

OPINION NO. 67-050**Syllabus:**

1. The laws of the state permit an Ohio chartered building and loan association to issue preferred stock, providing that all of the provisions of the General Corporation Law with respect to changing the basic structure of the corporation are complied with.

2. The Superintendent of Building and Loan Associations has the authority to determine, upon submission of a specific proposal for the issuance of preferred stock, whether the terms of such preferred stock are such as to be in the best interests of all parties concerned and of the sound financial corporate structure of the association.

To: J. Gordon Peltier, Director, Dept. of Commerce, Columbus, Ohio
By: William B. Saxbe, Attorney General, May 26, 1967

Your request for my opinion poses the following questions:

"1. Does the Ohio law permit a building and loan association organized under the law of this state to issue preferred stock?

"2. If the answer to the first question is affirmative, may the issuing association redeem, purchase or acquire the preferred stock prior to dissolution or liquidation of the association?"

Section 1151.02, Revised Code, provides for the incorporation of building and loan associations as follows:

"A building and loan association may be organized and conducted under the general laws of this state relating to corporations, except as otherwise provided in sections 1151.02 to 1151.55, inclusive, of the Revised Code.* * *"

Section 1151.20, Revised Code, provides for the issuance of stock by a building and loan association and reads in pertinent part:

"A building and loan association may issue stock to members, upon certificates or upon written subscription, on such terms consistent with sections 1151.02 to 1151.55, inclusive, of the Revised Code, as its constitution and bylaws provide, but no initiation or membership fee shall be charged, and if the stock is sold at a premium, all such premiums shall be placed in the reserve fund of the association. All amounts, except fines and premiums, paid in by a member as such on any one account, together with all credits on such account, shall be considered payments on a stock subscription, and the aggregate of such payments and credits, less any charges to such account, shall constitute a stock credit of such member for the purposes of such sections. Each member may vote his stock to the extent and in the manner provided by the constitution of the association, but no member shall accumulate his votes. This section does not prohibit the issuance of permanent stock."

It is well established by the case law that a building and loan association may issue either installment or prepaid shares of stock and Section 1151.20, supra, specifically provides for the issuance of permanent stock.

One of the most often quoted statements relating to the fundamentals of a building and loan association is found in the early Ohio case of Eversmann v. Schmitt, 53 Ohio St. 174, at page 184, where it is stated:

"Mutuality is the essential principle of a building association."

Inasmuch as Chapter 1151, Revised Code, is silent as to the issuance of preferred stocks by a building and loan association, it must be considered whether the issuance of such preferred stock would destroy the mutuality essential to such an association.

Although there are no decisions of the Ohio courts wherein the possible issuance of preferred stock has been discussed, there is, in fact, a 1914 decision of the Federal District Court, Southern District of Ohio, in which the matter was discussed. In Central Building, Loan & Savings Co. v. Bowland, 216 Fed. 526, we find the following discussion by the Court on the question of issuing different classes of stock:

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"No claim is made by the government that under the Ohio laws different classes of capital stock may be issued, and for that reason there is a lack of mutuality between members, so that question may not be directly involved; but, since its discussion bears pertinently on the question to be decided here, some reference to it may be of value. It may be said that, even if the laws of Ohio empowered the directors to provide for different classes of stock, there are a number of cases to the point that the mutuality essential to such associations is not affected. *Latimer v. Investment Co.* (C.C.) 81 Fed. 776; *Manship v. Building & Loan Ass'n* (C.C.) 110 Fed. 845, 853; *Wilson v. Parvin*, 119 Fed. 652, 56 C.C.A. 268; *People v. Preston*, 140 N.Y. 549, 35 N.E. 979, 24 L.R.A. 57. The reason is that, even when the state laws do not give the power expressly, or the power is not necessarily to be inferred from them, to issue such stock, yet if there is nothing in the law to prohibit, and the issuing of such shares is for the purpose of obtaining the money which shall be used to promote the purposes of such association, such division into different classes of shares does not disturb the essential qualities of a 'building association,' such as the term is understood generally by the public and by legislators when enacting general laws on the subject, and a fortiori, when the power is expressly given.

