

of aircraft with safety but which is not equipped with facilities for either the shelter, supply or care of aircraft."

It necessarily follows from those definitions that certain improvements such as the construction of a hangar on a landing field will place it in the airport class. Would that be the establishment of an airport within the provisions of Chapter 360 or Chapter 190? Upon reading those Acts it seems to have been the chief concern of the legislature to give the Commission supervision over the original location of a landing field or airport. After the location has been once established it does not seem reasonable to require approval of such an improvement upon a landing field simply because it then becomes an airport and not require approval of a similar improvement upon an existing airport.

I am therefore of the opinion that the approval or consent of the Commission is not required before a municipality acquires additional land or facilities for the expansion of existing airports or landing fields.

OFFICIAL OPINION NO. 82

August 4, 1945.

Hon. F. W. Van Antwerp, Chairman,
Department of Financial Institutions,
State House,
Indianapolis, Indiana.

Dear Sir:

I have your letter of July 18th in which you request my opinion on the following questions:

"1. In view of prior opinion of April 26, 1944, in which our authority to issue limited or restrictive licenses is indicated, and in view, further, of the fact that a license issued upon the restricted basis may be extended to a general one automatically by the increase of capital structure to \$50,000.00, what factors shall the Department take into consideration in making its

investigation of a restricted application under Section 28 of the Financial Institutions Act with respect to the financial standing and character of the incorporators and of the public necessity for the financial institution in the community?

"2. In making the investigation called for by Section 28 must the Department take into consideration the public necessity for an industrial loan and investment company with all the statutory powers, including those of issuing certificates of investment, or is the Department to investigate only the public necessity for another *lending* institution in the community, in the event the application is for a restricted non-investment type license?

"3. If the public necessity for a company with full statutory powers in the community must be taken into consideration in determining the public necessity for a restricted or non-investment type business, is the proposed capital structure of the applicant a factor to take into consideration among the other factors to be found by the Department in determining public necessity and the fitness of the applicant?

"4. In view of the possibility that an applicant proposing a \$1000.00 capital structure, and applying for a restricted license, may thereafter by amendment of its Articles automatically qualify itself as a corporation with full powers under the Industrial Act, may the Department fix any such amount of capital structure as it might deem best in each particular case, not less than the general corporation limitation of \$1000.00 nor more than the Industrial Loan Act limitation of \$50,000.00."

Since the previous opinion of this office with reference to so-called restricted certificates of authority did not consider the nature and scope of investigation by the department in issuing a certificate of authority, a review of the language of that opinion may to some extent facilitate the answer to your questions propounded at this time. It was then said:

"* * * It is consequently my opinion that based on reason and authority the lending and investment

functions permitted such a corporation are severable and that it should be permitted to do a lending business although it has not met all the requirements for issuance of certificates of indebtedness or investment. *I am further of the opinion that the act is self-executing in that regard:* if the capital required for investment business is not present in the corporate structure or is impaired whether at the inception of the corporation or later, the corporation automatically becomes subject to the statutory prohibition against doing an investment business. It is the duty of the Department of Financial Institutions to see that such corporation engages in no more business than the state of its capital justifies, and as a matter of administrative policy in the performance of that duty, I see no reason why the department may not incorporate appropriate language in the certificate of authority to show that a corporation which has not met the capital requirements for doing an investment business may not engage in that business."

I wish to emphasize; it was the opinion of this office then and is now, that the provisions of the industrial loan and investment Act are self-executing. In other words, if a corporation organized under the general corporation laws of Indiana seeks to do an industrial loan and investment business, the very existence or non-existence of the capital and investment requirements will determine the extent of the business in which the company may engage. That follows from the language of the Act without any intervention of the department. The function of the department as an enforcement agency is to satisfy itself that each industrial loan and investment company is engaging in no more business than its capital structure permits.

Industrial loan and investment companies are incorporated under the general corporation laws of Indiana as corporations for profit. The capital structure required of a corporation in Indiana in order to commence business is found in Section 17, Chapter 215, p. 725, Acts of 1929 (25-216 (8) Burns' 1933 R. S.), as follows:

“The amount of paid-in capital with which it will begin business, which shall not be less than five hundred dollars (\$500);”

Consistently with our previous opinion, as soon as such a company has been properly incorporated, with appropriate corporate powers, it is in a position to make application to the Department of Financial Institutions for an industrial loan and investment license. The fact, however, that it does not have the capital structure (\$50,000) required by the industrial loan and investment Act for those companies seeking to issue certificates of investment or indebtedness, will *ipso facto* limit its corporate activities for the time being, at least, to those of loaning money.

