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BUILDING AND LOAN ASSOCIATIONS, SUPERINTENDENT OF—IN ISSUING, SUSPENDING, REVOKING OR CANCELLING CERTIFICATES PROVIDED FOR IN SECTIONS 9643-1, 9660-3a, 679, 690, G. C.; IS SUBJECT TO PROVISIONS OF ADMINISTRATIVE PROCEDURE ACT—IN GIVING OR WITHHOLDING HIS APPROVAL, CONSENT OR CERTIFICATE PROVIDED FOR IN SECTIONS 693-1, 693-2, 9643-4, 9645, 9649, 9655, 9657, 9660-2, 9660-3, 9660, 9665 AND 967c, G. C., HE IS NOT SUBJECT TO PROVISIONS OF ADMINISTRATIVE PROCEDURE ACT.

SYLLABUS:

The superintendent of building and loan associations in issuing, suspending, revoking or cancelling the certificates provided for in Sections 9643-1, 9660-3a, 679 and 690, General Code, is subject to the provisions of the Administrative Procedure Act but in giving or withholding his approval, consent or certificate provided for in Sections 693-1, 693-2, 9643-4, 9645, 9649, 9655, 9657, 9660-2, 9660-3, 9660, 9665 and 9670, General Code, he is not subject to the provisions of the Administrative Procedure Act.

Columbus, Ohio November 1, 1945

Hon. Charles A. Bitzer, Superintendent of Building and Loan Associations
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Will you kindly furnish me with your opinion in writing as to the applicability of Section 154-62 et seq. of the General Code, commonly known as the Administrative Procedure Act, to the Department of Commerce, Division of Building and Loan Associations, particularly construing the term agency as it is used in Section 154-62 supra.”

Section 154-3 of the General Code provides in part as follows:

“The following administrative departments are created: * * *

The department of commerce, which shall be administered by the director of commerce, hereby created;”

Section 154-6, General Code, provides as follows:

“Offices are created within the several departments as follows: * * *

In the department of commerce:

Superintendent of building and loan associations.”

Section 154-62, General Code, being part of the Administrative Procedure Act, provides in part as follows:

“The following words when used in this act shall have the meanings respectively ascribed to them in this section:

‘Agency’ means and includes, except as hereinafter limited, any official, board or commission having authority to promulgate rules or make adjudications in the bureau of unemployment compensation, the state civil service commission, the department of industrial relations, the department of liquor control, the department of taxation, the industrial commission, the functions of any administrative or executive officer, department, division, bureau, board or commission of the government of the state of Ohio specifically made subject to the provisions of the administrative procedure act, and the licensing functions of any administrative or executive officer, department, division, bureau, board

or commission of the government of the state of Ohio having the authority or responsibility of issuing, suspending, revoking or cancelling licenses. This act shall not apply to the public utilities commission, nor shall it apply to actions of the superintendent of banks, the superintendent of building and loan associations and the superintendent of insurance in taking possession of, and rehabilitation or liquidation of, the business and property of banks, and building and loan associations, insurance companies, associations, reciprocal fraternal benefit societies and bond investment companies, nor to any action that may be taken by the superintendent of banks under the provisions of Sections 710-19, 710-88a and 710-107a of the General Code. * * *

'License' means and includes any license, permit, certificate, commission or charter issued by any agency. * * *".

The question to be determined is whether the building and loan division or the superintendent of building and loan associations is included within the term "agency" as defined in the above quoted section. This section, for the purposes of analysis, may be separated as follows:

" 'Agency' means and includes, except as hereinafter limited, any official board or commission having authority to promulgate rules or make adjudications in the bureau of unemployment compensation, the state civil service commission, the department of industrial relations, the department of liquor control, the department of taxation, the industrial commission,"

Neither the division of building and loan associations nor the superintendent of building and loan associations is enumerated therein and so must be excluded therefrom.

"the functions of any administrative or executive officer, department, division, bureau, board or commission of the government of the state of Ohio specifically made subject to the provisions of the administrative procedure act,"

An examination of the statutes of Ohio fails to disclose any provision specifically making the division of building and loan associations or the superintendent of building and loan associations subject to the provisions of the administrative procedure act.

"and the licensing functions of any administrative or executive officer, department, division, bureau, board or commission of the government of the state of Ohio having the authority or responsibility of issuing, suspending, revoking or cancelling licenses.

* * *

'License' means and includes any license, permit, certificate, commission or charter issued by any agency."

