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OFFICIAL OPINION NO. 25

June 28, 1960

Mr. Joe McCord  
Director, Department of Financial Institutions  
410 State House  
Indianapolis 4, Indiana

Dear Mr. McCord:

This will acknowledge your letter of May 25, 1960, which reads as follows:

“We will appreciate your official opinion in answer to some questions which have been raised in connection with Section 272 of the Indiana Financial Institutions Act (Burns’ Indiana Statutes 18-2122) pertaining to funds for contingent losses and undivided profits of building and loan associations.

“1. Do such sinking funds or reserve funds, established under the provisions of the above mentioned section, constitute irrevocable reserve funds established for the sole purpose of absorbing losses?

“2. May a building and loan association make an annual expense charge against such sinking fund or reserve account for depreciation on office building, furniture and fixtures, or equipment?”

Three sections of the Indiana Financial Institutions Act, Acts of 1933, Ch. 40, have a bearing on the points at issue. These sections in whole, or in part, are set forth as follows:

(a) *The Acts of 1933, Ch. 40, Sec. 272, as found in Burns’ (1950 Repl.), Section 18-2122:*

“Every association shall set aside, from its gross profits, at least three [3] per cent thereof each year, as a sinking fund, to provide for *contingent losses*, and shall accumulate such fund until the total amount thereof shall equal ten [10] per cent of the total assets of the association. Any *losses incurred* by such association shall be paid out of and charged against such fund for contingent losses. Any association may also carry an undivided profits account, and accumulate such

account until the total shall equal ten [10] per cent of the total assets of the association. Any amount carried in the undivided profits account may, from time to time, upon order of the board of directors, be transferred to the fund for contingent losses, or may be used for the payment of dividends. *The fund for contingent losses shall not be available for the payment of dividends or operating expenses, but any association, may, by order of its board of directors, charge against its fund for contingent losses, any losses sustained from its investments, whether resulting from depreciation or otherwise, without encroaching upon its undivided profits or its net earnings, until such fund for contingent losses has been exhausted. The fund for contingent losses may be increased by contributions and transfers from the undivided profits account, or from net earnings, upon resolution adopted by the board of directors.*" (Our emphasis)

- (b) *The Acts of 1933, Ch. 40, Sec. 273, as amended and found in Burns' (1959 Supp.), Section 18-2123:*

"Subject to the provisions of this act [ §§ 18-101—18-2417], any association may invest funds received by it in the following, but in no other manner:

\* \* \*

"(c) In furniture, fixtures and equipment necessary for the business of the association, but the total amount invested therein and in real estate, as permitted by subsection (d) (1) hereof, shall not exceed the association's loss reserves and undivided profits, or five [5] per cent of the association's total assets, whichever is less, without written approval of the department; \* \* \*

"(d) In real estate as follows:

"(1) Such as may be suitable and proper for the convenient transaction of its business, but the total amount invested therein and in furniture, fixtures and equipment shall not exceed the limitations set forth in subsection (c) hereof, without the written approval of the department. \* \* \*"

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- (c) *The Acts of 1933, Ch. 40, Sec. 259, as amended and found in Burns' (1959 Supp.), Section 18-2108:*

“\* \* \* Dividends shall be credited and paid only out of the net earnings actually collected during the period for which the dividend is declared, after deducting from such earnings all expenses of operation for such period, or out of the undivided profits account from earnings collected and added to such account during any previous period, *but no dividend shall be credited or paid out of the fund for contingent losses, or until the amount required by this act shall have been set aside for each dividend period out of the gross profits and added to the fund for contingent losses.* \* \* \*” (Our emphasis)

The answers to your questions will be found by an examination of the plain and accepted meaning of certain key words appearing in the above sections. Particular attention is invited to the emphasized portion of Section 272, as shown in Burns' 18-2122, *supra*. The words with special significance are: “contingent,” “sinking fund” and “depreciation.” In addition, reference is also called to the tense of the verbs “sustain” and “incur,” as employed therein. The Acts of 1933, Ch. 40, Sec. 3, as amended and found in Burns' (1950 Repl.), Section 18-103, contains a number of definitions of terms used in The Indiana Financial Institutions Act but none of the key words listed above are so defined. Therefore, it is necessary to determine the legislative objective through an examination of the words used, both singly and in relation to each other.