However, under the Indiana General Corporation Act, such a corporation has the right to amend its articles to provide for an increase of capital stock in any amount.

Section 22, Chapter 215, p. 725, Acts 1929, 25-221 Burns' 1933 R. S.;

Section 26, Chapter 215, p. 725, Acts 1929, 25-225 Burns' 1933 R. S.

This increase of capitalization may be accomplished by the corporation without the knowledge or the consent of the Department of Financial Institutions, since the department has no greater powers than those enumerated in the industrial loan and investment Act and since no express power is vested in the department by that Act to pass upon amendments to the corporate charters of industrial loan and investment companies.

See: *New York Central R. Co. v. Public Service Comm.*, 191 Ind. 627 (1921);

Department of Insurance v. Church Members Relief Assn., 217 Ind. 58 (1940).

It would follow, then, that if an industrial loan and investment company secures a certificate of authority from the Department of Financial Institutions, although at the time of the issuance of the certificate it may be unable, because of its capital structure, to issue certificates of investment or indebtedness, such a corporation may at any time by

increase of its capital stock and compliance with investment requirements qualify itself to become an "issuer" company. Thus every company which receives a certificate of authority is not only authorized to engage in loaning activities, but is potentially an investment company and may engage in all of the activities and exercise all of the powers vested in such company under the provisions of Section 6, Chapter 182, p. 897, Acts of 1935, as amended by Section 3, Chapter 105, p. 491, Acts of 1937 (18-3106 Burns' 1933 R. S.) and particularly subsection (a) which provides:

"To issue, negotiate and sell its secured or unsecured certificates of investment or indebtedness upon such terms and conditions, in such form, payable at such times and bearing such rate of interest as may be approved in writing by the department."

In the light of those considerations, we must then determine how and under what circumstances certificates of authority should issue to an industrial loan and investment company, whether it at the time exercises both functions or is only potentially an investment company. Certificates of authority for industrial loan and investment companies are provided for in Section 4 of Chapter 181, p. 897 of the Acts of 1935 (18-3104 Burns' 1933 R. S.) which provides:

"When authorized by the department in the manner prescribed by sections 25, 26, 27, 28, and 29 of the Indiana Financial Institutions Act and any amendments thereof, any domestic corporation now or hereafter organized under the general corporation laws of the State of Indiana, may engage in business as an industrial loan and investment company subject to the limitations and restrictions hereinafter set forth."

Section 25 of the Indiana Financial Institutions Act (Chapter 40, p. 176, Acts of 1933, as amended by Section 1, Chapter 83, p. 205, Acts of 1941, 18-222 Burns' 1933 R. S.) reads as follows:

"No bank, trust company, building and loan association, savings bank, or credit union shall be organized or incorporated or engaged in business as such in this state unless and until the articles of incorporation

of such proposed financial institution shall have been submitted to and shall have been approved by the department, and unless the department shall approve the organization and establishment of such institution in the city or town in which the incorporators propose to establish such institution. The request to establish such proposed institution shall be set forth in an application which shall be furnished and prescribed by the department and shall contain such information as the department may require. No such application shall be approved by the department until a public hearing, after due notice thereof, shall have been had thereon, in the city or town in which the applicant proposes to establish such institution. If the proposed institution be a credit union said application shall be in lieu of such hearing, unless exceptions shall be filed to such approval, in which event such public hearing shall be held, which hearing may be had in the office of the department."

Section 28 of the same Act sets forth the elements to be considered by the department in passing upon the application. They are three in number: (1) the financial standing and character of the incorporators or organizers, (2) the character, qualifications and experience of the officers of the proposed financial institution and (3) the public necessity for the financial institution in the community in which the proposed financial institution is to be established. In thus conducting its investigation and passing upon the application, the department is exercising a discretionary power vested in it by the Legislature. Had it been possible to lay down exacting rules to use as a measuring stick in each particular situation, no doubt the Legislature would have done so and dispensed with any exercise of discretion. For the same reason the Legislature has not authorized the Department of Financial Institutions to make rules and regulations which will automatically determine each application, but has entrusted it with discretionary authority to pass upon each individual case according to its merits.

