

also is clear that if not reimbursed for their non-betterment costs, respondents will be subjected to substantial expense as a direct result of the highway improvement program.

“Respondents benefit from the statute only in the sense that they are relieved of a financial burden which they could be required to bear. The question to be decided then is whether the use of public funds to pay part or all of the loss or expense to which an individual or corporation is subjected by the state in the exercise of its police power is an unconstitutional donation for a private purpose. We think not provided the statute creating the right of reimbursement operates prospectively, deals with the matter in which the public has a real and legitimate interest, and is not fraudulent, arbitrary or capricious. * * *”

As heretofore expressed, it is my opinion that the Relocation Act does operate prospectively, deals with a matter in which the public has a real and legitimate interest, and thus involves a public purpose as opposed to a private purpose.

In conclusion, it is my opinion that Chapter 112 of the Acts of 1961 is valid under the Constitution and laws of Indiana, and that the payment by Indiana to the utility company pursuant to said Act is not in violation of a contract between them.

OFFICIAL OPINION NO. 45

September 22, 1961

Honorable Allan E. Bloom
State Representative
303 Standard Building
Fort Wayne 2, Indiana

Dear Representative Bloom:

This will acknowledge receipt of your request for my Official Opinion relative to the legal capacity of a member of a board of zoning appeals or planning commission to contract with the municipality which he serves or the county in which said municipality is located.

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Your letter asks the following questions :

“(1) May an individual who is a member of a Board of Zoning Appeals or a Planning Commission of a municipality enter into contracts in his individual capacity as a businessman with such municipality or any other governmental unit within the jurisdictional area of said Planning Commission or Board of Zoning Appeals, said member being unsalaried and unpaid for his position on said Board of Zoning Appeals or Planning Commission?

“(2) Since a Board of Zoning Appeals or a Planning Commission has a two mile fringe area extending around a municipality, would a member of such Commission or Board be prohibited from making contracts as an individual businessman with the County or any other sub unit thereof, or would such a contract be a violation of Burns' Indiana Statutes Annotated 48-1247 or any other act or statute of the State of Indiana?”

There are two statutes in the State of Indiana which deal broadly with the problem of a public officer or employee contracting with a unit of government. Acts of 1905, Ch. 169, Sec. 517, as found in Burns' (1956 Repl.), Section 10-3713, was apparently intended to cover public officials and appointees at all levels of State and local government. Acts of 1905, Ch. 129, Sec. 46, as amended, and as found in Burns' (1950 Repl.), Section 48-1247, seems to be limited to officers and employees of cities and towns. Burns' 10-3713, *supra*, reads as follows:

“Any state officer, county commissioner, township or town trustee, mayor or a common councilman of any city, school trustee of any town or city, or their appointees or agents, or any person holding any appointive power, or any person holding a lucrative office under the constitution or laws of this state, who shall, during the time he may occupy such office or hold such appointing power and discharge the duties thereof, be interested, directly or indirectly, in any contract for the construction of any state house, court house, school house, bridge, public building or work of any kind,

erected or built for the use of the state, or any county, township, town or city *in the state, in which he exercises any official jurisdiction, or who shall bargain for or receive any percentage, drawback, premium, or profit or money whatever, on any contract, or for the letting of any contract, or making any appointment wherein the state, or any county, township, town or city is concerned*, on conviction, shall be fined not less than three hundred dollars [\$300] nor more than five thousand dollars [\$5,000], and be imprisoned in the state prison not less than two [2] years nor more than fourteen [14] years, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period.” (Our emphasis)

Burns’ Section 48-1247, *supra*, pertaining to officers and employees of cities and towns, reads as follows:

“*No member of the common council or board of trustees, nor any officer, clerk, or deputy of such officer, or other employee of any city or incorporated town of this state, shall, either directly or indirectly, be a party to, or in any manner interested in, any contract or agreement, either with such city or incorporated town, or with any officer, board, clerk, deputy or employee of such city or incorporated town, for any matter, cause or thing by which any liability or indebtedness is in any way or matter created or passed upon, authorized or approved by such council or board of trustees or by any member thereof, or by any officer, board, clerk, deputy or employee of such city or incorporated town. Any contract in contravention of the foregoing provisions shall be absolutely void; and any person violating any of such provisions shall be fined not more than one thousand dollars [\$1,000] and imprisoned in the state prison not less than one [1] year nor more than ten [10] years. No councilman or trustee or other officer, clerk, deputy or employee of any city or incorporated town shall, either directly or indirectly, purchase any bond, order, claim or demand whatsoever against such city or incorporated town, during his continuance in office or employment, for any sum less than the amount*

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specified therein; and any bond, order, claim or demand so purchased by any such officer or other person in contravention of the foregoing provisions shall be forfeited to such city or incorporated town, and no action shall ever be maintained thereon. Gifts and the acquirement of equitable interests by any such officers in any such bonds, orders, claims or demands shall be deemed to be within the meaning and scope of the foregoing provisions." (Our emphasis)

In order to answer your first question, it is necessary to determine whether or not a member of a municipal board of zoning appeals or a planning commission is an officer or person included within the provisions of Burns' 10-3713, *supra*, or Burns' 48-1247, *supra*. If a member of such board or planning commission is directly covered by either one or both of said statutes, then a contract between such member and the unit of government which he serves is absolutely void, and the person involved might be subject to the penalties provided for in the statutes.

Acts of 1947, Ch. 147, Sec. 1 to Sec. 93, as amended, and as found in Burns' (1951 Repl.—1961 Supp.), Sections 53-701 to 53-794, contain the provisions of the law pertaining to planning and zoning which relate to your questions. It should be noted that your questions do not indicate whether a city or a town board of zoning appeals or planning commission is involved. However, Burns' 53-703, *supra*, defines "city" to include both classified cities and towns, and the term "mayor" to mean mayor of a city or president of a town board of trustees. Burns' 53-705, 53-706 and 53-707, *supra*, provide for the selection of the members of the city planning commission. The membership of the planning commission is selected from the city council, board of park commissioners, board of public works, county surveyor, city engineer, and appointees of the mayor. In each instance the planning commission will be composed of members from this group and although there will be some variance in membership, depending upon the classification of the city or its governmental organization, it can be said that the planning commission of each city will be composed of one or more members of the common council and appointees of the mayor.

The portion of Burns' 10-3713, *supra*, basically applicable here reads as follows:

“* * * mayor or a common councilman of any city
* * * or their appointees or agents * * *.”

Since the planning commission is made up of appointees of the mayor and one or more members of the common council, the express wording of Burns' 10-3713, *supra*, would make such members subject to the provisions of that statute.

Burns' 48-1247, *supra*, is perhaps more extensive in coverage and, for the purpose of this portion of your question, reads in part, as follows:

“No member of the common council * * * nor any
officer, * * * or other employee of any city * * *.”
(Our emphasis)

Without specifically detailing the various duties of the planning commission, it is noted that they have extensive powers covering the regulation of private property. These powers extend to such things as making rules and regulations; preparing, enforcing and reviewing ordinances; and other restrictions and limitations on the use of private property. This seems to me to be an exercise of some portion of the sovereign power of the state. I reached this same conclusion with respect to a county planning commission in 1954 O. A. G., page 258, No. 70. If the members of the planning commission exercise some of the sovereign power of the state, then it follows that they are “officers” such as are contemplated by Burns' 48-1247, *supra*. Thus, the members of the planning commission as “officers” would also be subject to the provisions of Burns' 48-1247, *supra*.

Membership on the city board of zoning appeals is provided for by Burns' 53-768, 53-768a, and 53-768b, *supra*. These members are appointed by the mayor and, in certain instances, additional members will be appointed by the circuit court judge of the county in which said board is exercising its authority. These board members are also “appointees” of officers covered by Burns' 10-3713, *supra*, so that the provisions of the statute would apply to such board members.

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The members of the board of zoning appeals also exercise rather extensive authority over the use of private property and for this reason they do exercise a portion of the sovereign power of the state. The exercise of this sovereign power places these board members in the category of officers as that term is expressed in Burns' 48-1247, *supra*. Thus, any contract between such board member and the unit of government which he serves would be subject also to the provisions of this statute.

Therefore, in answer to your first question, it is my opinion that any contract between a member of the board of zoning appeals or planning commission of a municipality would be absolutely void because said individual is prohibited from entering into such a contract by virtue of Burns' 10-3713, *supra*, and Burns' 48-1247, *supra*.

The problem of so-called "interested dealing contracts" has been of major concern to this office and to the Indiana State Board of Accounts for some period of time. Our Supreme and Appellate Courts have rendered a number of decisions with respect to such contracts. For the most part, our courts have held that any such interest is a violation of public policy, even in the absence of statute, and the contract is absolutely void. In the case of Noble *et al.* v. Davison (1911), 177 Ind. 19, 28, 29, 96 N. E. 325, the Court said:

"* * * This court has ever steadfastly adhered to the rule which invalidates all agreements injurious to the public, against the public good or which have a tendency to injure the public. Contracts belonging to this class are held void, even though no injury results. The test of the validity of such agreements is the tendency to public injury, regardless of the actual intent of the parties, and regardless of actual results.

"Integrity in the discharge of official duty is zealously guarded by the law. It lends no aid to that which tends to corrupt or contaminate official action, whether such action be judicial, legislative or administrative.

