## OPINION NO. 73-005

Syllabus:

Under R.C. 1151.292 (A), a building and loan association may make real estate loans only upon the security of a first mortgage.

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To: Wallace A. Boesch, Supt., Div. of Building and Loan Assoc., Columbus, Ohio

By: William J. Brown, Attorney General, January 31, 1973

Your letter requesting an opinion states the facts and poses the question as follows:

> Does a savings and loan association organized under Chapter 1151, Ohio Revised Code, have authority under Section 1151.292 (A), Ohio Revised Code, to invest in so-called 'wrap-around' loans, which are secured by liens on real estate. A wrap-around loan is defined as an additional loan made by a second lender to refinance a mortgagor for a sum greater than the existing balance on a first mortgage, without paying off or disturbing the existence of the first mortgage. Thus the wrap-around mortgage held by the second lender is a junior lien on the real estate rather than a first lien as provided by Section 1151.292 (A), Ohio Revised Code.
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> An example is presented as follows:
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> A borrower having an original $1,000,000 mortgage loan on residential real property, with an existing balance of $700,000, desires to increase his financing to $1,200,000. Thereupon a savings and loan association (which has the capacity for this loan within its percentage-of-assets limitation) grants a total mortgage loan package of $1,200,000, 'wrapping' its mortgage for $1,200,000 around that of the first lender. Only $500,000 of the $1,200,000 loan is disbursed to the borrower.
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> The question which we wish to be resolved is whether an association's investment in such a loan as described above, either in full or in part, would be a legal investment for the association under Section 1151.292 (A)?

The statute to which you refer, R.C. 1151.292, clearly prescribe that a building and loan association may make real estate loans only upon the security of a first mortgage. The only exception is that the association may accept some additional junior security when it already holds a first mortgage on the property. In pertinent part R.C. 1151.292 reads as follows:

> A building and loan association shall observe the following procedure in making real estate loans:
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> (A) The association may make loans upon obligations secured by a mortgage or deed of trust on real estate, which mortgage or deed of trust shall be made directly to the association. Except for taxes and assessments not then payable, such obligations shall be first liens on real estate. This section does not prevent an association organized under Chapter 1151. of the Revised Code from accepting additional security when the primary and principal security is a first mortgage or deed of trust on real estate. (Emphasis added.)

In a prior Opinion, recently rendered at your request, I pointed out that building and loan associations are quasi-public institutions, the regulation of which was long ago pre-empted by the state; and that, while the powers of such associations were originally very narrowly circumscribed, the General Assembly has in recent years considerably broadened the scope of their activities. Opinion No. 72-100, Opinions of the Attorney General for 1972. That Opinion dealt with R.C. 1151.292 (H), which prescribes the maximum amount which a building and loan association is allowed to loan to any one borrower. The history of subsection (H) was traced from its form as enacted in 1955 through several amendments culminating in 1967. The 1967 amendment was extensive, and, although somewhat ambiguous, the most reasonable interpretation seemed to be that it was designed to bring the law of Ohio into accord with federal regulations on the same subject. My interpretation of subsection (H) was, therefore, based upon the clear intent of the federal limitation on the amount to be loaned to any one borrower.

The present case is quite different. There is no ambiguity here. As can be seen from the plain language of R.C. 1151.292 (A), a building and loan association is permitted to make real estate loans only upon the security of a first mortgage. Gardner v. Johns, 69 Ohio App. 229, 233, 235 (1939). In the so-called "wrap-around" loan, on the contrary, another lender already holds the first mortgage and the association receives only a second mortgage as security for its loan.

It has been suggested that the "wrap-around" loan has been sanctioned under federal regulations and that subsection (A) should be interpreted in the light of those regulations. The Rules and Regulations for the Federal Savings and Loan System provide in pertinent part as follows (§ 541.9):

> (a) The term 'loans on the security of first liens' means loans on the security of any instrument (whether a mortgage, deed of trust, or land contract) which makes the interest in the real estate described therein . . . specific security for the payment of the obligation secured by such instrument: Provided, The instrument is of such nature that, in the event of default, the real estate described in such instrument could be subjected to the satisfaction of such obligation with the same priority as a first mortgage or a first deed of trust in the jurisdiction where the real estate is located.

It is urgeed that the association which makes a "wrap-around" loan will place sufficient funds in escrow to be able to liquidate the first mortgage immediately upon default of the mortgagor, and that this makes the associations's second mortgage an "obligation with the same priority as a first mortgage."

Whether or not this federal regulation is consistent with the underlying federal statute (12 U.S.C. 371) it is unnecessary to decide, for in the case of subsection (A) there is not, as there was in the case of subsection (H), any evidence that the General Assembly deliberately amended the statute to bring it into line with federal regulations. As was noted in the previous Opinion, subsection (H) was amended for that purpose in 1967. Subsection (A), on the other hand, remains essentially the same today as when it was first enacted in 1923 as part of G.C. 9657. 110 Ohio Laws, 68. I conclude, therefore, that subsection (A) differs from subsection (H), in that the language of the former is clear, whereas that of the latter is ambiguous; furthermore, the two subsections also differ in that there is no evidence of any intent on the part of the General Assembly to bring the language of (A) into line with federal regulations, whereas such evidence is present in the case of (H).

In specific answer to your question it is my opinion, and you are so advised, that, under R.C. 1151.292 (A), a building and loan association may make real estate loans only upon the security of a first mortgage.