whatever limitation may have been imposed upon the Indiana Yearly Meeting of Friends by the Acts of 1850, Ch. 269, supra, if any, has long since become ineffectual and all doubt has been clearly erased by the reincorporation of this organization pursuant to the Acts of 1943, Ch. 108, supra. Moreover, such reincorporation has the effect of remedying and curing any and all defects which may have existed prior thereto, being effective not only prospectively, but with respect to present problems and retroactively, so as to legalize any and all gifts theretofore received in excess of the purported limitation contained in the original charter statute.

OFFICIAL OPINION NO. 35

May 23, 1962

Mr. Joe A. Harris, Chairman
Indiana Alcoholic Beverage Commission
911 State Office Building
Indianapolis, Indiana

Dear Mr. Harris:

This Official Opinion is based on the four questions submitted in your recent letter, which reads as follows:

“1. Can the Indiana Alcoholic Beverage Commission, in addition to all other requirements prescribed by law, require a receipt or other evidence showing that an applicant has paid all his or her gross income tax in order to qualify for the issuance of any type of alcoholic beverages permit?

“2. If the answer to #1 is in the affirmative, what ‘other evidence’ would be legally satisfactory to demonstrate gross income tax payment to date?

“3. If the answer to #1 is in the negative, can the Indiana Alcoholic Beverage Commission under its authority to prescribe the form and contents of the application blanks for an alcoholic beverage permit require the applicant to state whether his gross income tax is paid to date?

“4. If the answer to #3 is in the affirmative, can the Indiana Alcoholic Beverage Commission and/or Indi-
ana Gross Income Tax Division act against the applicant in the event that he or she has falsely stated that his or her gross income tax is paid to date?"

It is generally accepted that administrative agencies have only such authority as is conferred upon them by valid statutory enactment; that is, the statutory administrative agency is one of limited powers and jurisdiction, possessing only such powers as are expressly granted to it by the statute creating the agency, together with such other power as may be necessarily incident to the powers expressly granted. It is also generally accepted that the power of the administrative agency to act upon applications and to grant or deny the issuance of licenses or permits depends on, and is limited by, the statutory language by which it is authorized or required to act.

1 I. L. E. Administrative Law and Procedure § 21;

Looking more particularly at the necessarily incidental powers of the administrative agency, the courts have generally determined that the agencies have such implied powers, and only such implied powers, as are necessarily inferred or implied from and incident to, or reasonably necessary and fairly appropriate to make effective, the express powers granted to, and the duties imposed upon, them.

73 C. J. S. Public Administrative Bodies and Procedure, § 50 and cases cited;

The General Assembly has clearly expressed itself on the confidential nature of gross income tax information in the Acts of 1983, Ch. 50, Sec. 24, as amended, as found in Burns’ (1951 Repl.), Section 64-2624, which Section reads in pertinent part as follows:

"Unless in accordance with a judicial order, or as herein provided, the department, its counsel, agents, clerks, stenographers, or other employees, shall not divulge the gross income, or the amount of tax paid by
any person, or any other information disclosed by the reports filed under the provisions of this act, except to members and employees of the department, or to the governor, or to the Attorney-General or any other legal representative of the state in any action in respect to the amount of tax due under the provisions of this act, or to any duly authorized officer of the United States. Any violation of the provisions of this section shall be followed forthwith by the dismissal of the offending officer or employee of the state from his office or employment, and in addition, the offender shall be deemed guilty of a misdemeanor, and be subject to a fine of not less than one hundred dollars [$100] nor more than five hundred dollars [$500], and imprisonment for not less than ten [10] days nor more than thirty [30] days in the county jail.

The General Assembly has also spoken with clarity and particularity as to the duties and functions of administrative officers, including those at the Indiana Alcoholic Beverage Commission, respecting the issuance of licenses to persons who have not paid their poll and personal property taxes. These expressions are found in the Acts of 1931, Ch. 124, as amended and as further found in Burns' (1952 Repl. and 1961 Supp.), Section 42-102 et seq., which read as follows:

"It shall be unlawful for any board, officer, or person to issue any license, as hereinafter defined, to any person who is a resident of this state, unless the applicant for such license shall, at the time when he or she applies for such license, and in addition to all other requirements prescribed by law, submit a receipt or other evidence showing that such applicant has paid all his or her poll and personal property taxes in full. 'Other evidence' in the case of all licenses issued by the bureau of motor vehicles shall mean a statement signed by the treasury of the county in which the applicant is a resident, that the applicant has paid all poll and personal taxes assessed against such applicant; which shall include all delinquent personal property tax and poll tax or in the event that the applicant owns no personal property subject to taxation, or is not subject to poll
tax, any county in the state in which applicant resides, a signed statement from the assessor of the county in which the applicant now resides, certifying that such applicant has made an affidavit to the effect that he owes no delinquent personal property or poll tax in any county in the state of Indiana.

