Upon the foregoing authorities and reasoning, in my opinion, the answers to your specific questions should be as follows:

1. The members of the Board of Commissioners should not collect actual expenses. The expenses of the county attorney should be paid, provided he was engaged by the Board to perform this particular work upon the basis of "expenses." The expenses of the architect can only be paid according to the terms of the contract he has with the Board of Commissioners.

2. The second question is answered exactly the same as the first.

3. The county commissioners should be allowed their mileage in accordance with the statute for the miles necessarily traveled.

4. The fourth question is answered exactly the same as the third.

5. The county attorney and architect should collect their expenses only in accordance with their respective contracts with the Board of Commissioners.

This opinion has not discussed the statutes pertaining to the necessity of appropriation before any claims can be paid, as I understand sufficient appropriations in this instance were properly made by the county council.

OFFICIAL OPINION NO. 28

March 18, 1948.

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

Dear Sir:

I acknowledge receipt of your letter of February 19, 1948, requesting my official opinion as follows:

"As you probably know, the Judge of Superior Court Room 3 of Marion County resigned sometime ago and a Judge was appointed to fill this vacancy. We would like to have an official opinion as to whether
or not a Judge should be nominated at the primary this spring and elected this fall to fill such vacancy or whether or not the present Judge will hold office under his appointment until the full term for which the Judge who has resigned, was elected.

“In 1946 a county assessor was elected in Marion County. The assessor, after his election and qualification, died, and an appointment was made to fill such vacancy. We would also like to have an official opinion as to whether or not a candidate should be nominated at the primary this year and elected this fall to fill such vacancy or whether or not the present county assessor will hold office under his appointment until the full term for which the assessor who has died, was elected. We have checked through the opinions which were written by Judge Gause and he has held that under Section 64-1101, Burns’ Revised Statutes, 1933, that county assessors can only be elected in certain years, therefore, under his construction, since the election of county assessor was in 1946, there could not be another election of county assessor until 1950, and that therefore, the present appointee would hold until after an assessor is duly elected in 1950 and qualifies.

“* * *

“We would be glad to have an opinion on the above at your earliest convenience and oblige.”

It is first noted that each of the offices mentioned in your request are statutory offices and are not created by the Constitution.

First, as to the office of Judge of the Marion Superior Court, Section 18 of Article 5 of the Constitution of Indiana provides as follows:

“When, during a recess of the General Assembly, a vacancy shall happen in any office, the appointment to which is vested in the General Assembly; or when, at any time, a vacancy shall have occurred in any other State office, or in the office of Judge of any court; the Governor shall fill such vacancy, by appointment, which
shall expire, when a successor shall have been elected and qualified.”

There is obiter dictum in an earlier Indiana case to the effect that the phrase, “judge of any court” includes a superior court. See State, ex rel. v. Gerdink (1909), 173 Ind. 245 at 248 and a superior court has been held to be within the classification of “such other courts as the General Assembly may establish,” under Section 1 of Article 7 of the Indiana Constitution. See State, ex rel. v. Gerdink, supra.

However, the authorities concerning the status of such courts apparently are not determinative of the length of term of appointees to fill vacancies.

The constitutional provision of Section 18 of Article 5 which limits the term of an appointee until “a successor shall have been elected and qualified,” has been held not to apply to statutory offices created by the General Assembly. In the case of statutory offices the question is said to be one of construction of the particular statutes involved. State, ex rel. Hench v. Chapin (1886), 110 Ind. 272, 277; Lake County Election Board v. State (1946), 224 Ind. 465, 68 N. E. (2d) 787; Harrison v. Alexander (1946), 224 Ind. 450, 68 N. E. (2d) 784.

The latter case involved the appointment to the statutory office of Judge of the Lake Juvenile Court. It was there argued that the term of the appointee was limited by Section 18 of Article 5. The Court said, however, that the Lake Juvenile Court being a statutory court, the term of an appointee to fill a vacancy was not limited by the Constitution but was controlled by Section 7 of Chapter 115 of the Revised Statutes of 1852, Section 49-409, Burns’ 1933, which reads as follows:

“Every person elected to fill any office in which a vacancy has occurred shall hold such office for the unexpired term thereof.”

This section applies to all appointments made to fill vacancies in offices created by the Legislature when no different provision is made therefor. Carson v. State, ex rel. Bath (1896), 145 Ind. 348, 350.

I find no different provision in regard to a Superior Court Judge appointed by the Governor to fill a vacancy in that office.
Harrison v. Alexander, supra, being the last expression of the Indiana Supreme Court, I am of the opinion that it is controlling in this case and that a judge appointed to fill a vacancy in the Marion Superior Court holds his office for the unexpired term thereof.

Concerning the assessor, Section 160, Chapter 59, Acts 1919 (Section 64-1101, Burns' 1943 Replacement) provides in part as follows:

"There shall be elected on the first Tuesday after the first Monday in November, 1922, and every four (4) years thereafter in each county in this state, one (1) county assessor, * * *. If any vacancy shall occur in said office, the board of county commissioners shall fill the same at any regular or special session. * * *"

If no provision had been made in the latter statute for the filling of the vacancy, then any vacancy would have been filled under and pursuant to Section 4, Chapter 115, Revised Statutes 1852 (Section 49-405 Burns' 1933) as follows:

"The board of county commissioners shall fill all (other) vacancies in county or township offices, except such township or other offices the vacancies in which are otherwise provided for; and such appointment shall expire when a successor is elected and qualified, who shall be elected at the next general or township election, as the case may be, proper to elect such officers."