"While the description of associations of this kind, as set forth in some of the cases, may be accepted as correct, yet if what is done is only in furtherance of their purposes, and is not a departure from the essential principle underlying them, there would seem to be no objection to any conduct, otherwise legal, of the affairs of such associations having the same purposes in view.* * *

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"If what is done is within the power of corporations generally, and is not prohibited by law, and is in furtherance of the primary objects of building associations as understood generally and as above described, then it is not ultra vires and does not destroy the character of the building association as such."

In the text "The Law of Building Associations" by G. A. Endlich (1895), after a discussion of several early cases concerning the issuance of various classes of stock, it is stated at Sections 464 and 465, at pages 440, 441:

"The result of the principles declared and applied in these decisions would seem to be, in the absence of any statutory provision expressly authorizing or prohibiting it, (1) that building associations may always permit prepayments of

stock subscriptions to be received, with or without rebate or interest allowance in consideration of such prepayment: (2) that, in pursuance of charter provisions, such associations may issue paid-up stock with the incident of priority in distribution over installment stock: (3) that, under a like power and the right to pay dividends, they may issue paid-up stock bearing income at any given reasonable rate per annum payable in cash out of and to the extent of the earnings of the association, - an arrangement on the part of the corporation to pay interest or dividends to its shareholders, without reference to the ability of the company to pay them out of its earnings being wholly illegal and void.

"It is but a corollary of what has been said that a building association may, by charter provision, be authorized to issue different classes of stock to be paid for in periodical installments of different amounts, unless, indeed, the statute prescribes one uniform rate. Thus, such restrictions out of the way, one class of stock may be issued, the weekly or monthly dues upon which shall be a certain sum; another class in which the dues shall be double that sum, etc. The test of the legality of any such arrangement must always be that all the stock of every class shall share equally, according to the sums paid in, in the common fund and profits."

See also "Building and Loan Associations" by William H. Thornton and Frank H. Blackledge (1898), Sections 149, 150, at pages 144 - 150.

It would therefore seem that, inasmuch as Section 1151.20, supra, provides general authority for the issuance of stock by a building and loan association and Section 1151.02, supra, provides that a building and loan association may be organized and conducted under the general corporation laws which permit the issuance of more than one class of stock, I must conclude that the Ohio law would permit the issuance of preferred stock by a building and loan association organized under the laws of this state.

Your second question asks whether such preferred stock, if issued, may be withdrawable by the issuing corporation prior to the dissolution or liquidation of such association. The term "preferred stock" is used with reference to stocks having many various rights, privileges and liabilities. It is therefore difficult to consider the question as posed for the reason that, until a definite proposal is made as to the specific features of such preferred stock, it is nearly impossible to evaluate the possible conditions of the issue and the resultant stability of the corporate structure of the building and loan association.

Chapter 1151, et seq., Revised Code, charges the Superintendent of the Division of Building and Loan Associations within the Department of Commerce with the responsibility of the continued supervision of Ohio chartered building and loan associations from the time of their inception through their liquidation or dissolution. Section 1151.02, supra, provides that he shall approve the original

articles of such a corporation prior to their filing with the Secretary of State. Section 1151.47, Revised Code, provides further that he shall approve any amendments to the constitution or bylaws prior to the filing of such amendments with the Secretary of State. It, therefore, seems to me that the Superintendent of the Division of Building and Loan Associations has the authority and duty to make an appraisal of any amendment to the constitution and bylaws of a building and loan association, including a proposal that certain preferred stock be issued, and determine whether the resultant change in the corporate structure would sufficiently protect general creditors and shareholders and has the necessary approval of all classes of current shareholders.

The General Corporation Law allows the issuance of shares which are redeemable at the option of the issuing corporation. However, inasmuch as the Division of Building and Loan Associations is charged with the supervision and regulation of such association, it would appear to be reasonable for the Division to require that the terms of the preferred shares provide that the corporation may not redeem, purchase or acquire such shares until all the other liabilities of the association other than to holders of common shares have been fully liquidated. This would be a question of fact subject to the judgment by the Superintendent of Building and Loan Associations when the original articles or amended constitution and bylaws are submitted to him for his approval.

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

1. The laws of the state permit an Ohio chartered building and loan association to issue preferred stock, providing that all of the provisions of the General Corporation Law with respect to changing the basic structure of the corporation are complied with.

2. The Superintendent of Building and Loan Associations has the authority to determine, upon submission of a specific proposal for the issuance of preferred stock, whether the terms of such preferred stock are such as to be in the best interests of all parties concerned and of the sound financial corporate structure of the association.