Let us now examine the statutes of the state of Ohio to determine whether the division of building and loan associations or the superintendent of building and loan associations have any licensing functions within the meaning of the above terms. If so, then such licensing functions are subject to the Administrative Procedure Act.

Section 9643-1, General Code, provides in part as follows :

"Upon receipt of a copy of the articles of incorporation of such proposed building and loan association, the superintendent of building and loan associations shall immediately examine into all the facts connectel with the formation of such proposed corporation, including its location and proposed incorporators, and if it appears that such corporation if formed, will be lawfully entitled to commence the business for which it is organized and entitled under the law to conduct, the superintendent of building and loan associations shall so certify to the secretary of state, who shall thereupon record such articles of incorporation."

It would seem that the certificate provided for in the above statute is necessary before the proposed building and loan association may lawfully begin business or before the Secretary of State may record the articles of incorporation. See Section 9643-3 of the General Code. The withholding of such certificate would have the effect of preventing the proposed building and loan association from beginning business and I believe such a certificate would be a license within the meaning of Section 154-62, General Code.

Section 9643-2, General Code, as it existed before September 3, 1943, provided for an appeal in the event the superintendent withheld the certificate as provided for in Section 9643-1. This section, that is, Section 9643-2, was repealed at the time of the adoption of the original Administrative Procedure Act. See 120 O. L. page 404. It would seem that by the adoption of the Administrative Procedure Act and by repealing the remedy previously provided for in Section 9643-2, General Code, the legislature intended the remedy under the Administrative Procedure Act to apply from that time on.

I am of the opinion that the same reasoning applies and the same conclusion should be reached in regard to the certificate furnished by the

superintendent of building and loan associations under Section 9660-3a, General Code, which provides for the conversion or reorganization of a federal building and loan association into a state association, said section reading in part as follows:

“Upon receipt of the articles, the secretary of state shall forthwith transmit to the superintendent of building and loan associations, hereinafter called superintendent, a copy thereof. If it appears that the corporation if formed, will be lawfully entitled to commence the business for which it is organized and entitled under the law to conduct, the superintendent shall so certify to the secretary of state who shall thereupon record such articles. If the superintendent withholds such certificate more than thirty days, an appeal may be made by the federal association as provided in section 9643-2 of the General Code.”

Section 678, General Code, provides for the admission of a foreign building and loan association to do business in Ohio and reads in part as follows:

“* * * No foreign building and loan association shall do business in Ohio until it procures from the inspector of building and loan associations a certificate of authority to do business in this state after complying with the following provisions: * * *”

Section 679, General Code, provides as follows:

“When a foreign building and loan association has complied with the provisions of the preceding section, and the inspector is satisfied that it is doing business according to the laws of Ohio and is in sound financial condition, he shall issue his certificate of authority to the association to do business in this state. Annually thereafter, upon filing the annual statement herein provided for, if the inspector is satisfied as herein provided, he shall issue a renewal of such certificate.”

The certificate of the inspector (superintendent of building and loan associations) provided for in this section is a necessary prerequisite before the building and loan association may do business in Ohio and the withholding thereof would necessarily preclude such association from doing business in Ohio. I am of the opinion that such certificates is a license within the meaning of the Administrative Procedure Act.

Section 690, General Code, provides as follows:

“If upon examination the inspector of building and loan associations finds that a foreign association does not conduct its

business in accordance with law, or that its affairs are in an unsound condition, or if it refuses to permit an examination to be made, he may cancel its authority to do business in this state, and cause a notice thereof to be mailed to the home office of the association and published in at least one newspaper published in the city of Columbus. After the publication of such notice no such association or agent thereof shall receive further stock deposits from members residing in this state, except payments on stock on which a loan has been taken."

It would seem that the cancellation of a foreign building and loan association's authority to do business in Ohio as provided for in the above section is in effect a revocation of its license and in doing so the superintendent of building and loan associations would be subject to the provisions of the Administrative Procedure Act.

Going back to Section 154-62, General Code, we find the following provision :

"* * * This act shall not apply to *** the superintendent of building and loan associations *** in the taking possession of, and rehabilitation or liquidation of, the business and property of * * * building and loan associations, * * *."

It is clear that in those situations where the superintendent of building and loan associations takes possession for the purpose of rehabilitation or liquidation, the Administrative Procedure Act does not apply.

