BUILDING AND LOAN: Association may not purchase Class "B" shares. Officer of association may purchase shares through broker providing broker does not mislead seller.

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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:

> "We are in receipt of a letter from Ray W. Hunt, secretary of the Sedalia Savings and Loan Association, in which he raises several legal questions. Mr. Hunt's letter reads in part as follows:
>
> 'I am writing for some information regarding the sale, purchase and transfer of Class B. certificates in building and loan associations.
>
> 'I would like to know whether or not we would be violating any State law or ruling of the building and loan department should we make direct purchase of Class B. certificates from the customers of this association who wish to dispose of their Class B certificates? Do we have the right to make direct purchase?
>
> 'In the event our shareholders sell their certificates to broker and that broker offers to sell the certificates to an officer or director of this association for his own individual use, would that be in violation of the law

> or rules and regulations of the Department? Of course, it is understood in this last question that the money for the purchase of this stock is the individual money of the purchaser.'
>
> "Please give us a ruling on the legal questions raised in the above at your earliest convenience."

I.

The first question presented is whether a building and loan association may purchase Class "B" stock, that is, "participating reserve shares" or "participating reserve certificates" from its shareholders. Building and loan associations are quasi public financial institutions, and for the protection of them the state of Missouri has, by the building and loan statutes, provided special inquisitorial, supervisory, and regulating laws which are specific, adequate, complete, and therefore, exclusive. State ex rel. Wagner v. Farm and Home Savings Loan Association, 90 S. W. (2d) 93.

Section 5593, Laws of Missouri, 1935, page 201, provides for the creation of "participating reserve fund" and for issuing certificates therefor. This statute provides that any real estate or any loans or assets of doubtful value may be placed in a separate fund from the other assets of the association to be represented by "participating reserve shares" or "participating reserve certificates". As to the manner in which these shares or certificates are to be paid, the statute says:

> "* * 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. * * * * * * * * * * * * * * 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."

From a reading of the above, it will be seen that the "B" stock may only be retired by payment from the assets which represent such stock or by the acceptance of such stock as payment in the sale of real estate. No other method of retiring the Class "B" stock is provided for by the statutes and since the building and loan laws are exclusive, it is our opinion that an association may not purchase Class "B" stock from its shareholders.

II.

The next question presented is whether a director of a building and loan association may purchase shares of stock for his own personal use, through a dealer or broker, from a shareholder of the association.

A dealer of building and loan securities is defined by Section 5628A, Laws of Missouri, 1935, page 195, as follows:

> "(e) 'Dealer' shall include every person who, in this state, engages for all or part of his time, on his own account or as an agent or broker, personally or through an agent or broker, directly or indirectly, and by whatsoever means in the purchasing or otherwise acquiring from any person or persons of building and loan securities for the primary

> purpose of selling or, except by withdrawal or through the maturity thereof, otherwise disposing of the same at a profit or for a commission, or in otherwise dealing or trading in building and loan securities."

Transactions which involve the sale of shares through a dealer are impersonal. The buyer puts an order in, the dealer acquires the stock and the seller and buyer are never cognizant of the identity of the other.

The authorities all agree that a director is not precluded by virtue of his position from purchasing stock from an individual shareholder (14 C. J. 128).

Therefore, a sale of stock by a shareholder to a director is proper where no profit or ultimate gain accrues knowingly to the director except that of which the seller is aware.

There is a conflict in the authorities, however, whether there is a duty on the director to disclose information acquired in his capacity as director which may affect the value of the stock.

The directors of a corporation stand in a relation of trust to the corporation and are bound to exercise the strictest good faith in respect to its property and business. Proctor v. Farrar, 213 S. W. (Mo. Sup.) 469. Chouteau v. Allen, 70 Mo. 290. However, this relationship is deemed to be limited to the management of the general corporation affair and not to extend to dealing with the individual share owner in respect to his shares of stock. 7 R. C. L. 457; Fletcher's Cyclopedia of Corporations, Vol. 3, section 1168.

The general rule as stated in 84 A. L. R. 616, is:

> "The general rule, as already indicated, is that an officer or director of a corporation does not sustain a fiduciary relation to an individual stockholder with respect to his stock, and consequently the mere failure on the part of such officer or director,

> in purchasing the shares from the stockholder, to disclose any inside information, will not militate against him so long as he does not actively mislead the seller or perpetrate a fraud; in other words, ordinarily, a corporate officer or director has a right to purchase the stock of a shareholder therein, the same as any other person has a right to purchase such stock, and there is nothing in the mere fact that the purchaser is an officer or director of the corporation whose shares he purchases from which fraud or unfair dealing may be inferred."

To the same effect is 32 Mich. L.R. 678, 47 Har. L.R. 353.

This rule is recognized in Wann v. Scullin, 210 Mo. 429, in which our Supreme Court held that a director, buying stock from a shareholder, was not required to disclose to the shareholder that he was a director in the corporation.

In the case of Goodwin v. Agassiz, 283 Mass. 358, 186 N. E. 635, the defendant, a director of a corporation, purchased shares through a broker on the stock exchange, from a shareholder. The director defendants were in possession of knowledge which would tend to increase the value of the stock. The court held that the fact that the defendants were directors created no fiduciary relation between them and the plaintiff in the matter of the sale of his stock. The court said at l.c. 661:

> "* * * Purchases and sales of stock dealt in on the stock exchange are commonly impersonal affairs. An honest director would be in a difficult situation if he could neither buy nor sell on the stock exchange shares of stock in his corporation without first seeking out the other actual ultimate party to the transaction and disclosing to him everything which a court or jury might later find that he then knew affecting the real or speculative value of such

> shares. Business of that nature is a matter to be governed by practical rules. Fiduciary obligations of directors ought not to be made so onerous that men of experience and ability will be deterred from accepting such office. Law in its sanctions is not coextensive with morality. It cannot undertake to put all parties to every contract on an equality as to knowledge, experience, skill and shrewdness. It cannot undertake to relieve against hard bargains made between competent parties without fraud. On the other hand, directors cannot rightly be allowed to indulge with impunity in practices which do violence to prevailing standards of upright business men. Therefore, where a director personally seeks a stockholder for the purpose of buying his shares without making disclosure of material facts within his peculiar knowledge and not within reach of the stockholder, the transaction will be closely scrutinized and relief may be granted in appropriate instances. * * * * * * * * * "

Therefore, the rule seems to be that a director may purchase stock through a broker from a shareholder provided he does not knowingly allow the broker to obtain such stock by misleading the seller or perpetrating a fraud upon the seller in order to obtain the stock.

CONCLUSION

It is, therefore, the opinion of this department that a building and loan association may not purchase Class "B", that is, "participating reserve shares" or "participating reserve certificates" from its shareholders.

It is further the opinion of this department that a director may purchase stock from a broker providing he does not knowingly permit the broker to obtain the shares by misleading the seller or perpetrating a fraud upon the seller.

Respectfully submitted

APPROVED:

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J. E. TAYLOR
(Acting) Attorney General

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