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October 27, 1981

ATTORNEY GENERAL OPINION NO. 81-247

Marvin S. Steinert, Commissioner
Savings and Loan Department
503 Kansas Avenue, Room 220
Topeka, Kansas 66603

Re: Corporations -- Savings and Loan Code; Powers -- Merger or Consolidation

Synopsis: A proposed merger of two or more savings and loan associations must be approved at an annual or special meeting of each of such associations by an affirmative vote of 51% of the shares of each association represented at such meeting in person or by proxy. Such proposal need not be approved by 51% of all shares of each such association. Cited herein: K.S.A. 17-5521, 17-5541.

* * *

Dear Mr. Steinert:

You have requested our opinion regarding the statutory procedures for the merger or consolidation of savings and loan associations. The particular provision prompting your inquiry is found in K.S.A. 17-5541 and reads as follows:

> "Any two or more associations may merge into one of such associations, or may consolidate into a new association by an affirmative vote of fifty-one percent of the shares, of each of said associations represented in person or by proxy, at any annual or special meeting of the shareholders of each association called for that purpose at which at least twenty days' prior notice shall have been given to each shareholder." (Emphasis added.)

In light of the above-quoted provisions, particularly the emphasized portion thereof, you have posed the following question:

> "Specifically does K.S.A. 17-5541 require that 51% of all of the shares of each of the merging associations be voted in favor of the proposed merger, or does it require only that the proposed merger be approved by 51% of the shares of each of the merging associations represented in person or by proxy (present) at an annual or special meeting of the shareholders of the merging associations?"

The question you have raised is primarily one of statutory construction, and there are several rules enunciated by the Kansas Supreme Court which we believe to be of pertinence to this issue. Of principal significance is the following statement in Southeast Kansas Landowners Ass'n. v. Kansas Turnpike Auth., 224 Kan. 357 (1978):

> "The fundamental rule of statutory construction, to which all others are subordinate, is that the purpose and intent of the legislature governs when that intent can be ascertained from the statutes. Easom v. Farmers Insurance Co., 221 Kan. 415, Syl. 2, 560 P.2d 117 (1977); Thomas County Taxpayers Ass'n. v. Finney, 223 Kan. 434, 573 P.2d 1073 (1978); Brinkmeyer v. City of Wichita, 223 Kan. 393, 573 P.2d 1044 (1978)." 224 Kan. at 367.

The Court also has provided guidance in ascertaining the legislature's intent, and we believe the following statement of the Court to be of relevance here:

> "A primary rule for the construction of a statute is to find the legislative intent from its language, and where the language used is plain and unambiguous and also appropriate to the obvious purpose the court should follow the intent as expressed by the words used and is not warranted in looking beyond them in search of some other legislative purpose or extending the meaning beyond the plain terms of the act. (Alter v. Johnson, 127 Kan. 443, 273 Pac. 474; Hand v. Board of Education, 198 Kan. 460, 426 P.2d 124; City of Overland Park v. Nikias, 209 Kan. 643, 498 P.2d 56; Hunter v. Haun, 210 Kan. 11, 499 P.2d 1087.)" City of Kiowa v. Central Telephone & Utilities Corpation, 213 Kan. 169, 176 (1973).

Of similar import is the Court's pronouncement in Lakeview Gardens, Inc. v. State, ex rel. Schneider, 221 Kan. 211 (1976):

> "[T]his court must ascertain and give effect to the intent of the legislature. In so doing we must consider the language of the statute; its words are to be understood in their plain and ordinary sense. (Hunter v. Haun, 210 Kan. 11, 13, 499 P.2d 1087; Roda v. Williams, 195 Kan. 507, 511, 407 P.2d 471.) When a statute is plain and unambiguous this court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be. (Amoco Production Co. v. Armold, Director of Taxation, 213 Kan. 636, 647, 518 P.2d 453; Jolly v. Kansas Public Employees Retirement System, 214 Kan. 200, 204, 519 P.2d 1391.)" 221 Kan. at 214.

We also note the Court's statement in Rogers v. Shanahan, 221 Kan. 221, 223, 224 (1977):

> "When, as here, the resolution of a question requires construing a statute, the court is guided by certain presumptions. It is presumed the legislature understood the meaning of the words it used and intended to use them; that the legislature used the words in their ordinary and common meaning; and that the legislature intended a different meaning when it used different language in the same connection in different parts of a statute. See 82 C.J.S. Statutes §316 (b) (1953); See also, Rausch v. Hill, 164 Kan. 505, 190 P.2d 357."

With these well-established rules of construction in mind, we have considered the above-quoted provisions of K.S.A. 17-5541; and we have concluded that the legislature intended that a proposed merger of two or more savings and loan associations be approved at an annual or special meeting of each of such associations by an affirmative vote of 51% of the shares of each association represented at such meeting in person or by proxy.

We find nothing in the pertinent language of K.S.A. 17-5541 to suggest that the merger proposal be approved by 51% of all shares of each such association. To the contrary, the provision in question requires only that it be approved "by an affirmative vote of fifty-one percent of the shares, of each of said associations represented in person or by proxy, at any annual or special meeting of the shareholders of each

association." Even though the punctuation of this provision leaves something to be desired, it is clear that, by including the phrase, "of each of said associations represented in person or by proxy," the legislature intended that only those shareholders actually present or represented by proxy be considered in determining the required votes for approval. In our judgment, the language of this provision is plain and unambiguous. Thus, we would not be warranted in looking beyond the words used in search of some other meaning.

Moreover, it is to be noted that elsewhere in the Savings and Loan Code the legislature has used different language to express a requirement that the total number of an association's shareholders must be considered in determining the requisite number of votes to approve action by the association. Specifically, the bulk sale of an association's assets is authorized by K.S.A. 17-5521, if such sale is approved "by the affirmative vote of a majority of the votes of all members of the association at any annual meeting, or special meeting called for such purposes." (Emphasis added.) The substantial difference between this language and the provisions of K.S.A. 17-5541 is significant. Conspicuously absent from the language of K.S.A. 17-5521 is any reference to shareholders represented in person or by proxy at the shareholders' meeting. Instead, the legislature has provided in effect that, regardless of the number of shares represented in person or by proxy at such meeting, a majority of all the association's shareholders must approve a bulk sale of the association's assets.

It is important to note that K.S.A. 17-5521 and 17-5541 were originally part of the same enactment (L. 1943, ch. 133, §§99, 119) and have not been amended since enactment. Thus, as suggested by the previously-quoted statement of the Kansas Supreme Court in Rogers v. Shanahan, supra, it is to be presumed that the legislature intended different meanings when it used different language in these sections of the same enactment. Such rule of statutory interpretation provides additional support for our conclusion that K.S.A. 17-5541 does not require approval of a merger proposal by 51% of all of an association's shareholders.

Finally, you have advised us that from the time of its enactment, K.S.A. 17-5541 has consistently been construed by you and your predecessors as requiring only that 51% of those shares represented in person or by proxy must approve a merger. Here, again, established rules of statutory construction accord significance to such interpretation. As stated in Lincoln American Corp. v. Victory Life Insurance Co., 375 F. Supp. 112, 118 (D. Kan. 1974): "[A]n interpretation of state law by a state agency delegated the responsibility of enforcing that law is entitled to great weight." See, also, Save

Our Invaluable Land (SOIL), Inc. v. Needham, 542 F.2d 539, 542 (10th C.C.A. 1976); Sharp v. United States, 108 F. Supp. 745, Syl. ¶2 (D. Kan. 1952). Stated another way, "a specific and long-standing administrative interpretation of a statute should not be overruled except for weighty reasons." Wichita Board of Trade v. United States, 352 F. Supp. 365, 369 (1972); probable jurisdiction of appeal noted, 409 U.S. 1005, 34 L. Ed.2d 298, 93 S.Ct. 432 (1972); affirmed in part, reversed in part, 412 U.S. 800, 37 L.Ed.2d 350, 93 S.Ct. 2367 (1973).

Thus, even though an administrative interpretation which is clearly wrong should not be adhered to (Sharp v. United States, supra), we believe the long-standing interpretation of K.S.A. 17-5541 by your office correctly construes the provisions of this statute and should be followed by savings and loan associations proposing to merge or consolidate.

Very truly yours,

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