(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
sheriff in any county having a population of over five hundred thousand is authorized to appoint a legal deputy pursuant to Acts of 1959, Ch. 143, Sec. 1, as found in Burns' (1959 Supp.), Section 49-2805a. Such deputy could hardly be considered a county attorney.] However, the Legislature has recognized the existence of a county attorney by the mention of this position in several statutes.

See: Acts of 1915, Ch. 142, Sec. 2, as amended, as found in Burns' (1959 Supp.), Section 21-215;

Acts of 1943, Ch. 251, Secs. 2, 16 and 23, as found in Burns' (1948 Repl.), Sections 28-202, 28-220 and 28-232;

Acts of 1917, Ch. 28, Sec. 1, as found in Burns' (1956 Repl.), Section 10-3103.

A very significant section concerning the existence of a county attorney is found in Acts of 1899, Ch. 154, Sec. 19, as found in Burns' (1948 Repl.), Section 26-519. This section specifies the items which shall be included in the estimate of a budget prepared by the board of county commissioners. The fifth item is “Salary of the county attorney.”

The position of county attorney was described as follows in 1948 Opinions of the Attorney General, page 128, No. 27, at page 133:

“The county attorney is not a county official, but is merely an employee who is retained by the county to do the legal work necessary in the normal and usual affairs of the county. There is provision by statute for the salary or expenses of this office, but it has been held that the designated salary for contract prices made by the county commissioners is regarded to be in full payment for all of the usual and ordinary services within the county. McCabe v. Board of Commissioners of Fountain County (1874), 46 Ind. 380; City of Rochester v. Campbell (1916), 184 Ind. 421.”

It has long been recognized by the courts of this state that the board of county commissioners has the power to employ attorneys to represent the county.
Stingley v. Nichols, Shephard & Co. et al. (1891), 131 Ind. 214, 30 N. E. 34;
The Board of Commissioners of Jay County v. Taylor et al. (1889), 123 Ind. 148, 23 N. E. 752;
The Board of Commissioners of Ripley County v. Ward et al. (1880), 69 Ind. 441;
McCabe v. The Board of Commissioners of Fountain County (1874), 46 Ind. 380;
Jessup v. Hinchman (1922), 77 Ind. App. 460, 133 N. E. 853;
Holman et al. v. Robbins (1892), 5 Ind. App. 436, 31 N. E. 863.

The board of county commissioners, in legal contemplation, is the county. Thus the county may act, as a county, only through its board of commissioners. It has the care of the property of the county as well as its supervision and management.

The State ex rel. Board of Commissioners of Daviess County v. Clark et al. (1853), 4 Ind. 315;

Board of Commissioners of the County of Newton et al. v. Wild et al. (1905), 37 Ind. App. 32, 76 N. E. 256.

From the above authorities we must conclude that the board of county commissioners presently has the implied power to employ a county attorney who shall give advice pertaining to the conduct of the business of the county and to represent the county in court. When the board of commissioners exercises this power, the county is assured of legal representation, and under these circumstances it would be unnecessary for any other county board or official to employ an attorney to represent the county.

Returning to your specific questions concerning the powers of the county council, the following basic proposition with respect to the power and authority of public officers should be first considered:

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“A public officer who derives power and authority solely from statute has no power other than that found in the statute, plus such additional incidental powers as are implied as being necessary for the purpose of performing the express statutory powers granted such public officer. * * *”


In Applegate, County Auditor v. State ex rel. Pettijohn (1933), 205 Ind. 122, 125, 185 N. E. 911, our Supreme Court held that where no specific statutory authority existed which authorized the county council of Hamilton County to appropriate an amount for compensation of a deputy county treasurer, the appropriation therefor could not be made by the county council.

I stated earlier in this Opinion that I can find no statutory authority which specifically authorizes a county council to appoint or employ a county attorney. Neither do I find a statute from which this power might be necessarily implied from expressed powers. An examination of the statutory duties of the county council does not reveal an intent of the Legislature for the council to assume the authority heretofore exercised by the county commissioners with respect to acting on behalf of the county.

In the aforementioned case of Applegate, County Auditor v. State ex rel. Pettijohn, the Court commented on the power of a county treasurer to employ assistance in performing his duties, stating as follows at page 125:

“The law contemplates that the treasurer shall perform the duties of his office, and that his salary and allowances shall compensate him for that service, and that if assistance is required he shall pay the expense thereof out of his own compensation, unless there is express statutory provision for an allowance, and the statutes above referred to clearly show such a legislative interpretation of the law.”

The duties of public officers are prescribed by statute and persons accepting such a public trust are presumed to have
knowledge of the duties and obligations imposed upon them. When such officers feel the need for legal advice with respect to the performance of their duties, it is incumbent upon them to seek the advice of their county attorney, city attorney, or the legal authority properly employed to advise and represent their political subdivision. If such officers do not see fit to seek such advice and wish to obtain legal counsel from another source, they are required to pay the expense thereof out of their own personal funds unless there is an express or implied statutory provision authorizing payment therefor from public funds.

Therefore, in conclusion, it is my opinion, in answer to your questions Nos. 1 and 2, that the county council does not possess the statutory power, either express or implied, to employ a county attorney or attorneys and an appropriation for such employment is not authorized by law. Since I have concluded that a county council may not employ a county attorney, an answer to your question No. 3 is unnecessary.

OFFICIAL OPINION NO. 38

September 8, 1960

Mr. John Peters, Chairman
State Highway Department of Indiana
State House Annex
Indianapolis, Indiana

Dear Mr. Peters:

This is in answer to your letter of August 15, 1960, requesting an Official Opinion as follows:

“Certain Railroad Companies are requesting that we obtain easements and pay for the right to cross their tracks in the construction of railway-highway grade separation projects.

* * *

“We will appreciate it if you will furnish us with an Official Opinion regarding our right to cross the operating property of the Railroad and compensation therefor.”