"Any person who shall make a false affidavit in regard to personal property and poll tax in applying for motor vehicle and/or drivers or chauffeurs license, shall be guilty of a misdemeanor and upon conviction thereof be fined in a sum not less than $25.00 nor more than $50.00 and shall have his or her license or licenses revoked for a period of not less than one [1] year."

The Legislature's broadest and most general grants of power to be exercised by the commission, in relation to your stated questions, are contained in the Acts of 1935, Ch. 226, Sec. 6, numbered paragraphs (14) and (15), as that section has been amended and as the same is found in Burns' (1956 Repl.), Section 12-402, at page 844. These said numbered paragraphs read as follows:

"The alcoholic beverage commission of Indiana shall have and exercise the following functions, duties and powers, to wit: * * * (14) To regulate the mode and method of dealing in, and the transportation of alcoholic beverages, and prescribe the manner and method in which all books, invoices, receipts, papers and documents, orders and bills, used or relating to such traffic or transportation shall be kept and require the preservation thereof, and to inspect and examine, and require true copies and duplicates thereof to be made and furnished to the commission. The commission may in its discretion, by rule or regulation, prohibit or regulate the sale of alcoholic beverages within the state when the same is being carried on in violation of the Indiana Fair Trade Act. (15) To prescribe all forms of applications and licenses or permits, and of all reports and of all other papers and documents required to be used under or in the enforcement of this act: Provided, however, Until such time as such commission shall have
prescribed such forms, said administrator may pre-
scribe such forms * * *"

A few paragraphs further on, Burns' 12-402, supra, at page 846, grants the commission specific authority to promulgate rules and regulations in the exercise of the powers granted in that section to the said commission. The rule and regulation promulgation authority obviously refers only to the 1935 Liquor Control Act, and with respect thereto only as to mat-
ters which touch upon the regulation and control of alcoholic beverages and alcoholic beverage traffic. That said rule-making authority provides:

"After such inquiry, if the commission find and record that it has found as a fact:

"1. That the protection of the economic welfare or the health or the peace and morals of the people of the state is in danger of being impaired, unless the rule or regulation being considered is adopted; or

"2. That the purpose and policy of the act will be better effected if such rule or regulation is adopted; or

"3. That this act will be evaded and disregarded unless such rule or regulation being considered is adopted; or

"4. That the privileges accorded under this act are being abused and will continue being abused or are being used or will be used for the purpose of evading the provisions of the act or the collection of taxes thereunder unless the rule or regulation being consid-
ered is adopted; or

"5. That a condition of negligence in the enforce-
ment of this act exists, or practices are being carried on, which tend to promote disorder or which tend to promote fraud in the collection of taxes, or in the en-
facement of this act, or which tend to render the man-
ufacture or traffic in, or transportation of alcoholic beverages dangerous to the political subdivision or sub-
divisions in which the same are being carried on, and that the rule or regulation being considered is advis-
able and designed to prevent or suppress such conditions or practices.

"Then, in case of any such findings so made and recorded the commission may adopt and record the rule or regulation under consideration by the commission, consistent with this act." (Our emphasis)

In addition the 1935 Liquor Control Act contains particular provision for the personal disqualification of certain consumer-sale permit applicants for reasons referred to in the act as "special disqualifications," which are as follows:

"* * * Except as otherwise authorized herein, no beer retailer's permit for alcoholic malt beverages shall be issued to:

"(1) Any alien;

"(2) A person who is not a resident of the county in which the premises described in the application and the permit are located and who has not been such resident for at least one [1] year continuously, prior to the date of application for such permit;

"(3) A person who is not of good moral character and repute in the community in which he resides;

"(4) A copartner, unless all the members of such copartnership shall be qualified to obtain a permit;

"(5) A person who does not own the premises for which a permit is applied, or does not have a bona fide lease thereon for the full period for which the license is to be issued;

"(6) Any mayor, or any sheriff, chief of police, police officer, or any officer of any municipal corporation or governmental subdivision or of the state of Indiana charged with any duty or function in the enforcement of this act, or any officer or employee of any person, firm or corporation engaged in the alcoholic traffic, which person, firm or corporation is a nonresident of the state of Indiana or is engaged in carrying on any phase of the manufacture of, traffic in, or transportation of alcoholic beverages without a permit under
this act, where a permit is required under the terms of this act, or any person who leases (except as in this act elsewhere provided) from a person, firm or corporation, or is indebted to a person, firm or corporation holding a permit hereunder to manufacture or sell at wholesale alcoholic malt beverages, or to any officer or agent thereof, for any debt secured by lien, mortgage, or otherwise upon the premises covered by such retailer's permit, or upon any of the property or fixtures therein, or used or to be used in connection therewith.

