



Office of the Comptroller of the Currency

Interpretations - Corporate Decision #96-62

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DECISION OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION OF BOATMEN'S NATIONAL BANK OF OKLAHOMA TULSA, OKLAHOMA TO RELOCATE A BRANCH TO 2100 SOUTH UTICA, CITY OF TULSA TULSA COUNTY, OKLAHOMA

I. Introduction and Summary Conclusion

On May 21, 1993, Boatmen's First National Bank of Oklahoma, Oklahoma City, Oklahoma (**NOTE:** On September 13, 1996, Boatmen's First National Bank of Oklahoma, Oklahoma City, Oklahoma, merged into Bank IV Oklahoma, N.A., Tulsa, Oklahoma, under the charter of the latter and with the title Boatmen's National Bank of Oklahoma, Tulsa, Oklahoma.) (the "Applicant"), acquired certain assets and assumed certain liabilities of Cimarron Federal Savings Association, Muskogee, Oklahoma, from the Resolution Trust Corporation, including a branch office located at 6630 South Lewis, Tulsa, Oklahoma (the "Tulsa Branch"). On January 17, 1995, the Tulsa Branch relocated from South Lewis to its present location at 2424 East 21st Street, Tulsa, Oklahoma. By application dated June 7, 1996, the Applicant seeks to relocate the Tulsa Branch to 2100 South Utica, Tulsa, Oklahoma ("Utica Plaza").

By letter dated July 2, 1996, the OCC received a protest and request for hearing on behalf of The F&M Bank & Trust Company of Tulsa, Oklahoma (the "Protestant"), arguing that the Applicant has no authority to relocate the Tulsa Branch to Utica Plaza, which is within 330 feet of two of Protestant's offices. The Protestant argued that a branch could not be relocated to a place where a branch could not be established de novo. It also argued that a branch could not be established de novo because a recent amendment to Oklahoma's branching provision eliminating Tulsa County from the counties subject to a 330 foot "proximity" test for establishing branches was unconstitutional under the Oklahoma Constitution. After the OCC denied the request for a hearing, the Protestant was given an opportunity to comment. On August 7, 1996, the Protestant filed additional comments, claiming that the Tulsa Branch was not being operated as a bank branch, and that therefore its branch authorization had lapsed. The Protestant claims that absent a valid branch authorization, the Tulsa Branch cannot be relocated. On August 14, 1996, Applicant responded to the protest, arguing that Oklahoma's proximity restriction does not apply to relocating branches in Tulsa County. The Applicant also offered evidence of transactions and accounts at the Tulsa Branch, arguing that the office is an operating bank branch.

The following analyzes whether the Tulsa Branch may be relocated to Utica Plaza and considers the arguments raised by the Protestant. We conclude that the proposed relocation meets the requirements of federal and Oklahoma law.

II. Discussion

A. Federal Law: The McFadden Act

The McFadden Act governs national bank branching:

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location, imposed by the law of the State on State banks

12 U.S.C. § 36(c).

The Act also provides that:

No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent of the Comptroller of the Currency.

12 U.S.C. § 36(i). (**NOTE:** This provision was formerly codified at section 36(e) but was relocated as part of section 102(b)(A) of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994.)

The OCC has promulgated a regulation implementing 12 U.S.C. § 36(i) at 12 C.F.R. § 5.40 (1996) which provides that:

(a) *Authority.* A national bank may change the location . . . of a branch in accordance with 12 U.S.C. § 36(i) and 12 U.S.C. § 2901 et seq.

(e) *Branch Relocation.* A national bank desiring to relocate a branch shall file an application. An application to relocate a branch is evaluated in essentially the same manner as an application to establish a branch.

Therefore, in acting upon an application under section 36(i) for a branch relocation, the Comptroller is bound by the section 36(c) standards governing branch establishment, which reference state legal standards. *See, e.g. Mutschler v. Peoples National Bank of Washington*, 607 F.2d 274 (9th Cir. 1979). Further, where state law restricts one method of branching but provides alternative methods for branching, for example by restricting de novo branches but permitting branching by acquisition, national banks are limited to branching by the same method. *See, e.g. First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252 (1966). It follows, therefore, that if a state bank can relocate a branch to a proposed site, so can a national bank, since relocating a branch is a method of establishing a branch at a particular site.

