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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002353-MR

COMMONWEALTH OF KENTUCKY,
EX REL. THE OFFICE OF FINANCIAL
INSTITUTIONS; CORDELL G. LAWRENCE,
EXECUTIVE DIRECTOR (OFI)[1] APPELLANTS

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 06-CI-00737

HOME FEDERAL SAVINGS AND LOAN
ASSOCIATION; MEMBERS CHOICE
CREDIT UNION; BEACON CREDIT UNION;
SERVICE ONE CREDIT UNION; C&O
CREDIT UNION; GREATER KENTUCKY
CREDIT UNION, INC.; KENTUCKY
EMPLOYEES CREDIT UNION APPELLEES

AND NO. 2007-CA-002384-MR

MEMBERS CHOICE CREDIT UNION;
BEACON CREDIT UNION; SERVICE ONE
CREDIT UNION; C&O CREDIT UNION;

[1] By Order entered on September 29, 2008, Charles A. Vice, Commissioner of The Office of Financial Institutions (n/k/a Department of Financial Institutions), was substituted for Cordell G. Lawrence, Executive Director of The Office of Financial Institutions.

GREATER KENTUCKY CREDIT UNION, INC.; KENTUCKY EMPLOYEES CREDIT UNION — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 06-CI-00737

HOME FEDERAL SAVINGS AND LOAN ASSOCIATION — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,[2] SENIOR JUDGE.

WINE, JUDGE: The Commonwealth of Kentucky, *ex rel*. The Office of Financial Institutions (OFI), appeals from a declaratory judgment of the Franklin Circuit Court which rejected the agency's interpretation of Kentucky Revised Statutes (KRS) 286.6-107 as allowing community or geographic charters for state credit unions. OFI and the intervening credit unions now appeal, arguing that Home Federal Savings and Loan (Home Federal) lacked standing to bring this action and failed to exhaust its administrative remedies. We agree with the trial court that Home Federal had standing to bring this action and was not required to pursue this matter through administrative proceedings. We further find Home Federal is not

[2] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

barred from bringing this action by the doctrine of laches, and that there were no relevant issues of fact which precluded summary judgment. On the substantive issue, we conclude that the trial court's interpretation of KRS 286.6-107 is more consistent with the plain language of the statute than OFI's interpretation. Therefore, the trial court correctly found that OFI is not authorized to grant community- or geographic-based charters to state credit unions. Hence, we affirm.

The relevant facts of this action are not in dispute. OFI charters, regulates, and supervises banks, trust companies, savings and loan associations, consumer loan companies, investment and industrial loan companies, and credit unions in Kentucky. In 1984, the General Assembly enacted the current version of KRS 290.107 (now KRS 286.6-107), which defines membership for credit unions chartered and regulated by the OFI. Since the enactment of the statute, OFI has allowed community and geographic fields of membership for credit unions.

On May 31, 2006, Home Federal filed a declaratory judgment action against OFI in Franklin Circuit Court. Home Federal is a federally chartered thrift located in Ashland, Kentucky. Home Federal alleged that OFI has acted outside of the scope of its authority by allowing community-based charters because community (or geographic) fields of membership are not authorized under KRS 286.6-107. Home Federal further alleged that this action in excess of its authority violates the separation of powers doctrine by allowing OFI to exercise legislative power in violation of Sections 27 and 28 of the Kentucky Constitution. OFI filed a motion to dismiss, arguing that Home Federal lacks standing to challenge the

agency's statutory interpretation allowing geographic fields of membership. The trial court denied the motion on October 26, 2006.

Thereafter, a number of credit unions regulated by OFI collectively filed a motion for leave to intervene as defendants. The credit unions, namely Members Choice Credit Union; Greater Kentucky Credit Union, Inc.; Beacon Credit Union; C&O Credit Union; Service One Credit Union; and the Kentucky Employee's Credit Union, alleged that the OFI had previously granted each of them permission to amend their charters to provide geographic fields of membership. Thus, they asserted that they would be adversely affected by the declaratory relief sought by Home Federal. Home Federal did not object to the motion to intervene, which the trial court granted on March 19, 2007.