“(7) Any person who, within two [2] years preceding the date of the application for any retailer's permit has been convicted of any violation of the laws concerning alcoholic malt beverages within the state of Indiana, or any other state, or who within such period of two [2] years has been convicted of petit larceny or of any felony against the laws of the state of Indiana or the United States of America, or in any case to anyone who within the last preceding one [1] year has been lawfully confined as punishment for any crime against any sovereignty;

“(8) A person whose place of business is conducted by a manager or agent, unless such manager or agent possesses the same qualifications required for the issue of a license to him;

“(9) A minor; a person non compos mentis;

“(10) A person who has held a permit under this act which has been revoked within one [1] year prior to the date of application for retailer's permit; nor a person who has made application for any permit which has been denied less than one [1] year prior to his new application unless said application was denied by reason of a procedural or technical defect;

“(11) A person who is not the proprietor of a restaurant located and being operated, on the premises described in the application for said permit or of a hotel as defined herein or a club as defined herein, owning or leasing said premises as a part thereof (providing, that nothing contained in this specification (11)
shall apply to the qualifications for, or affect the privileges to be accorded under a dealer's beer permit, or a dining-car beer permit). The foregoing eleven [11] specifications may be referred to elsewhere in this act as 'special disqualifications.'"

Acts 1935, Ch. 226, Sec. 10, as amended and as found in Burns' (1956 Repl.), Section 12-509, at pp. 893 and 894.

It is to be noted that other sections of the Liquor Control Act refer to and adopt certain “special disqualifications” through incorporation by reference to Burns' 12-509, supra, and, although passed in 1935 and re-enacted in 1937, the said “special disqualifications” contain no reference to the payment or nonpayment of taxes of any kind.

I have been unable to find any statutory language which directly or indirectly tends to authorize the Indiana Alcoholic Beverage Commission to involve itself in the collection of gross income tax or in the gross income tax status of an applicant for any alcoholic beverage license or permit.

In further consideration of your third question, it may be pointed out that under the concept or doctrine of the separation of governmental powers, the Constitution of Indiana provides in part:

"The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." (Our emphasis)

Indiana Constitution, Art. 3, Sec. 1.

The Indiana Alcoholic Beverage Commission is a part of the Executive branch of the state government empowered to act only as expressly intended by the Legislative branch of that same government, which created the said commission. The Supreme Court of Indiana has heretofore commented on this relationship concerning alcoholic beverages, namely in relation to the 1933 Alcoholic Beverage Act, as follows:
"* * * We do not believe that the Alcoholic Beverages Act violates the rule against delegation of legislative power, nor that it offends the constitutional doctrine of separation of powers. The things which the Excise Director is authorized to do are acts which relate to, and are essential to, the performance of duties imposed upon the Director by the very terms of the statute. The power conferred is one to make decisions or 'to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.' (Citing cases) It has been aptly stated that 'the true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law.' * * *"

Fry, Excise Director, et al. v. Rosen (1934), 207 Ind. 409, 421, 189 N. E. 375.

Provisions requiring an applicant for an alcoholic beverage permit, or any other type of license, to produce information or evidence concerning payment of gross income taxes, fall within the province of the Legislature, to which is solely committed the wisdom of creating such a requirement. Such a matter is not within the statutory frame of reference assigned by the Legislature to the commission, and since the General Assembly has not seen fit to enact such legislation, under such circumstances it does not behoove the commission to attempt to act where the Legislature has not acted or authorized the commission to act.

Mere usage, custom or a desire to accomplish an end, noble and good in and of itself, cannot be invoked to invest administrative agencies with powers not fairly within the legislative grant.


Therefore, it is my Official Opinion that:

1. The Indiana Alcoholic Beverage Commission is without direct or specific authority to require proof of payment of
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gross income taxes by receipt or other evidence from an applicant for an alcoholic beverage permit.

2. Nor, as an adjunct to some specific power or duty contained in the Liquor Control Acts, is there any implied authority in the commission to create a requirement of proof of gross income tax payment as a prerequisite to the issuance of an alcoholic beverage permit.

3. That while the end sought to be accomplished by the commission may be a good and desirable one, nevertheless there is neither authority in the commission to prescribe questions relating to gross income tax payment information in the application for alcoholic beverage permits, nor the authority to refuse to issue such a permit on the sole ground that such questions, if included, were either not answered or were wrongly or falsely answered.

OFFICIAL OPINION NO. 36

May 31, 1962

Hon. Joseph E. Klen
State Representative
6607 Marshall Avenue
Hammond, Indiana

Dear Representative Klen:

This is in answer to your letter of May 15, 1962, requesting an Official Opinion with regard to the following question:

"Is it necessary to obtain the consent of the Public Service Commission in order to establish a street or highway at grade across a railroad within a city or a town?"

The authority of the Public Service Commission in the matter of establishing or extending a highway at grade over the right of way and tracks of any railroad is set out in the Acts of 1913, Ch. 182, Sec. 7, as found in Burns’ (1951 Repl.), Section 55-1807, which reads, in part, as follows:

"* * * Whenever it shall be desired to establish or extend a highway at grade over any railroad, street