B. State Law

Oklahoma restricts branching by state banks, except by acquisition. Relocation of branches (**NOTE:** The Oklahoma statute governing branch relocations differentiates between de novo branches and acquired branches. Since the Tulsa Branch is an acquired branch, only the pertinent provision is quoted.) is also restricted:

H. Branch Relocation. It is the policy of the Legislature of Oklahoma that branches, whether de novo or by acquisition, . . . of banks state or national, not be permitted to be relocated in such a manner which would result in one or more branches in locations which could not have been lawfully established there to begin with, except as specifically permitted herein. A branch may be

relocated:

2. By acquisition. A branch which resulted from the acquisition of a branch from another bank or savings and loan or of a main office or branch thereof, which was converted to a branch, hereinafter referred to as the "acquired branch". Application may be made to relocate the acquired branch to a location on property owned or leased by the bank:

- a. within the corporate city limits where the acquired branch is located, or
- b. to a location within twenty-five (25) miles of the acquired branch if the relocation is to be in a city or town in which no state or national bank is located. However, if an application for a bank charter has been filed, the State Banking Board or the Office of the Comptroller of the Currency shall give priority to the charter application if filed prior to the branch application;

1996 Okla. Sess. Law Serv. Ch. 92, § 6 (H.B. 1947) (West 1996) (to be codified at Okla. Stat. tit. 6, § 501.1(H) (1996)) (emphasis added). (NOTE: This relocation provision was originally adopted in 1995 as Section 501.1(I). Effective June 1, 1996, the provision was renumbered as part of an amendment to the state branching law. See 1996 Okla. Sess. Law Serv. Ch. 92, § 13 (H.B. 1947) (West 1996). The substance of the relocation provision was unchanged as a result of the recent amendment.)

The plain language of § 501.1(H) gives state banks, and because of the McFadden Act, national banks, the authority to relocate branches to anywhere within the same city on bank-owned or leased property. Thus, we conclude that Applicant's proposal to relocate a branch within the city of Tulsa six blocks to Utica Plaza is authorized by the McFadden Act and applicable provisions of state law.

III. The Protest

A. Relocation of the Tulsa Branch Violates 330 Foot Proximity Test

Protestant claims that Applicant's proposal would violate the McFadden Act because Oklahoma branching law would not allow a state bank to establish a branch at or relocate a branch to the Utica Plaza site. Protestant argues that a recent amendment to Oklahoma branching law, which removed Tulsa County from counties subject to a branch establishment restriction, was unconstitutional, and that the restriction applies in Tulsa County. The restriction provides the following:

2. Neither the Banking Board nor the Comptroller of the Currency shall grant a certificate for any branch bank unless it is more than three hundred thirty (330) feet from any main bank or branch bank in counties with a population of five hundred thousand (500,000) or more according to the *1980 Federal Decennial Census* unless the branch bank is established with the irrevocable consent of such other bank. This distance limitation shall be determined by measuring along a straight line drawn between the nearest exterior wall of the appropriate main bank building or branch bank building and the nearest exterior wall of the branch bank or facility.

1996 Okla. Sess. Law Serv. Ch. 92, § 6 (H.B. 1947) (West 1996) (to be codified at Okla. Stat. tit. 6, § 501.1(A) (1996) (emphasis added)). The amendment inserted "1980" in place of "latest" in the emphasized provision. Tulsa County had a population of 470,593 in 1980 and 503,341 in 1990. U.S. Bureau of the Census, *County and City Data Book: 1994*, 452 (12th Ed. 1994). Under the current version of this statute, therefore, the branch establishment restriction is inapplicable in Tulsa County.

The OCC has broad authority to interpret state branching laws in the context of applying the McFadden

Act. *See, e.g., Bank of N. Shore v. FDIC*, 743 F.2d 1178, 1184 (7th Cir. 1984). The OCC does not believe it is appropriate to declare the Oklahoma branching law unconstitutional under the Oklahoma Constitution in the context of this relocation application. Indeed, a search of case law in Oklahoma reveals that only a court may declare a state statute unconstitutional under the state constitution. *See, e.g., State v. Turpen*, 681 P.2d 763, 767 (Okla. 1984). In *State v. Turpen*, the Supreme Court of Oklahoma held that an opinion of the attorney general on the constitutionality of a state statute "should be considered advisory only, and thus not binding until finally so determined by an action in the District Court of this state." *State v. Turpen*, 681 P.2d at 767. The OCC will therefore not inquire into the constitutionality under the state constitution of Oklahoma's branching law. (NOTE: Also informative on this matter is a letter dated September 26, 1996 from the Oklahoma Attorney General's Office to State Bank Commissioner Mick Thompson, refusing to issue an opinion on the constitutionality of the branch establishment provision, but specifically noting "that the starting point for an analysis as to the constitutionality of a statute begins with the recognition that the validity of a statute is presumed and that presumption continues until the statute's invalidity is shown beyond any doubt. *Way v. Grand Lake Ass'n. Inc.*, 635 P.2d 1010, 1017 (Okla. 1981), (citing *Herndon v. Anderson*, 25 P.2d 326 (Okla. 1933).") According to the 1980 Census, the relevant population of Tulsa County is 470,593. The branch establishment restriction is therefore inapplicable in Tulsa County, and therefore not applicable for purposes of the proposed branch relocation. (NOTE: Because we conclude that the 330 foot proximity limitation is not applicable to branching in Tulsa County, it is unnecessary at this time to decide whether that test in the branch establishment provision would apply to branch relocations.)

