



## Can't I just get a loan from the bank?

By Karen Arland and Lisa Lee, *Ice Miller, LLP*

"Can't I just get a loan from the local bank?" This is a question that AIC staff and county attorneys throughout the State hear on an almost weekly basis. Counties face tremendous fiscal challenges, from funding payroll to paying for the new highway department truck that was ordered six months ago. Nearly every county finds, at some point or another that it needs to borrow money, but everyone wants to avoid issuing bonds. Regardless of whether the county is "getting a loan from the local bank", signing a promissory note, issuing bonds or bond anticipation notes, it is still borrowing money. The proper structuring of that borrowing, regardless of its name, can save county officials frustration, possible embarrassment, and in some cases, prosecution for official misconduct.

Many counties assume that the general corporate power to borrow money under IC 36-1-4-9 is sufficient authorization to go to the local bank for a loan. However, the general corporate power, standing by itself, is not sufficient to provide the procedures that the county must follow. IC 36-1-3-6(a) (the Home Rule Statute) provides that if there is a constitutional or statutory provision requiring a specific manner for exercising a power, a county wanting to exercise the power must do so in that manner. The General Assembly has enacted numerous statutes requiring a county to act in a specific manner when it desires to borrow money, and a county wishing to borrow money must comply with those statutes.

IC 36-2-6-18-20 contain the provisions that generally apply to counties when they are borrowing money to obtain funds to be used by the county in the exercise of its powers and for the payment of county debts. In order to obtain a loan (from any source) and issue bonds, tax anticipation warrants or notes to repay that loan, the county must first adopt an ordinance. The ordinance must state the purpose for which the bonds are being issued and include the terms of the bonds to be issued in evidence of the loan; in other words, the conditions under which the county will borrow the money, including the maximum amount of time for which the loan will be outstanding (which cannot exceed 20 years), what revenue source the county

will use to repay the loan, how frequently principal and interest payments on the loan will be made, what interest rate applies to the loan, whether the county can pay off the loan early (and if so, whether there are any prepayment penalties) and other similar terms. The ordinance must also contain information as to the time and manner in which the county will give notice of the bond sale; and the manner in which the bonds will be sold. Loans obtained pursuant to this section generally require a competitive sale of the bonds for which notice is given in accordance with IC 5-3-1 (see IC 5-1-11). Even though this statute authorizes a county to borrow money for up to 20 years, there is nothing that requires the county to actually borrow money for any specific period. A county could borrow money for one year (or less), or two, or five or 10 under this provision. Depending upon the source of repayment for the bonds, other procedures may also apply.

If the loan is to be repaid with property taxes, other statutes may also govern the procedures under which the loan may be obtained, including IC 6-1.1-20 (the petition and remonstrance and referendum processes). If the loan is to be repaid with local income tax revenues (COIT, CAGIT or EDIT), the county will need to comply with those respective statutes.

IC 36-9-41 permits a county to borrow the money necessary to finance a public work project costing not more than \$2 million or a "government efficiency" project costing not more than \$3 million from a financial institution in Indiana by executing a negotiable note. A public work project is a project for the construction of any public building, highway, street, alley, bridge, sewer, drain, or any other public facility that is paid for out of public funds. A government efficiency project is a project necessary or useful to carrying out an interlocal cooperation agreement entered into two or more political subdivisions or governmental entities or a project necessary or useful to the consolidation of local government services.

IC 36-9-41 does not specify whether a county must adopt an

ordinance or resolution, but because a county is required to adopt an ordinance to borrow money under virtually every other statute, including IC 36-2-6-18, it would be well advised to adopt an ordinance. Unlike a borrowing conducted under IC 6-1.1-20, the county must obtain the approval of the DLGF before it may borrow funds under this statute. A county that desires to issue a note under this chapter is required to publish a notice of its determination to borrow the money, and 10 or more taxpayers may file a petition objecting to the borrowing. If an objection is filed, the DLGF will conduct a hearing, and issue a determination as to whether the borrowing should be allowed. Assuming there are no objections, or that the DLGF finds in favor of the county, the borrowing can go forward.

The county must repay the note, over a term not exceeding 10 years. The note is payable each January 1 and July 1 from property taxes, beginning with the next January 1 or July 1 following the first tax collection for which it is possible for the county to levy a tax. (If a note is issued in August of 2011, the first payment would be due on July 1, 2010.) The county must obtain the approval of the DLGF before it can levy the property tax or issue the note, and the note must be sold at a competitive, public sale. Because the maximum cost of the project to be financed with the note is \$2 million, the project may qualify for an exception to the petition/remonstrance and referendum processes under IC 6-1.1-20, although the county should check with its financial advisor to determine which process, if any, will be applicable to such a note borrowing.

In addition to these general proceedings, there are dozens of statutes that authorize other kinds of borrowing, including, but by no means limited to, redevelopment districts, storm water districts and park districts.

The local bank may require additional documentation from the county before it will lend money; most banks expect to receive an opinion that the county has the legal authority to borrow funds, and that the borrowing is being done on a tax exempt basis. Before a county seeks a loan from the local bank, it should confirm what additional information the local bank will need.

Most counties also find it helpful, when preparing to borrow money, to enlist the services of their financial advisor, to assist them in structuring the financing and repayment schedule and negotiating the terms of the borrowing with the local bank.

In short, although it might be very attractive to simply "get a loan from the local bank", the county must comply with certain basic procedures to borrow money – even from the local bank. •

*Ice Miller LLP serves as general counsel to the Association of Indiana Counties. If you have any questions concerning the procedures that apply to a particular borrowing, please feel free to call Lisa Lee at (317) 236-2268.*



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