Mr. Edwin Steers, Sr.
Member, State Election Board
108 E. Washington Street, #1108
Indianapolis 4, Indiana

Dear Mr. Steers:

This is in answer to your letter of November 12, 1962, wherein you request an Official Opinion, based on the seven (7) questions contained in the enclosure attached to your letter.

The factual situation upon which these questions are based, is shown to be as follows: A member of a county board of commissioners is now serving a term which expires at the end of 1964. This commissioner is interested in the possibility of running in the primary and general elections of 1963 for the office of mayor, the term of which will be due to commence January 1, 1964. The specific questions presented, based on the assumption that the General Assembly of 1963 makes no change in the applicable law, are as follows:

“(1) Would there be anything illegal in said member of the county Board of Commissioners running in said City Primary in May 1963 as a candidate for nomination for said office of Mayor and/or his running as his party’s candidate for said office of Mayor in the city Election in November 1963, and/or in his election in said city Election to the office of Mayor of said city,—each and all while he is a duly elected, qualified and acting member of the Board of Commissioners of said county?

“(2) Would his candidacy in said city Primary in May 1963 in any way affect or prejudice the validity of his membership of and continued service upon said county Board of Commissioners?

“(3) Would his candidacy in said city Election in November 1963 in any way affect or prejudice the validity of his membership of and continued service upon said county Board of Commissioners?
"(4) Would his election as Mayor of said city in said city Election in November 1963 in any way affect or prejudice the validity of his membership and continued service upon said county Board of Commissioners?

"(5) Would his on 1 January 1964 fully qualifying and taking his oath of office for the office of Mayor of said city automatically at and as of the time of taking his said oath of office automatically terminate his office as a member of said county Board of Commissioners, and thereby at the same time create a vacancy in and of said membership of said county Board of Commissioners?

"(6) If the answer to (5) above is in the affirmative then, (A) would the appointment by the remaining two (2) members of said county Board of Commissioners of a duly qualified elector of said county as a member of said county Board of Commissioners to fill said vacancy in said county Board of Commissioners be for the remainder of the unexpired term of said vacating member of said Board of Commissioners, to-wit until the end of the year 1964 and until his successor to said office is duly elected and qualified, in keeping with Burns' Ind. Statutes, Sections 26-604 and 49-405 as now constituted, and (B) would not the said office be open for filling by means of the 1964 May Primary and the 1964 November general Election, for the term thereof of three (3) years to commence 1 January 1965?

"(7) Would the answer to (A) and to (B) of (6) above not be the same, except as to the time of making the appointment to fill the vacancy and the earlier commencement of the successor's term if said fully elected Mayor resigned from his office as a member of said county Board of Commissioners immediately following his said election as Mayor or at any other time after his said election as Mayor prior to the taking of his office as Mayor?"
The answers to each of the above questions have a definite relationship to the following basic premise: The right of a member of a board of county commissioners, before the expiration of his term as such commissioner, to run for, and, if elected, to qualify for the office of and serve as mayor of a city, his said term as commissioner not expiring until a number of months subsequent to the commencement of the term of mayor.

It is initially important to examine the characteristics of the office of county commissioner. In my 1957 O. A. G., page 57, No. 13, I had the following question for consideration: "* * * whether or not a county commissioner, while holding office, may run for another public office." In that consideration, I cited the Indiana Constitution, Art. 7, Sec. 16, which reads as follows:

"No person elected to any judicial office, shall, during the term for which he shall have been elected, be eligible to any office of trust or profit, under the State, other than a judicial office."

The judicial characteristic of the office of county commissioner, is shown by the following statements in my 1957 O. A. G., No. 13, supra, on pages 58 and 59, as follows:

"Historically, the Board of County Commissioners in this state has always been held a judicial body. Our Supreme Court, in considering the nature of the County Board of Commissioners under the Indiana Constitution of 1816, concluded that such a board was to be held a court of record and that its acts could only be proved by the record. The State v. Conner & Others (1840), 5 Blackf. 325.

"Very shortly after the adoption of the 1852 Constitution, the Supreme Court reiterated the ruling in the Conner case, supra, in Board of Commissioners of Lagrange County v. Cutler (1855), 7 Ind. 6.

"In the case of McCabe v. Board of Commissioners of Fountain County (1874), 46 Ind. 380, the same Court said at page 382:

"'There is little doubt that the board is a judicial tribunal.'
1962 O. A. G.

"The case of Hastings v. Board of Commissioners of Monroe County (1933), 205 Ind. 687, 188 N. E. 207, brought forth the most extensive statement by our Supreme Court on the nature of the Board of Commissioners. The Court said at page 691:

"* * * it should be kept in mind that a board of county commissioners is a court; that such boards belong to the judicial department of the state; that they, like courts of general jurisdictions, look to the general assembly alone for administration or ministerial power.'