B. Tulsa Branch Does Not Exist

Protestant also argues that the Tulsa Branch has not been operated as a bank branch, and that the branch authorization has lapsed. Protestant therefore argues that the Tulsa Branch does not exist, and may not be relocated. Upon reviewing the materials and arguments presented by Protestant and Applicant on this matter, however, it is clear that the Tulsa Branch is being operated as a branch of Applicant, and has been so operated since its relocation to East 21st Street.

Protestant offers as proof that the Tulsa Branch is not being operated as a branch several facts. First, the East 21st Street location is not listed in the local phone book with Applicant's other branches. Second, signs on the building and office door at East 21st Street indicate that Boatmen's Trust Company is located at the location. Third, the office door has at times been locked during normal business hours, with a note on the door advising visitors to push a button or ring a bell for assistance. Finally, another note on the door of the office states new hours for the office, effective June 6, which approximately coincides with the date of this relocation application, June 7. Protestant considers the proximity of the change in business hours to the date of the application as evidence of an attempt by Applicant to create the facade of a bank branch open to the public in a location previously closed to the public. Protestant therefore concludes that the office on East 21st Street has not been a branch, and that the OCC's branch authorization for the Tulsa Branch lapsed under OCC rules 18 months after the January 17, 1995 OCC letter approving the relocation from South Lewis to East 21st Street. See 12 C.F.R. 5.40(h). Without a properly authorized branch on East 21st Street, Protestant argues, there is no branch to relocate to Utica Plaza.

Whether the office on East 21st Street is a branch depends on the definition of branch in the McFadden Act, as interpreted by courts. The statutory definition includes bank offices "at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f). Courts have identified other factors that need to be present before an office will be considered a "branch" of a national bank. As a result, the OCC generally performs a three step analysis in determining whether an office is a branch. *See, e.g.* OCC

Interpretive Letters 634 and 635. First, the facility must perform at least one of the McFadden Act core banking functions of receiving deposits, paying checks, or lending money. *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987). Second, it must be "established" (i.e., owned or rented) by the bank. *Independent Bankers Ass'n of America v. Smith*, 534 F.2d 921 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976) (" *IBAA v. Smith* "); *Independent Bankers Ass'n of New York v. Marine Midland Bank*, 757 F.2d 453 (2d Cir. 1985). Third, the facility must be accessible to bank customers and thus give the bank a competitive advantage in obtaining customers. *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969); *IBAA v. Smith*, 534 F.2d 921.

Applying this analysis to the Tulsa Branch, it is clear that the facility at East 21st Street is a branch office. First, according to an affidavit submitted by the branch manager of the Tulsa branch, the types of transactions conducted included accepting deposits and cashing checks for Applicant's customers. Performing such McFadden Act core banking functions satisfies the first step in the analysis. Further, according to materials submitted by Applicant's counsel, the office on East 21st Street has been leased by Applicant during the period in question, satisfying the second step of the analysis. Finally, according to the branch manager's affidavit and supported by evidence submitted by Applicant, the Tulsa Branch was open to the public, providing customers with a local facility at which to transact their banking business, and members of the public did, in fact, transact core banking functions in person at the office. In such a case, the third step of the analysis is satisfied. (**NOTE:** Protestant's observation that the office appeared at times to be locked during normal business hours is not relevant to the question of whether the office was open to the public. A national bank's schedule of office hours must be determined by the bank's board of directors independently of other banks. See 12 C.F.R. § 7.3000, 61 F.R. 4868 (February 9, 1996). A schedule of branch office hours could easily include differences between branches, depending on the particular needs of the bank's customers and staffing considerations of the bank. Further, according to Applicant, the lack of space in the East 21st Street office is one reason for wanting to move to the larger facility at Utica Plaza. Applicant's targeted mailings to bank customers appears to be a reasonable method of advertising the existence of the branch, while limiting the customer traffic in the office to a manageable level.) Consequently, we conclude the Tulsa Branch is a functioning branch office of Applicant and may be relocated.

IV. Other Factors

In addition to legal considerations, section 5.40 also states that the OCC reserves the right to deny applications, or to grant approval subject to certain conditions if significant supervisory concerns exist with respect to the applicant or an affiliate, the applicant's Community Reinvestment record is less than satisfactory, or the transaction is more favorable to insiders than would be a comparable transaction with unrelated parties. 12 C.F.R. § 5.40(b)(1996). Applicant's Community Reinvestment record is satisfactory, and an evaluation of the other factors discloses no basis to disapprove the proposed branch relocation of the Tulsa Branch.

V. Conclusion

Based upon the above analysis of the applicable requirements of federal and Oklahoma law, it is my opinion that these requirements have been met with respect to the relocation of the Tulsa Branch. Thus, the Application is hereby approved.

/s/

Julie L. Williams
Chief Counsel

Application Control Number: 96-MW-07-0022