(c) The governing board of a department of parks and recreation created pursuant to Acts of 1955, Ch. 311, supra, has the authority to fix the compensation of all the appointive officers and employees employed by such board.

3. (a) A utility service board operating pursuant to Acts of 1913, Ch. 76, supra, has the authority to fix the compensation of all employees of such board and such compensation may be lowered but not raised by the city council.

(b) The board of a levee authority district created pursuant to Acts of 1959, Ch. 289, supra, has the authority to fix the compensation of all appointive officers and employees of such district.

(c) The board of the airport authority district created pursuant to Acts of 1959, Ch. 315, supra, has the authority to fix the salaries or compensation of the various officers and employees of such district.

OFFICIAL OPINION NO. 65

December 12, 1959

Mr. Edwin Steers, Sr.
Member of State Election Board
108 East Washington Street
Indianapolis, Indiana

Dear Mr. Steers:

This will acknowledge receipt of your recent request for an Official Opinion based on the letter to you from the Indiana Municipal League attached thereto. The following questions are presented therein:

“(1) If an incumbent councilman, elected to serve another four-year term, dies prior to being sworn in, does the person elected by the council to fill the present unexpired term retain office for the next four year period?

“(2) If an incumbent councilman, re-elected for another four-year term, dies after being sworn in but before the beginning of the next ensuing
term, would there then be two vacancies to be filled—that for the remainder of this term and that for the next term?

“(3) If a councilman-elect, who is not an incumbent, dies before he has taken the oath of office, does the incumbent retain the office for the next ensuing term?

“(4) If a councilman-elect, who is not an incumbent, dies after he has been sworn in, but before the beginning of the next ensuing term, does the council fill the vacancy as it would all other such vacancies during the term?

“(5) Would not like procedure be employed in the case of death of a Mayor-elect under like conditions?”

The procedure for filling vacancies in city offices, including those of city councilman and mayor, is set forth in the Acts of 1905, Ch. 129, Sec. 45, as amended and found in Burns’ (1959 Supp.), Section 48-1246, which reads as follows:

“* * * In case of a vacancy in the office of mayor the city comptroller in all cities having such office shall act as mayor: Provided, That such officer while acting as mayor shall not perform any duties as comptroller but shall appoint a suitable person to act as comptroller during such time. * * * In the event of the death, resignation or disability of the city comptroller and in cities not having a city comptroller the common council shall designate one [1] of its members to act as mayor pro tempore until a special meeting of the council to be held not less than ten [10] days nor more than fifteen [15] days thereafter, at which special meeting the council shall elect a suitable person to fill out the unexpired term of the mayor. Notice of such special meeting shall be given by the city clerk by publication once in a newspaper of general circulation printed in such city. In case of a vacancy in the office of councilman from death, resignation or other cause, the common council shall fill such vacancy at a special meeting to be held at a time not less than two [2] nor more than fifteen [15] days after such vacancy is discovered by such council of
which special meeting notice shall be given by the clerk as herein required when the council is to fill a vacancy in the office of mayor. *All persons so filling vacancies in elective city offices shall hold only during the unexpired term of any such officer* and shall during such incumbency be entitled to the salary thereto attached

* * *” (Our emphasis)

The time for holding the election of all the elective officers of cities in this state is specified in the Acts of 1945, Ch. 229, as amended and found in Burns’ (1949 Repl.), Sections 29-4312, 29-4313 and 29-4315. Burns’ 29-4312, supra, reads as follows:

“The time for holding the election of all the elective officers of all cities in this state * * * shall be and the same is hereby changed from the first Tuesday after the first Monday in November, 1946, to the first Tuesday after the first Monday in November, 1947; and thereafter elections for the elective officers of all such cities shall be held on the first Tuesday after the first Monday of November of every fourth year.” (Our emphasis)

Burns’ 29-4313, supra, provides for holding all city primaries for candidates “which are to be voted for at the city election to be held in November 1947, and each four [4] years thereafter.” (Our emphasis)

Burns’ 29-4315, supra, reads as follows:

“The several city officials to be elected under the provisions of this act shall take office at twelve o’clock noon on the first day of January, 1948, and thereafter such city officers shall take office at twelve o’clock noon on the first day of January next following their election. Such officers shall serve for four [4] years and until their successors are elected and qualified.”

