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BUILDING AND LOAN ASSOCIATIONS—SUPERINTENDENT WITHOUT AUTHORITY TO REVOKE CERTIFICATION OF ARTICLES ONCE GIVEN — §1151.03 R.C. — APPROVAL OF BRANCH OFFICE, ONCE APPROVED CANNOT BE REVOKED — §1151.05 R.C.

SYLLABUS:

1. The Superintendent of building and loan associations does not have the power to revoke a certification to the Secretary of State of the articles of incorporation of a proposed building and loan association, previously certified pursuant to Section 1151.03, Revised Code.
2. The Superintendent of building and loan associations does not have the power to revoke approval of a branch office of a building and loan association, previously given pursuant to Section 1151.05, Revised Code.

Columbus, Ohio, March 18, 1959

Andrew C. Putka, Superintendent of Building and Loan Associations
Columbus, Ohio

Dear Sir:

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

“In order to properly administer the affairs of building and loan associations chartered by the State of Ohio, it is my desire to submit to you for your opinion the following questions:

“1. Where the Superintendent of Building and Loan Associations has certified the Articles of Incorporation of a proposed building and loan association to the Secretary of State for record-

ing of such Articles pursuant to Section 1151.03 of the Revised Code, has the Superintendent of Building and Loan Associations the power to revoke such certification if upon his examination into the affairs of the association, under authority of Section 1151.09, Revised Code, he finds either (1) that such certification was issued without full compliance with Section 1151.03, Revised Code, or (2) that upon reconsideration of the proposed association's application under Section 1151.03, Revised Code, he would, in his discretion, refuse to issue such certification for any of the reasons listed in such section?

"2. Where the Superintendent of Building and Loan Associations has simultaneously issued approval for more than one branch office to the same building and loan association pursuant to Section 1151.05 of the Revised Code, has the Superintendent of Building and Loan Associations the power to revoke such approval when he finds that the financial reserves of such building and loan association are insufficient to support more than one branch office?"

The questions you have raised relate to the power of the Superintendent of building and loan associations to revoke certifications and approvals issued by him pursuant to Sections 1151.03 and 1151.05, Revised Code. These questions necessitate a preliminary review of the establishment of the office of Superintendent of building and loan associations, and the authority which has been delegated to that office by the General Assembly.

The office of the Superintendent of building and loan associations was created by Section 121.04, Revised Code, the pertinent part of which reads:

"Offices are created within the several departments as follows:

"* * *

"In the department of commerce:

"Superintendent of building and loan associations. * * *"

While this statute delegates no authority to the Superintendent, Chapters 1151. through 1157., Revised Code, provide the powers of the Superintendent and the extent of his administrative authority. It will be noted that the General Assembly has not seen fit to provide the Superintendent with a broad grant of supervisory and regulatory powers couched in general terms such as have been granted to some administrative agencies. No one statute grants him the general power to police the industry to insure that particular associations conduct their activities in accord with the

general welfare of the public. The chapters cited above do, however, provide specific powers and duties for the Superintendent.

Among these powers and duties is the authority, pursuant to Section 1151.03, Revised Code, to approve and certify to the Secretary of State, articles of incorporation of a proposed building and loan association. Section 1151.09, Revised Code, authorizes the Superintendent to issue certificates of authority to commence business to newly incorporated associations which comply with the statutory requirements.

The statute involved in your first query is Section 1151.03, Revised Code, which is as follows :

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

“The superintendent may refuse so to certify to the secretary of state, if upon such examination he has reason to believe that the proposed corporation is to be formed for any business other than legitimate building and loan business, that the character and general fitness of the persons proposed as incorporators in such corporation are not such as to command the confidence of the community in which such corporation is proposed to be located, that the public convenience and advantage will not be promoted by its establishment, or that the name of the proposed corporation is likely to mislead the public as to its character or purpose; or if the proposed name is the same as one already appropriated by any existing building and loan association in this state or so similar thereto as to be likely to mislead the public, unless the place of business of such proposed corporation is to be located in a county other than the one in which such corporation bearing such name or similar name is then doing business.”

It may be seen that in this statute there is no express power to revoke this certification and such revocation is not expressly authorized in any other section of the Code. It follows, therefrom, that if the Superintendent has the power to revoke such a certification, it must be an implied power.

Two reasons may be suggested why the Superintendent does not have this implied power. The first involves Chapter 119., Revised Code, known

as the Administrative Procedure Act. It was held in Opinion No. 523, Opinions of the Attorney General for 1945, p. 675, that the action of the Superintendent in withholding a certification under Section 1151.03, Revised Code, was subject to the provisions of the Administrative Procedure Act. Section 119.06, Revised Code, states:

“No adjudication order of an agency shall be valid unless said agency is specifically authorized by law to make such order.”

Section 119.01(D), Revised Code, defines adjudication as follows:

(D) ‘Adjudication’ means the determination by the highest or ultimate authority of any agency of the rights, duties, privileges, benefits, or legal relationships of a specified person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature.”

As a revocation of a certification previously issued would certainly affect the “rights, duties, privileges, benefits or legal relationships” of the building and loan associations concerned, it would be an adjudication order. Both Sections 119.06 and 119.01(D), Revised Code, are part of the Administrative Procedure Act, and, as such, applicable according to the Opinion of the Attorney General cited above to a certification by the Superintendent under Section 1151.03, Revised Code. This would seem to prohibit any authority to revoke such a certification, if the authority is not expressly granted but only implied from the power to issue the certification.

