford, Newville, Spencer, and Concord Townships, and one (1) member-at-large from Butler and Wilmington Townships.”

Page 69 of said comprehensive plan also provides the qualifications for the board of school trustees among which is the requirement that the trustee be a “freeholder” in the school district he represents. This occasioned your fourth question.

In answer to your first question it is provided under clause B on page 69 of the comprehensive plan that “The candidate elected-at-large shall be the person receiving the greatest number of votes.” This is also substantially the same language contained in subsection 3 of Chapter 302 of the Acts of 1961, *supra*, however, said subsection of said 1961 Act also provides that where said board members are to be elected and at the time provided by law for the filing of notice of candidacies for the primary election next following the creation of the community school corporation. Nominations for members of the board of school trustees of the community school corporation shall be made by a petition signed by the candidates and ten (10) registered voters residing within the boundaries of a community school corporation, which shall be filed with the clerk of the circuit court in the county. It is, therefore, clear the Legislature intended a person running for office of school trustee at-large must file his petition as a candidate for that office at-large, in other words, the area from which a candidate is to be elected at-large constitutes an election district. This

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was clearly understood by the county committee in this instance when in making provision for the Northwest reorganized district provision was made for "One (1) member at-large from Waterloo and Grant Township." This constituted an election district for which a person must announce his candidacy and run for office. A like situation exists in the county committees provisions for the election of the school board for the Eastern DeKalb County reorganized district, where it provided for "one member at-large from Butler and Wilmington Township." This also constitutes a district in which a person must be a resident; must announce his candidacy and file his petition as a candidate for this office from this joint township district. Each of these joint township districts are referred to as those from which candidates shall file their petitions and run for office as members-at-large. Therefore, on page hh of the comprehensive plan where provisions for "The Garrett-Keyser-Butler" district refers to one member-at-large being elected, and makes a like provision for the "South Central" reorganized district, these later provisions mean the candidate shall file his petition for the member-at-large office; he may reside any place within the school corporation, and the person receiving the greatest number of votes running for the office "at-large" will be the one elected at-large in each of those two reorganized school corporations.

2. In answer to your second question, the provision that "under a simple majority, the candidates to receive the highest number of votes shall be elected to four year terms, and the balance of the candidates, having received the next highest number of votes, shall be elected for two year terms to complete the number required on the board of school trustees," as contained in clause C, page 69, of the Comprehensive Plan, *supra*, is to be construed in connection with, and if necessary controlled by, the mandatory provisions of the statutes then in existence, being subsection (3), Ch. 202, Acts 1961, *supra*, which provides "a simple majority of the candidates where the number of members of the board of school trustees is an odd number, who receive the highest number of votes shall be elected for four (4) year terms and the balance of the candidates necessary to complete the number required on the

board of school trustees receiving the next highest number of votes shall be elected for two (2) year terms."

3. In answer to your third question, although the plan refers to a reorganized school corporation as a district it necessarily must be a school corporation rather than a district under the reorganization statute, since the statute provides for the establishment of reorganized school corporations, rather than districts. The statute refers to the establishment of districts of which persons must be residents in order to be candidates for office. These are merely residence districts which may be provided in the plan and in which a person must reside in order to be a candidate for such office as school trustee. Subsection 3 of Chapter 302 of the Acts of 1961, *supra*, clearly provides "All candidates for membership on the board of school trustees shall be voted upon by the voters residing within the boundaries of the community school corporation only." This clearly requires that each candidate for office, whether he be a candidate at-large or a candidate for office residing within a certain district, must be voted upon by all of the voters residing within the boundaries of the entire reorganized school corporation. While the 1963 amendments to the statute in question have optional provisions for the election of board members from membership districts, and permits them to be elected by the voters of the district only, such authority did not exist under the original 1959 statute, or under the 1961 amendments thereto, and is not applicable to this comprehensive plan since it is controlled by the 1961 amendments to the statute. Therefore, no matter how many election districts, whether specified districts or districts at-large, exist within a reorganized school corporation, only one ballot is used for each of the four reorganized school corporations provided for in the DeKalb County comprehensive plan.

The foregoing, answers the questions as to the form of ballots later referred to in your letter. You will use the ballot for each of the reorganized school corporations. If, in any one of those reorganized school corporations, an election district consists of a township, the persons running for that particular office will be listed thereunder; those running from a city residence district will be listed under that office, and those running at-large from a two township at-large district,

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will likewise be designed and listed as candidates for that district, all on one ballot in each of the four reorganized school corporations.

4. In answer to your fourth question, the eligibility of a candidate to run for such office of school trustee depends upon the meaning of the word "freeholder."

