

CITIES AND TOWNS BULLETIN

AND UNIFORM COMPLIANCE GUIDELINES ISSUED BY STATE BOARD OF ACCOUNTS

September 2011

JUNE TRAINING SCHOOL

The State Board of Accounts extends its deepest appreciation to the officers and committees of the Indiana League of Municipal Clerks and Treasurers for making the arrangements and handling the registrations at the School in Merrillville. Next year's June School will be held in Indianapolis as part of the League's Annual Conference during the week of June 24 through 28. Please note that the League's Fall District meetings will again qualify as State-Called meeting days. This year's meetings will be in Middlebury on October 20 and in Nashville on October 26. Registration information will be sent out by the League for the District meetings.

SALARIES – UTILITY SERVICE BOARD MEMBERS

Since IC 8-1.5-3-3(f) requires the ordinance establishing a utility service board to provide for the salaries, if any, to be paid to the members, any such increases in salaries in subsequent years would require an amendment to such ordinance by the common or town council.

COURT COSTS – WHEN DEFENDANT IS NOT LIABLE FOR

A defendant against whom a judgment is entered is liable for costs. Costs are part of the judgment and may not be suspended except under IC 9-30-3-12. Whenever a judgment is entered against a person for the commission of two (2) or more civil violations (infractions or ordinance violations), the court may waive the person's liability for costs for all but one (1) of the violations. This does not apply to judgments entered for violations constituting:

1. Class D infractions; or
2. Class C infractions for unlawfully parking in a space reserved for a person with a physical disability under IC 5-16-9-5 or IC 5-16-9-8.

If a judgment is entered:

1. for a violation constituting:
 - A. a Class D infraction; or
 - B. a Class C infraction for unlawfully parking in a space reserved for a person with a physical disability under IC 5-16-9-5 or IC 5-16-9-8; or
 2. In favor of the defendant in any case;
- the defendant is not liable for costs. (IC 34-28-5-5)

Class D Infractions include seatbelt violations under IC 9-19-10 and IC 9-19-11 and stray dog violations under IC 15-20-1-4.

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HOME RULE

All cities and towns have home rule powers as set out in IC 36-1-3. The following should be considered when exercising such powers.

Limitations on Home Rule

It is desirable to look at the limitations, both expressed and implied, that have been placed on the scope of Home Rule powers. As noted in prior bulletins, Home Rule was never intended to give local governments a completely free hand to do whatever they want, and there are definite rules and limits that must be observed.

Expressed Limits of Home Rule

The Home Rule law contains a number of expressed provisions that preclude, limit, or condition the exercise of powers under Home Rule.

First, there are two general limits. A unit may not do anything that is:

1. expressly denied by the state constitution or state law (for example, a unit could not prescribe a penalty for an action that violates state law or impose jail time as a penalty for violation of a local ordinance).
2. expressly granted to another entity (counties, for instance could not take over functions or usurp powers vested by law in municipalities, townships, etc.).

In addition, there are other powers of a more specific character that units still may not exercise in the absence of authorization by state law. These include:

1. The power to condition or limit its civil liability, except as expressly granted by statute.
2. The power to prescribe the law governing civil actions between private persons.
3. The power to impose duties on another political subdivision, except as expressly granted by statute.
4. The power to impose a tax, except as expressly granted by statute.
5. The power to impose a license fee greater than that reasonably related to the administrative cost of exercising a regulatory power.
6. The power to impose a service charge or user fee greater than that reasonably related to reasonable and just rates and charges for services.
7. The power to regulate conduct that is regulated by a state agency, except as expressly granted by statute.
8. The power to prescribe a penalty for conduct constituting a crime or infraction under statute.
9. The power to prescribe a penalty of imprisonment for an ordinance violation.

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10. The power to prescribe a penalty of a fine as follows:
 - A. More than ten thousand dollars (\$10,000) for the violation of an ordinance or a regulation concerning air emissions adopted by a county that has received approval to establish an air program under IC 13-17-12-6.
 - B. For a violation of any other ordinance:
 - (i) More than two thousand five hundred dollars (\$2,500) for a first violation
 - (ii) More than seven thousand five hundred dollars (\$7,500) for a second or subsequent violation of the ordinance, other than traffic or parking violations.
11. The power to invest money, except as expressly granted by statute.
12. The power to order or conduct an election, except as expressly granted by statute.