The second reason why the Superintendent does not have the implied power to revoke a certification issued pursuant to Section 1151.03, Revised Code, concerns the extent to which the powers of a public official may be properly expanded by implication. It has been held in Ohio, that when a public official is delegated certain responsibilities and the method by which these responsibilities are to be put into effect has not been expressly delineated by statute or regulation, the public official has the implied power to carry out his responsibilities by any reasonable method. In the case of *State, ex rel., Copeland v. Medical Board*, 107 Ohio St., 20 at 28, it was held that under certain circumstances the courts will recognize implied powers in administrative agencies. The court in this case quoted from the opinion of Judge Donahue, in *State, ex rel., v. Hildebrant*, 93 Ohio St., 11, 12, as follows:

“* * * Therefore, if the constitution of the state commands a public officer to do a particular thing, without directing the man-

ner in which it shall be done, and the general assembly of the state has not, in the exercise of the authority conferred upon it, enacted any laws to facilitate the operation of the provisions of the constitution, it necessarily follows that the officer who is required to perform this duty has implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method of doing the thing commanded; otherwise, full directions would have been given the officer or the duty would not have been imposed upon him. * * *

The situation you outlined in your letter does not, however, fall within this principle. The General Assembly has specifically expressed the ways in which the unlawful or unsound operation of a building and loan association may be terminated. Chapter 1157., Revised Code, provides for the possession of building and loan associations by the Superintendent. Section 1157.01, Revised Code, gives the Superintendent authority to take possession of a building and loan association in the following manner :

“If upon examination the superintendent of building and loan associations finds that the affairs of a domestic building and loan association are in an unsound or unsafe condition, that it is conducting its business in whole or in substantial part contrary to law, that it is failing to comply with the law, or that its affairs are not being conducted for the best interests of its depositors, shareholders, or creditors, he may, with the written approval of the director of commerce, forthwith take possession of the business and property of such building and loan association.”

Section 1157.23, Revised Code, gives the Superintendent the alternative to order a building and loan association to liquidate its business and property for the same reasons as would authorize the Superintendent to take possession of it. The pertinent part of that Section reads as follows :

“In lieu of taking possession of the business and property of a domestic building and loan association, the superintendent of building and loan associations may, for any of the causes specified in section 1157.01 of the Revised Code, and with the written approval of the director of commerce, order such association 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 it and shall terminate the power of such association to accept money on deposit, to issue new stock, and to pay withdrawals of shareholders or depositors. The board of directors of such association shall exercise all other powers vested by sections 1701.01 to 1701.98, inclusive, of the Revised Code, in the directors of a corporation electing to dissolve, but 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 General Assembly has thus provided two specific ways in which the Superintendent may cancel the authorization of a building and loan association to do business and to terminate its activities. These two statutory methods negate the existence of any implied power to revoke a certification under Section 1151.03, Revised Code, inasmuch as the method of cancellation or revocation has not been left to the discretion of the Superintendent.

This should serve to answer part two of your first question, and it may also clarify part one of that question. It should be noted, however, that under part one of your first question, you state that the certification issued pursuant to Section 1151.03, Revised Code, was issued without full compliance with that statute. A close examination of the Section concerned shows that there is a mandatory duty delegated to the Superintendent to examine into the circumstances of the proposed corporation. The Superintendent cannot waive that mandatory requirement. If it were found in any particular case that there was, in fact, no such examination, or that an important part of the statutory examination was omitted, the purported certification by the Superintendent to the Secretary of State would not be the type of certification envisaged by the statute and would be a nullity. Under these circumstances, of course, there would be no certification to revoke, even if the Superintendent were held to have such implied power.

In answer to your second question concerning the power in the Superintendent to revoke approval given to a branch office of a building and loan association, most of the same principles are applicable. Opinion No. 523, *supra*, held that the Administrative Procedure Act was not applicable to the approval of branch offices by the Superintendent. It follows, therefore, that Section 119.06, Revised Code, also does not apply to Section 1151.05, Revised Code. The statute authorizing the Superintendent's approval provides no standards or other criteria which the Superintendent might use to revoke such approval. It may be seen therefrom that the General Assembly did not intend to authorize the Superintendent to revoke such approval. As there is no general grant of regulatory power to the Superintendent there is nothing from which the implied power to revoke approval of a branch office could be derived.

Where the building and loan association has become financially endangered from excessive expansion of branch offices, the Superintendent

is not without a remedy. Under the proper circumstances he may utilize Section 1157.01 or Section 1157.23, Revised Code, to protect the interests of the shareholders, depositors and the general public.

It is my opinion, therefore, and you are accordingly advised, that :

1. The Superintendent of building and loan associations does not have the power to revoke a certification to the Secretary of State of the articles of incorporation of a proposed building and loan association, previously certified pursuant to Section 1151.03, Revised Code.

2. The Superintendent of building and loan associations does not have the power to revoke approval of a branch office of a building and loan association, previously given pursuant to Section 1151.05, Revised Code.

Respectfully,

MARK McELROY

Attorney General