In Indiana Law Encyclopedia, Vol. 26, Statutes, § 117, pp. 321, 322, it is said:

“Under express statutory provisions, Burns' Ann. St. § 1-201, words and phrases will be taken in their plain, ordinary, or usual sense unless a different purpose is clearly manifested by the statute itself. \* \* \*

“The words of a statute are given their ordinary or common meaning, unless it appears from the context, or otherwise in the statute, that a different sense was intended, as where the words are expressly defined in the statute.

“A word or phrase which appears in different parts of a statute will be given the same meaning, unless an intention to the contrary clearly appears.”

In the case of *The Indiana Creosoting Co. v. McNutt, Governor, et al.* (1936), 210 Ind. 656, 5 N. E. (2d) 310, 314, it is said:

“\* \* \* The meaning of a word used in a statute must be construed with reference to all other words used therein and with which it is associated. \* \* \*”

In order to arrive at the intention of the Legislature, the Act as a whole and all parts thereof must be considered.

*Western Machine Works et al. v. Edwards Machine & Tool Corp. et al.* (1945), 223 Ind. 655, 63 N. E. (2d) 535;

*The State ex rel. Michener, Attorney General v. Harrison et al.* (1888), 116 Ind. 300, 19 N. E. 146.

The key words “contingent,” “sinking fund” and “depreciation” may be defined as follows:

(a) *contingent*

- “1. that may or may not happen; possible
2. happening by chance; accidental;
3. dependent (*on* or *upon* something uncertain); conditional.”

Webster’s New World Dictionary, College Edition, p. 319.

“Contingent ‘is the quality of being casual; the possibility of coming to pass; an event which may occur; a possibility; a casualty. *All anticipated future events which are not certain to occur are “contingent” events, and may be properly denominated mere “possibilities,” more or less remote, while anticipated events which are certain to occur, or must necessarily occur, are in no degree “contingent.”*’” (Our emphasis)

Words and Phrases, Perm. Ed., Vol. 9, p. 109.

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“Possible, but not assured; doubtful or uncertain, conditioned upon the occurrence of some future event which is itself uncertain, or questionable.”

Black’s Law Dictionary, Third Edition, p. 419.

### (b) *sinking fund*

“‘A “sinking fund” may be, and generally is, intended as a cumulative security for the payment of the debt with which it is connected.’”

Words and Phrases, Perm. Ed., Vol. 39, p. 452.

### (c) *depreciation*

“1. a decrease in value of property through wear, deterioration, or obsolescence. 2. the allowance made for this in bookkeeping, accounting, etc.”

Webster’s New World Dictionary, College Edition, p. 394.

“‘Depreciation’ is the loss, not restored by current maintenance, which is due to all the factors causing the ultimate retirement of the property. These factors embrace wear and tear, decay, inadequacy, and obsolescence. Annual depreciation is the loss which takes place in a year.”

Words and Phrases, Perm. Ed., Vol. 12, p. 288.

The Legislature in 1933 through the language employed in Section 272, *supra*, specifically provided that the “sinking fund” established thereby was to provide for *contingent losses*. Definitions are uniform in holding that the word “contingent” implies happening by chance, possibility, doubtful, uncertain, that which is more or less remote, as distinguished from those anticipated events or happenings which are certain to occur, or must necessarily occur. An example of a contingent loss could be that occasioned by flood, fire or tornado. It will next be observed that as a condition precedent to a charge against such a contingent fund and payment therefrom, the losses must be *incurred*; the tense of the verb indicates that the loss

must be an *accomplished fact*, one that is actual as distinguished from one based on conjecture. It will also be observed, in connection with losses from investments, that the tense of the verb is again past tense as shown by the use of the word "sustained." Here again, it is necessary that the loss be an *accomplished fact*, an actual loss. The additional provision in said Section 272 that "the fund for contingent losses shall not be available for the payment of dividends or operating expenses" further demonstrates the legislative intent to keep this fund inviolate except for the specific purpose intended. The prohibition against dividend paying from the sinking fund for contingent losses is also set forth specifically in Section 259, Burns' 18-2108, *supra*.