The first two considerations above set forth are fairly definite. The chief difficulty in other states has been in the determination of public necessity. In *Schaake v. Dolley*, 118

Pac. (Kansas) 80, (1911), the statutory requirement was similar to that of Indiana, to-wit: "* * * public necessity of the business in the community," and the court said at p. 85:

"* * * The question for the charter board, in any case arising under this law, is, Are the banking facilities of the community adequate to the public needs? This question is to be determined, like any other question of fact, from a consideration of the conditions existing in the community concerned. The board has no discretion over these conditions. It does not create them, and cannot modify them. It merely finds out and declares what they are, and the statute then dictates what shall be done. * * *"

In State, *ex rel.* v. State Securities Commission, 176 N. W. (Minn.) 759 (1920), the requirement was "reasonable public demand." The court said at p. 760:

"* * * Paragraph 2 intends that a bank shall come to a locality because of a desire for it and that it shall not be foisted upon the community when there is no reasonable wish for it there. It does not intend that one or more established banks may keep out another because the banking facilities sufficiently take care of the banking business. Its purpose is not to deter competition or foster monopoly, but to guard the public and public interests against imprudent banking."

And at p. 761:

"* * * The responsibility for a correct determination of the existence of a reasonable public demand, when the commission keeps within the limits stated, is upon the commission and not upon the court. * * *"

See also:

Weir v. Page, 141 A. (Md.) 518 (1928);
 People, *ex rel.* v. Schweder, 108 N. E. (Ill.) 1009
 (1915);
 9 Zollman, Banks and Banking, Sec. 6092.

In exercising this discretionary power with respect to industrial loan and investment companies I am of the opinion that all three considerations above enumerated should be determined in the light of the dual functions of such companies: first, as a loaning agency, and second, as an investment agency or in the event its capital requirements are not then sufficient, a potential investment agency in the community where it desires to operate. In other words, in making its investigation and decision based upon all three considerations and particularly that of public necessity the department cannot ignore the fact that a company which now seeks only to loan money, may without the advice or consent of the department become an investment company.

1. To specifically answer your questions, in answer to your first question it is my opinion that in considering the financial standing and character of the incorporators and public necessity for the financial institution in the community, the department should take into consideration that each company incorporated for the purpose of doing an industrial loan and investment company business is either actually or potentially an investment company.

2. In answer to your second question I am of the opinion that the department has not fulfilled its function, if upon application by a company which has less than \$50,000 capital, it considers only the public necessity for another lending institution in the community and ignores the fact that this company may in the near or distant future become an investment company.

3. The answer to your third question presents considerable difficulty because it involves the determination of evidentiary factors which are peculiarly the function of the administrative body. I am of the opinion that the capitalization of the company is an element which should be considered in the light of all the other facts presented in determining the financial standing and character of the incorporators, the character, qualifications and experience of the officers and the necessity for a loaning and investment agency.

4. In answer to your fourth question, the powers of the department to make rules and regulations with respect to industrial loan and investment companies are set forth in Section 17, Chapter 181, p. 897, Acts of 1935, as amended by

Section 5, Chapter 105, p. 491, Acts of 1937 (18-3117 Burns' 1933 R. S.). I find no authorization in that section to make a rule or regulation concerning the capital structure of a corporation applying for a certificate of authority and having less than the capital requirement which would entitle it to issue certificates of investment.

OFFICIAL OPINION NO. 83

August 8, 1945.

Hon. Ralph F. Gates, Governor,
State of Indiana,
State House,
Indianapolis 4, Indiana.

My dear Governor:

I have your letter of July 20, 1945, in which you ask the following question:

“There has been considerable dispute as to who has jurisdiction over the portraits of the governors which hang on the fourth floor of the state house.

“I would like to have an opinion from you as to who has jurisdiction.”

In answering your question it is necessary to refer to the legislative history of the laws concerning the portraits of the governors of the State of Indiana.

Section 5 of Chapter II of the Acts of 1869 (Spec. Sess.), which was the general appropriations act, provided as follows:

“That the Governor of State is hereby authorized to secure, as soon as practicable, a true and life-like likeness of each of the Governors of the State and Territory of Indiana, including the present incumbent, to be placed in the State Library, and for that purpose a sum not exceeding two hundred dollars each is hereby appropriated.”

The above statute was apparently the first one enacted concerning the governors' portraits and provided that they be