The matter then proceeded to cross-motions for summary judgment. In an order entered on November 2, 2007, the trial court granted summary judgment in favor of Home Federal. The court first found that Home Federal was not required to exhaust administrative remedies before bringing this action. The court further found that OFI's interpretation of KRS 286.6-107 was not supported by the plain language of the statute or its legislative history. Consequently, the court concluded that OFI was not authorized to allow state-chartered credit unions to have geographic fields of membership.

Thus, the court prospectively enjoined OFI from approving credit union bylaws allowing geographic fields of membership. The court further enjoined the intervening credit unions from "accepting new members whose only

basis for membership is a 'common bond of interest' that is based on geography." However, the court also stated that this injunction does not apply to any credit union members who joined the credit unions prior to the entry of the order. OFI appealed from this order, and the intervening credit unions filed a separate notice of appeal. These appeals are now consolidated before this Court.

In its appeal, OFI first argues that Home Federal lacked standing to bring this action. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), the United States Supreme Court set out the "irreducible constitutional minimum of standing" in three elements:

> First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560-61, 112 S.Ct. at 2136 (internal citations omitted).

Similarly, Kentucky Courts have held:

> In order to have standing in a lawsuit "a party must have a judicially recognizable interest in the subject matter of the suit." *Healthamerica Corp. v. Humana Health Plan*, Ky., 697 S.W.2d 946 (1985). The interest of a plaintiff must be a present or substantial interest as distinguished from a mere expectancy. *Winn v. First Bank of Irvington*, Ky.App., 581 S.W.2d 21 (1979). The issue of standing must be decided on the facts of each case. *Rose v. Council for Better Education, Inc.*, Ky.,

> 790 S.W.2d 186 (1989); *City of Louisville v. Stock Yards Bank & Trust*, Ky., 843 S.W.2d 327 (1992). Simply because a plaintiff may be a citizen and a taxpayer is not in and of itself sufficient basis to assert standing. There must be a showing of a direct interest resulting from the ordinance. *Cf. Carrico v. City of Owensboro*, Ky., 511 S.W.2d 677 (1974); *York v. Chesapeake & Ohio Railroad Co.*, 240 Ky. 114, 41 S.W.2d 668 (1931).

City of Ashland v. Ashland F.O.P. No. 3, Inc., 888 S.W.2d 667, 668 (Ky. 1994).

OFI contends that the fact that Home Federal is a competitor of the regulated credit unions is not sufficient to establish standing. Under the specific facts of this case, we disagree. As OFI correctly points out, fear of competition is not injury which would afford Home Federal standing to bring this action. *Healthamerica*, 697 S.W.2d at 948. However, *Healthamerica* dealt with competition in the context of public contracts, holding that "a disappointed competitor has no standing to judicially contest the award of a public contract to another entity." *Healthamerica*, 607 S.W.2d at 947. Similarly, in *Lexington Retail Beverage Dealers Association v. Department of Alcoholic Beverage Control Board*, 303 S.W.2d 268 (Ky. 1957), the plaintiffs, who held liquor licenses, attempted to challenge an agency's increase in the quota for liquor licenses in Fayette County. The former Court of Appeals held that the licensees had no contract or property rights, and thus could not show any injury to their private rights. *Id.* at 270. "The only possible basis of plaintiffs' claim is that their competitive position in the liquor business may be adversely affected. This is not

only remote and speculative and a normal business risk, but they have no right to be free from competition." *Id.*

In contrast, this case involves OFI's administration of its regulatory authority. *See Humana of Kentucky, Inc. v. NKC Hospitals, Inc.*, 751 S.W.2d 369, 372 (Ky. 1988). Where the proposed competition is unlawful by reason of arbitrary and capricious administrative action or abuse of discretion, the competitor may possess sufficient standing to sue. *See First National Bank of Buffalo v. Peoples State Bank, Inc.*, 574 S.W.2d 300, 302 (Ky. 1978), *citing Warren Bank v. Camp*, 396 F.2d 52 (6th Cir. 1968). The credit union statutes in KRS Chapter 286.6 strictly regulate the operations of Kentucky-chartered credit unions. OFI is charged with administering those statutes, including the statutory limitations on membership in such credit unions. Home Federal alleges that OFI has exceeded its statutory authority by granting geographic- or community-based charters to credit unions. Consequently, we find that Home Federal has shown an actual, justiciable injury which would afford it standing to bring this action.

