Opinion No. 75-77

December 30, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Mr. Snider Campbell Savings and Loan Supervisor Department of Banking Lew Wallace Building Santa Fe, New Mexico 87503

QUESTIONS

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1. May a permanent capital stock savings and loan association, organized prior to effective date of the present Savings and Loan Act and authorized to issue preferred stock by its articles of incorporation, now issue and sell such stock?

2. May any savings and loan association, regardless of the nature and the date of its organization, issue and sell preferred stock?

CONCLUSIONS

1. Yes.

2. Yes.

OPINION

*{*207}* **ANALYSIS**

A review of the distinctive nature of mutual and capital stock savings and loan associations as well as the history of the regulation concerning such associations should be useful in analyzing the questions presented. With respect to a mutual association, its business capital is virtually loaned to it by its customers or members. This capital infusion is evidenced not by shares of stock but rather by passbooks or certificates which constitute a contractual right to withdraw that capital in the form of the fixed value of the members' loans or savings accounts. In the capital stock association, shareholders have contributed permanent capital in exchange for a pro rata interest, evidenced by stock certificates, in the corporation.

Legislation regulating savings and loan associations first appeared in New Mexico in 1931. This legislation permitted the formation of "mutual" associations, but prohibited the issuance of **preferred** stock certificates or shares to members. Laws 1931, Ch. 147, § 11; Laws 1933, Ch. 78, § 53 (Mutual Act). Thus, while these associations shared many of the rights and powers available to other corporate entities, their power was restricted as regards the issuance of preferred stock among the several kinds and

classes of shares authorized, and the rationale therefor can be found in the following statement:

"Much has been said about the issuance of preferred shares being 'violative of the principle of equality and mutuality,' which . . . is the distinctive thing characterizing such associations. That preferred shares do disturb the 'equality' of interests which ordinarily prevails between shareholders may be conceded. That business corporations may generally, in the absence of charter or other legal inhibition in the law of the state of their origin, prefer one class of shares over another in respect to profits and principal, is now well settled . . . . If, then, the issuance of preferred shares with the consent of the members of a[n] . . . association is an act ultra vires, it must be because it is an act offensive to object, plan, and general scheme of such corporations, and therefore not within the implied powers of this kind of association." **Wilson v. Parvin,** 119 F. 656, 657-658 (6th Cir. 1903).

See also, **Intermountain Building and Loan Ass'n v. Gallegos,** 78 F.2d 972 (9th Cir. 1935), **cert. den.,** 296 U.S. 639, 56 S. Ct. 172 80 L. Ed. 454 (1935); **Central Building, Loan and Savings Co. v. Bowland,** 216 F. 526 (S.D. Ohio W.D. 1914); **Fisher v. Intermountain Building & Loan Ass'n,** 55 Idaho 326, 42 P.2d 50 (1935); **Griffin v. White,** 182 S.C. 219, 189 S.E. 127 (1936); **Sumrall v. Commercial Bldg. Trust's Assignee,** 50 S.W. 69 (Ky. App. 1899).

In 1959, New Mexico permitted for the first time the formation and operation of permanent capital stock associations. Laws 1959, Ch. 279. The Capital Stock Building and Loan Association Act (Capital Stock Act) authorized the issuance of "other classes and kinds of stock and certificates" in addition to the class known as "permanent capital stock." Laws 1959, Ch. 279, § 3. These "other classes and kinds" included investment shares, savings shares and savings certificates, Laws 1959, Ch. 279, § 6, as amended, which were not to be considered as representing contributions of capital but rather as representing depositors' withdrawable savings. *{*208}* See also Section 48-15-132, NMSA, 1953 Comp. (1973 P.S.). As such, the depositors were creditors of the association and were entitled to share pro rata with other general creditors in the event of a distribution of the assets. See **Barrymore v. Kemp,** 69 F.2d 335 (9th Cir. 1934), **cert denied,** 293 U.S. 566, 630, 55 S. Ct. 77, 79 L. Ed. 665 (1934).