* * *"

The factual situation will differ considerably with each individual case, and any doubt should be resolved against the validity of the contract due to the underlying evil which is thought to exist with respect to such agreement.

I have in the past dealt with other questions pertaining to contracts between particular public officials and the units of government which they serve. 1959 O. A. G., page 85, No. 18, deals with a member of the board of public works of a city who was also an employee of a contractor performing work for such city. 1958 O. A. G., page 92, No. 21, concerned a member of a county board of public welfare who was also a member of a firm furnishing printing supplies to the county. 1958 O. A. G., page 38, No. 9, dealt with contracts between penal institutions and a member of the institutional parole board. In two of the above Opinions I stated that Indiana is one of the strictest jurisdictions in the United States insofar as the law regarding such contracts is concerned. Most of the reasoning and authorities cited in those Opinions are applicable to the question here under consideration. In 1959 O. A. G., page 85, No. 18, *supra*, I concluded that the member of the board of public works, who was merely an employee of the private contractor, did not have a direct or indirect interest in the contract with the municipal government. However, I also expressed in that Opinion the need for extreme caution under the circumstances presented. The risks involved in such contracts require the utmost caution in all situations and prudent public officials would resolve all doubts by avoiding any connection with such contracts.

Your second question represents a type of contract between an official of one unit of government, in which he exercises his official jurisdiction, and another unit of government which, from a practical standpoint, is outside his area of authority. A similar situation was discussed in 1955 O. A. G., page 76, No. 22, which concerned a contract between the school board and a member of the common council. I stated in that Opinion that Burns' 48-1247, *supra*, would probably not apply where two separate units of government are involved. On the other hand, Burns' 10-3713, *supra*, seems to be more extensive in coverage and might apply to a contract between an officer of one unit of government, in his individual business capacity,

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and another separate unit of government. This is especially true if the contracting officer exercises any official authority within the jurisdictional sphere of the other unit of government.

The tendency to exert influence, by reason of a position held, may only be indirect if the official contracting in an individual business capacity does not have the authority to award or approve such contract. However, such influence is, nevertheless, a contaminating possibility, and the officials in the other unit of government having authority to award or approve contracts might be inclined to show favoritism to another public official in preference to another individual contractor. It is the tendency toward contamination, regardless of harm and irrespective of the circumstances, which serves to invalidate such contracts.

McNay v. Town of Lowell (1908), 41 Ind. App. 627,
84 N. E. 778.

There is a general rule which holds that a person who is entrusted with the business of others cannot be allowed to make such business the object of profit to himself. Our courts have held that *this rule does not depend on reasoning technical in its character and it is not local in its application.*

In the Matter of State Board of Accounts *et al.* v.
Holovachka (1957), 236 Ind. 565, 142 N. E. (2d)
593;

Noble *et al.* v. Davison, *supra*;

McNay v. Town of Lowell, *supra*;

Cheney *et al.* v. Unroe (1906), 166 Ind. 550, 77 N.
E. 1041.

The decisions of our courts have been, as already indicated, very strict in regard to any contracts involving a public official as an individual, and a unit of government. Many cases have made broad statements of policy against any such contract and the court in Noble *et al.* v. Davison, *supra*, held that such

contracts would be void as against public policy even in the absence of statute.

By the statement of your second question it is apparent that a member of the board of zoning appeals or plan commission does, or might, exercise his official authority beyond the boundaries of the municipal corporation. This extension of authority or jurisdiction may be sufficient to invalidate any contract between such public official and the county government or some sub-unit thereof. Thus, the contract may violate Burns' 10-3713, *supra*, but would not violate Burns' 48-1247, *supra*.

In view of the tendency of the Indiana courts to disapprove such contracts, any case of doubt should be resolved in favor of avoiding participation in any such contract. The penalty provisions above should be sufficient to warn even the most improvident official contemplating a business contract with any unit of government. However, based solely upon the statutes involved and the particular facts presented by your second question, it is my opinion, in answer to said question, that a contract between a member of a city or town board of zoning appeals or plan commission and a unit of county government, or some sub-unit thereof, other than said city or town, would not be in violation of either Burns' 10-3713, *supra*, or Burns' 48-1247, *supra*.

In summary, it is my opinion that a member of a city or town board of zoning appeals or plan commission is an officer within the meaning of Burns' 10-3713, *supra*, and Burns' 48-1247, *supra*, so that any contract between said official and the unit of government in which he exercises his official jurisdiction is absolutely void and in violation of said statutes. Moreover, a contract between said official and some other unit of government, outside the official's normal sphere of authority, would not violate Burns' 48-1247, *supra*, and probably would not violate Burns' 10-3713, *supra*, although such contracts should be avoided by any public official.