Implicit Limitations of Home Rule

In addition to those limitations that are expressed in the Home Rule law, there are also a number of important considerations that will further limit the scope and applicability of Home Rule powers. These limits are not made explicit in the Home Rule law, but may be applied from examining other statutes and principles of law. These implied limitations include:

1. a governmental unit may not exercise powers outside its normal territorial jurisdiction, except as specifically authorized by law or through interlocal agreement; and
2. restrictions inherent in the federal laws, regulations, and constitution must be observed.

Procedures for Utilizing Home Rule

The ability to use Home Rule properly is not only important in terms of allowing government flexibility as needed, but is even more important now that many of the state laws which previously provided permissive powers to local units have been repealed. This is especially true of those laws which constituted "class" legislation in the past. Therefore, aside from providing additional powers, local units will need to invoke Home Rule authority in passing local ordinances to continue powers or procedures formerly granted by specific state statutes.

Who Can Utilize Home Rule Powers?

The Home Rule laws confer these powers to counties, cities, towns, schools, and townships. Libraries have never been accorded Home Rule powers, nor have special entities such as special service corporations or regional commissions.

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When Should Home Rule Powers Be Used?

A unit may exercise its Home Rule powers whenever it is “necessary or desirable” to exercise any power, perform any function, provide any service – and create the structural elements or procedures to do so – and:

1. the laws and constitutions of the state and federal governments do not expressly or implicitly prohibit or preempt it from doing so; and
2. state law does not already provide for exercising the power, providing the service, or performing the function, or state law does provide for the foregoing but does not mandate any procedures to follow in implementing it.

How Are The Home Rule Powers Exercised?

A question that one often hears when talking about Home Rule is, “Well that all sounds very nice – but how do we adopt Home Rule?” The answer to this question is very simple – you don’t adopt Home Rule. Home Rule represents both a policy of the state and a particular method of more efficiently conveying powers to local governments. Home Rule is not like a “local option tax” that requires further action to become effective within a particular local jurisdiction.

Local action is required only when a unit wants to do some particular thing under Home Rule authority. A unit doesn’t “adopt Home Rule,” but it does adopt specific powers that it wants to exercise. The formal ordinance procedure is required to accomplish this end.

An error to which Home Rule has been subject in the past is the impression that it confers powers on local officials and bodies individually. Occasionally individual officials wanting to perform some function and seeing no state law prohibiting them from doing so have acted with the idea that “if anybody gripes, I’ll say its Home Rule.” Home Rule does not work that way. Home Rule is essentially a legislative power – a form of limited legislative discretion delegated by the state legislature to the appropriate local legislative bodies.

In essence, local ordinances substitute for state laws in the exercise of Home Rule powers. The bodies that must pass the appropriate authorizing ordinances are:

1. in the case of a town, the town council;
2. in the case of a city, the city council;
3. in the case of Indianapolis/Marion County, the city-county council.

The ordinance authorizing the exercise of a new power, the performance of a new function, or the provision of a new service under the authority of the Home Rule law should be adopted according to the same rules and procedures generally applicable to the adoption of ordinances by the local legislative body. Although it is not a specific requirement, it would probably be advisable to state in the preamble or digest of the ordinance (not in the body of the ordinance itself) that Home Rule powers vested in the unit’s government by IC 36-1-3 are being exercised so that the source of authority will be clear in the event that the action is questioned.

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MUNICIPAL UTILITIES – GENERAL QUESTIONS

The following questions are questions received frequently. We are listing our audit position in response to these inquiries.

1. **Question:** Does a city or town which owns and operates its own waterworks have the right to correct a water bill that is erroneous?
Answer: Yes. Once a decision has been reached, all board actions should be documented and recorded in that body's minutes.
2. **Questions:** May a city or town compromise a water bill even if it is not erroneous?
Answer: While IC 36-1-4-17 allows a city or town to compromise an amount of money owed to a city or town, the city or town should comply with the provisions of the rate ordinances adopted for its utilities.
3. **Question:** Is a city or town that owns and operates its own sewage works required to assess a lien pursuant to IC 36-9-23-32 once the sewer charges become delinquent?
Answer: We believe that the provisions of IC 36-9-23-32 and IC 36-9-23-33 must be followed.
4. **Question:** Does the 10% delinquent fee referred to in IC 36-9-23-31 constitute a monthly penalty for a delinquent bill or is it a one time penalty?
Answer: We believe the 10% delinquent penalty is a one time charge assessed against fees as they become delinquent.

