In the Acts of 1933, chapter 27, section 1, pertaining to mileage: The Legislature fixed the sum of five cents for each mile necessarily traveled in the discharge of duties as supervisor of highways. In section 3, chapter 114 of the Acts of 1937, page 596 of the volume, is found the following significant language:

"* * * It shall be unlawful for any officer or employe to receive or for any officer, department, board or commission to allow any sum in excess of six cents per mile payable out of any funds, for the use or operation of any motor vehicle, owned or operated by any state officer or employe, and used in the discharge of state business within the boundaries of the State of Indiana. * * *"

It is my opinion, based on the above Acts of the Legislature, that a rate of not to exceed six cents per mile should be charged.

HIGHPWAY COMMISSION, STATE: Right-of-way in streets—Cities of over 3,500 population, whether commission may purchase same.

January 13, 1938.

Hon. Earl Crawford,
Chairman, State Highway Commission,
State House Annex,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion in answer to the following question:

"Does the commission have the power to buy right-of-way for state highways in cities of more than thirty-five hundred population?"

The determination of the above question requires a consideration of the provisions of section 2 of chapter 256 of the Acts of 1937 (Acts of 1937, page 1199). The same section appears as section 36-2902 of the December, 1937 cumulative pocket supplement of Burns' Indiana Statutes Annotated, 1933. The section is quite lengthy. However, it will not be necessary to quote it in its entirety. It provides in part as follows:
(1) "From and after the 1st day of January, 1938, said commission, to the extent of the funds available for the purpose, shall maintain and, as it determines necessary and the funds required are available, to (shall) construct and reconstruct the roadway of the streets in all incorporated cities and towns in the state, excepting in cities of the first class, over which highways in the state highway system are routed: * * *"

Immediately following the above quoted language are two provisos limiting the commission in carrying out the foregoing provision. These provisos are to the effect that the commission shall not be required to maintain, construct or reconstruct the roadway of any such street to a width exceeding 46 feet, and that the commission shall not be authorized to construct or reconstruct the roadway of any such street for a width of more than 56 feet.

The section further provides in part as follows:

(2) "Whenever said commission has determined to construct or reconstruct any such street, it shall cause a preliminary survey thereof to be made for the purpose of ascertaining the drainage condition of said street and the necessary drainage and sanitary sewers therefor, and when so ascertained and determined, said commission shall notify such city or town of such determination, and before said commission shall be required to construct or reconstruct any such street, said city or town at the expense thereof, or of the property owners liable therefor, shall cause the drainage of such street and the sewer system thereof to conform to such determination of said commission."

The section continues as follows:

(3) "If the roadway of any such street is less than thirty-six (36) feet in width between curbs, said commission before it shall construct or reconstruct any such street shall notify such city or town that it must procure at its own expense, either by grant, purchase or condemnation a sufficient right of way upon which to construct a street with a roadway thirty-six (36): feet wide between curbs, with additional width for the construction of necessary curbs and sidewalks: * * *" (Our italics.)
It is then provided:

(4) "Provided, That if said commission shall determine that traffic on such street requires a roadway wider than thirty-six (36) feet between curbs, it shall notify such city or town of its determination, whereupon it shall become the duty of such city or town to procure a right-of-way for such street of the width determined by said commission, with the necessary additional width for curbs and sidewalks: Provided, That said commission shall not be required to proceed with the construction of any such street until such right-of-way is obtained and paid for by such city or town."

It seems to me that a consideration of the foregoing quoted provisions of the section, under consideration, in language mandatory in form but discretionary in fact, places a duty upon the commission after the first day of January, 1938, under certain circumstances to maintain and under certain circumstances to construct and reconstruct the roadways of streets in all incorporated cities except cities of the first class over which highways in the state highway system are routed. I say that this duty is discretionary in fact because the duty devolves upon the Commission only to the extent of the funds available as applied to maintenance and as it determines necessary and the funds required are available as applied to construction and reconstruction. The extent to which funds are available, is of course a matter lodged within the sound discretion of the board, as is also the determination of when it is necessary to construct or reconstruct such a street as is described in the section.

This discretion, however, is itself limited by the fact that under no conditions can the commission be required to maintain, construct or reconstruct the roadway of any such street to a width of more than 46 feet and the commission is absolutely prohibited from constructing or reconstructing the roadway of such a street for a width of more than 56 feet.

The excerpts from the quoted paragraphs identified as numbers (3) and (4), supra, have to do with the authority and the manner of exercise of the authority of the Commission in obtaining an adequate width of said street preliminary to its construction or reconstruction by it. Referring now particularly to those provisions it will be seen that if the roadway
is less than 36 feet wide the Commission is not authorized to construct or reconstruct such a street until the city or town has procured the necessary right-of-way for the construction of a street of such width. It seems to me that quoted paragraph number (3) makes this very plain.

After having thus provided the section continues as already quoted, as follows:

(4) "Provided, That if said commission shall determine that traffic on such street requires a roadway wider than thirty-six (36) feet between curbs, it shall notify such city or town of its determination, whereupon it shall become the duty of such city or town to procure a right-of-way for such street of the width determined by said commission, with the necessary additional width for curbs and sidewalks: Provided, That said commission shall not be required to proceed with the construction of any such street until such right-of-way is obtained and paid for by such city or town."

What is the significance of the last of the two provisos in the above quoted language? The provision is simply that the commission shall not be required to proceed with the construction of any such street "until such right-of-way is obtained and paid for by such city or town." Does that mean that the commission may acquire the additional right-of-way out of its own funds and then proceed? It certainly falls far short of any such direct statement of power. In fact the section will be searched in vain for any direct statement to that effect. If the commission has such power, it must rest upon inference solely. But I do not think there is any language in the section to suggest such power by inference. When considered in connection with the language immediately preceding it, the proviso above referred to clearly does not furnish the basis for such an inference of power. It simply provides a further means by which the commission may enforce its determination that a street wider than 36 feet is necessary, and I think the purpose of this proviso is simply to make it plain that when the commission makes a determination that a width in excess of 36 feet is necessary, it may stand upon that determination and refuse to proceed until its order is complied with notwithstanding the fact that earlier in the section a roadway of 36 feet in width had been authorized
under certain conditions. The language of the section is not as accurately used as it might be but on the whole I think its meaning is fairly clear.

Summarizing what has been said herein, if the roadway is less than 36 feet in width, the commission has no authority to construct or reconstruct it until the city or town at its own expense has obtained enough additional right-of-way upon which to construct a 36-foot street. If that has been done, under ordinary conditions, the commission, if funds are available, and if it determines such construction is necessary, would be authorized and it probably would be its duty to construct or reconstruct such street, except that if the commission determines that a width of more than 36 feet is required it has the right to make such a determination and to refuse to proceed until the city or town has complied with the requirements of such determination.

Later on in the section the following language appears "the cost of such improvement shall be paid for out of the funds appropriated to said commission for the construction of highways."

I do not think, however, that this language affects the power of the commission either by adding to it or by taking from it. It simply designates the fund appropriated to the commission which is to be charged with the expense of such work.

In my opinion, the question should be answered in the negative.

HEALTH, STATE BOARD OF: County Health Officer—
Salary fixed on per capita basis. May not be $1,800 unless so figured on per capita basis.

January 14, 1938.

Hon. Verne K. Harvey, M.D.,
Director, Indiana State Board of Health,
Indianapolis, Indiana.

Dear Sir:

Receipt is acknowledged of your request for an official opinion dated January 12, 1938, which request reads as follows:

"I would greatly appreciate an official opinion on the following facts:
Chapter 217 of the Acts of 1935 (Burns' Indiana Statutes