OFI also argues that this action should be barred because Home Federal failed to exhaust its administrative remedies. However, exhaustion of administrative remedies is not required when an agency acts in excess of its powers. *Adkins v. Commonwealth*, 614 S.W.2d 950, 953 (Ky. App. 1981). Nor is exhaustion of administrative remedies required where the complaint raises an issue of jurisdiction as a mere legal question, not dependent upon disputed facts, so that an administrative denial of the relief sought would be clearly arbitrary. *Franklin v.*

Natural Resources and Environmental Protection Cabinet, 799 S.W.2d 1, 2 (Ky. 1990). *See also Goodwin v. City of Louisville*, 309 Ky. 11, 15, 215 S.W.2d 557, 559 (1948).

Furthermore, OFI does not identify any administrative remedies which Home Federal would be entitled to pursue. Home Federal is not an entity that is regulated by OFI. In fact, OFI concedes that Home Federal would have no basis to intervene in an administrative hearing pursuant to KRS 286.6-012. Therefore, we agree with the trial court that Home Federal was not required to exhaust any administrative remedies before bringing this action.

The central issue in this case concerns OFI's interpretation of KRS 286.6-107. In its separate appeal, Beacon Credit Union also argues that Home Federal should be barred by the doctrine of laches from bringing this action due to its unreasonable delay in bringing this action. We agree with the trial court's analysis on these issues and adopt the following portion of its opinion:

> OFI is required to interpret the statutes it is charged to administer. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*, 467 U.S. 837, 843 (1984).[3] OFI's interpretation of law concerning the scope of its own authority, however, is subject to legislative limits and judicial review. OFI is created by statute, and its power to act is limited to the delegation of legislative authority conferred on it by the General

[3] In its *amicus* brief, the Credit Union National Association challenges the application of the *Chevron* test to review OFI's interpretation of KRS 286.6-107. However, the Kentucky Supreme Court applied the *Chevron* analysis in *Board of Trustees of Judicial Form Retirement System v. Attorney General*, 132 S.W.3d 770, 787 (Ky. 2003). Furthermore, while we agree with the *amicus* that the *Chevron* doctrine does not expressly apply or preempt state law, we find no indication that the general principles set out in *Chevron* are inconsistent with Kentucky law in this area.

Assembly. *Van Hoose v. Commonwealth*, 995 S.W.2d 389 (Ky. App. 1999) (internal citation omitted). OFI's interpretation of its enabling statute is entitled to deference only when it is supported by the language of the statute. *See Che*vron, 467 U.S. at 843; *Camera Center, Inc. v. Revenue Cabinet*, 34 S.W.[3d] 39, 42 (Ky. 2000) ("the agency cannot by its rules and regulations, amend, alter, enlarge or limit the terms of legislative enactment.").

As the U.S. Supreme Court has explained, interpretations contained in an agency's internal policy which have not been promulgated through formal rule-making or adjudication, "do not warrant *Chevron*-style deference." *Christiansen v. Harris County*, 529 U.S. 576, 587 (2000). OFI cannot implement, by internal policy or regulation, an expansion of its legislative mandate. *See* KRS 13B.130. Unless OFI's interpretation of the statute is supported by the language enacted by the legislature, OFI cannot expand its power to approve community fields of membership without violating the restrictions of Section 27 and 28 of the Kentucky Constitution, which confer constitutional status on the doctrine of separation of powers in Kentucky. *Robertson v. Shein*, 204 S.W.2d 954 (Ky. 1947). *See also Legislative Research Commission v. Brown*, 664 S.W.2d 907 (Ky. 1984).

This Court must discharge its constitutional duty to enforce the boundaries of the separation of powers when an agency seeks to act beyond the scope of its authority by expanding its legislative mandate without authorization. Although OFI's interpretation of this statute is longstanding, it is supported by neither the plain language of the statute nor the legislative history of the statute. As the Kentucky Supreme Court has held, "an erroneous interpretation or application of the law is reviewable by the court which is not bound by an erroneous administrative interpretation no matter how longstanding such an interpretation." *Camera Center v. Revenue Cabinet*, 34 S.W.3d 39, 41 (Ky. 2000). Here, the legislature considered and rejected the option of allowing community based, or geographic, fields of

membership for credit unions. OFI cannot expand its legislative mandate by administrative fiat.