AUDIT REQUESTS

Current prevailing state statutes (see IC 5-11-1-25) require the State Board of Accounts to examine all cities regardless of size and those towns with populations greater than 5,000 on an annual basis. Towns with a population of 5,000 or less must be examined every two years. This examination responsibility is in addition to all other governmental and not-for-profit entities that we must examine or for which we have oversight responsibilities. Due to this tremendous workload, we physically are unable to immediately respond to requests for special examinations of cities and towns.

It should be noted if any official suspects or has reason to believe funds are missing or are being taken, the Field Supervisor for that area or the State Examiner in Indianapolis should be contacted for immediate evaluation and investigation.

All requests should be directed to the State Examiner and should set out the reason(s) for such requests. If the examination requested falls within our pre-planned annual audit program, we will make every effort to expedite the assignment to satisfy the inquiry.

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MOTOR VEHICLE HIGHWAY ACCOUNT
APPROVED USES OF DISTRIBUTIONS BY CITIES AND TOWNS

IC 8-14-1-5 limits the use of city and town Motor Vehicle Highway Account distributions to “their highways.” IC 8-14-1-1(3) defines the term “highways” to include “roadway, rights of way, bridges, drainage structures, signs, guard rails, protective structures in connection with highways, drains, culverts, and bridges and the substructure and superstructure of bridges and approaches thereto and streets and alleys of cities or towns.” Following is a listing of the approved uses.

1. Construction and reconstruction of streets, alleys, and curbs.
2. Repair and maintenance of streets, alleys, and curbs.
3. Oiling, sprinkling, snow removal, weed and tree cutting and cleaning streets, alleys, and curbs.
4. Costs of the separation of the grades of crossing of public highways and railroads.
5. Purchase or lease of highway construction and maintenance equipment.
6. Purchase, erection, operation and maintenance of traffic signs and signals, and safety zones and devices.
7. Painting of structures, objects, surfaces in highways for the purpose of safety and traffic regulations.
8. Law enforcement purposes subject to the following limitations:
 - A. for cities and towns with a population of less than five thousand (5,000) no more than fifteen percent (15%) may be spent for law enforcement purposes.
 - B. for cities or towns other than those specified in (A), no more than ten percent (10%) may be spent for law enforcement purposes.
9. Payment of principal and interest on bonds sold primarily to finance road, street, or thoroughfare projects.

Expenditures of Motor Vehicle Highway Distributions must have been budgeted and appropriated in the same manner as required for expenditure of general property tax revenues.

IC 8-14-1-3 provides for a penalty for misapplication of Motor Vehicle Distributions and states in part:

“If any funds allocated to any city or town shall be used by any officer or officers of such city or town for any purpose or purposes other than for the purposes as defined in this chapter, such officer or officers shall be liable upon their official bonds to such city or town in such amount so used for other purposes than for the purposes as defined in this chapter, together with the costs of said action and reasonable attorney fees, recoverable in an action or suit instituted in the name of the state of Indiana on the relation of any taxpayer or taxpayers resident of such city or town.”

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**LOCAL ROAD AND STREET ACCOUNT
APPROVED USES OF DISTRIBUTIONS BY CITIES AND TOWNS**

IC 8-14-2-5 states: "Money from the local road and street account shall be used exclusively by cities, towns, and counties for:

1. engineering, land acquisition, construction, resurfacing, maintenance, restoration, or rehabilitation of both local and arterial road and street systems;
2. the payment of principal and interest on bonds sold primarily to finance road, street, or thoroughfare projects;
3. any local costs required to undertake a recreational or reservoir road project under IC 8-23-5; or
4. the purchase, rental or repair of highway equipment."

IC 8-14-2-7 only applies to towns in Marion County and states: "An included town under IC 36-3-1-7 may transfer surplus allocated monies to the town general fund from the local road and street account if those monies have not been allocated or expended within the previous twenty-four (24) months."