The Indiana Constitution, Art. 15, Sec. 3, provides as follows:

“Whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer,
other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean, *that such officer shall hold his office for such term, and until his successor shall have been elected and qualified.*” (Our emphasis)

The Indiana Constitution, Art. 6, Sec. 9, provides as follows:

“Vacancies in county, township, and town offices shall be filled in such manner as may be prescribed by law.”

In an analysis of the questions you have presented, it is necessary that the following points be considered, namely:

(a) Did the officer-elect qualify for the prospective term?

(b) Does a vacancy exist?

(c) When is the time of election for such office?

(d) What is the duration of the term?

Let us first look to what is necessary for an officer-elect to “qualify.” In 22 Indiana Law Encyclopedia 223, it is stated that:

“In order for a public officer to qualify for office, it is necessary that he perform all acts which are under the law conditions precedent to his entering on the discharge of duties of his office.”

My 1956 O. A. G., page 1 at pp. 4 and 6, No. 1, concerns the case of a councilman-elect, not an incumbent, who failed to “qualify,” before his death, by taking the necessary steps required by law. That Opinion contains much that is in point in connection with the questions herein presented. Two statements therefrom are as follows:

“Therefore, it would appear that the following steps must be taken by a City Councilman in order to qualify to take possession of his office and enter upon the discharge of the duties thereof:
“1. He must file his statement of campaign expenses.

“2. He must take and subscribe an oath which must be indorsed on his certificate of election and filed according to law.”

* * *

“I am, therefore, of the opinion that, based upon the facts which you have submitted to me, the present City Councilman will hold over, under Art. 15, Sec. 3 of the Indiana Constitution, until his successor is elected and qualified.”

In your letter, reference is made to the fact of “being sworn in” or “taking the oath of office.” In the use of these words I assume that the Indiana Municipal League wanted to show that the individual had “qualified.” My consideration of the questions and my answers are based on this assumption.

The following statutes enumerate various acts which must be performed by city councilmen and mayors prerequisite to their rights to take possession of their office and to discharge the duties thereof. A campaign expense report is required by the Acts of 1945, Ch. 208, Sec. 373, as found in Burns’ (1949 Repl.), Section 29-5708. The requirement for the oath and endorsement on the certificate of election is found in the Acts of 1905, Ch. 129, Sec. 44, as found in Burns’ (1950 Repl.), Section 48-1244.

Whether or not a “vacancy” exists in an office is a fact to be determined by the circumstances in each particular situation. In my 1958 O. A. G., pages 48, 51, No. 12, I stated:

“When a person has been duly admitted to an office, the right to exercise the powers of said office continues during the prescribed term and until his successor is elected and qualified. In other words, the right of an officer to continue in office after his prescribed term is a contingent and defeasible right, which right is defeated by the election and qualification of his successor, and if the successor who has been duly elected and qualified dies before the commencement of his term, a vacancy is thereby created for that term.”
Under the facts considered in my Opinion, last above cited, I held that inasmuch as the officer-elect had qualified according to law, his death prior to entering upon his new term, created a vacancy. The case of Gosman v. State ex rel. Schumacher (1885), 106 Ind. 203, 6 N. E. 349, which I cited and quoted in my Opinion, contains the following statement:

"The right to hold over is not defeated or terminated by the election of a successor. The successor must have been elected and qualified. Appointment is not the equivalent of election in the constitutional sense. Speed v. Crawford, 3 Met. (Ky.) 207. Election and qualification are essential to vest the right to the succeeding term in the officer elect. Until these occur it remains contingently in the incumbent, and while an existing title remains in him no vacancy exists. Accordingly, in Commonwealth v. Hanley, 9 Pa. St. 513, where a successor to the clerk of the Orphans' Court, after having been elected, died before the commencement of his term, without having qualified, it was held no appointment could lawfully be made. Where, however, a successor has been elected and qualified, the right of such successor to the ensuing term vests immediately, and the contingent right of the incumbent is thereby defeated. In such a case the death of the officer elect before the commencement of the term for which he was elected, does not revive the right of the incumbent to hold over. A vacancy results. The title to the office for the succeeding term having vested in another, the owner of the term having died, and the contingent right of the incumbent having effectually ended, the office can only be filled by a resort to the means provided for supplying the vacancy. State ex rel. v. Bemenderfer, 96 Ind. 374; State v. Seay, 64 Mo. 89 (27 Am. R. 206)."

