

OPINION NO. 72-094

Syllabus:

Where a building and loan association, after prudent investigation of the offered security, grants a loan under Section 1151.291, Revised Code, secured by a first lien on a developed and platted industrial park, and where the developer is in the process of selling the lots and applying the proceeds to retirement of the principal, that security constitutes "other real estate which produces sufficient income to maintain the property and retire the loan" within the meaning of Section 1151.291, Revised Code.

To: Wallace A. Boesch, Supt. Building and Loan Associations, Columbus, Ohio
By: William J. Brown, Attorney General, October 17, 1972

I have before me your request for my opinion, which reads in part as follows:

"In order to administer properly the affairs of building and loan associations chartered by the State of Ohio, it is the wish of this Division to submit to you for opinion the following:

"An association grants a loan under

Section 1151.291, Ohio Revised Code, secured by a first lien on a developed and platted industrial park, with no structures erected thereon. The developers (borrower) are in the process of selling these lots and are applying proceeds of the sales against the loan principal. The association releases individual lots at a predetermined release price or 60% of the sales price whichever is greater, and also shares a 50% participation in the net profit on the sale of each parcel.

"Section 1151.291 (B), Ohio Revised Code, provides that real estate pledged to secure the obligation shall be '* * * other real estate which produces sufficient income (emphasis ours) to maintain the property and retire the loan in accordance with its terms. * * *'

"The question we are asking to be resolved is: Can the proposed sale of the real estate security be * * * in accordance with the income-producing requirement of the Section?"

Section 1151.291, Revised Code, reads in pertinent part as follows:

"A building and loan association may make loans to members and others on such terms as are provided by the association upon obligations secured by real estate subject to the procedures of section 1151.292 of the Revised Code and the following limitations:

"(A) Loans made under this section shall not aggregate more than twenty percent of the association's assets.

"(B) The real estate pledged to secure the obligation shall be any real estate upon which one or more buildings have been permanently erected, other real estate which produces sufficient income to maintain the property and retire the loan in accordance with its terms, or building lots or sites, provided such lots or sites abut on streets, which by reason of installations and improvements, including such services and utilities as are available and common to the area, that have been completed are ready for the construction on each such building lot or site of a structure designed for residential use. Loans secured by building lots or sites are subject to the special limitations provided in division (F) of this section and shall not aggregate more than five percent of the association's assets. In addition building lots or sites pledged to secure the obligation shall be free and clear of any unpaid assessments for improvements."
(Emphasis added.)

In this case the real estate, which is pledged to secure the

association's loan to the developers, is the industrial park in which the developers are selling off lots in order to obtain funds to retire the loan. We understand your question to be whether this property meets the statutory requirement of "other real estate which produces sufficient income to * * * retire the loan", or whether the loan must be secured by some separate income-producing real estate.

Chapter 1151, Revised Code, contains the general statutory provisions governing the regulation of building and loan associations. Sections 1151.29 through 1151.342, Revised Code, prescribe the authority of the associations to make loans and the types of security required to cover the loans. Section 1151.29 provides for loans secured by improved residential, business or farm real estate. See 133 Ohio Laws, 64. Section 1151.29 reads in pertinent part as follows:

"A building and loan association may make loans to members and others on such terms as are provided by the association upon obligations secured by real estate subject to the procedures of section 1151.292 of the Revised Code and the following limitations:

"(A) Such real estate shall be improved residential property, a combination of residential and business property, or a farm under cultivation.

"(B) * * * * * * * *

"The aggregate balance of loans under this division in excess of forty-five thousand dollars shall not exceed twenty per cent of the association's assets.

"Loans made upon the security of the kinds of real estate set forth in division (A) of this section may be made in excess of forty-five thousand under section 1151.291 of the Revised Code, or when the unpaid balance of such loans is not in excess of seventy-five per cent of the appraised value of the security property, they may be considered as having been granted under said section."

However, Section 1151.291, which has already been quoted above in part, provides for loans secured by other types of real estate. See 133 Ohio Laws, 66. While the security required by Section 1151.29 is "improved residential property, a combination of residential and business property, or a farm under cultivation", that required by Section 1151.291 is "real estate upon which one or more buildings have been permanently erected, other real estate which produces sufficient income to * * * retire the loan * * *, or building lots or sites, provided such lots or sites abut on streets, * * *[and] are ready for the construction * * * of a structure designed for residential use." These two types of loan are treated differently in several respects, for example, in the aggregate amount of the association's assets allowed to be committed to each class, in the amount of individual loans, and in the time of payment.

Your question appears to have two facets. Does the phrase

"other real estate" mean real estate other than that which the borrowers are engaged in selling off? Does the sale of the real estate which constitutes the security for the loan "produce sufficient income" to retire the loan within the meaning of Section 1151.291?

1. I see no reason why the word "other" in the pertinent clause in Section 1151.291 (B) - "other real estate which produces sufficient income" - must be read to exclude the particular real estate, for the development of which the loan is sought. Since this clause is one of a series describing the types of real estate which may be used as security for a loan from a building and loan association, the normal interpretation of the word "other" would be that it simply refers to a different type of real estate from that described in the immediately preceding clause. This is obviously the meaning intended in the use of the word in the title assigned to Section 1151.291 in 133 Ohio Laws, 66. And two of my predecessors have dealt with loans, which were secured by the land to be developed, without any question of this sort having occurred to them Opinion No. 337, Opinions of the Attorney General for 1963 and Opinion No. 66-116, Opinions of the Attorney General for 1960. There is nothing to indicate that the General Assembly intended to exclude the real estate under development as security for the loan, so long as it produces sufficient income to pay off the loan.

2. Nor is there any reason why the sale of lots from the development cannot be said to fulfill the statutory requirement of Section 1151.291 that the security be such as will "produce sufficient income to maintain the property and retire the loan." Where, as here, the legislature did not define the term "income", resort may be had to a standard dictionary. Richards v. State, 110 Ohio St. 311, 315-316 (1929); Robert V. Clapp Co. v. Fox, 124 Ohio St. 331, 336-337 (1931). Webster's Third New International Dictionary gives the following definition of "income":

** * * 4a: a gain or recurrent benefit that is usu. measured in money and for a given period of time, derives from capital, labor, or a combination of both, includes gains from transactions in capital assets, but excludes unrealized advances in value: commercial revenue or receipts of any kind except receipts or returns of capital. (Emphasis added.)

I think it clear that, under this definition, the sale of the lots produces "income." Whether that income is "sufficient to retire the loan" is, of course, a question which requires the exercise of prudent judgment on the part of the association, before accepting the security and making the loan, on the basis of its experience with similar tracts and the general need for industrial growth in the community. Even if the security offered were some other independent tract of real estate, the association would be faced with the same decision.

In view of the foregoing it is my opinion, and you are so advised, that where a building and loan association, after prudent investigation of the offered security, grants a loan under Section 1151.291, Revised Code, secured by a first lien on a developed and platted industrial park, and where the developer is in the process of selling the lots and applying the proceeds to retirement of the principal, that security constitutes "other real estate which produces sufficient income to maintain the property and retire the loan" within the meaning of Section 1151.291, Revised Code.