It appears legislative intent is for local road and street account distributions to be used only for direct expenses incurred in the construction, reconstruction, or maintenance of arterial and local roads and streets in cities and towns. This would prohibit the use of such funds for building buildings or for such indirect costs as administrative salaries or supplies, goods, or materials not used directly for one of the aforementioned purposes.

Local road and street account distributions must be budgeted and appropriated prior to expenditure in the same manner as property tax revenues.

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CUMULATIVE CAPITAL IMPROVEMENT FUND – USES
(Cigarette Tax Distributions)

IC 6-7-1-31.1 states as follows:

“(a) The fiscal body of each city and the fiscal body of each town shall, by ordinance or resolution, establish a cumulative capital improvement fund for the city or town. Except as otherwise provided in subsection (c), the city or town may only use money in its cumulative capital improvement fund:

- (1) to purchase land, easements, or rights-of-way;
- (2) to purchase buildings;
- (3) to construct or improve city owned property;
- (4) to design, develop, purchase, lease, upgrade, maintain, or repair:
 - (A.) computer hardware;
 - (B.) computer software;
 - (C.) wiring and computer networks; and
 - (D.) communications access systems used to connect with computer networks or electronic gateways;
- (5) to pay for the services of full-time or part-time computer maintenance employees;
- (6) to conduct nonrecurring in-service technology training of unit employees;
- (7) to undertake Internet application development; or
- (8) to retire general obligation bonds issued by the city or town for one (1) of the purposes stated in subdivision (1), (2), (3), (4), (5) or (6); or
- (9) for any other governmental purpose for which money is appropriated by the fiscal body of the city or town.

(b) The money in the city’s or town’s cumulative capital improvement fund does not revert to its general fund.

(c) A city or town may at any time, by ordinance or resolution, transfer to:

1. its general fund; or
2. an authority established under IC 36-7-23;

money derived under this chapter that has been deposited in the city’s or town’s cumulative capital improvement fund.”

The Attorney General in Official Opinion No. 1, dated May 25, 1965, held a city or town existing at the time of the last preceding U.S. decennial census continues to share in the cigarette tax distribution on this basis and not on the basis of any subsequent U.S. Census Bureau special census

Official Opinion No. 15 also states a city or town coming into existence after the last preceding U.S. decennial census is entitled to share in the cigarette tax distributions.

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HAZARDOUS MATERIALS CLEANUP COSTS

A fire department imposing a charge for hazardous materials cleanup costs may bill the responsible party for the total value of the assistance provided, as determined from the State Fire Marshal's schedule of service charges issued under IC 36-8-12-16(h).

Money collected must be deposited in the general fund or hazardous materials response fund of the city or town that established the fire department under IC 36-8-2-3 or IC 36-8-13-3 and may be used only for the following:

1. Purchase of supplies and equipment used in providing hazardous materials emergency assistance.
2. Training for members of the fire department in skills necessary for providing hazardous materials emergency assistance.
3. Payment to persons with which the fire department contracts to provide services related to the hazardous materials emergency assistance provided by the fire department.

A fire department may not bill for services provided that duplicate services provided by another governmental entity.

The responsible party billed for services may elect to reimburse the fire department by providing replacement materials that are of equal or greater value than those expended by the fire department in responding to the emergency.

A fire department that imposes a service charge and maintains an action for reimbursement under IC 13-25-6-5 may recover all costs of the action, including attorney's fees.

A responsible party is subject to a penalty for failure to pay the full amount of a charge made within sixty (60) days after the issuance of the bill for payment by the fire department. The amount of the penalty is ten percent (10%) of the amount of the charge that remains unpaid on the due date. [IC 36-8-12.2]

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COMPENSATION – WAIVER OF BY TOWN OFFICERS

A town officer may waive the officer's compensation for any year by filing a notice that satisfies the following:

1. The notice is in writing.
2. The notice states in substance all of the following:
 - A. The position held by the town officer.
 - B. The calendar year covered by the notice.
 - C. That the town officer waives compensation.
 - D. That the town officer understands that the notice is irrevocable beginning January 1 of the year covered by the notice.
3. The notice is signed by the town officer who wants to waive compensation.

A town officer who wants to waive compensation must file the notice with the town clerk-treasurer before January 1 of the year covered by the notice.

A notice filed is irrevocable beginning January 1 of the year covered by the notice.

A town officer who files a notice:

1. is not entitled to compensation for duties performed in the year covered by the notice; and
2. may not be paid compensation for duties performed in the year covered by the notice.

For the purposes of waiving salary, "compensation" means the total of all money paid to an elected town officer for performing duties as a town officer, regardless of the source of funds from which the money is paid. The term also includes all employee benefits paid to a town officer, including life insurance, health insurance, disability insurance, retirement benefits, and pension benefits. [IC 36-5-3-6]

ASSIGNMENT OF WAGES

Any assignment of the wages of an employee is valid only if all of the following conditions are satisfied:

1. The assignment is:
 - A. in writing;
 - B. signed by the employee personally;
 - C. by its terms revocable at any time by the employee upon written notice to the employer; and
 - D. agreed to in writing by the employer.
2. An executed copy of the assignment is delivered to the employer within ten (10) days after its execution.

A wage assignment may be made for the purpose of paying any of the following:

1. Premium on a policy of insurance obtained for the employee by the employer.
2. Pledge or contribution of the employee to a charitable or nonprofit organization.
3. Purchase price of bonds or securities, issued or guaranteed by the United States.

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ASSIGNMENT OF WAGES (Continued)

4. Purchase price of shares of stock, or fractional interests therein, of the employing company, or of a company owning the majority of the issued and outstanding stock of the employing company, whether purchased from such company, in the open market or otherwise. However, if such shares are to be purchased on installments pursuant to a written purchase agreement, the employee has the right under the purchase agreement at any time before completing purchase of such shares to cancel said agreement and to have repaid promptly the amount of all installment payments which theretofore have been paid.
5. Dues to become owing by the employee to a labor organization of which the employee is a member.
6. Purchase price of merchandise sold by the employer to the employee, at the written request of the employee.
7. Amount of a loan made to the employee by the employer and evidenced by a written instrument executed by the employee subject to the amount limits set forth in IC 22-2-6-4(c).
8. Contributions, assessments, or dues of the employee to a hospital service or a surgical or medical expense plan or to an employees' association, trust, or plan existing for the purpose of paying pensions or other benefits to said employee or to others designated by the employee.
9. Payment to any credit union, nonprofit organizations, or associations of employees of such employer organized under any law of this state or of the United States.
10. Payment to any person or organization regulated under the Uniform Consumer Credit Code (IC 24-4.5) for deposit or credit to the employee's account by electronic transfer or as otherwise designated by the employee.
11. Premiums on policies of insurance and annuities purchased by the employee on the employee's life.
12. The purchase price of shares or fractional interest in shares in one (1) or more mutual funds.
13. A judgment owed by the employee if the payment:
 - A. is made in accordance with an agreement between the employee and the creditor; and
 - B. is not a garnishment under IC 34-25-3. [IC 22-2-6-2]

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CONFLICT OF INTEREST FORMS

As stated in the December 2010 Cities and Towns Bulletin for form approvals, please submit all future conflict of interest forms electronically by e-mail. The individual submitting the request will receive a reply by e-mail.

Please send all electronic Conflict of Interest Form submissions to BaAnderson@sboa.in.gov. Please ensure the e-mail subject line reads exactly **Conflict of Interest Forms 2011** (make sure you only use one space between **Forms** and **Approval** and **2011**). Future year submissions should include the applicable year, i.e., 2012, 2013, etc.

Conflict of Interest Forms not submitted electronically will also receive an e-mail reply if we can determine an e-mail address.

Any individual desiring to receive a stamped hardcopy form approval (whether submitting the Conflict of Interest Form electronically or by mail) may receive a stamped hard copy by return mail by providing a self-addressed stamped envelope with your request.

TRANSFER OF APPROPRIATIONS

A city or town council may approve the transfer of money from one major budget classification to another within a department or office if the transfer is determined to be necessary, does not require the expenditure of more money than the total amount set out in the budget as finally determined, and the transfer is approved at a regular public meeting and by proper ordinance or resolution. The transfer may be made without notice and without the approval of the Department of Local Government Finance. (IC 6-1.1-18-6)

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QUESTIONS FROM THE JUNE 2011 CITIES AND TOWNS TRAINING SCHOOL

Question No. 1: Can money be transferred permanently from the CEDIT or Rainy Day fund to utility funds?