We next look to the "time of election" for such city officers as mayor and city councilman. This is shown by Burns' 29-4312, supra, to be "on the first Tuesday after the first Monday in November 1947" and thereafter "on the first Tuesday after the first Monday of November of every fourth year." (Our emphasis) This would designate such city election years
to be 1947, 1951, 1955, 1959, and every fourth year thereafter. This four-year cycle is also provided for in Burns’ 29-4313, supra, where it is stated that city primaries shall be held to nominate candidates “which are to be voted on at the city election to be held in November 1947, and each four [4] years thereafter.” (Our emphasis) Thus, we see that there has been established a definite cycle for the beginning of each term of such city officers.

The duration of the term of city councilman and mayor is provided for in Burns’ 29-4315, supra, wherein it is stated that “such officers shall serve for four [4] years and until their successors are elected and qualified.”

In the case of State ex rel. Fares v. Karger (1948), 226 Ind. 48, 54, 77 N. E. (2d) 746, the Supreme Court clearly recognized the right of an elected officer to qualify for his office a considerable time in advance of the actual commencement of his term of office. In the above case, where a trustee was elected at the General Election in November, 1946, the Court said:

“Had the trustee elected at the general election in November, 1946, duly qualified by giving bond and taking the oath of office as provided by law his death on November 10, 1946, would have created a vacancy authorizing the Board of Commissioners to appoint his successor. Since he did not so qualify, his death did not create a vacancy in the office * * *”

In 1947 O. A. G., page 382, No. 79, an Official Opinion involving the office of mayor, it is said:

“In the case of State ex rel. Jett v. Ives (1906), 167 Ind. 13, 78 N. E. 225, it was held that under the provisions of the Constitution that officers holding an office for a given term shall continue in office until their successors have been elected and qualified applies to municipal officers. Likewise, it has been held by our Supreme Court that if a person elected to an office dies before he qualifies, his death does not create a vacancy to be filled by appointment but the incumbent of the office holds over until a successor is elected and qualified.
1959 O. A. G.

"Kimberlin v. State ex rel. Tow (1891), 130 Ind. 120, 29 N. E. 773;

"Gosman v. State ex rel. Schumacher (1885), 106 Ind. 203."

In 1948 O. A. G., page 80, No. 17, involving the mayor of the same city referred to in 1947 O. A. G., page 382, No. 79, supra, there is much that is applicable to the instant case. For example, following a quote of the Indiana Constitution, Art. 15, Sec. 3, supra, it is stated: "This rule applies to municipal officers." Following a reference to Acts of 1945, Ch. 229, as amended, supra, it is said:

"* * * This act affirmatively shows that the legislature intended that city officers not be elected at a general election." (Our emphasis)

And the further statement is made in said Opinion:

"It has been held by our Supreme Court that the 'term of office' refers to the office itself and not to the incumbent and is not enlarged or varied by changing the date when a person shall be elected to fill such office. Russell v. State (1908), 171 Ind. 623, 87 N. E. 13; State ex rel. v. Wells (1895), 144 Ind. 231, 43 N. E. 133."

Your five specific questions will now be answered in the numerical sequence used in your letter. The questions and, in my opinion, the answers thereto are as follows:

Question (1)

"If an incumbent councilman, elected to serve another four-year term, dies prior to being sworn in, does the person elected by the council to fill the present unexpired term retain office for the next four-year period?"

In such a case, there would be a vacancy created in the term of office being served at the time of death, which would necessitate the filling of such vacancy by the city council for the remainder of the unexpired term and until a successor is elected and qualified in accordance with Burns' 48-1246, supra,
and Art. 15, Sec. 3 of the Indiana Constitution. However, inasmuch as the incumbent councilman-elect had not qualified for the succeeding term, there would be no vacancy created in such new term and the council would be without authority to make an appointment for such succeeding term. Therefore, the person appointed to fill out the remainder of the unexpired term would hold over until his successor could be elected and qualified. In accordance with the provisions of Burns' 29-4312, supra, the next time for holding the election of all elective officers of all cities in this state shall be in November 1963 and every four years thereafter.

