As to the "non-issuer" type of loan and investment company, a company organizing under the 1935 Act may elect to qualify as an "issuer" or not (O. A. G. 1944, p. ——). In 51 Am. Jur. Taxation, Section 180, p. 241, it is said:

"Another principle relating to classification for tax purposes which has authority in its support is that where a classification is such that the individual taxpayer has some control over his inclusion or exclusion therefrom, it cannot be considered unconstitutionally discriminatory. * * *"

As pointed out, if the "non-issuer" does business on its capital alone and without availing itself of the privilege of issuing certificates of indebtedness its shares of capital stock would be taxable under Chapter 83 of the Acts of 1933. If it borrows money for operation the notes representing the same are subject to intangible tax by the owner unless it is exempt under some statute. Thus we see the result will work out about the same as in case of a bank or trust company and there would be no such inequality in ultimate results as would justify declaring the statute invalid.

In my opinion an Industrial Loan and Investment Company organized under "The Indiana Loan and Investment Act" of 1935 is not liable for the payment of intangible tax upon loans made by it. That is applied both to the "non-issuer type" and to the "issuer type" of such Industrial Loan and Investment Companies.

DEPARTMENT OF INSURANCE: Insurance—Municipal corporations' use of public funds to pay premium on group policies.

October 24, 1944.

Opinion No. 89

Hon. Frank J. Viehmann, Commissioner,
Department of Insurance,
State of Indiana,
Indianapolis, Indiana.

Dear Sir:

I have your letter of October 16th, in which you request an opinion whether or not cities, counties, townships, school
districts and state educational units may, out of the public funds, pay for group insurance for teachers and employees. Specifically you ask whether:

"1. It is legal for cities, counties, townships and school districts to buy group insurance for their teachers and employees and pay all or part of the cost.

"2. There is an authorization to deduct contributions from teachers and employees toward the cost of group insurance."

Your first question raises two subordinate questions: first, is it constitutional to use public funds for the purpose of paying premiums upon group, life, health and accident insurance for public officers and employees?

In considering that question we should probably start with the fundamental principle that taxes may only be levied for "public purposes" and as corollary thereto, funds raised by taxation may only be expended for "public purposes." The exact nature of "public purposes" is difficult to define. See:


However, we are not without some authority on this specific question. In Nohl v. Board of Education, 199 Pac. 372, New Mexico (1921), the Board of Education of Albuquerque purchased group insurance on the life of teachers. In that case the court said:

"* * * The expenditure of public funds raised by taxation or other methods for public purposes must necessarily be intrusted by the Legislature to public agencies, and these agencies are required to exercise discretion and judgment in determining the purpose for which such money will be spent, within the limits of the authority granted, and courts will not interfere unless there is a clear departure from the legislative authority. * * *

"* * * Many things are provided now for the comfort and convenience of both teachers and pupils which heretofore would have been prohibited by injunction as an improper expenditure of public funds. * * *"
That case was followed with approval in Bowers v. Albuquerque, 200 Pac. 421 (1921). In State ex rel. v. Memphis, 251 S. W. 46 (1923), group insurance was purchased upon employees of the city water works, the premium to be paid from receipts from the sale of water. The court discussed similar situations and decided in specific language that the expenditure of the money for premiums was for a public purpose. cf State ex rel. v. Wilmington, 134 Atl. 694, New Jersey (1926).

By analogy Indiana has authorized the collection and expenditure of public funds for similar purposes. See Firemen's Pension Fund, Sec. 48-6501, et seq, Burns' 1933 Statutes, Police Pension Fund, Sec. 48-6401, et seq, Burns' 1933 Statutes, Municipal Utilities Employees' Pension, Sec. 48-6601, et seq, Burns' 1933 Statutes, and more recently, by Chapter 52 of the Acts of 1941 (Sec. 39-1819, Burns' 1940 Replacement), municipalities and subdivisions of the state were authorized to purchase liability insurance upon operators of motor vehicles and pay for the premium thereon out of public funds. On April 15, 1943 (1943 Opinions of Attorney General, p. 187) the Attorney General of Indiana gave as his opinion that the expenditure of public funds for such purpose was lawful. It is my opinion, therefore, that the expenditure of public funds for group insurance would be a "public purpose", if otherwise authorized.

The second and more difficult question is whether there is any existing power in towns, cities, township trustees or boards of education to provide for the payment or part payment of the premiums upon such insurance.

As to cities and towns it is well established in Indiana that the powers of municipal corporations are limited strictly to those delegated by the Legislature or necessarily implied from such delegation. As stated in Scott v. City of La Porte, 162 Ind. 34 at 43 (1903):

"The powers conferred upon municipalities must be construed with reference to the object of their creation, namely, as agencies of the state in local government.

* * *

"The statute under which a municipal corporation is created is its organic act. Such a corporation can only exercise the following powers: First, those granted
in express words; second, those necessarily implied in or incident to the powers expressly granted; and, third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. * * *.”

and in Pittsburgh, etc., Ry. Co. v. Town of Crown Point, 146 Ind. 421 at 422 (1896):

“No incidental powers can be implied except such as are essential to the accomplishment of the purposes of their creation and for their continued existence. * * *”

Upon check of the statutes relating to municipal corporations and for employees and officers, I find no express or implied power for the purchase of group insurance. In fact a survey of the statutes with reference to salaries and employment compels the conclusion that the purchase of group insurance by the municipality is in excess of its powers. For instance, Sec. 48-1222, Burns' 1933 provides that salaries of employees shall be fixed by the mayor with the approval of the council and shall not be raised during the calendar year. Salaries of officers are set forth in Section 48-1233, Burns' 1933 Statutes, and are in full for all services. Furthermore, that of an officer may not be changed during his term of office, Sec. 48-1407, Burns 1933. By Sec. 48-1507, a contract beyond the appropriation made is void.