KRS 286.6-107

The Kentucky statute governing membership of state credit unions reads as follows:

> (1) The membership of a credit union shall be limited to and consist of the subscribers to the articles of incorporation and such other persons within the common bond set forth in the bylaws as have been duly admitted members, have paid any required entrance fee or membership fee, or both, have subscribed to one (1) or more shares, and have paid the initial installment thereon, and have complied with such other requirements as the articles of incorporation or bylaws specify.
>
> (2) Credit union membership shall be limited to persons having a common bond of similar occupation, association, or interest.

(Emphasis supplied).

This statute was patterned after the Model Act of 1979. The first section of Kentucky's statute is a verbatim adoption of the model language. The second section of Kentucky's statute, however, deleted the portion of the model language that specifically authorized geographic fields of membership. The Model Act provided as follows:

> (2) Credit Union membership may include, but is not necessarily limited to groups having a common bond of similar occupation, association, or interest, or to groups who reside within an identifiable neighborhood, community, or rural district, or to employees of a common employer, or to persons employed within a defined

business district, industrial park or shopping center, and members of the immediate family of such persons.

(Emphasis added).

The defendants [OFI and the intervening credit unions] argue that the Kentucky statute, by deleting the language authorizing the various geographic or economic categories for membership, somehow created a *broader* range of permissible membership than the Model Act. The Court must examine the language and structure of the Model Act for support for this position.

The structure of the Model Act itself is instructive on the question of whether the concept of "common interest" includes a common geographic location. Under the Model Act membership may be limited to (1) groups with "similar occupation, association, or interest;" or (2) groups who reside within an identifiable geographic area. The act clearly lists these as two different types of groups. Defendants' interpret the second alternative (geographic area) as duplicative but more restrictive. However, the structure of the paragraph does not suggest that the subsequent clauses are examples of implementing the first, "common bond" clause. If a common geographic area qualifies as a common bond of similar interest, then the use of the second clause in the Model Act would be entirely redundant. Statutes are to be interpreted so that no part is meaningless or ineffectual. *Potter v. Bruce Walters Ford Sales, Inc.*, 37 S.W.3d 210 (Ky.App. 2000).

Moreover, a review of the Kentucky legislation supports the conclusion that residence in an identifiable geographic location is *not* adequate as a common bond to support membership in a credit union. The 1984 Kentucky legislation that defines credit union membership provides that "credit union membership shall be limited to persons having a common bond of similar occupation, association or interest." 1984 Ky. Acts, c. 408, Sec. 11. It is noteworthy that the legislation, as originally introduced in Senate Bill 255,

explicitly provided for residence in related geographic areas to qualify as a basis to support credit union membership. The geographic area provisions were deleted from the bill before final passage. The definition of membership in the legislation, as originally introduced, closely tracked the Model Act:

> Credit union membership shall be limited to persons having a common bond of similar occupation, association or interest, or to persons who reside within an identifiable neighborhood, community, rural district, or to employees of a common employers [sic], or to persons employed within a defined business district, industrial park or shopping center, and members of the immediate family of such persons.
>
> Senate Bill 255, Section 11(2) (1984 General Assembly; BR 1518)[4] (Introduced February 14, 1984). (Emphasis supplied).

The bill was amended in the Senate Committee Substitute on February 28, 1984.[5] The Senate Committee Substitute deleted all of the definition set forth above following the word "interest." This definition ("Credit union membership shall be limited to persons having a common bond of similar occupation, association or interest.") remains unchanged in the statute today. KRS 286.6-107(2). Thus, it is clear that the legislature considered and rejected the proposal to allow for geographic fields of membership in credit unions.

Courts are required to construe statutes by examining the plain language of the statute. *Bowling Green v. Board of Ed.*, 443 S.W.2d 243 (Ky. 1969): *Kentucky Indus. Util. Customers, Inc. v. Kentucky Utilities Co.*, 983 S.W.2d 493, 500 (Ky. 1998). An agency's construction of a statute it administers must be upheld if it is a permissible construction. *Chevron*

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[4] Copy on file with Legislative Research Commission. [Footnote in original].

[5] *See* Legislative Record, Final Legislative Action, 1984; General Assembly Copy of S.B. 255 (1984) (Copy on file, Legislative Research Commission). [Footnote in original].

U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

Defendant OFI interprets "interest" to "necessarily entail" community fields of membership. Numerous definitions of interest are offered, none of which clearly entail a geographic field. Defendants argue that persons living in the same community "travel the same roads and frequent the same schools, churches, shopping centers, and other facilities." All proposed examples of community interest suggest very defined communities that do not comport with those previously chartered: for example, paying taxes to the community would not support expansion of Fancy Farm [Credit Union's][6] charter to a tri-county area since that is not a single taxing district; there is no single leader elected for that tri-county area; and there are likely people in that community who do not own the real property on which they reside. The examples offered for a common interest in a geographic field actually illustrate how poorly the concepts converge.

Nor can the common bond of geographic interest be that everyone in the community wants affordable financial services. Again, such a common bond would be limitless: everyone wants affordable financial services. Nor can a similar interest in seeing that a community credit union is well-managed be the common interest because that would allow the bond of being in the credit union to suffice for the common bond required to join in the first place. Under the statute, the "common interest" is a prerequisite to membership; it is the threshold that must be reached before membership can be conferred. The defendants' interpretation of the statute would vitiate

[6] Earlier in its opinion, the trial court noted OFI's argument that Fancy Farm Credit Union has been chartered with a geographic field of membership since 1957. However, the court also pointed out that its charter had been issued under a prior version of the statute, and that "the small rural western Kentucky community of Fancy Farm has many unique social, religious, educational and political characteristics that could give rise to a 'common bond of interest' irrespective of geography."

the statutory requirement that makes a common bond the prerequisite for membership.[7]

> Defendants argue that geographic based charters must be included in the concept of a "common bond of similar . . . interest" for the requirement of "an identifiable neighborhood, community, or rural district" to act as a limit. If the term "common bond of interest" includes geographic charters, then removal of the limitation of the Model Act would allow Kentucky to charter credit unions geographically within the Commonwealth without any meaningful limit. The common bond of interest could be as broad as residence in the Commonwealth or even an interest in residence in the Commonwealth. Under this interpretation, the concept of "common bond of interest" would be limitless.
>
> The defendants argue that altering the language of the Model Act from "groups" having a common bond to "persons" having a common bond indicates intent to open membership rather than limit membership. However, Senate Bill 255 - prior to its amendment - used the term "persons" (rather than "groups") in reference to the geographic field of membership, and that entire clause was deleted from the final legislation. Kentucky's alterations from the Model Act also include removal of the language that membership "may include" to language that membership "shall be limited to" members having a common bond of similar occupation. This Kentucky

[7] The credit unions further argue that the membership limitations in KRS 286.6-107 must be interpreted in light of other sections in the Act, particularly KRS §§ 286.6-070, 286.6-085, and 286.6-095. KRS 286.6-070 provides that the executive director of OFI shall have supervisory authority over state-chartered credit unions; KRS 286.6-085 allows credit unions to exercise "such incidental powers as are granted corporations;" and KRS 286.6-095 provides that "[n]otwithstanding any other provision of law, the executive director may make reasonable rules authorizing credit unions to exercise any of the powers conferred upon federal credit unions, if he deems it reasonably necessary for the well-being of such credit unions." The credit unions contend that these sections, when read together, allow OFI to authorize geographic or community fields of membership to place state credit unions in parity with federal credit unions. We disagree. These sections specifically address the powers which credit unions may exercise as corporate bodies. *See also* KRS 286.6-075. These sections do not give OFI's executive director unlimited discretion to expand the permissible fields of membership in credit unions as set out in KRS 286.6-107.

change clearly narrows the Model language. The Model Act specifically does "not necessarily limit[]" membership, while Kentucky unequivocally limits membership. It is nonsensical to interpret the Kentucky Act to be broader than the Model Act.

Defendants argue that "[t]he fact that the legislature did not use exclusionary language indicates an intention not to limit." (OFI's Response to Motion for Summary Judgment, p. 8, citing *Camera Center, Inc. v. Revenue Cabinet*, 34 S.W.3d 39, 43 (2000)). This is no disagreement with this canon of construction. However, the Court finds it is not applicable here. The Kentucky legislature did use exclusionary language: "membership shall be limited to" certain persons. The Court may not disregard the words enacted by the legislature. *AK Steel Corp. v. Commonwealth,* 87 S.W.3d 15 (Ky.App. 2002).

The United States Supreme Court, in interpreting the corresponding federal act governing federal credit unions, has also held that the statute must be interpreted to impose limits on membership, in interpreting the meaning of the phrase "shall be limited" - which is common to the federal and Kentucky statutes. In *National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479, 502-5[] (1998), the Court addressed § 109 of the Federal Credit Union Act, which stated "membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." The Court addressed whether the common bond must unite all members of a credit union or whether the common bond must unite the members of each unrelated group, as in a conglomerate. *Id.* at 502.

The Supreme Court observed that an interpretation that allowed a conglomerate credit union with unrelated groups "cannot be considered a *limitation* on credit union membership if at the same time it permits such a *limitless* result. *Id.* at 502-503. The Court stated that such a broad interpretation, where "it would be permissible to grant a charter to a conglomerate credit union whose members

would include the employees of every company in the United States" would effectively read the words "shall be limited" out of the statute. *Id.*

The relevant language is identical between the Kentucky and federal statutes: membership "shall be limited." The Supreme Court found that the same common bond must unite all members for this language to have effect. The same rationale is true for a geographic limitation. If the clause regarding an identifiable geographic area is a limitation on an otherwise broad and encompassing concept of interest, then interest would become such a limitless concept that the provisions stating membership "shall be limited" would become a nullity. The legislature could have retained [the] model act's language that membership *may* be, but is not necessarily, limited. Having consciously chosen to alter the language to explicitly provide for limitation of membership, the Court cannot interpret the term enacted by the legislation ("shall be limited") to have no actual or practical effect.

Further, in *National Credit Union Administration* the Supreme Court examined the common bond phrase by comparison to the geographic phrase, pursuant to the canon that similar language within the same section should be given a consistent meaning. Regarding the federal geographic limitation, the Court stated "[t]he reason that the NCUA has never interpreted, and does not contend that it *could* interpret, the geographical limitation to allow a credit union to be composed of members from an unlimited number of unrelated geographic units, is that to do so would render the geographic limitation meaningless." *Id.* at 502 (emphasis in original). The fact that the federal statute speaks of "groups" rather than "persons" does not change the wisdom of this analysis.

Of course, some common interests may correlate to geography. The unique nature of Fancy Farm is a perfect example of a community that arguably has a common bond of similar interests because the individuals and families who live in that small rural community share social, economic, school, church, recreational, civic and

other interests in addition to their geographic connection. However, it is the common bonds rather than mere geographical proximity that makes [sic] it an appropriate "group" to form a credit union.

In addition, the defendants note that the current incarnation of Kentucky's credit union statute provides for "similar occupation, association, or interest" rather than "identity" of profession or employment, as previously required. The Court finds that this change simply reflects a common sense legislative determination that proving "identical" interests for purposes of establishing eligibility for credit union membership is too onerous a burden. This legislative change is in no way related to the issue of whether community based charters are authorized.

The statute makes no mention of geographic fields of membership. OFI has interpreted this silence as authorizing geographic fields of membership, notwithstanding the clear legislative history that demonstrates that geographic fields of membership were proposed and rejected by the General Assembly. In these circumstances, the agency's interpretation of the statute is clearly erroneous, and "the court . . . is not bound by an erroneous administrative interpretation no matter how long standing [sic] such an interpretation." *Camera Center v. Revenue Cabinet*, 34 S.W.3d 39, 41 (Ky. 2000). See *also St. Luke Hospitals, Inc. v. Commonwealth*, 186 S.W.3d 746, 751 (Ky.App. 2005). However, where a party has acted in reliance upon a longstanding [sic] administrative interpretation of the law, it is within the discretion of the court to apply its decision correcting the erroneous administrative interpretation prospectively to avoid injustice. *Hagan v. Farris*, 807 S.W.2d 488, 490 (internal citations omitted).

