104 Ind. App. 196, 9 N. E. (2d) 121, the Court adopted the following statement with respect to statutory construction of regulatory acts passed for the public safety:

"'When the purpose of the legislative body sought to be accomplished is clear, such construction shall be given the statute as shall carry out such purpose, even though such construction is contrary to the strict letter thereof.' Northern Ind. R. Co. v. Lincoln Nat'l. Bank (1910), 47 Ind. App. 98, 92 N. E. 384."

In so construing Burns' 20-1004, supra, it is my opinion, in answer to your final question, that drive-in movie theatres having a fixed location, buildings, structures and other facilities on the premises can be classified as "moving picture shows" within Class A or B, depending upon a determination of the area or seating capacity of the theatre.

OFFICIAL OPINION NO. 36

August 26, 1960

Hon. Samuel H. Power
Indiana State Representative
900 East Clinton Street
Frankfort, Indiana

Dear Representative Power:

This is in answer to your recent letter wherein you request an Official Opinion concerning the appropriation of funds by a county council for bovine tuberculosis testing within such county as provided for by Acts of 1951, Ch. 80, Sec. 410, as amended by Acts of 1951, Ch. 178, Sec. 1, and as found in Burns' (1959 Supp.), Section 16-1801. Your specific questions are as follows:

"My questions are as follows: In light of part of Section 410 and part of Section 413 of the statutes which were in force immediately prior to the enactment of the present statutes, which prior statutes are quoted below (See Burns Indiana Statutes Annotated, 1959 Cumulative Supplement, Vol. 5, Part 1, pages 150 and 151 where the prior law is set out), after the Indiana
State Livestock Sanitary Board determines that the cattle within a particular county shall be tested for bovine tuberculosis to conform with federal regulations governing the reaccreditation of that county,

"(1) must the county council make any appropriation at all?

"and

"(2) if the county council fails to make an appropriation or makes an appropriation insufficient to enable the state veterinarian to conduct fully tuberculosis testing which may be necessary to meet the requirements for reaccreditation of said county, who pays the expenses which would otherwise have been paid by the county?"

Chapter 80 of the 1951 Acts is known as the “Domestic Animal and Poultry Disease Act of Indiana.” Sections 410 through 417 of this Act concerned the testing of cattle for bovine tuberculosis within the county. Chapter 80 contained an emergency clause and became effective February 28, 1951. However, at the same session of the Legislature, an amendatory act (Acts of 1951, Ch. 178), containing an entirely new procedure for such testing, was passed which amended Sections 410, 411, 412, 414, 415, 416 and 417, added two sections, 418 and 419, and specifically repealed Section 413. This amendatory act also had an emergency clause and became effective March 4, 1951.

The power to amend and modify statutes rest in the Legislature:


It is within the power of the Legislature to amend a law which has been passed earlier in the same session:

82 C. J. S. Statutes, § 243b, page 413;

Sutherland, Statutory Construction, 3rd Ed., Vol. 1, § 1902.
Therefore, in order to answer your questions it is necessary to refer only to the act as amended rather than to the act originally passed at the 1951 session of the Legislature.

Burns' 16-1801, supra, reads as follows:

"Whenever the board (Indiana State Livestock Sanitary Board) determines that the cattle within an accredited county shall be tested for bovine tuberculosis to conform with federal regulations governing the re-accreditation of a county, the county council of such county shall make an appropriation of a sufficient amount of money to carry on such work, but the appropriation shall not exceed a tax levy of three-fourths of a mill for each dollar of assessed valuation. The amount of money required shall be determined by the board from the most reliable source of information and shall reflect the number of cattle within the county. The board, before July 1 of the year in which the appropriation is to be made, shall notify the county auditor to have such amount of money included in the county budget for the year in which the testing of cattle for reaccreditation purposes is to be done. If the funds appropriated by the county council in accordance with the estimates submitted by the board are insufficient to complete the testing or any retesting which may be necessary to meet the requirements for reaccreditation, the board shall provide from its appropriation such additional funds as are necessary to carry out the testing program."

Your first question asks whether the county council must "make any appropriation at all" even though the Indiana State Livestock Sanitary Board (hereinafter referred to as the Board), pursuant to law, makes a determination that the cattle within the county shall be tested. You will note that the above section provides that "the county council of such county shall make an appropriation of a sufficient amount of money to carry on such work." In the next sentence it is provided that "The amount of money required shall be determined by the board * * * *." In addition, the amount determined by the Board is included in the county budget by the county auditor. The section then provides that "If the funds appropriated by
the county council in accordance with the estimates submitted by the board * * *.” It therefore becomes apparent from the language used in the above quoted section that, although the statute refers to an appropriation by the county council of a “sufficient amount” of money to carry on such work, that “sufficient amount” is determined by the Board and must be appropriated by the county council in accordance with the estimates submitted by said Board.

