NOTE: THIS INTERPETIVE LETTER IS BASED UPON THE VERSION OF CHAPTER 31.24 RCW THAT PRECEDED ENACTMENT OF THE BUSINESS DEVELOPMENT COMPANY ACT OF 2006 (2006 c 87), WHICH SUBSTANTIALLY MODIFIED THE REQUIREMENTS OF CHAPTER 31.24 RCW SO AS TO RESULT IN THIS INTERPRETIVE LETTER HAVING ONLY HISTORICAL VALUE.

State of Washington
DEPARTMENT OF FINANCIAL INSTITUTIONS
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ISGC – 2003 – 003 - DOB

June 24, 2003

[redacted]

[redacted]

RE: Business Development Corporation [redacted]

Dear Mr. [redacted]:

We are responding to your letter of June 20, 2003, requesting an interpretation of several sections in Title 31, Chapter 24 of the Revised Code of Washington.

Question No. 1: Definition of "Financial Institution" & Application

RCW 31.24.010(2) states:

> "Financial institution means *any banking corporation or trust company, national banking association, savings and loan association, insurance company or related corporation, partnership, foundation, or other institution* engaged primarily in lending or investing funds."

[Italics added.]

RCW 31.24.020 states:

> "The secretary of state shall not approve articles of incorporation for a corporation organized under this chapter until a total of at least ten *national banks, state banks, savings banks, industrial savings banks, federal savings and loan associations, domestic building and loan associations, or insurance companies* authorized to do business within this state, or any combination thereof, have agreed in writing to become members of said corporation."

[Italics added.]

In addition, RCW 31.24.040 states:

> "Notwithstanding any rule at common law or any provision of any general or special law or any provision in their respective charters, agreements of association, articles of organization or trust indentures:
>
> (2) *All financial institutions are hereby authorized to become members of the corporation* and to make loans to the corporation as provided herein . . . "

[Italics added.]

Based on a reconciliation of the three statutes above, we conclude the following: While any financial institution, as defined in RCW 31.24.010, is authorized to become a member of Business Development Corporation [redacted] you must nonetheless meet the specific requirements of RCW 31.24.020 before the Department of Financial Institutions can certify your Articles of Incorporation. That is, Business Development Corporation [redacted] must have at least ten charter members from these specific categories before its Articles of Incorporation can be certified.

Whether this restriction was the intent of the Legislature can only be deduced from the plain language of the statutory provisions, taken in context and as a whole. That is their plain meaning, so we must apply that plain meaning.

Question No. 2: [redacted] Corporation as Member

While [redacted] Corporation makes loans, it presumably, as you have stated to us, is primarily a utility company. Thus, it does not meet the definition of "financial institution" pursuant to RCW 31.24.010(2) cited above. You should consider, however, the provisions of RCW 31.24.040(1) that would allow [redacted] Corporation to become a stockholder of the Corporation.

Question 3: Member But Not Shareholder?

RCW 31.24.010(3) states:

> "*Member means any financial institution authorized to do business within this state which shall undertake to lend money to a corporation* created under this chapter, upon its call, and in accordance with the provisions of this chapter."

[Italics added.]

RCW 31.24.040(1) states in pertinent part, as follows:

> ". . . a financial institution which does not become a member of the corporation shall not be permitted to acquire any shares of the capital stock of the corporation . . ."

Thus, while a "financial institution" must become a member in order to be a shareholder of the Corporation, it does not follow that a "financial institution" that is a member must necessarily become a shareholder as well. Indeed, while 31.24.040(3) allows a "financial institution" to acquire stock in the Corporation, the provision is permissive rather than mandatory.

Accordingly, a "financial institution" may be a member but not a shareholder.

Question 4: Loan Limits

As a matter of corporation law, a "call" provision in applicable governing documents of a corporation binds a member or shareholder, as applicable, to the terms thereof, if the member or shareholder assumed its status as a member or shareholder with notice and understanding of the "call" provision. For example, unless the articles of incorporation provide for "assessment," the typical business corporation, chartered only under the auspices of the Washington Business Corporations Act (RCW 23B), cannot "assess" or "call" its shareholders. Moreover, in this context, if the shareholder certificate states, as most do, that the shareholder is granted "non-assessable shares," the board of directors has no power to make a "call" upon the shareholders. This is the corporate governance scheme in a typical business corporation with respect to a "call" upon members or shareholders.

In this case, the nature of the Industrial Development Corporation charter prescribes the application of certain statutory provisions, contained in RCW 31.24.050, which set loan limits for various types of members in the event of a "call" by the corporation. These are loan limits set by statute, and as such, operate as a limitation upon the corporate governance standard that could otherwise be set by the articles of incorporation, bylaws and/or resolution of the board of directors.

Nothing in RCW 31.24.050, however, suggests to us that the governing charter documents of the corporation — articles of incorporation, amendments to articles of incorporation[1] or, even in some cases, board of directors resolutions — cannot provide a more permissive corporate governance standard, below the "loan limits" established by statute, whereupon a member may establish its own limits.[2]

While we recommend that you seek the services of your own legal counsel in the crafting of charter documents, we find nothing in our governing statutes that would preclude us, in theory, from "re-approving" a charter whose governing documents established a means by which members could establish their own "call" limits below the statutory maximum.