"The Appellate Court followed the rule of the Hastings case, supra, two years later in Board of Commissioners of Lake County et al. v. Woodward et al. (1935), 101 Ind. App. 142, 194 N. E. 735.

"In the light of this historical background, there is little doubt that a member of a Board of County Commissioners is a judicial officer, even though some acts by such Commissioners are administrative or ministerial in nature."

Let us next examine the characteristics of the office of mayor to determine whether such office is a judicial office or an "office of trust or profit under the State, other than a judicial office," as contemplated by the provisions of the constitutional provision herein considered.

First, as to the judicial characteristic of the office of mayor. Your questions and the factual data supplied do not indicate the class of the city involved. In my judgment the mayor of our one city of the first class is not a judicial officer for the reasons shown in my Official Opinion No. 56 of August 3, 1962, page 305 herein. The Acts of 1933, Ch. 233, Secs. 5 to 8, inclusive, as amended and found in Burns' (1962 Supp.), Sections 48-1212, 48-1216, 48-1217 and 48-1219, respectively provide that the office of city judge is included as one of the elective offices for cities of the second, third, fourth and fifth classes. In the case of fourth and fifth class cities it is specifically provided that the respective sections do not create the office, however, this may be accomplished by proper ordinance of the common council. Burns' 48-1217, supra (for fourth class
cites) and Burns' 48-1219, supra (for fifth class cities) each provide that the mayor shall not be eligible to hold the office of city judge during the tenure of his office as mayor. Therefore, it is my opinion that the mayor is no longer a judicial officer in any city within the state, regardless of the class of such city.

Secondly, let us consider whether the office of mayor, in any city of Indiana, regardless of the class thereof, is an "office of trust or profit under the State." In my 1962 O. A. G., No. 56, supra, numerous statutory references are set forth, which in my opinion supported my conclusion that the office of mayor of Indianapolis is an office of trust or profit under the state. These citations referred to the powers and duties of mayors to perform, among others, the following: Cause laws of the state to be executed and enforced; to administer oaths and take acknowledgments; to take deposition; to sign all bonds, deeds and written contracts for the corporation; to solemnize marriages; to revoke or suspend licenses issued by the city; to issue subpoenas and compel attendance of witnesses to testify at hearings on complaint of a licensee. These powers and duties apply to mayors of cities regardless of the class of such city. Therefore, on the basis of the reasons set forth in 1962 O. A. G., No. 56, supra, it is my opinion that the office of mayor, regardless of the class of such city, is an "office of trust or profit under the State."

A final point for consideration in connection with the questions asked is this: What effect, if any, would resignation from the office of county commissioner have in the event of election to the office of mayor? The answer to this question is found in 1954 O. A. G., pages 83, 85, No. 23, wherein it is said:

"The Attorney General (1948) stated that, in his opinion, a person who was elected to a judicial office could not resign and be elected to another office, not judicial, if the term for which he was originally elected would not expire prior to the commencement of the beginning of the subsequently elected office." (1948 O. A. G., page 188, No. 33)

See also: 1962 O. A. G., No. 56, supra.

Therefore, it is my opinion, that the county commissioner in the instant case, would be ineligible for the office of mayor
inasmuch as his term as such commissioner will not expire prior to the commencement of the term of office of mayor. In addition, the ineligibility could not be cured by his resignation as county commissioner. In view of the conclusions set forth above, I do not feel that further specific answers to the questions submitted are appropriate or necessary.

OFFICIAL OPINION NO. 68
December 4, 1962

Mr. Robert R. McClarren, Director
Indiana State Library
140 North Senate Avenue
Indianapolis 4, Indiana

Dear Mr. McClarren:

I am in receipt of your letter of October 21, 1962, requesting my Official Opinion concerning the construction of the provisions of Acts 1947, Ch. 321, Sec. 14b, as added by Acts 1953, Ch. 13, Sec. 5, and as found in Burns’ (1962 Supp.), Section 41-914b. Your specific questions are as follows:

“1. When on receipt of a proposal from the board of a public library of a town, to combine with a township to form a single town-township library district the township trustee and the advisory board of the township agree to such a merger (in lieu of a petition from resident voters of the township) must the township trustee publish the proposal for merger?

“2. If the advisory board of the township, having agreed to merger in lieu of accepting the petition of resident voters of the township, receives remonstrances to its action, must the advisory board heed these remonstrances and at its first meeting follow the provisions of the law cited above regarding remonstrances?

“3. If the township trustee and the advisory board of the township agree to the merger can a town within that township be excepted from inclusion in the town-township library district?”