Further, the mandatory word “shall” is used with respect to the duty of the county council to appropriate the money in question. In construing the word “shall” as used in a statute, our Supreme Court, in State of Indiana ex rel. Simpson et al. v. Meeker et al. (1914), 182 Ind. 240, 105 N. E. 906, stated as follows:

“* * * As a general rule of statutory interpretation the presumption is that the word ‘shall,’ as used in any given law, is to be construed in an imperative sense, rather than directory, and this presumption will control unless it appears clearly from the context or from the manifest purpose of the act as a whole that the legislature intended in the particular instance that a different construction should be given the word.”

Clearly, the language of Burns’ 16-1801, supra, indicates that the duty of the county council is a mandatory one rather than merely directory. This conclusion is further strengthened by the obvious fact that the Board, by reason of its specialized functions, is more competent to determine the amount of money necessary to conduct a bovine tuberculosis program in conformity with federal regulations.

In answer to your question No. 1 I must therefore conclude that the county council has a mandatory duty to appropriate the amount submitted by the Board, such appropriation, however, not to exceed a tax levy of three-fourths of a mill for each dollar of assessed valuation.

Your second question reads as follows:

“(2) if the county council fails to make an appropriation or makes an appropriation insufficient to enable the state veterinarian to conduct fully tuberculosis testing which may be necessary to
meet the requirements for reaccreditation of said county, who pays the expenses which would otherwise have been paid by the county?""

This question is answered by the last sentence of Burns' 16-1801, supra, which for clarity I will again quote:

"If the funds appropriated by the county council in accordance with the estimates submitted by the board are insufficient to complete the testing or any retesting which may be necessary to meet the requirements for reaccreditation, the board shall provide from its appropriation such additional funds as are necessary to carry out the testing program."

I stated in answer to your question No. 1 that it is the mandatory duty of the county council to appropriate the amount submitted by the Board. The language of the statute does not contemplate a situation where the county council fails to perform its mandatory duty by not making any appropriation for the testing program. The Legislature must have assumed that this duty would be performed and if not, appropriate legal action would be taken to enforce the provisions of the act. I note that the statute provides, in case of a deficiency, that the Board shall provide from its appropriation such additional funds as are necessary to carry out the program. Thus the language indicates that any moneys furnished by the Board are in addition to an amount already appropriated by the county council. The statute imposes no duty upon the Board to furnish funds where no appropriation has been made by the county council.

I can conceive of two instances whereby the funds appropriated by the county council in accordance with the estimates submitted by the Board might be insufficient to complete the testing program. The first might occur when the estimate by the Board is not sufficient for the program, and the second when the tax levy limitation prevents a sufficient amount from being appropriated. In each instance it is the statutory duty of the Board to provide from its appropriation the additional amount necessary to carry out the testing program.

In summary, my answers to your questions are as follows:
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(1) Pursuant to the provisions of Burns' 16-1801, *supra*, a county council has the mandatory duty to appropriate an amount determined by the Indiana State Livestock Sanitary Board for a bovine tuberculosis testing program, such appropriation, however, not to exceed a tax levy of three-fourths of a mill for each dollar of assessed valuation.

(2) When a county council makes an appropriation pursuant to Burns' 16-1801, *supra*, and such appropriation is not sufficient to complete the testing program, the Indiana State Livestock Sanitary Board shall provide from its appropriation such additional funds as are necessary to complete such testing program. However, the statute imposes no duty upon the Board to furnish funds where no appropriation has been made by the county council.

OFFICIAL OPINION NO. 37

September 7, 1960

Mr. T. M. Hindman
State Examiner
Indiana State Board of Accounts
304 State House
Indianapolis 4, Indiana

Dear Mr. Hindman:

This is in answer to your recent request for an Official Opinion regarding the power of a county council to appropriate money for the employment of two county attorneys. Your specific questions are as follows:

"1. Since the County Council is not an administrative body, does it have power to appropriate for itself money to employ two County Attorneys?"

"2. Does the County Council have authority to employ such County Attorneys?"

"3. Can the County Council direct the activities of such County Attorneys, if they are so employed?"

In order to answer your questions it should first be pointed out that there is no specific statute authorizing any county board or official to appoint or employ a county attorney. [A