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.”
The Acts of 1852, Ch. 83, Sec. 13, as amended, as found in Burns' (1951 Repl.), Section 55-601, expresses the following:

"Every such corporation (railway corporation) shall possess the general powers, and be subject to the liabilities and restrictions, expressed in the special powers following:

* * *

"Fifth. To construct its road upon or across any stream of water, water-course, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or water-course, road or highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises."

This "Fifth" clause was interpreted by the Supreme Court of Indiana in the case of New York, Chicago & St. Louis R. Co. et al. v. Rhodes et al. (1909), 171 Ind. 521, 86 N. E. 840, in the following language found at pages 524, 525 thereof:

"Under the statutes of this State, it is the duty of all railroad companies to construct and keep in safe condition all highway crossings; and this duty is the same whether the highway was established before or after the railroad was built. § 5195 Burns 1908, cl. 5, § 3903 R. S. 1881; (cites). It is clear from our statute and the cases cited that a railroad company acquires its right of way subject to the right of the State to extend public highways and streets across the same, and subject to the condition that it must place, keep and maintain all highway crossings, regardless of whether the highway was established before or after the road was built, in such condition as not unnecessarily to impair the usefulness of the highway, and 'so as not to interfere with the free use' thereof, and 'in such a manner as to afford security for life and property,' without reference to whether the railroad company owns the right of way in fee, or merely an easement therein. (cites)
"Having accepted the privileges and franchises from the State and acquired its right of way subject to such right under said statute on the part of the State it is not entitled to any compensation for the interruption and inconvenience, if any, nor for increased expense nor increased risk, if any, nor for the expense and inconvenience of the railroad company in complying with the requirements of said statutes as to highway crossings. (cites)

"Said subdivision five of § 5195, supra, does not depend for its validity upon the police power of the State, but is valid because the State has the power to provide the conditions upon which railroads acquire their rights of way in the State, and such conditions are binding whether the right of way be acquired by deed, condemnation or otherwise. Moreover, the laws requiring railroad companies to construct, maintain and keep in safe condition all the highway crossings, by erecting and maintaining gates, and providing men to operate them, to plank crossings, construct cattle-guards, employ gatemen or flagmen, etc., are passed in the exercise of the police power, and are constitutional although enacted after the railroad was built. (cites)"

In the case of Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. Gregg et al. (1913), 181 Ind. 42, 102 N. E. 961, the Indiana Supreme Court discussed the Rhodes case, supra, and the nature of the property right involved in the following language found at page 53 thereof:

"In New York, etc. R. Co. v. Rhodes (1909), 171 Ind. 521, 525, 86 N. E. 840, 24 L. R. A. (N. S.) 1225, it was held that a railroad company having accepted the privileges and franchises from the State and acquired its right of way subject to the right of the State to locate and maintain its public highways (subd. 5, § 5195 Burns 1908, § 3903 R. S. 1881), is not entitled to any compensation for the interruption and inconvenience, if any, nor for increased expense nor increased risk, if any, for the expense and inconvenience of the railroad company in complying with the requirements of such statute as to highway crossing. Even in the absence of
such a statute as § 5195, supra, the rule is that a private corporation which acquires a right to construct a railroad, takes it subject to the dominant right of the State to cross its railroad whenever the public necessity demands that new roads or streets shall be opened. In accepting a grant from the State, the private corporation impliedly agrees that the sovereign right to provide necessary highways for citizens of the State shall not be impaired. It is considered that there is no taking of property where a public highway crosses a railroad right of way and where as in this instance the two uses may coexist; and it makes no difference in the matter of compensation whether the railroad merely owns an easement or the fee. I Elliott Roads and Sts. (3 ed.) § 249 and cases there cited. Chicago, etc. R. Co. v. Luddington (1910), 175 Ind. 25, 40, 91 N. E. 939, 93 N. E. 273, and cases there cited.” (Our emphasis)

This case was cited with approval by the United States Supreme Court in the case of Lake Shore & Michigan Southern R. Co. et al. v. Clough et al. (1916), 242 U. S. 375, 61 L. Ed. 374, 37 S. Ct. 144. This latter case concerned the extension of a drainage ditch through existing railroad right of way rather than a state highway extension as in the situation you present in your letter; but, the same statutory material was involved as well as substantially similar points of law.

Certain language contained in the case of Cincinnati, Indianapolis & Western R. Co. v. The City of Connersville (1908), 170 Ind. 316, 83 N. E. 503, might be interpreted by some persons to be in conflict with the previous and subsequent interpretations made by said court of the Acts of 1852, Ch. 83, Sec. 13, supra. However, as the court indicated in that case it was a condemnation proceeding by the city of Connersville and the only question raised in the Supreme Court related to damages. Whether, in fact, the exercise of eminent domain powers was necessary for the city to extend its street across the railroad’s right of way was not before them and as the court said, when such powers are exercised, whatever is necessarily taken from the railroad is subject to full compensation.

There have been no judicial decisions or legislative enactments subsequent to the cases and statutes herein cited which,
in my opinion, would affect the judicial interpretations given Burns' 55-601, Clause Fifth, supra, and, therefore, it is my opinion that the State Highway Department of Indiana may construct highways across the tracks and the operating right of way of a railroad without liability for compensation to the railroad.

OFFICIAL OPINION NO. 39

September 20, 1960

A. C. Offutt, M. D.
State Health Commissioner
Indiana State Board of Health
1330 West Michigan Street
Indianapolis 7, Indiana

Dear Dr. Offutt:

This is in reply to your recent request for an Official Opinion which reads, in part, as follows:

"The 1945 Act, governing the regulation and licensing of hospitals, Burns' Section 42-1601, et seq., exempts 'convalescent homes, boarding homes or homes for the aged' from its provisions.

"On the other hand, the Indiana Nursing Home Licensing Law, the same being Chapter 136 of the Acts of 1957, as amended by Chapter 209 of the Acts of 1959, Indiana General Assembly appears to specifically exempt any institution operated by a hospital from licensure under the provisions of the Indiana Nursing Home Licensing Law. * * *

"It is respectfully requested that we have your official opinion relating to the authority in Indiana for the licensure and regulation of hospitals which own and operate a home for the aged, more commonly referred to as a 'nursing home,' and charge individuals for the use thereof." (Our emphasis)

There was enclosed with your letter of request a copy of correspondence received by you in which details of a proposed operation were set forth thus: