

Opinion No. 65-62

April 8, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Wayne C. Wolf, Assistant Attorney General

TO: Barney Cruz, Director, Corporation Department, Corporation Commission, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Does Section 51-21-4, New Mexico Statutes Annotated, 1953 Compilation, exempt a Mutual Building and Loan Association from the reporting requirements of Section 51-21-2, N.M.S.A., 1953 Compilation?
2. Does Section 51-21-4, N.M.S.A., 1953 Compilation, exempt a capital stock savings and loan association from the reporting requirements of Section 51-21-2, N.M.S.A., 1953 Compilation?

CONCLUSIONS

1. No.
2. No.

OPINION

{*103} ANALYSIS

Your questions ask for an interpretation of the exemption provisions of Section 51-21-4, N.M.S.A., 1953 Compilation. That section exempts certain organizations from the reporting provisions of the Corporate Reports Act as contained in Section 51-21-2, N.M.S.A., Compilation. The exemption section, insofar as applicable, reads as follows:

"Exempt corporations. -- The following corporations shall be exempt from filing a report pursuant to the Corporate Reports Act:

- A. State banks or insurance companies incorporated under the laws of New Mexico;
- B. Insurance companies which are incorporated under the laws of the United States, other states or foreign countries, and which are licensed to transact business in the state of New Mexico; and

C. National banks; and

D. Nonprofit corporations."

It is obvious that neither the mutual nor the capital stock savings and loan association are insurance companies. We, therefore, are left with the consideration of whether or not either type association could be considered a non-profit association or a bank.

We turn to Section 51-14-20, N.M.S.A. 1953 Compilation, for a definition of the terms "non-profit corporation". That section, insofar as applicable, says:

"Definitions. -- For the purpose of this act, unless the {*104} context otherwise requires, the terms defined in this section shall have the meanings ascribed to them as follows:

* * *

(b) NONPROFIT CORPORATION. 'Non-profit corporation' means a corporation formed for a purpose not involving pecuniary gain to its shareholders or members, paying no dividends or other pecuniary remuneration, directly or indirectly, to its shareholders or members as such, and having no capital stock.

Although Section 51-21-4, N.M.S.A., 1953 Compilation, is not a part of the Act referred to in Section 51-14-20, supra, it is obvious that Section 51-21-4, supra, refers to all the acts which now comprise Chapter 51 of the New Mexico Statutes. Section 51-21-4, supra, exempts certain type corporations which are referred to in other parts of the statutes, and we must use the definitions contained in other sections in construing the meaning of Section 51-21-4, supra. In addition, we note that the definition of nonprofit corporation, as it appears in Section 51-14-20, supra, is substantially the same as the standard definition. See **Sheren v. Mendenhall**, 23 Minn. 92, and collected cases at 16 A.L.R. 2d 1345. We conclude that neither a mutual nor a capital stock building and loan association is a nonprofit organization because of the fact that each may provide pecuniary gain to its members or stockholders by virtue of Sections 48-15-11 and 48-15-31, N.M.S.A., 1953 Compilation.

We next turn to the more serious consideration of whether or not either a mutual building and loan association or a capital stock building and loan association could be considered a "bank" for the purpose of Section 51-21-4, supra. In order to properly make the determination with respect to each type corporation, it is necessary to look at the basic distinctions between these two type organizations.

Until 1959, the only building and loan associations authorized by law were the mutual building and loan associations. The mutual building and loan association originated as a cooperative enterprise organized to benefit its own members. As stated in 12 C.J.S. "Building and Loan Associations," Section 2 at pages 395-396.

"The principal object of a building and loan association is to create a loan fund for the benefit of its borrowing members, the underlying idea being that, by means of the system of small periodical payments provided, people of limited means will be enabled to become the owners of homes, and thrift, economy, and good citizenship will thereby be promoted. In other words, these associations have a twofold purpose, one to encourage thrift among people of moderate income, and the other to aid them to borrow money for the purpose of the erection or purchase of a home."

