OPINION 24

OFFICIAL OPINION NO. 24

December 6, 1976

Honorable Lee Clingan
Indiana State Representative
121 Elm Drive
Covington, Indiana 47932

Dear Representative Clingan:

This is in response to your request for my official opinion as to whether the constitutional debt limitation set forth in Article 13, section 1 of the Constitution of Indiana applies to loans from the Flood Control Revolving Fund to towns to construct or modernize water supply systems.

ANALYSIS

In 1959, the Indiana General Assembly enacted the provisions now found at Indiana Code, sections 13-2-23-1 through 13-2-23-11 which create a Flood Control Revolving Fund to provide loans to municipalities to finance their instituting, accomplishing, and administering flood control programs. The Fund is administered jointly by the State Board of Finance and what now is the Natural Resources Commission. The 1963 General Assembly, by enacting the provisions now found at Code sections 19-3-6-1 through 19-3-6-16, extended the purposes for which Flood Control Revolving Fund monies may be used by authorizing the State Board of Finance, upon recommendations from the Public Service Commission, the State Board of Health, and the Natural Resources Commission, to make loans from the Fund to communities having a population of 1,250 or less for the construction, modernization, enlargement, or alteration of a water supply system. You question here whether a town which seeks a loan under the 1963 law is limited in the amount it may borrow by Article 13, section 1 of the Constitution of Indiana, which prohibits a municipality from incurring an aggregate indebtedness in excess of two percent of the value of taxable property within its boundaries.

Similar questions were considered in Official Opinion No. 8 of 1975 and Official Opinion No. 5 of 1976. 1975 O.A.G. No. 8 concluded that an Industrial Development Fund loan to a town would be a general obligation of the town which had borrowed the money and thus would have to be made within the constitutional debt limitation. 1976 O.A.G. No. 5 concluded that while a Flood Control Revolving Fund loan to a conservancy district similarly would be an obligation of the district, a conservancy district is a "special taxing district," not a "political or municipal corporation" within the meaning of Article 13, section 1. *Martin v. Ben Davis Conservancy District* (1958), 238 Ind. 502, 153 N.E.2d 125. Consequently, a loan to such a district need not be made within the constitutional debt limitation.

As noted in 1975 O.A.G. No. 8, a town is a "political or municipal corporation" and cannot come within the "special taxing district" exception found in the *Martin* case, *supra;* its indebtedness may not exceed two percent of the value of its taxable property. However, the 1963 law which authorizes the use of Flood Control Revolving Fund monies for local water supply programs contains a section which provides that where a loan is made in excess of the constitutional limitation, the excess amount is not a general obligation of the municipality. That section, Code section 19-3-6-13, provides the following:

> "Nothing contained in this act shall be construed as authorizing or requiring any loan to be repaid from tax collections in an amount which exceeds any constitutional limitations, in event the amount borrowed is in excess of such limitations such excess amount shall be payable only from revenues to be derived from charges to users for services rendered."

Under this section, the State Board of Finance would have authority to make a loan to a town from the Flood Control Revolving Fund even though the amount of the loan, when added to the existing debt of the town, exceeds two percent of the value of the taxable property of the town. However, the Board, in making its policy determination, must realize

that the amount of the loan which exceeds the debt limitation is not the obligation of the town and would not be subject to recovery either by the State's bringing suit or by the State Auditor's withholding payment and distribution of State funds to the town. Only to the extent that a town which was receiving sufficient revenue from user charges nevertheless was failing to make repayments would the State have legal recourse to pursue a delinquent loan.

CONCLUSION

It is, therefore, my Official Opinion that a town is a "political or municipal corporation" within the meaning of Article 13, section 1 of the Constitution of Indiana, whose debts may not exceed two percent of the value of taxable property within the town. As I suggested in Official Opinion No. 5 of this year, the Founding Fathers obviously intended this constitutional debt limitation provision to apply to all governmental units with respect to all obligations. Indiana Code, section 19-3-6-13 says, however, that any part of Flood Control Revolving Fund loan proceeds which a town receives which exceeds the two percent limitation is not an obligation of the town. That excess portion of the "loan," then, is actually a grant to the town in the sense that it is not a general obligaion of the town subject to recovery by the State but rather may be paid only from charges assessed against those who use the water system. Consequently, although the State Board of Finance has authority to make loans from the Flood Control Revolving Fund to towns to construct or modernize water supply systems, the Board must realize that that portion of a "loan" which exceeds two percent of the value of the taxable property within the town legally amounts to a grant to the town corporation and should be so denominated.