One strictly advisory note we would like to make at this time, however, is that the standard to be voted on by both shareholders and members when amending the articles of incorporation for this purpose ought to provide for fairness among all the members in the way in which they may exercise self-governance. RCW 31.24.080 provides for a two-thirds majority of the members and a two-thirds majority of the voting shares in amending the articles of incorporation. While shareholders have cumulative voting, the vote of the membership is one person-one vote, subject, however, to the attempt by the Legislature, in RCW 31.24.070, to create a kind of "cumulative" or "weighted" voting for members according to their respective loan limits. Notwithstanding this attempt at parity (and it is impossible for our counsel or the Division of Banks to speculate upon specific future scenarios), it may be possible for a super-majority of the members who also constitute a super-majority of the voting shares to adopt a standard that is unfair to a minority of the members. Consider with your attorney how you might prevent this. Conversely, if the amendment to the articles of incorporation empowers the board of directors to individually negotiate loan limits with each member, are there standards that require the board of directors to adopt "call" provisions in its bylaws that are fair to all members?

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[1] See also RCW 31.24.080 for the standards for amending the articles of incorporation of an Industrial Development Corporation.

[2] Indeed, as set forth in the preamble to RCW 31.24.050, it states: "Each member of the corporation shall make loans to the corporation as and when called upon by it to do so *on such terms and other conditions as shall be approved from time to time by the board of directors*, subject to the following conditions . . ." [Italics added]

In no event, however, may your governing "call" standard violate the statutory "fairness" standard set forth in RCW 31.24.050(4), to wit:

> ". . . [E]ach call made by the corporation shall be prorated among the members of the corporation in substantially the same proportion that the adjusted loan limit of each member bears to the aggregate of the adjusted loan limits of all members. The adjusted loan limit of a member shall be the amount of such member's loan limit, reduced by the balance of outstanding loans made by such member to the corporation and the investment in capital stock of the corporation held by such member at the time of such call."

Question 5: The Meaning of "Other Institution"

RCW 31.24.050(3)(b) states in pertinent part:

> " . . . and such limits as may be approved by the board of directors of the corporation for other financial institutions."

In the context of this sub-section, we must apply plain meaning and standard statutory construction.

What are "other financial institutions" in this context? They are any type of "financial institution," as defined in RCW 31.24.010(2), which have not been mentioned previously in RCW 31.24.050(3)(b). So, after considering what types of financial institutions have previously been mentioned in RCW 31.24.050(3)(b), "other financial institutions," for this purpose, include a "related corporation [of an insurance company], partnership, foundation, or other institution engaged primarily in lending or investing funds."

To which entity or entities does "board of directors" apply? It applies, in the opinion of our counsel, to the board of directors of the chartered industrial development corporation and not to the boards of directors of each of the respective "other financial institutions." Otherwise, corporation" would have been "plural and not "singular."

Thus, it is the board of directors of the corporation (not the "other financial institution") that sets the maximum allowable loan limit.

Question 6: Member/Shareholder Bank's Participation Limit

What is a member/shareholder commercial bank's participation limit (i.e., loans to the corporation plus stock investment), assuming total capital plus unencumbered surplus of $20,000,000?

RCW 31.24.050(3)(b) states, with respect to commercial banks, that the "loan limit" is:

> " . . . *two and one-half percent of the capital and surplus of commercial banks* . . . "

[Italics added]

This clearly represents $500,000 based on the assumption you have provided.

RCW 31.24.040(3) states in pertinent part, as follows:

> " . . . the amount of the capital stock of the corporation which may be acquired by any member pursuant to the authority granted herein *shall not exceed ten percent of the loan limit of such member*."

[Italics added]

Thus, based on this assumption, a bank, which is both a member and a shareholder, is limited to a capital stock investment of $50,000, pursuant to RCW 31.24.040(3), and a maximum loan limit of $450,000 (i.e., total participation limit minus stock investment).

This is concurrent with your own conclusions.

Question 6: Voting Powers of Member/Shareholder

You have asked what the voting powers are of a member that is also a shareholder. This can be determined from the plain meaning of RCW 31.24.070, which states, in pertinent part:

> "As to all matters requiring action by the stockholders and the members of the corporation, said stockholders *and* said members shall vote *separately* thereon *by classes*, and, except as otherwise herein provided, such matters shall require the affirmative vote of a majority of the votes to which the stockholders present or represented at the meeting shall be entitled *and* the affirmative vote of a majority of the votes to which the members present or represented at the meeting shall be entitled."

[Italics added]

As we have been informed by counsel, the plain meaning of this provision coupled with an understanding of general corporation law, leads us to the conclusion that a member that is also a shareholder votes once as a member and also once as a shareholder for each action of the corporation requiring a vote of both the members and the shareholders.

Question 7: Loan Limit or Loan Amount Outstanding?

RCW 31.24.070 further states:

> "Each stockholder shall have one vote, in person or by proxy, for each share of capital stock held by him, and each member shall have one vote, in person or by proxy, for each additional one thousand dollars which such member is *authorized to have outstanding on loans to the corporation at any one time* as determined under subsection (3)(b) of RCW 31.24.050."

[Italics added]

As our counsel understands it, the intent of the Legislature was to create by statute a kind of cumulative voting for "members" similar, in theory, to the cumulative voting that exists in both RCW 23B and in RCW 31.24 for shareholders.

Having said that, however, is a member's number of votes determined by its loan limit or its loans outstanding? The operative word in this context is "authorized" and not "outstanding."

Since “authorized” is the operative word in the statutory provision, the member’s number of votes is determined by the loan limit to be determined from subsection (3)(b) of RCW 31.24.050.

We trust that we have answered your questions completely and that, in doing so, we have been of help in your “re-application” for certification as an Industrial Development Corporation pursuant to RCW 31.24.

If our Division of Banks staff can be of further assistance, please do not hesitate to call upon us.

Yours very truly,

David Kroeger
Director, Division of Banks

Cc: Helen Howell, Director
Joseph M. Vincent, Acting Legal Counsel