In New Mexico, however, the purpose of the mutual building and loan association is different in one respect from the purpose as stated in the above quotation. By virtue of Section 48-15-6, N.M.S.A., 1953 Compilation, a mutual building and loan association can loan surplus funds to non-members if there is no demand on the surplus funds by members. In such a situation the mutual association can also invest the surplus funds in certain specified securities.

A commercial bank, on the other hand, is limited in its loaning ability in a different manner. In general, it can loan money to any person on the personal obligation of the borrower subject only to reserve requirements established by the Commissioner of Banking and diversification requirements established by the Banking Act. {**105*} See Section 48-22-1 to 48-22-74, N.M.S.A., 1953 Compilation (P.S.).

It is obvious from a comparison of the statutes authorizing the incorporation of banks and those concerning formation of mutual building and loan associations that these two entities are different and that the general financial powers of a bank are broader than those of a mutual savings and loan association. This difference in power to perform specific financial services has been sufficient to distinguish a mutual building and loan association from a bank. See **First National Bank, v. Dawson County**, 66 Mont. 321, 213 Pac. 1097. We must also conclude that because of the distinction between the powers of a bank and those of a mutual building and loan association that such an association is not a bank within the meaning of Section 51-21-4, *supra*.

A capital stock building and loan association is also a creature of statute, and it differs significantly from a mutual building and loan association in its organization. The capital stock building and loan association was unknown to New Mexico until 1959. In 1959 the State Legislature permitted the creation of such an organization. It, like most other private corporations, is designed to realize a profit for its capital shareholders, and in this particular aspect it is more like a bank and less like a mutual building and loan association. The capital stock building and loan association may distribute profits to capital shareholders after maintaining the required statutory reserve. In all these respects the capital stock building and loan association is more like a bank than is the mutual association, but we must compare the capital stock association with a bank to ascertain if the practical difference between the two is significant enough to distinguish between them for the purpose of Section 51-21-4, *supra*.

The capital stock building and loan association is defined by Section 48-15-28, N.M.S.A., 1953 Compilation (P.S.) in the following manner:

"A capital stock building and loan association is a financial institution **incorporated under the general corporation laws** of the state, having for its purposes those outlined in section 2 of the Capital Stock Building and Loan Association Act, and may issue in addition to other classes and kinds of stock and certificates a class known as 'permanent capital stock'. The par funds derived from the sale of such permanent capital stock shall be set apart and be a fixed and permanent guarantee and reserve to holders of all other classes of stock and certificates. Such permanent capital stock shall not be withdrawn until final liquidation and no loan shall ever be made by the association upon the pledge of such stock as security." (Emphasis supplied)

Turning to Section 51-2-1 we find the following statement concerning the general corporation law of this state:

"Corporations for mining, manufacturing, industrial and other pursuits or for any purpose for which corporations are or shall hereafter be authorized by any general incorporation law of this state shall be organized and governed by this article."

Then, upon referring to Section 51-2-6, N.M.S.A., 1953 Compilation, we find a restriction in the general corporation law concerning the organization of banks. That restriction appears as follows:

"Upon executing, filing and recording a certificate pursuant to all the provisions of this article, three or more persons may become a corporation for any lawful purpose or purposes whatever, except corporations for the construction {**106*} and operation of railroads, telegraph lines, express companies, savings banks, commercial banks, trust companies, building and loan associations, insurance, surety and irrigation companies; . . ."

From this provision it becomes obvious that a bank cannot be formed under the general corporation laws of this state. The provision quoted also prohibits the formation of mutual building and loan associations except in accordance with Sections 48-15-1, et seq., N.M.S.A., 1953 Compilation. Therefore, since the capital stock building and loan associations must by statutory direction be formed under the provisions of the general corporation law, they cannot be banks. We also note that it was the express holding of the case of **First Thrift and Loan Association v. State**, 62 N.M. 61, 304 P.2d 582), that a bank could not be incorporated under the general corporation laws of the state. We must, therefore, conclude that a capital stock building and loan association organized under the general corporation laws of this state cannot be a bank within the meaning of Section 51-21-4, supra.