OPINION 65-31

Syllabus:

Section 1151.298 (F), Revised Code, authorizes an association, prior to the commencement of the development, to disburse a portion of the loan proceeds not to exceed two-thirds of the appraised value of the real estate if such real estate is already owned by the borrower and two-thirds of the appraised value of the real estate or its cost, whichever is the lesser, if a portion of the loan proceeds is used to purchase such real estate.

To: Lyle L. Herbold, Superintendent, Division of Building and Loan Associations Columbus, Ohio
By: William B. Saxbe, Attorney General, March 9, 1965

Your request for my opinion reads as follows:

> "If a building and loan association grants a loan under the provisions of Section 1151.298 of the Revised Code for a sum which equals 66 2/3% of the appraised value of the land prior to the commencement of a development for primarily residential use and 66 2/3% of the cost as certified by a licensed engineer of installing the contemplated development, the amount loaned not being in excess of 66 2/3% of the appraised value of the land when fully developed, would the association be authorized under the above-cited section to disburse, prior to the commencement of the development, an amount equal to 66 2/3% of the appraised value of the undeveloped land, if the land is already owned by the borrower when the loan is granted?"

As noted in Opinion No. 337, Opinions of the Attorney General for 1963, the post depression legislation enacted in 1934 was to regulate the loaning practices of building and loan associat ons in order to reduce the security risk on real estate loans. Thereafter, the law precluded loans secured by vacant or partially developed or developed real estate. However, in 1961 former Section 1151.29, Revised Code, which regulated real estate loans, was substantially amended and among other additions Section 1151.298, Revised Code, was enacted (129 Ohio Laws 1082). This section provides for loans on real estate to be acquired and developed primarily for residential purposes. Such loans, however, are subject to the procedural regulations of Section 1151.298, supra, some of which are set forth in pertinent part as follows:

> "A building and loan association may make loans to members and others upon obligations secured by real estate for the acquisition of undeveloped or partially developed land and

the development thereof for primarily residential use subject to the procedures of section 1151.292 /1151.29.27 of the Revised Code except division (D) thereof, and subject to the following limitations and procedures:

"(B) The amount loaned on any loan made under this section shall not exceed sixty-six and two-thirds per cent of the appraised value of the land prior to the commencement of the development contemplated by said loan and sixty-six and two-thirds per cent of the cost as certified by a licensed engineer of installing the development contemplates by said loan. * * *

"(F) No association shall, before commencement of the development of said land, disburse from the proceeds of any loan made pursuant to the provisions of this section an amount in excess of sixty-six and two-thirds per cent of the appraised value of said land or its cost, if a portion of the proceeds of the loan is used to purchase the land, whichever is the lesser, prior to the commencement of the development thereof.

"(G) In addition to the amount authorized to be disbursed by division (F) hereof, no association shall disburse, during the period of development of said land, an amount in excess of sixty-six and two-thirds per cent of the actual cost of the developments to the date of such disbursement.* * *"

It is apparent that this section was enacted to meet current business demands but at the same time the legislature strictly prescribed the minimum security risk that could be incurred by the landing association.

Your inquiry is derived from the regulations set forth in Section 1151.298 (F), supra. I note at this point that Opinion No. 2996, Opinions of the Attorney General for 1962, concluded that an association is authorized to make a loan under Section 1151.298, supra, on real estate already owned but undeveloped or partially developed for the purpose therein provided. With that conclusion I am in accord. A reading of Section 1151.298 (F), supra, however, quite reasonably raises the question of whether the purchase of the real estate is a condition precedent to the advancement of any loan proceeds prior to the commencement of the development.

In light of the procedural requirements of Section 1151.298, supra, it is my conclusion that prior to the commencement of the development of the real estate subsection (F), supra, authorizes the disbursement of loan proceeds to the borrower as therein limited where the real estate is already owned by the borrower at the time the loan is granted as well as where the real estate is to be acquired by the borrower and a portion of the loan proceeds are needed for such acquisition. This conclusion is based upon the following analysis of this section.

I note that the negative language of the subsection (F), supra, goes specifically to the amount of the disbursement and not to the purpose. It is also significant that the language commencing with "if a portion of the proceeds" appears at the end of the section and not the beginning. If the purchase of the real estate were meant to be a condition precedent to the disbursement of any loan proceeds under subsection (F), supra, such condition would more logically appear at the beginning of the section and be followed by a positive, rather than a negative, directive.

It is my analysis that the language in question modifies the word "cost." As a matter of sentence structure I support this conclusion by looking at the placement of the phrase "whichever is the lesser" and the repetition of the phrase "prior to the commencement of the development thereof." If the purchase were the qualifying act, then the phrase "whichever is the lesser" should logically follow the word "cost." Furthermore, if that were the intent it would have been superfluous to repeat the last phrase of the sentence. This implies to me that the legislature was contemplating two situations, i.e., 1) where the real estate was already owned, and 2) where the loan proceeds were to be used in the acquisition of the real estate. In either situation the association is only loaning an amount which is sufficiently secured by the value of the mortgaged real estate as of that time. A reading of subsection (G) of Section 1151.298, supra, also indicates to me that an amount could be disbursed to the borrower under any circumstances prior to the commencement of the development of the real estate.

It is clear that the legislature could have concluded subsection (F), supra, following "sixty-six and two-thirds per cent of the appraised value of said land" and still have provided sufficient security coverage. I can only conclude that the additional language was intended to provide greater security protection in the case where the cost of the purchased land is less than the appraised value. This conclusion is based upon the apparent recognition by the legislature that the actual cost provides better evidence of the true security value of the real estate. In the case where the real estate is already owned, it is, of course, the appraised value not the cost of the real estate to the borrower that controls.

Therefore, it is my opinion and you are hereby advised that:

Section 1151.298 (F), Revised Code, authorizes an association, prior to the commencement of the development, to disburse a portion of the loan proceeds not to exceed two-thirds of the appraised value of the real estate if such real estate is already owned by the borrower and two-thirds of the appraised value of the real estate or its cost, whichever is the lesser, if a portion of the loan proceeds is used to purchase such real estate.