A "freeholder" is defined in Ballentine's Law Dictionary, Second Edition, page 529, as follows:

"A person who owns land in fee, or for life, or for some indeterminate period. He must have title to the property, and not simply a contingent or an expectant estate, or a right of occupancy, or a privilege, with power to prevent alienation or incumbrance by the holder of the legal title * * *"

The term "freeholder" is defined in *Maitlen et al. v. Barley et al.* (1910), 174 Ind. 620, 621, 92 N. E. 739, as follows:

"The same technical strictness does not attach to the term 'freeholder' when used in statutes similar to that under consideration, as in deeds and other instruments affecting title. *Wheldon v. Cornett* (1903), 4 Neb. (Unofficial) 421, 94 N. W. 626.

"A freeholder is one who owns land in fee, or for life, or for some indeterminate period. *State v. Ragland* (1876), 75 N. C. 12; *Harlan v. State, ex rel.* (1902), 136 Ala. 150, 33 South. 858; *People, ex rel., v. Scott* (1876), 8 Hun. 566."

In 5 I. L. E. Cemeteries § 14, Title and Rights of Lot Owners, it is said:

"In cases arising before the Indiana General Cemetery Act it was held that when one buys a lot in a cemetery he does not acquire a general right of property, but only a right to use the ground as a place of interment and that the extent of that use is determined by the rules of the cemetery. It was held, however, that he did acquire a property right which the law recognizes and protects from invasion."

The Supreme Court in *Dwenger et al. v. Geary et al.* (1887), 113 Ind. 106, 112, 14 N. E. 903, said in part:

“* * * One who buys the privilege of burying his dead kinsmen or friends in a cemetery acquires no general right of property. He acquires only the right to bury the dead, for he may not use the ground for any other purpose than such as is connected with the right of sepulture. Beyond this his title does not extend. He does not acquire, in the strict sense, an ownership of the ground; all that he does acquire is a right to use the ground as a burial-place. In discussing this subject it was said by the court, in *Page v. Symonds*, 63 N. H. 17 (56 Am. R. 481): ‘Such right of burial is not an absolute right of property, but a privilege or license to be enjoyed so long as the place continues to be used as a burial-ground, subject to municipal regulation and control, and legally, revocable whenever the public necessity requires. It is a right of limited use, for purposes of interment, which gives no title to the land. *Craig v. First Presbyterian Church*, 88 Pa. St. 42 (32 Am. R. 417); *Windt v. German Reformed Church*, 4 Sandf. Ch. 471. A grant of a lot in a cemetery is said to be analogous to a grant of a pew in a meeting-house, and the right of burial in a public burying-ground in some respects resembles the right of pew tenancy * * *’”

See also:

1949 O. A. G., pages 344, 348, 349, No. 91;

Certia v. Univ. of Notre Dame et al., (1924), 82 Ind. App. 542, 545, 141 N. E. 318;

Holloway v. Thompson (1942), 112 Ind. App. 229, 239, 42 N. E. (2d) 421.

In 10 Am. Jur., *Cemeteries*, § 22, *Nature of Right, Title, or Interest*, it is stated:

“The sentiment of all civilized peoples regards the resting place of the dead as hallowed ground, and requires that in some respects it be not treated as subject to the laws of ordinary property. It follows that an

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interest in a burial lot is of a somewhat peculiar nature. As a general rule, one who purchases and has conveyed to him a lot in a public cemetery does not acquire the fee to the soil, but only a right of burial therein, which has been variously designated as an easement or as a license or privilege * * **

See also:

14 C. J. S. Cemeteries, § 20.

The latest act governing cemeteries is the Acts of 1939, Ch. 142, as amended and found in Burns' (1950 Repl. and 1963 Supp.), Sections 21-1001 *et seq.*, and known as "The Indiana General Cemetery Act," discloses that the owner of such cemetery may sell and grant "burial rights therein, which shall not thereafter be transferred or assigned without the written consent of the owner of the cemetery." (Acts of 1939, Ch. 142, Sec. 6, Burns' [1950 Repl.], Section 21-1006) Thus, the language of the later statute governing the management of the cemeteries is in harmony with the foregoing-quoted Opinion of the Attorney General (1949 O. A. G., No. 91, *supra*) and the case authority therein cited to the effect that rather than evidencing the sale of real estate, or an interest therein, the so-called cemetery deed evidences merely the ownership of a burial right.

I am, therefore, of the opinion a person owning no taxable property, but owning a cemetery lot, would not be a "freeholder" within the meaning of the qualifications required for candidates for office of school trustee under the comprehensive plan for the reorganization of schools for DeKalb County, Indiana.

OFFICIAL OPINION NO. 54

November 18, 1963

Hon. William A. Berning
State Representative
409 Standard Building
Fort Wayne, Indiana

Dear Representative Berning:

This is in response to your request for my Official Opinion