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BANKS AND BANKING: Branch Banks

A structure used by a bank to extend the services of an authorized bank office does not constitute a branch office unless the extension allows the bank to serve a new geographical area or to acquire a material advantage over its competitors.

Opinion No. 4926 January 29, 1976.

Richard J. Francis
Commissioner
Financial Institutions Bureau
Department of Commerce
Law Building
Lansing, Michigan 48913

You have requested my opinion on whether a bank may extend its banking activities to structures apart from the premises of an authorized bank office without having the additional structure licensed as a branch. Your request states that "[t]hese branch offices are all located within a short distance (not more than two blocks) of an authorized branch office of the subject bank." The answer to your question involves an interpretation of the term "branch bank" contained in the Banking Code, 1969 PA 318, § 5(d); MCLA 487.305(d); MSA 23.710(5)(d), which provides:

> " 'Branch' means any branch bank, branch office, branch agency, additional office or any branch place of business at which deposits are received or checks paid or money lent. . . ."

In 1 OAG 1955, No 2315, p 676 (November 25, 1955), the Attorney General stated:

> ". . . it would be reasonable for a bank to extend its banking house within the limits of the premises owned by the bank. This would contemplate the purchase of adjoining lots for the enlargement of the banking house. However, under the authority contained in Section 37 of the act[1] I do not believe that a bank should be enabled to extend its banking house across a physical barrier such as a street or public alley or business building located on property not owned by the bank and devoted to other commerce."

Since issuance of Opinion No 2315, *supra,* a number of significant cases have been decided which requires a review of my predecessor's opinion.

I initially note that the Michigan State Courts have not decided this issue. However, litigation in the federal courts have involved the interpretation of Section 36(f) of the National Banking Act, 12 USCA § 36(f); 44 Stat 1229, which defines the term "branch bank" for national banks. In interpreting the state definition of a "branch bank" contained in 1969 PA 318, § 5(d), *supra,* the Michigan Court of Appeals has followed the federal court's interpretation of the federal branch bank definition. See *Tri-City Bank of Warren* v *Department of Commerce,* 39 Mich App 703, 705; 197 NW2d 332 (1972).

[1] This refers to the earlier banking act, 1937 PA 341.

Until 1962, the Comptroller of the Currency had interpreted the federal branch definition in the manner stated in 1 OAG 1955, No 2315, *supra.* That interpretation was challenged in *Michigan National Bank* v *Saxon,* Civ. No. 921-62 (DC 1962), in which the plaintiff, a national bank doing business in Michigan, sought to erect a drive-in facility 500 feet from an authorized branch office. The Comptroller had refused to authorize the extension. In reversing the Comtroller's decision the District Court stated:

> "The term 'branch' is defined in 12 United States Code, Section 36(f). The definition is that the term 'branch' shall be held to include any branch bank, branch office, branch agency, additional office or any branch place of business. The only possible phrase that could apply to the drive-in facility involved in this case is the phrase 'additional office.' It does not mean, however, that every time a bank rents an additional room or additional offices in another building, as banks do sometimes when their business expands, that they are opening a new branch. The words 'additional office' must be reasonably construed as meaning a separate and independent office, operating in the same way as branch banks generally operate, and not merely additional office space to an existing facility.
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> "Here we have a small structure connected by a pneumatic tube and operating as part of the branch now existing. It seems unreasonable to the Court to call that a separate branch.
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> "It is a matter of common knowledge that business offices have to accommodate, under modern conditions, customers who arrive in automobiles. It is quite evident from the exhibits that there is no way of parking an automobile in the immediate vicinity of the building now used by the bank.
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> "The bank proposed to buy a nearby parking lot, only five hundred feet away, on which to erect a structure to serve these customers who arrive in automobiles and to transmit their deposits by a pneumatic tube to the existing office.
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> "The Court is reminded of the admonition of St. Paul that the letter killeth but the spirit giveth life. It would be unreasonable, in the view of the Court, to hold this additional drive-in facility as a separate branch instead of a part of the existing branch."

In *Jackson* v *First National Bank of Valdosta,* 246 F Supp 134, (MD Ga 1965), a Federal District Court retreated from the broad exclusion from the branching laws granted to detached facilities in the *Michigan National case, supra.* In *Jackson,* the national bank sought to establish a drive-in facility approximately 200 feet from the main banking house primarily to cash checks and receive deposits. In reversing the Comptroller's approval to operate the facility, the Court stated as follows:

> "Notwithstanding the apparent literal coverage of § 36(f), this court is urged to adopt the position that 'branch' as defined in § 36(f) was not meant to cover a situation such as this one where merely 'an expansion of an existing facility' is involved and the problem is one of only *de minimis* proportions. The comptroller of the currency felt that this was the case and that since the 'drive-in-facility' would 'be

in unity of operation with the present main office' there was no need nor requirement for issuance of a certificate authorizing a 'branch.' Several factors compel rejection of that approach in this case. These factors fall roughly into four categories: (1) the distance separating the main banking house and the 'drive-in-facility', (2) the number of intervening structures, (3) the lack of physical connection between the main banking house and the 'drive-in-facility', and (4) the economic effect of the 'drive-in-facility' on the balance of competition between the plaintiff bank and defendant bank. . . ." pp 138-139.

The difficulty in determining whether an extension constitutes a branch office was further recognized in *North Davis Bank* v *First National Bank of Layton,* 457 F2d 820, (CA 10, 1972), where the defendant sought to to establish a drive-in-facility 100 feet from an established office and across a street 66 feet wide. The facility was to be connected to the authorized office by a pneumatic tube with no intervening structures between the drive-in-facility and the authorized branch. In holding that the facility was not a branch, the Court stated:

"There is no fixed test for determining what constitutes a branch bank. *First National Bank* v. *Dickinson,* 396 U.S. 122, 90 S. Ct. 337, 24 L.Ed. 2d 312 (1969). Each case must be considered on its own facts. In this case it is disclosed that the proposed facility is an integral operating part of the bank proper. The outside drive-in-teller's window is nothing more than an enlargement of existing facilities for the convenience of customers in conducting bank business, and does not constitute 'a separate branch bank, branch office, branch agency, additional office or branch place of business.' 12 U.S.C. § 36(f). . . ." p 824

Recently, this question was reviewed in *Commonwealth of Virginia, ex rel State Corporation Commission* v *Farmers & Merchants National Bank,* 380 F Supp 568 (WD Va, 1974) aff'd 515 F2d 154 (CA 4, 1975) cert den, ... US ....; 96 S Ct 133; 46 L Ed 2d 99 (1975). Here, the defendant bank established a drive-in-facility approximately 200 feet from an existing branch office. The State Banking Commissioner objected claiming the facility was in violation of state banking laws and that the decision in *First National Bank in Plant City, Fla* v *Dickinson,* 396 US 122; 90 S Ct 337; 24 L Ed 2d 312 reh den 396 US 1047; 90 S Ct 677; 24 L Ed 2d 693 (1969), precluded the Comptroller from permitting any national bank to engage in banking activities which effectively gives such banks a competitive advantage over state chartered banks. The Court however refused to apply a literal and mechanical application of the branch bank definition. Instead, the Court extensively reviewed applicable precedent and in a well reasoned opinion concluded that each situation must be determined on its own merits based on the following test:

". . . This court discerns in the Act and the relevant Supreme Court decisions two basic factors, central to the consideration of whether a facility constitutes a 'branch'

"(1) whether a facility expands in a material way customer access to banking service in a geographical area not previously served;

"(2) whether the facility is so situated physically as to give a bank a material competitive advantage in securing customers.

"In order to determine the presence or absence of these two often unarticulated factors, courts have considered certain data relevant. These have included (1) the distance separating the facility from the existing bank office, (2) the number of intervening structures, (3) the lack of physical connection, such as by pneumatic tubes, between the facility and the existing bank office, and (4) the economic effect of the facility on the balance of competition between competing banks. *See, e.g., Jackson* v. *First National Bank of Valdosta, supra; Dunn* v. *First National Bank of Cartersville, supra; North Davis Bank* v. *First National Bank of Layton, supra.* Other factors this court has considered relevant to this case are (1) whether it was feasible for an existing bank office to physically attach the drive-in windows to the existing office, and (2) whether the freestanding facility could have been constructed closer to the existing bank office. *In making these determinations, no single factor impresses this court as controlling; nor do any hard and fast rules concerning such factors as distance of separation recommend themselves. Only after considering all the relevant factors and circumstances peculiar to this case has this court determined that the defendant's drive-in facility does not constitute a 'branch'.*" pp 573-574 (emphasis added)

The above cases lead me to conclude that a bank may construct an extension facility without having the additional structure licensed as a branch unless the extension allows the bank to serve a new geographical area or to acquire a material advantage over its competitors.

FRANK J. KELLEY,
Attorney General.

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TAX ASSESSMENTS: Church property

A building and land occupied and used by a church as a house of public worship must be owned by the church to be exempt from ad valorem taxes.

Opinion No. 4939 January 29, 1976.

Honorable Donald E. Bishop
Michigan Senate
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Lansing, Michigan 48901

You have asked for my opinion on the following question:

"Must a building and land occupied and used by a church as a house of public worship be owned by the church to be exempt from taxation under MCLA 211.7?"

Const 1963, art 9, § 4 provides:

"Property owned and occupied by nonprofit religious or educational organizations and used exclusively for religious or educational pur-