OPINION NO. 72-100

Syllabus:

The maximum amount which a building and loan association is allowed to loan to any one borrower, under Section 1151.292 (H), Revised Code, is measured by the amount which has actually been disbursed to the borrower and not by the face amount of the loan contract.

To: Wallace A. Boesch, Supt., Building and Loan Associations, Columbus, Ohio
By: William J. Brown, Attorney General, November 1, 1972

You have requested an interpretation of the statutory limitation on the total amount of loans which a building and loan association may make to any one borrower upon obligations secured by real estate. Your request reads as follows:

> "In order to administer properly the affairs of building and loan associations chartered by the State of Ohio, we are submitting to you for opinion the following questions:
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> "1. In determining whether a loan complies with applicable lending limitations, such as the provisions of Section 1151.292 (H), Ohio Revised Code, the question has arisen whether the face amount of the loan is used in the computation or the total amount which the lender has disbursed at any given date. (Assuming in both instances that no payments have been made on the principal.) For example, a borrower executes a note and mortgage to an association for $1,000,000. However, the maximum loan under the above Section that the association may make at this time is $600,000, and this is the amount disbursed. The remaining $400,000 is held in escrow under control of the association until the latter has legal authority (under same Section) to disburse additional sums.

Is the maximum amount authorized by the Section determined by the face amount of $1,000,000, or by the initial $600,000 disbursement?

"2. Assuming that the face amount is the deciding factor, would a loan such as the one in the example be brought into legal conformity by a stipulation in the loan contract that the total amount disbursed and outstanding at any given date will never exceed the maximum legal amount the association may lend?"

It is settled that building and loan associations are quasi-public institutions, and that the state has pre-empted the regulation of such associations. In State, ex rel. Bettman v. Court of Common Pleas, 124 Ohio St. 269, 274-276 (1931), the court said:

"* * * The success or failure of such institutions affects the stability of business and the financial interests of the entire community, and it became necessary that they be strictly supervised and controlled for the protection of depositors and the welfare of the public. * * * Recognizing the character of such institutions, and the purpose they seek to serve, the Legislature of this state has enacted statutes governing, controlling and regulating them, and, in language that cannot be misunderstood, has wisely made provision for their supervision at all times and under all circumstances and conditions, * * *

"* * * * * * * * *

"We cannot disregard the clear and manifest purpose of the legislative branch of the government to fully protect and safeguard the interests of depositors and others in these quasi-public institutions. Confidence is essential to their stability and maintenance, and that has been encouraged and promoted by supervision and control under state authority. * * *"

And in State, ex rel. Crabbe v. Massillon Savings & Loan Co., 110 Ohio St. 320, 325-326 (1924), the court said:

"* * * That the state recognized that such powers were necessary is shown by the adoption of what may be denominated as a building and loan code. The various sections of the building and loan act disclose that the franchises obtained by these associations remain under the direct control of the state and its agents; that the inspection and examination of their various activities, and a regulatory power over issuing stock, receiving deposits, borrowing money, and investing funds, are lodged in the state. As is well known, those who become members of such associations by subscribing to stock therein comprise a large number of people, many of whom are represented by small savings which are often utilized for the purchase or erection of homes. And it was for the purpose of correcting and controlling the probable abuse of power, in respect thereto, that the Legislature entered the field of regulation."

See also Hagerman v. Ohio Building and Savings Association, 25 Ohio St. 186, 203-204 (1874); State, ex rel. Day v. Superior Savings & Loan Co., 25 Ohio St. 2d 79 (1971).

Although the General Assembly continues its regulation of the associations, it has allowed them to exercise powers once considered foreign to the concept of a building and loan association. Originally the association's activities were in the unique position of being both creditors and debtors of the association. No deposits were accepted from, nor loans made to, outsiders. "Mutuality is the essential principle of a building association. Its business is confined to its own members; its object being to raise a fund to be loaned among themselves, or such as may desire to avail themselves of the privilege. This is done by the payment, at stated times, of small sums, in the way of dues, interest on loans and premiums on loans. Each shareholder, whether a borrower or a nonborrower, participates alike in the earnings of the association, and alike assists in bearing the burden of losses sustained." Eversman v. Schmitt, 53 Ohio St. 174, 184 (1895); see also Sundheim, Law of Building and Loan Associations (1922), pages 19-24, 48-49, 107-108. Eventually, authority was granted to the associations to accept deposits from, and to make loans to, nonmembers. In commenting on this extension of powers the Supreme Court, in Vance v. Warner, 129 Ohio St. 357 (1935), said (at page 364):

> "We cannot subscribe to the contention that it never was the intention of the people of Ohio to attach double liability to holders of stock in building and loan associations that were authorized to receive money on deposit.
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> "We do agree that it was not the original purpose or intent of the law that building and loan associations should accept money on deposit. The original purpose of building and loan associations was to finance the acquisition of homes by loaning money to home builders, usually limited by the by-laws of the association to two-thirds of the value of the property and secured by a first mortgage on the property.
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> "If these institutions had confined their activities along this line, they would have been happier and healthier. They insisted upon engaging in the business of accepting deposits. It was but logical and natural that money deposited in a building and loan association should be surrounded with the same safeguards as were required of a bank of deposit.
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> "We are fully aware that many persons, natural and artificial, will suffer from the imposition of the double liability--but they imposed it upon themselves when they ratified the work of their delegates to the Constitutional Convention of 1912, and,while the penalty may be severe, there was much wisdom in the provision."

In the light of this history, which indicates a modern, less restrictive view of the powers of building and loan associations, I shall approach your questions. The limitation on the authority to make loans to a single borrower, with which you are concerned, appears in Chapter 1151 of the Ohio Revised Code, which contains the general statutory provisions governing the regulation of the associations. Sections 1151.29 through 1151.342 of that Chapter

prescribe the authority to make loans, and the types of security required. Section 1151.29 makes provisions for loans secured by improved residential, business or farm real estate. Loans secured by other types of real estate are covered by Section 1151.291, Revised Code. And Section 1151.292, Revised Code, sets forth the procedures to be followed in making all such real estate loans, and the limitations on the amounts thereof. That Section, interpretation of which is sought by your request, reads in part as follows:

> "A building and loan association shall observe the following procedures in making real estate loans:
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> "* * * * * * * * *
>
> "(H) No such associations shall loan to any one borrower already primarily indebted to the association unless such indebtedness has been subsequently assumed by another borrower, in a total amount which, together with the amount to be loaned, is more than ten per cent of the amount of its withdrawable accounts or an amount equal to the sum of such institution's non-withdrawable accounts, surplus, undivided profits, and reserves, whichever amount is the lesser, but any association may grant one or more mortgage loans aggregating not more than forty-five thousand dollars to one borrower regardless of the above limitations. * * *"

This provision is obviously designed to promote the stability of the associations by limiting the amount that can be loaned to any one borrower.

Your question is whether the "total amount" limit to one borrower is to be measured by the amount which, at the present time, has actually been disbursed to the borrower by the association, or by the total amount ultimately to be disbursed under the loan contract. In order to make clear just what we are concerned with, I repeat the pertinent words of subsection (H):

> "No such association shall loan to any one borrower, already primarily indebted to the association * * *, in a total amount which together with the amount to be loaned, is more than ten per cent * * *." (Emphasis added.)

It must be confessed that the phrase, "together with the amount to be loaned", is ambiguous and is susceptible of either of the interpretations suggested in your question. It may mean (1) only that amount which is about to be disbursed to the borrower in addition to the present amount of his indebtedness; or it may mean (2) the full amount which the loan contract requires to be disbursed to the borrower eventually. Where there is ambiguity, an effort should be made to ascertain the intent of the legislature. Slingluff v. Weaver, 66 Ohio St. 621, 626 (1902).

It has been suggested that the General Assembly must have intended the second alternative in order to protect the borrowers by preventing the associations from committing themselves to make loans which they might not be able to fulfill. I can find nothing, however, to support this interpretation beyond the language of the admittedly ambiguous phrase, and I am satisfied that the first alternative is the more reasonable interpretation.

Section 1151.292 (H) was originally enacted in 1955. See 126 Ohio Laws, 649 (what is now subsection H was originally subsection G). In 1957, the then Attorney General had occasion to comment on its purpose in the following language (Opinion No. 1155, Opinions of the Attorney General for 1957):

> "There can be no doubt that the purpose of the legislature in enacting this Section 1151.292 [H] was to prevent a building and loan association concentrating its loans directly or indirectly to any one corporation or person and thus distribute the risk of the loans by making loans of less than 4% of the total value of the shares and deposits up to $35,000. This would tend to provide for strict construction of the law to prevent over lending to one person or corporation."

It seems clear from this language that my predecessor thought that the intent of the legislature was to protect the association from imprudent loan practices, rather than to protect the borrowers from overcommitting themselves under loan contracts. It should be noted that one of the requirements of a loan is the actual disbursement of money to the borrower. National Bank of Paulding v. Fidelity & Casualty Co., 131 F. Supp. 121, 123 (S.D. Ohio, 1954), 57 Ohio Op. 483; 57 O. Jur. 2d 522. A contract to loan, on the other hand, may be executory in that some of the disbursements are not to take place until certain conditions precedent have been met. That is evidently the situation in the example you have given in which the contract calls for $1,000,000 but only $600,000 has presently been disbursed.

Since enactment in 1955, Section 1151.292 (H) has had several amendments, mostly to raise the dollar amount of the limitation. See the history following the Section in the Revised Code. In 1967, however, there was an extensive revision - as part of which the subsection became (H) instead of (G) - which seems to have been designed to bring Ohio law into accord with federal regulations on the same subject. Title 12 of the Code of Federal Regulations contains a section (§ 563.9-3) which limits the amount of loans which can be made to any one borrower by any federally-insured lending institution. The language of this regulation, which had been adopted in 1963, was used, in some part verbatim, in the 1967 amendment of Section 1151.292 (H). The amendment does retain some of the language of the original subsection and the arrangement differs from the federal regulation, but the object seems to have been to bring state and federal laws into alignment, and it is quite clear that the federal limitation on the amount to be loaned to any one borrower is measured by the amount which has actually been disbursed and not by the face amount of the loan contract.

In a somewhat similar situation, one of my predecessors was asked whether a building and loan association could lawfully accept subscriptions to its capital stock in excess of the capital authorized in its articles of incorporation, as long as the same actually paid in totaled less than the authorized capital. The then Attorney General responded that this would be illegal since it would amount to an increase in the amount of capital stock which could only be done by amendment of the articles of incorporation. Opinion No. 4257, Opinions of the Attorney General for 1941. That Opinion is clearly distinguishable from the present question which arises from an ambiguity in the statute.

Since the face amount of the loan contract is not a factor in determining the amount which may be loaned to any one borrower,

it is unnecessary to answer your second question. It should be noted, however, that the provisions of Section 1151.292 (H), like any other applicable statute, must be read into the provisions of every loan contract. Personal Industrial Bankers, Inc. v. Citizens Budget Co., 80 F. 2d 327, cert. den. 298 U.S. 674; 11 O. Jur. 2d 411.

In view of the foregoing it is, therefore, my opinion, and you are so advised, that the maximum amount which a building and loan association is allowed to loan to any one borrower, under Section 1151.292 (H), Revised Code, is measured by the amount which has actually been disbursed to the borrower and not by the face amount of the loan contract.