Answer: No. IC 6-3.5-7-12.7 and IC 36-1-8-5.1 only allow for permanent transfers to be made from the CEDIT fund or Rainy Day fund to other appropriated city and town funds.

Question No. 2: I have cash in a Build Indiana Fund. Can I declare the fund dormant and transfer it to the General Fund?

Answer: You will need to contact the State Budget Agency for their permission before you could declare such fund dormant.

Question No. 3: Can a deputy clerk-treasurer continue to be covered under a blanket bond if he/she files bankruptcy?

Answer: You would need to contact your insurance carrier. It is possible that the deputy may not be able to continue to be covered.

Question No. 4: When is the 100R Report [Report of Names, Addresses, Duties and Compensation] due to be filed with the State Board of Accounts?

Answer: The Report is due to be filed by January 31 each year.

Question No. 5: Will the new Local Indiana Business Price Preference law in IC 5-22-15-20.9 have any effect where a city or town chooses to purchase items using the State's QPA contract?

Answer: It is our audit position that the new price preference provision would not affect purchases made under the State's QPA contract as provided in IC 5-22-10-15 and IC 5-22-17-9.

Question No. 6: What can deferral program fees be used for?

Answer: IC 33-37-8-6[b] lists the permitted uses of such fund. Funds derived from a deferral program may be disbursed only by the adoption of an ordinance appropriating the funds for one (1) or more of the following purposes:

1. Personnel expenses related to the operation of the program.
2. Special training for:
 - A. a prosecuting attorney;
 - B. a deputy prosecuting attorney;
 - C. support staff for a prosecuting attorney or deputy prosecuting attorney; or
 - D. a law enforcement officer.
3. Employment of a deputy prosecutor or prosecutorial support staff.
4. Victim assistance.
5. Electronic legal research.
6. Office equipment, including computers, computer software, communication devices, office machinery, furnishings, and office supplies.
7. Expenses of a criminal investigation and prosecution.

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8. An activity or program operated by the prosecuting attorney that is intended to reduce or prevent criminal activity, including:
 - A. substance abuse;
 - B. child abuse;
 - C. domestic violence;
 - D. operating while intoxicated; and
 - E. juvenile delinquency.
9. Any other purpose that benefits the office of the prosecuting attorney or law enforcement that is agreed upon by the county fiscal body and the prosecuting attorney.

The funds may be used only in accordance with guidelines adopted by the prosecuting attorneys council under IC 33-39-8-5.

Question No. 7: Our Town recently obtained quotes for a remodeling project on the Town Hall. A Deputy Town Marshal submitted the lowest quote. Should he file a Conflict of Interest Disclosure Statement?

Answer: Based upon language contained in IC 35-44-1-3, it would be our position the Deputy Town Marshal should file the disclosure statement.

Question No. 8: During a recent storm a part-time hourly police officer helped the street department remove trees. Does he get paid police or street department wages for the time he spent assisting the street department?

Answer: Based upon language contained in the Fair Labor Standards Act, and assuming the officer was not on duty, it would be our position that this person be paid at an hourly rate set for street department employees. If his total hours for work performed at both positions for the week were more than 40, he would need to be paid at time and one half for every hour over 40 based upon the average of the two hourly rates.

Question No. 9: We own our sewage utility but do not own the water utility that serves our town residents. How can we get the company that owns the water utility to shut off water service to our delinquent sewage utility customers?

Answer: IC 36-9-23-6 provides for a sewage utility to contract with a water utility providing water service to users or property served in the municipality to do the following:

1. Ascertain the amount of water consumed.
2. Compute the amount of the charge to be billed for sewer services.
3. Bill and collect the amounts due for sewer services.
4. Discontinue water service to delinquent sewer customers.

Question No 10: Two towns and two townships want to start a fire territory. They want to split the attorney fees involved four ways. Can we pay our town's portion of the fees from the general, water, and wastewater funds?

Answer: You could pay for the attorney fees from the general fund but we do not see how such fees would be considered as proper utility expenses.