The only possible justification for the payment of premiums upon group insurance for city employees or officers would be that it amounted to a raise in salary. In view of the many explicit provisions for salaries and the restraints imposed against indiscriminate raising of salaries, I do not believe the Legislature contemplated the purchase of insurance as part of a salary payment. If that could be done, rent could be furnished as part of salary, maintenance provided, or any number of additional emoluments added. The effect of all curbs and prohibitions would be nullified.

In People ex rel. v. Dibbel, 189 N. Y. Supp. 29 (1941), the city of Schenectady purchased group life insurance upon employees and officers whose salaries were not fixed by law. Upon mandate to pay the premium the court held that no authority conferred by the Legislature could be found to per-
mit such a purchase. It was there suggested that the insurance was by way of payment of wages, but the court said that there was no power for the city to indulge in such a scheme of payment.

It is true that in the New Mexico case and the Tennessee case the purchase of insurance was justified on the wage theory. Neither of those cases shows any of the exacting restrictions placed upon wages and salaries as are found in the Indiana statutes, and consequently the absence of detailed statutes may have permitted the courts in those cases to arrive at that result.

As to township trustees and county boards of commissioners, the same general principles apply: namely, that the power and authority, being delegated, are strictly limited to those expressed or necessarily implied. See State ex rel. Shuler School Trustee v. Board of Comm., 147 Ind. 235 (1897), where the court said at page 235:

"Townships, civil and school, in this State are corporations with such powers only as are expressly given by statute or are necessarily implied. * * *"

The trustee, in the absence of express provision, has not been permitted to pay office rent out of township funds.

State ex rel. v. Mills, 142 Ind. 569;

nor to rent a horse and buggy, as in the principal case above.

See also:

Bloomington School Township v. The National School Furnishing Co., 107 Ind. 43 (1886);
Oppenheimer v. Greencastle School Township, 164 Ind. 99 (1905);

As to Boards of Commissioners, see:

Gavin v. Board of Commissioners of Wells County, 104 Ind. 201;
Board of Commissioners of Jay County v. Fertich, 18 Ind. App. 1 (1897).

I find no express authority for the trustee to provide for such insurance. In fact, his authority to hire employees other
than teachers is so limited that few persons would be affected
in any event. As to other employees allowed, see Sec. 65-311,
Burns' 1943 Replacement Volume, and as to his duties see
Sec. 65-104, Burns' 1943 Replacement. Likewise, I find no
express authority for the purchase of such insurance by the
board of commissioners of the county, nor does it seem that
the implication of such authority is essential to the main-
tenance of municipal government in the county.

The same reasoning applies in the case of schools, although
the salary of a janitor of schools is not provided, and may be
set by the board of trustees (Sec. 28-2411, Burns 1933), the
trustees are authorized to adopt regulations concerning ab-
sence or sickness of teachers (Sec. 28-4306, Burns 1933), and
as to the organization and efficient management of schools
see:

School City v. Sigler, 219 Ind. 9 (1941).

In this situation, as well as with respect to cities, towns and
counties, the implication of authority to purchase such in-
surance is not essential to the efficient management of the
school. Furthermore, provisions for teachers' salaries are
rather detailed in Indiana statutes. The full compensation
must be in the written contract, minimum pay is provided
and schedules of pay for the next ensuing year must be
adopted by the trustee prior to May.

All of these things indicate that if such corporations or
state subdivisions are to purchase group insurance it must be
specifically authorized by statute. It was deemed necessary,
in order to provide for the insurance of properties of towns,
that such power be specifically provided for towns (see Sec.
48-301, Burns' 1933 Statutes), and more recently, as previ-
ously stated, in order to insure public employees against lia-
bility in the operation of automobiles it was deemed necessary
to have a special statute authorizing the payment of premiums
therefor.

It is therefore my opinion that as to those corporations
and subdivisions, existing law does not permit payment in full,
or partial payment of premiums for group insurance upon
employees or officers.

I have not considered herein the various state educational
institutions because it occurs to me that in the answer to
your first question, as applied to any given state college or
university, an investigation of the powers of the board of trustees would be first essential, thus necessitating an individual study in each case.

Upon the same principle it seems to me that your second question should have a similar answer; that no authorization is found, nor is necessarily implied, in the statute to permit deductions for group insurance. In the case of firemen, policemen, and municipal utility employees' pensions, that deduction is expressly provided by law.

By this opinion I do not mean to imply that a voluntary purchase of group insurance by any particular group of public employees is at present impossible, provided they wish to maintain the premiums themselves. I do not see any objection to their authorization of the treasurer or salary paying officer to deduct the amount of premium from their salaries and to pay the premiums for them. Such a plan would necessarily have to proceed upon an entirely voluntary basis.

In view of the answer heretofore made, it is not necessary to consider group life and health insurance as relating to various pension and retirement laws. It is suggested, however, that in the event of legislation to permit group insurance payment, a thorough study of group insurance as it may conflict or supplement such pension and retirement laws in Indiana, should be made.

STATE BOARD OF ACCOUNTS: CITIES—Authority of to require license fee of one who distributes milk. Chapter 172, Acts 1943 construed.

October 26, 1944.

Hon. Otto K. Jensen, State Examiner,
Department of Inspection and Supervision of Public Offices,
State House,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of October 9th, in which you ask the following questions: