VOLUME NO. 34 Opinion No. 53

BUILDING AND LOAN ASSOCIATIONS - Merger of; BUILDING AND LOAN ASSOCIATIONS - Branch offices, creation of. Sections 7-113 and 7-131, R.C.M. 1947.

HELD: 1. A proposed merger between building and loan associations may not be acted upon by the state superintendent of

banks until the proposed merger agreement has been ratified by two-thirds vote of the shareholders pursuant to the provisions of section 7-113, R.C.M. 1947.

2. **Montana statutes do not permit the establishment or operation of branch offices in this state by foreign building and loan associations.**

October 3, 1972

Mr. John A. Dowdall, Director
Department of Business Regulation
805 North Main Street
Helena, Montana 59601

Dear Mr. Dowdall:

You have requested my opinion as to whether Montana law prohibits a merger between a building and loan association chartered and operating in a neighboring state with one or more associations chartered and operating under Montana law. You have also asked whether, subsequent to such proposed merger, the foreign building and loan association may operate a branch or branches at the locations of the former Montana association or associations.

The factual information you have provided me in conjunction with your request indicates that a building and loan association organized and existing under the laws of North Dakota contemplates a merger with two separate building and loan associations organized and existing under the laws of Montana, one of which is located in Great Falls and the other in Glendive. Subsequent to the approval of the proposed merger the foreign association, which will be the surviving association, proposes to conduct savings and loan activities in Montana, maintaining offices in Great Falls and Glendive, Montana.

In reference to your first question, the statutes governing the operations of building or savings and loan associations in this state are currently codified in Title 7, chapter 1, Revised Codes of Montana, 1947. Section 7-131, R.C.M. 1947, specifies the requirements incumbent upon foreign associations seeking to do business in Montana. This statute provides:

> "Any association as defined in the foregoing section organized under the laws of any state, other than Montana, or of the United States, or of any foreign government, shall before doing business within this state, file in the office of the secretary of state and in the office of the superintendent of banks, a duly authenticated copy of their charter, articles of incorportion, or

articles of agreement, and also a statement, verified by oath of the president and secretary of such corporation or managing officials if other than a corporation and duly verified, showing:

"1. The name of such association and the location of its principal office or place of business without this state; and the location of the place of business or principal office within this state;

"2. The names and residences of the officers, trustees or directors;

"3. The amount of capital stock;

"4. The amount of capital invested in the state of Montana.

"Such association shall also file, at the same time, and in the same offices, a certificate, under seal and the signature of its president, vice-president, or other acting head, and its secretary, if there be one, certifying that the said association has consented to all the license laws and other laws of the state of Montana relative to foreign associations and has consented to be sued in the courts of this state, upon all causes of action arising against it in this state, and that service of process may be made upon some person, a citizen of this state, whose name and place of residence shall be designated in such certificate, and such service, when so made upon such agent, shall be valid service on the association."

It should be noted with respect to the above-quoted statute that a certificate issued by the secretary of state of the state of Montana, dated June 8, 1972, and documents filed with the secretary of state, indicate that the foreign association in question has complied with the provisions of section 7-131, supra, as far as the secretary of state's office is concerned.

The relevant statutory provision relating to the merger of building and loan associations is section 7-113 (22), R.C.M. 1947. This section provides:

"(22) Any two (2) or more building and loan associations, by and with the consent and approval of the superintendent of banks, may consolidate and unite and become incorporated in one (1) body, with or without any dissolution or division of the funds or property of any such association, or any such association may transfer its engagements, funds and property to any like association upon such terms as may be agreed upon by a majority vote of the respective board of directors, and ratified by a two-thirds (⅔) vote of the shares present and voting in person

or by proxy at a special meeting or meetings of the stockholders of the respective associations convened for that purpose, upon notice given as provided by law, said notice to state the object of the meeting. No such transfer shall prejudice any right of any creditor of such association."

The information you have submitted with regard to the proposed merger indicates that the foreign association in question is now seeking the approval of the superintendent of banks for the prospective merger but that it has not yet secured ratification of the terms of the merger agreement by two-thirds vote of the shares as required by the terms of section 7-113 (22), supra. Apparently, the foreign association contemplates submitting the agreements of merger to association stockholders **subsequent** to receipt of consent and approval of the consolidation and merger from the state superintendent of banks.

No consolidation or merger of savings and loan associations may be accomplished in this state except in strict accord with the provisions of Montana law. Section 7-113, supra, sets forth the powers and duties of savings and loan associations. It appears from a clear reading of this statute that a decision relative to the merger by the superintendent of banks, before the agreement is acted upon by the stockholders, would be contrary to the intent of the requirements specified in section 7-113 (22), supra. The superintendent of banks should not consider the propriety of any application for merger without first knowing whether or not the requisite two-thirds majority of the shareholders of the respective associations involved favored the merger. Conversely, the shareholders of any association or associations contemplating merger should be able to vote on the merger independent of any influence which may be worked upon them as a consequence of a premature decision by the superintendent of banks. An initial decision by the superintendent of banks would have the effect of deciding what the shareholders should do relative to the proposed agreement. The decision, as required by section 7-113 (22), supra, should be solely that of the shareholders in the first instance with consent and approval or denial by the superintendent of banks coming only after the shareholders have approved the agreement or merger. Since this procedure has not been followed, it does not appear that the foreign association has complied with Montana law relating to consolidation and thus, there is no application pending before the superintendent of banks upon which he can act.

In regard to your second question, it might appear, in light of the foregoing discussion, that the issue of whether the foreign association may or may not maintain branch offices is academic at this point, since the offices sought to be operated will only operate subsequent to approval of the proposed merger. However, the question should be answered since a decision may clarify the operational status of those Montana associations involved in the proposed merger.

My research does not disclose the existence of any Montana Supreme Court cases relative to whether building and loan associations may establish branch offices. Neither are there any statutory provisions specifically related to this question. However, in 29 **Opinions of the Attorney General,** no. 2, then attorney general Anderson held in part that a domestic building and loan association was not authorized by Montana law to establish a branch office. This opinion has never been overruled by a court of competent jurisdiction. Also, five legislative assemblies have met in regular session since the opinion was issued, and there have been a number of extraordinary sessions to some of these assemblies; yet, during this time, nothing has been enacted by the state legislature which in any way detracts from or overrules the opinion issued by then attorney general Anderson referred to above. Under these circumstances, it appears that the legislative assembly has acquiesced in the holding of 29 **Opinions of the Attorney General,** no. 2.

There have been supreme court cases from other jurisidictions recognizing an implied statutory authority for branch office operations by savings and loan associations. See, for example: **Austin Savings and Loan Association v. First National Bank of Stewartville,** 133 N. W.2d 505 (Minn., 1965); **Gerst v. Jefferson County Savings and Loan Association,** 390 S.W.2d 318 (Texas, 1965). A close reading of the particuar statutory language upon which such authority is found reveals that the statutes of both Minnesota and Texas are much more definite and permissive relative to branch office operations than are those of Montana. This fact is clearly demonstrated on page 509 of the **Austin** decision, supra, wherein the court states:

> "We are of the opinion that the statutes above set forth disclose ample legislative authority for the establishment of branch offices by local savings, building, and loan associations organized under c. 51. Thus, § 51.01, subd. 3, provides that '(a) "local associations" is one that confines its field of operation to the county in which is located its *principal place of business* and to *counties immediately contiguous thereto.*' (Italics supplied.) Likewise, § 51.36, as amended by L.1963, c. 606, § 12, limits the field of operations of a 'local association' organized under c. 51 to the county of 'its *principal place of business and those immediately contiguous thereto and any additional area within a 100-mile radius from the home office* ***.' (Italics supplied.)

In **Austin,** supra, the commissioner of banks in Minnesota approved the application of a savings and loan association seeking to establish a branch office **36 miles** from the main office.

The statutes upon which the court found implied authority for branch operations in **Gerst,** supra, provided:

"**No association shall, without the prior approval of the Commissioners (i) establish any office other than the principal office stated in its articles of incorporation,** (ii) move any office of the association from its immediate vicinity or (iii) change its name. When his approval is applied for, the Commissioner shall give any person who might be affected an opportunity to be heard on the action proposed to be taken for which approval is sought." Vernon's Texas Statutes, 1964 Supplement, Art. 852a, Sec. 2.13. (Emphasis supplied)

"In any instance where there is a conflict between an **application for the approval of a charter for a new association and an application for the establishment of an additional office by an existing association** both seeking to locate in the same community and the principal office of the existing association is located in a different county than such community, the Commissioner may give additional weight to the application having the greater degree of control vested in or held by residents of the particular community." Vernon's Texas Statutes, 1964 Supplement, Art. 852a, Sec. 2.14. (Emphasis supplied)

Thus, the applicable statutes in both Minnesota and Texas do appear to contain sufficient authority for the establishment of branch offices in both states by domestic savings and loan associations, conditioned only upon the approval of the commissioner. In Montana, however, there does not exist statutory language of sufficient breadth to imply the authority of a branch office operation by a savings and loan association.

Another important factor must be considered at this juncture. The instant application involves the consideration of whether a **foreign** association may operate branch offices in Montana. All of the preceding discussion relative to branch offices has been related to facts involving domestic savings and loan associations. The information you supplied in conjunction with your request indicates that the foreign association in question maintains that there would be no question of its right to establish branch offices in Montana if it were a federally chartered corporation. This assumption does not appear to be correct in light of 12 C.F.R., § 556.5 (b), wherein it states:

"*Policy on approval of branch office and mobil facilities.*

* * *

"(2) It is the Board's policy not to approve the establishment of a branch office or a mobile facility by (a federal savings and loan) association in a State other than that where the home office of the association is located."

In the instant case, the home office of the foreign association is located in North Dakota.

THEREFORE, IT IS MY OPINION, in view of the foregoing discussion, that:

1. The proposed merger may not be acted upon by the superintendent of banks since the applicant savings or building and loan association has not complied with the relevant provisions of Montana law relating to mergers and consolidation, in that the proposed merger agreement has not been ratified by two-thirds vote of the shareholders; and
2. The statutes of Montana do not allow the establishment or operation of branch offices in this state by a foreign savings or building and loan association.

Very truly yours,

ROBERT L. WOODAHL
Attorney General