Inasmuch as building and loan associations are entirely creatures of law, and as corporations have neither rights nor capacity, except as conferred by statute, if a power is claimed by them they must find their authority within the statutes under which they operate.

Indiana Law Encyclopedia, Vol. 4, Building and Loan Associations, § 1, p. 289;

1949 O. A. G., pages 131, 132, No. 33.

In view of the reference in your question No. 1 to "irrevocable reserve funds," it is interesting to note that in 1939 O. A. G., page 48 at page 49, the Attorney General considered Section 272, *supra*, together with the requirements for obtaining insurance with the Federal Savings and Loan Insurance Corporation pursuant to Title 4 of the National Housing Act, one of the requirements for such insurance being that an association:

"\* \* \* (2) Irrevocably establish their present reserve for contingencies as an account to be used for the sole purpose of absorbing losses \* \* \*."

and in conclusion, and as a result of the comparison of the two funds, he stated:

"\* \* \* Both accounts are available for losses and I can see no reason which would prevent their consideration together. \* \* \*"

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In my opinion the sinking fund for contingent losses, created by Section 272, *supra*, was intended as a cumulative security for the payment of unexpected losses actually incurred and sustained. Inasmuch as such a fund is both sound business practice and a safeguard against the uncertainties of the future, the statute should be strictly construed to accomplish the purpose intended. Therefore, it is my further opinion, in answer to your question No. 1, that said sinking fund for contingent losses does constitute an irrevocable reserve fund established for the sole purpose of absorbing losses.

Let us now look to your question No. 2. This involves the question as to whether or not a building and loan association can make an annual expense charge against the sinking fund for contingent losses *for depreciation on office building, furniture and fixtures or equipment*. This question is apparently predicated upon the following language found in Section 272, *supra*, namely :

“\* \* \* The fund for contingent losses shall not be available for the payment of dividends or operating expenses, *but any association, may, by order of its board of directors, charge against its fund for contingent losses, any losses sustained from its investments, whether resulting from depreciation or otherwise* \* \* \*.” (Our emphasis)

The nature and purpose of the “sinking fund for contingent losses” has been fully discussed herein. The word “depreciation” has been defined. The items listed in this question, namely, “office building,” “furniture and fixtures” and “equipment” may all be properly classed as authorized investments for building and loan associations within the purview of the provisions of Section 273, Burns’ 18-2123, *supra*. A reading of the emphasized portion of Section 272, *supra*, cited in this paragraph will show the tense of the verb “sustained” to be particularly significant. The verb being used in the past tense is indicative of the necessity that any losses to qualify as a proper charge against the sinking fund must be an *accomplished fact*, a loss actually sustained as distinguished from a bookkeeping entry whereby a certain percentage of the book value of the item is charged off each year. It is conceivable that there could be instances where upon the sale or other

disposition of the investment items listed, they would bring a price or prices greater than that at which they are carried as a result of annual depreciation charges.

Words strikingly similar to those employed in Section 272, *supra*, were considered in *Walker v. Thomas et al.* (1935), 75 Fed. (2d) 667, 669, where the words used were: "any losses by depreciation or otherwise in the investment thereof." The following extract from said case is also significant in showing the relationship between losses and depreciation and the necessity for *realized losses* that could only come from the *actual sale or exchange of the trust property*. On page 669, it is said:

"\* \* \* It is a matter of general knowledge that the word 'loss' as used in the federal tax statutes means *not a possible or contingent loss but a realized loss*, just as the word 'gain' means profit obtained through sale or conversion of capital assets. As used generally the word 'loss' means that which is gone and cannot be recovered. It is quite true, as commonly used, it may mean that which is withheld or that of which a party is dispossessed, and so business losses are said to occur where debts are due but are uncollectible; but ordinarily where the thing itself—the property—is held intact, undiminished in quantity and unchanged in character (and that is true here), no loss can be properly said to have occurred. Fluctuations in market value do not determine that ultimately there will be loss or gain. *The event in either case must abide the sale of the property*. Nor do we think the use by testator of the word '*depreciation*' takes away from the force of what we have said, for while the word may and does frequently mean a fall in value, *as used here in conjunction with the word 'investment,' it could have meant only realized losses by the actual sale or exchange of a particular part of the trust property, for the word 'investment' as generally used means to change; to convert into another form, etc.* \* \* \*'" (Our emphasis)

In addition, it will be noted that Section 272, *supra*, specifically provides that "The fund for contingent losses shall not be available for the payment of \* \* \* operating expenses." Therefore, it is essential to determine whether "depreciation

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on office building, furniture and fixtures or equipment" is an "operating expense." In my opinion, the authorities show that it should be so treated. An examination of a leading text book, Vol. 1 "Principles of Accounting," by H. A. Finney, 1938, Prentice-Hall, Inc., Chapters 15 and 16, page 249 *et seq.*, shows that the standard business practice is to treat depreciation on such items, as those listed above, as an *annual operating expense*. Furthermore, the "Standard Accounting Manual for Savings and Loan Associations," published by the United States Savings and Loan League in co-operation with the American Savings and Loan Institute, 1956, has classified depreciation for office buildings, furniture, fixtures and equipment, all as *operating expenses*. See Account Numbers in said publication as follows:

Office building expense depreciation, No. 4163, page 32 and No. 2713, page 26;

Furniture, fixtures and equipment expense depreciation, No. 4171, page 33 and No. 1620, page 18.

It is stated in the case of Guaranty Trust Co. v. Grand Rapids, G. H. & M. Ry. Co. (1931), 7 F. Supp. 511, 520, as follows:

"It appears, however, from the record in this case that among the most skilled accountants and engineers the word 'depreciation' has a variety of meanings depending greatly for its precise significance upon its application and the circumstances under which it is used.

"It was defined by Professor Riggs (a witness for plaintiff) as 'a subnormal condition of physical property such as to impair the capacity for service, usefulness, and the intrinsic value of the investment,' while another of plaintiff's witnesses defined it as '*an amount of money that ought to be set up in a reserve as representing that part of the cost or other basic value of a piece of property which can be reasonably imputed to operating expenses during the period the property has been in use.* \* \* \*'" (Our emphasis)

Therefore my answer to your question No. 2 is that a building and loan association may not make an annual expense

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charge against such sinking fund for contingent losses for depreciation on "office building," "furniture and fixtures," or "equipment" unless and until a loss in depreciation thereon is actually suffered and such loss to qualify would necessitate a sale or disposition of the items of property as a condition precedent to the loss being sustained.

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OFFICIAL OPINION NO. 26

June 29, 1960

Hon. Albert A. Steinwedel  
Auditor of State  
238 State House  
Indianapolis 4, Indiana

Dear Mr. Steinwedel:

This is in reply to your recent letter in which you request my Official Opinion concerning the payment of a claim for a Korean veteran's bonus. Briefly, you state in your letter that an applicant who had previously filed for and received a Korean War Bonus in the amount of \$200 had made request for an additional bonus of \$400 as a disabled veteran who had served during the Korean conflict. You point out that his application was first filed within the time limitations prescribed by law while the request for the additional bonus was made subsequent to the statutory time for filing applications. You further state that the claim for the additional amount was approved by the Veterans' Affairs Commission.

Your questions relative to the above facts are as follows:

"(a) Is my office permitted to accept Mr. Jackson's claim and pay the \$400.00 additional bonus allowance?

"(b) Does the Veterans' Affairs Commission have authority to order my office to pay this Veteran's claim or is their ruling merely a guide for this office to follow."

The statute providing for a bonus payment to Korean veterans and their next of kin is Acts of 1955, Ch. 249, as