Finally, the Court finds this case is not barred by the doctrine of laches. As guidance, the Court notes that in the substantially similar case of *Independent Bankers Association of America v. Heimann*, 627 F.2d 486, 487 (D.C. Cir 1980), that court did apply the doctrine of laches in a dispute between a bankers association and the

Comptroller of the Currency over the meaning of the term "branches" as used in 12 U.S.C. s 36(f) (1976). In that case, the banking association brought its action twelve years after the Comptroller first promulgated a ruling that loan production offices engaging in limited activities were not branches. *Id.* at 488. The Court noted that the banking association had waited past the time it had begun to feel competition due to the ruling. *Id.* The Court further opined that the delay allowed banks to make investments that could not be recouped if the loan production offices were closed; if these costs were recouped it would be through increased cost to customers. *Id.*

The Court stated the Comptroller's ruling was erroneous, but refused to allow the suit because it was contrary to public policy. *Id.* Significantly, the Court then stated, "we do not believe that we in any way are hindering individual banks, even if IBAA members, from seeking redress from the Comptroller, or, if necessary, the courts should the banks be faced with competition from LPO's [Loan Production Offices] that actually are 'branches.'" *Id.* The reasoning in this case is persuasive and is directly analogous to the present situation. Home Federal, whose competitor was not chartered using the geographic field until December 22, 2005, cannot be barred from asserting its rights in this matter, regardless of whether other financial institutions may have delayed in initiating a challenge to OFI's statutory interpretation.[8]

In these circumstances, it would be error for the Court to allow an erroneous interpretation of the statute to continue.[9] In order to avoid any hardship on credit

[8] The Court notes that the record here reflects only five credit unions have been chartered using a geographic field of membership since enactment of Senate Bill 255 in 1984. *See* OFI Memorandum in Support of Motion to Dismiss, p. 2 (July 26, 2006). This supports a finding that any delay in [bringing] a challenge has had minimal impact. [Footnote in original].

[9] Moreover, it appears that an additional impetus for bringing this action was the aborted administrative rulemaking process in which OFI sought to promulgate an administrative regulation codifying its interpretation of the statute allowing geographic fields of membership. See Administrative Register of Kentucky, Feb. 1, 2006. The proposed administrative regulation, 808 KAR 3:070, was withdrawn without comment or explanation prior to its consideration by the Administrative Regulations Review Subcommittee of the Legislative Review Commission,

> union members or existing credit unions that have previously obtained approval from OFI for by-laws [sic] allowing a geographic field of membership, the Court's ruling on these issues will be applied prospectively. *Hagan v. Farris*, 807 S.W.2d 488 (Ky. 1991).

Finally, four of the intervening credit unions, Greater Kentucky, C&O United, Service One, and Kentucky Employees, argue that summary judgment was inappropriate because there were disputed issues of fact. Specifically, they assert that factual findings are necessary to determine whether their geographic fields of membership reflect common bonds of similar occupation, association or interest. We disagree.

The only question before the trial court in this declaratory judgment action concerned OFI's legal interpretation of KRS 286.6-107. No factual issues were in dispute. The credit unions intervened as party defendants pursuant to Kentucky Rules of Civil Procedure (CR) 24.01, asserting that their interests would be affected by a judgment against OFI. In support of their motion to intervene, all of the credit unions asserted that they had "received a charter from the Office of Financial Institutions or its predecessor, permitting each credit union to serve a community field of membership." And none of the credit unions filed cross-complaints for declaratory judgment seeking an adjudication of their rights under the statute. Consequently, we conclude that the factual issues raised by the credit unions were outside of the scope of this action.

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on February 21, 2006. The fact that OFI first proposed and then abandoned the administrative regulation is further indication that OFI itself recognized it lacked statutory authority to adopt such a regulation. [Footnote in original].

Accordingly, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS, COMMONWEALTH OF KENTUCKY, *EX REL.* THE OFFICE OF FINANCIAL INSTITUTIONS; CORDELL G. LAWRENCE, EXECUTIVE DIRECTOR (OFI):

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ORAL ARGUMENT FOR APPELLANTS, COMMONWEALTH OF KENTUCKY, *EX REL.* THE OFFICE OF FINANCIAL INSTITUTIONS; CORDELL G. LAWRENCE, EXECUTIVE DIRECTOR (OFI):

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