

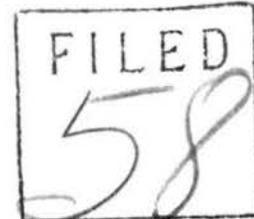
BUILDING AND LOAN:

Board of directors may set up  
"participating reserve fund" if permitted  
by by-laws. Shares must be distributed  
pro rata.

September 21, 1938

9/23

Honorable J. W. McCammon  
Supervisor, Bureau of  
Building and Loan Supervision  
Jefferson City, Missouri



Dear Mr. McCammon:

This department is in receipt of your request  
for an official opinion which reads as follows:

"I will greatly appreciate, at your  
earliest convenience, formal advice  
concerning procedure in connection  
with a building and loan rehabilitation  
proposition which now confronts me in  
Kansas City. It is my policy whenever  
possible to avoid receiverships and the  
subject association, the Anchor Savings  
and Loan Association, whose place of  
business is 921 Walnut Street, Kansas  
City, is in need of some type of re-  
organization. We would like to segregate  
the assets and obtain federal insurance.  
The particular point upon which we seek  
your advice is the method by which such  
segregation should be brought about.

"I am attaching hereto a copy of amend-  
ment to their by-laws known as Article  
IX, Section 1. Does this amendment meet  
the requirements of Section 5593, Laws  
of Missouri, 1935, Page 201, and does  
the Board of directors, with permission  
of the supervisor, have the authority  
to segregate this association and estab-  
lish a 'participating reserve' fund?"

Section 5593, Laws of Missouri, 1935, page 201 provides in part as follows:

" \* \* \* \* \*

And any building and loan association shall have the power to provide in its by-laws for the creation and establishment from time to time of a 'participating reserve fund,' in which may be placed any or all real estate owned by the association and any loans and/or other assets of doubtful value, the same to be selected by the board of directors, the book value of the assets in said reserve fund to be apportioned pro rata in reduction of the book value of the stock of the association then outstanding, subject to the approval of the supervisor of building and loan associations. Such reserve fund shall be and remain a separate (separate) fund from the other assets of the association to be liquidated and shall be represented by a class of stock to be known as 'participating reserve shares' of the association to be issued to those stockholders of the association pro rata, the book value of whose stock has been reduced by the creation of such reserve fund. In the liquidation of said reserve fund all the proceeds from the sale of said real estate or collection or liquidation of said loans or other assets shall be paid to the holders of said participating reserve shares, at such times as the board of directors shall determine. All losses, if any, that may occur in said reserve fund shall be absorbed by the holders of said participating reserve shares. The association, if so provided by by-law, may transfer and/or convey title to the assets in said reserve fund, or any part thereof, to three trustees selected by the board of directors, who may be officers of the association, under a trust

agreement defining the powers and duties of the trustees, who may issue 'participating reserve certificates,' instead of 'participating reserve shares,' to said stockholders entitled thereto, as provided above, giving all the rights and subject to all the liabilities herein provided as to 'participating reserve shares.' And upon the surrender to the association of the outstanding stock in the hands of a member of such association there shall be issued to such member new stock certificates of the association evidencing the reduced value of the stock surrendered, and in addition to such new stock certificates the reserve shares or reserve certificates to which such member is entitled, as above provided. Such reserve shares or reserve certificates issued to a borrowing member who had his stock up as collateral for a loan shall be pledged as additional collateral for such loan, and the borrowing member shall continue to make installment payments on his loan, as provided in the note or bond and deed of trust securing said loan, and upon payment of the loan in full the directors may apply as a credit on the loan the then value of the reserve shares as determined by the board of directors, after taking into consideration any estimated losses sustained in such reserve fund. In making reports and statements to the supervisory department of the state, the value of such a reserve fund undistributed shall be included as a part of the assets of the association and be classified as 'participating reserve fund.' Provided, however, that any building and loan association may in the discretion of the board of directors create more than one such participating reserve fund under the provisions of this act. And any building and loan association may in the sale of its real estate take stock in the association

in payment of the purchase price or any part thereof, at such price and upon such terms and conditions as the board of directors by resolution may approve."

The amendment which is attached to your request and which is to be construed, provides that the board of directors of the Anchor Savings and Loan Association may create and establish from time to time a "participating reserve fund" and then follows the wording of the statute except that the amendment does not provide that the shares shall be issued to the stockholders pro rata, as is required by the statute.

In an opinion rendered to you on June 3, 1937, this department held that Section 5593, supra, provided for a segregation of assets of an association without the necessity of a temporary receivership or court proceeding. The opinion did not take up the question of who had the power to create and establish the "participating reserve fund."

The primary difference between ordinary corporations and building and loan associations in regard to their management is that control vested in the officers of ordinary corporations is placed under the building and loan scheme in the board of directors. Sundheim on Building and Loan Associations, page 96, paragraph 98.

"The management of a building and loan association is generally intrusted, and rightfully so, to a board of directors, \* \* \*" 9 Corpus Juris, 928.

As was said in Home Building and Loan Association v. Barrett, 160 Mo. App. 164, 141 S. W. 723:

"The officers and directors of a building and loan association are possessed of such powers as are granted by statute, charter and by-laws and such as are not inconsistent therewith, which are necessary to the discharge of their several offices, \* \* \* "

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Therefore, when the statute says building and loan associations shall have the power to provide for the creation of a "participating reserve fund," the right to set up such fund is placed in the board of directors, and the amendment in question, since it provides for such control, is legal and proper.

However, as pointed out above, the statute provides that the shares must be issued to the stockholders pro rata which provision is <sup>not</sup> included in the by-laws. It is a well founded principle of building and loan law that the by-laws must conform to the statutes. 9 Corpus Juris 925; Collins v. Cobe, 66 N. E. 1079. Therefore, before approving any plan for segregation of the assets of the Anchor Savings and Loan Association we would advise that this provision be made a part thereof. In all other respects, Article IX, section 1 of the By-Laws of the Anchor Savings and Loan Association meets the requirements of Section 5593, Laws of Missouri, 1935, page 201.

## CONCLUSION

It is, therefore, the opinion of this department that the board of directors may provide for the "participating reserve fund" under authority of Section 5593, Laws of Missouri, 1935, page 201, if there is a by-law of the association allowing such action. However, the shares representing such fund must be issued to the stockholders pro rata.

Respectfully submitted,

ARTHUR O'KEEFE  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
(Acting) Attorney General

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