If, therefore, Section 160 is given the same meaning and effect as the Acts of 1852, it is wholly surplusage and we should be attributing to the General Assembly an intent to adopt an unnecessary provision. In Fletcher Avenue Savings and Loan Association v. Roberts (1934), 99 Ind. App. 391, at page 396, the court said:

"In construing statutes we must presume that the legislature intended each word used in the statute, to be necessary to express its intention, * * *."
"* * * A word or a clause in a statute is to be treated as surplusage only when no other possible course is open."

We must therefore construe the language of Section 160, Chapter 59, Acts of 1919 as being necessary to express an intent not expressed in the Acts of 1852.

Likewise, if the Acts of 1919, concerning vacancies in the office of county assessor be construed as a re-enactment in part of the Acts of 1852 concerning the filling of vacancies in county offices in general, then it must be noted that the legislature substantially changed the language in the re-enactment. One of the rules of statutory construction which would then appear to be applicable is that a substantial change in language evidences an intent to change the meaning. State, ex rel. v. Beal (1916), 185 Ind. 192, 197; Dailey v. Pugh (1925), 83 Ind. App. 431, 436; In Chism v. State (1932), 203 Ind. 241, 244, the court said:

"It is a rule of statutory construction that a change of phraseology from that of the original act will raise the presumption that a change of meaning was also intended."

It must further be noted that in 1920 the Attorney General ruled that where a vacancy occurred in February of that year, the person appointed to fill the vacancy should serve out the unexpired term of his predecessor and that no election should be held for that office in 1920. O. A. G. 1917-1920, page 515.

In Zoercher v. Indiana Associated Telephone Corp. (1936), 211 Ind. 447, 456, the court said:

"* * * While, of course, the opinion of the State Tax Board and the Attorney-General are not controlling, the practical construction of a statute is influential. * * *"

Again in County Department v. Scott's Estate (1944), 115 Ind. App. 28, the court said:

"* * * The opinion of the Attorney General is not controlling, yet the practical construction given to legislation by the public officers of the state and acted
upon by those interested and by the people is influen-
tial, * * *.”

In view of the fact that this opinion was given by the
Attorney General who held that office at the time of the enact-
ment of this statute and the further fact that the General
Assembly has permitted this statute to continue without
amendment for nearly thirty years thereafter, one would
almost be justified in saying that the legislature has acquiesced
in such interpretation. At least the construction so placed
upon the statute is entitled to great weight.

It will be noted that the first part of the quotation from
Section 160 of Chapter 59 of the Acts of 1919 specifies that
the elections for county assessor shall be held in 1922 and
every four years thereafter. We do not appear to have an
express judicial construction of this or a similar provision
of law. However in State, ex rel. v. Schortemeier (1925), 197
Ind. 507, the court makes the following statement:

“There is no provision of the Constitution of Indiana
which assumes to require that judges of the circuit
court shall be elected in any particular year, or that
their terms of office shall begin or end at any specified
time, which is in contrast with the provision that, ‘The
official term of the governor and lieutenant-governor
shall commence on the second Monday of January in
the year one thousand eight hundred and fifty-three;
and on the same day every four years thereafter.’
Art. 5, § 9, Constitution, § 142 Burns’ 1926. * * *”

This would indicate that a distinction must be made between
those offices where there is a specific provision as to when
elections shall be held therefore and those offices where there
is no such provision.

The cumulative effect of the application of these rules of
statutory construction results in the conclusion that one
appointed to a vacancy in the office of county assessor serves
for the unexpired term of his predecessor.

I am therefore of the opinion that both the judge of the
Marion Superior Court No. 3 and the County Assessor of
Marion County, who were appointed to fill vacancies in such
offices, are entitled to hold such offices for the unexpired terms
of their predecessors and that no election should be held for such offices in 1948.

OFFICIAL OPINION NO. 29

March 19, 1948.

Hon. Ralph F. Gates, Governor,
State of Indiana,
State House,
Indianapolis, Indiana.

Dear Governor:

You have asked my opinion concerning the availability for present expenditure of the Cigarette Tax Account in the General Fund. As a matter of preface I would like to say that this question is so close that the inclination is to resolve every doubt against expenditure or to attempt some form of judicial determination. I consider that, however, an evasion of responsibility.

In the final analysis, no matter how many objections are raised to present expenditure, we are confronted with the phrase in the statute "as the governor may direct." There is no way to explain that phrase except as a clear indication of legislative intent that there be a present expenditure of the fund. Otherwise it is completely meaningless.

In arriving at an opinion I have tried to confine the interpretation to the statute itself and its legislative history. Based on the attached memorandum it is my opinion that there is an appropriation of the Cigarette Tax Account and that that appropriation, although not in a desirable form, is in adequate legal form for present expenditure.

The funds, however, are limited in expenditure to general education, general and mental health and general welfare programs. They must be allotted pursuant to Chapter 279 of the Acts of the General Assembly for 1947 by the Budget Committee upon request of the Governor.

MEMORANDUM

I have made an examination of the authorities upon the question as to whether the proceeds from the cigarette tax