However, Section 687-21 of the General Code provides in part as follows :

"In lieu of taking possession of the business and property of a domestic building and loan association, for any of the causes specified in section 687 of the General Code, the superintendent of building and loan associations may, with the written approval of the director of commerce, for like cause or causes order any such association to proceed to liquidate its business and property. The issuance of such an order shall have the effect of an election of all the shareholders of such association to dissolve the same and shall terminate the power of such association (1) to accept money on deposit, (2) to issue new stock and (3) to pay withdrawals of shareholders or depositors, but, notwithstanding the issuance of such order, the board of directors of such association shall exercise all other powers vested by the general corporation act in the directors of a corporation electing to dissolve; pro-

vided that the written consent of the superintendent or his deputy must be secured to validate the exercise of any such other power, except the collection in money of debts due such association.

The superintendent of building and loan associations shall file with the secretary of state a certificate under his official seal, reciting the order made by him, which shall have the effect of the filing of a certificate of dissolution under the general corporation act excepting as otherwise specifically provided in this chapter. * * *

Section 687-22, General Code, provides for a remedy in the Common Pleas Court to set aside such order made by the superintendent of building and loan associations as provided for in the preceding section or to enjoin the enforcement thereof. This section of the General Code was not repealed at the time of the passing of the Administrative Procedure Act or since said time. It would seem that the order given by the superintendent of building and loan associations, under Section 687-21, General Code, to the board of directors of the building and loan association to liquidate their association, is another way of providing for liquidation by the superintendent and since the statute provides for a remedy, that the Legislature intended such action by the superintendent of building and loan associations not to be subject to the Administrative Procedure Act.

For the purpose of retaining some control over certain acts of the several building and loan associations doing business in Ohio, statutes have been passed providing for consent or approval by the superintendent of building and loan associations to the doing of these acts. I am of the opinion, however, that the giving or withholding such consent or approval does not have the effect of issuing, revoking or cancelling a license within the meaning of that term as used in the Administrative Procedure Act.

I should like at this time to set forth briefly these various statutes.

Section 693-1, General Code, provides for the written consent of the superintendent of building and loan associations to the reorganization of building and loan associations and approval of the plan of reorganization.

Section 693-2, General Code, provides for the written consent of the superintendent of building and loan associations to the sale or transfer of sub-standard or unacceptable assets under certain conditions.

Section 9643-4, General Code, provides for the approval of the superintendent of building and loan associations to the establishment of more than one office or branch of the building and loan association.

Section 9645, General Code, provides for approval by the superintendent of building and loan associations to amendments to the constitution or by-laws of the association. It also provides for the giving to the association of a certificate that it has complied with all the provisions required by law and is authorized to commence business—it is to be noted that such certificate is not required before the building and loan association is authorized to commence business but is in the nature of a statement of evidentiary facts.

Section 9649, General Code, provides power in the building and loan associations to issue capital notes or debentures subject to such terms and conditions as the superintendent of building and loan associations shall in writing approve.

Section 9655, General Code, provides for written approval of the superintendent of building and loan associations with reference to the holding of certain real estate and other related matters.

Section 9657, General Code, provides that no association shall, except with the written approval of the superintendent of building and loan associations, buy from or sell to any of its officers, directors, or employees any real estate, mortgage loan, or other kind of investment.

Section 9660-2, General Code, provides for the conversion of a building and loan association into a federal savings and loan association with the approval of its charter by the superintendent of building and loan associations.

Section 9660-3, General Code, provides for purchasing of shares in or joint occupancy with a federal savings and loan association by building and loan associations with the written consent of the superintendent.

Section 9660, General Code, provides for the written consent of the superintendent of building and loan associations to the purchase of notes and mortgages.

Section 9665, General Code, provides for consent by the superintendent to the dissolution of building and loan associations and the giving of his certificate that it is in a safe and sound condition. While the term certificate is here used, the giving of such certificate or the withholding thereof does not have the effect of issuing, suspending, revoking or cancelling a license.

Section 9670, General Code, provides for the approval by the superintendent of the individual surety on bonds of officers and employes of building and loan associations.

I am therefore of the opinion that the superintendent of building and loan associations in issuing, suspending, revoking or cancelling the certificates provided for in Sections 9643-1, 9660-3a, 679 and 690, General Code, is subject to the provisions of the Administrative Procedure Act but that in giving or withholding his approval, consent or certificate provided for in Sections 693-1, 693-2, 9643-4, 9545, 9649, 9655, 9657, 9660-2, 9660-3, 9660, 9665 and 9670, General Code, he is not subject to the provisions of the Administrative Procedure Act.

Respectfully,

HUGH S. JENKINS

Attorney General