Question (2)

"If an incumbent councilman, re-elected for another four-year term, dies after being sworn in but before the beginning of the next ensuing term, would there then be two vacancies to be filled—that for the remainder of this term and that for the next term?"

Where a councilman has been duly elected and qualified, pursuant to law, as his own successor, by reason thereof and based on the authorities, his contingent right to hold over after the term he is serving at the time of his death is defeated. Therefore, there would be two vacancies to be filled; one for the remainder of the term that he was serving and one for the next term for which he had been elected. The authorities cited herein show that the qualification for the office may be completed in advance of an ensuing term.

Question (3)

"If a councilman-elect, who is not an incumbent, dies before he has taken the oath of office, does the incumbent retain the office for the next ensuing term?"

This is a case where the incumbent councilman would be authorized to "hold over" under the authority of the Indiana Constitution, Art. 15, Sec. 3, supra. It is stated in State ex rel. Jett et al. v. Ives (1906), 167 Ind. 13, 19, 78 N. E. 225, concerning the above constitutional provisions:

"* * * it is clear that the reference is broad enough to include municipal officers, and it is our opinion that the provision does extend to them * * *"
The question then arises as to when his successor shall be elected. The only statutory authority for holding an election of a city officer is found in Burns' 29-4312, supra. See also "Election Laws of Indiana" governing city and school elections, 1959 edition, p. 106. It is clearly apparent that the authorized years for holding city elections, starting in 1947, are the years 1951, 1955, 1959 and every fourth year thereafter. Therefore, such an incumbent would retain the office for the next ensuing term. The 1956 O. A. G., page 1, No. 1, supra, and 1948 O. A. G., page 80, No. 17, supra, are directly in point and support the conclusion set out above.

Question (4)

"If a councilman-elect, who is not an incumbent, dies after he has been sworn in, but before the beginning of the next ensuing term, does the council fill the vacancy as it would all other such vacancies during the term?"

Inasmuch as the councilman elected has qualified, the fact that the time of such qualification was before the beginning of the ensuing term is immaterial. The right to the succeeding term was vested in the councilman-elect and upon his death a vacancy was created and the contingent right of the incumbent was effectively ended. The office could only be filled by a resort to the means provided for filling such a vacancy, namely, by the city council in accordance with Burns' 48-1246, supra. It is stated in City of Indianapolis v. Higgins (1894), 141 Ind. 1, 9, 40 N. E. 671, that:

"In every clause of the constitution the term town is used as comprehending cities. Not once is the term city or cities employed. It is settled by a uniform course of judicial decisions, the word 'towns' comprehends cities. By the constitution of the State, the word 'town' is used to comprehend cities. Every statute enacted by the Legislature respecting cities is founded on the constitutional provisions which use the word 'town' or 'towns.' The whole body of our legislation, respecting cities, rests upon the constitutional provisions which employ the terms town or towns."

Thus by judicial interpretation it was held that the Indiana Constitution, Art. 6, Sec. 9, supra, is applicable to cities as well as towns.
Question (5)

"Would not like procedure be employed in the case of death of a Mayor-elect under like conditions?"

The procedure to be followed in case of the death of a mayor-elect is the same as that for city councilmen, subject, however, to such provisions as are contained in Burns' 48-1246, supra. This difference is on account of the filling of the vacancy by the city comptroller in cities having such office and further provisions for filling a vacancy created by the death of any such comptroller while acting as mayor.

OFFICIAL OPINION NO. 66

December 15, 1959

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

Dear Mr. Steers:

This is in reply to your recent letter wherein you request an Official Opinion based on the question contained in a letter addressed to the State Election Board, from Mr. Hugh Williams, Sheriff of Knox County, Indiana. The request reads as follows:

"I was elected Sheriff of Knox County, Indiana, November 6, 1956, to fill the unexpired term of Frances Thomas, which expired 1/1/59. November 4, 1958, I was elected Sheriff of Knox County for a four year term.

"My question is, am I eligible to run in 1962 for another term of four full years. I have been advised I am eligible for four more years starting in January 1963, if elected."

The term of office, including provision for a uniform cycle for the office of County Sheriff is found in the Indiana Constitution, Art. 6, Sec. 11. This section which was added by constitutional amendment on November 2, 1948, reads as follows:

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