There was no specific authority or prohibition in the "Capital Stock Act" relating to the issuance of preferred stock. These associations were, however, made subject to the "Mutual Act" where inconsistencies did not exist. Laws 1959, Ch. 279, § 12. Since the "Mutual Act" permitted the issuance of several kinds and classes of stock certificates or shares but without preference, and since the "Capital Stock Act" granted similar permission but was silent as to granting preferences among shareholders, it would not be inconsistent to apply the prohibition in the former Act to the latter. It thus appears that under prior law, capital stock associations could not issue any class or kind of preferred stock to investors, regardless of whether this was authorized by their articles or bylaws.

The "Mutual Act" and the "Capital Stock Act" were repealed by Laws 1967, Ch. 61, which also enacted the present Savings and Loan Act, Sections 48 - 15 - 45 through 48-15-151, NMSA, 1953 Comp. (1973 P.S.), effective July 1, 1967. Associations which were organized and authorized prior to that date have been made subject to, and are deemed to exist by virtue of, this latest Act.

The name, rights, powers, privileges and immunities of each such association . . . shall be governed, controlled, construed, extended, limited and determined by the provisions of the Savings and Loan Act as if the corporation had been incorporated pursuant thereto . . . . Section 48-15-131, **supra.**

Absent any specific legislative prohibition against creating preferences among the classes of stock which a savings and loan association may issue, it is generally recognized that it may be done, especially where the associations have been given the power to borrow. **Fisher v. Intermountain Bldg. & Loan Ass'n, supra; Central Bldg. Loan & Savings Co. v. Bowland, supra; Redman v. International Bldg. & Loan Ass'n,** 55 Idaho 432, 43 P.2d 510 (1935). Furthermore, every "association incorporated pursuant to, or operating under, the provisions of the Savings and Loan Act **has all powers authorized by the corporation** laws of this state . . . ." Section 48-15-77, **supra.** (Emphasis supplied.) These general corporate powers include the power to create and issue shares having preferences when and in the manner so provided by the articles of incorporation. Sections 51-24-14 and 51-24-15, NMSA, 1953 Comp. (1973 P.S.).

In examining the Savings and Loan Act, we note that the only specific reference to the issuance of stock is in Section 48-15-48A, **supra,** which provides, in part, that:

"The charter of an association may provide for the issuance of permanent capital stock. Except as provided in the . . . Act, no other form or type of stock or shares shall be issued by an association."

The term "permanent capital stock" is nowhere defined in the Savings and Loan Act or in our corporation laws. With regard to "preferred stock," the United *{*209}* States Supreme Court has said that although it has privileges different from those of common stock, it is nevertheless a part of a corporation's capital stock and has the characteristics of such stock. **Warren v. King,** 108 U.S. 389, 396, 2 S. Ct. 789, 27 L. Ed. 769 (1883).

If the term "permanent capital stock" includes preferred stock, it remains to be determined what the phrase "no other form or type of stock" in Section 48-15-48A, **supra,** means. In our review of the history of savings and loan associations, we saw that associations were permitted to issue investment shares, savings shares and savings certificates in addition to permanent capital stock. These three types of "stocks" had a determinable withdrawal value, and entitled their holders to voting rights if provided for in the articles of incorporation and bylaws. Laws 1959, Ch. 279, § 6, as amended. Under the Savings and Loan Act, these three classes are now to be

considered as savings accounts, while permanent capital stock and shares or share accounts not entitled to dividends are not to be so considered. Section 48 - 15 - 132, **supra.** It thus appears that the Savings and Loan Act intends to include only those former investment and savings shares in "other forms or types of stock."

From the above, we conclude that the phrase "permanent capital stock" is meant to include only permanent stock or similar certificates which represent investments of non-withdrawable or "permanent" capital in an association. See 12 C.F.R. § 563b.2(a) (7). Since we have observed that "preferred stock" is a form or class of "capital stock," we also conclude that a preferred class may be authorized and issued by any form of savings and loan association, whether organized prior to or since the effective date of the Savings and Loan Act, so long as it is authorized by the articles of incorporation.

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