1960 Opinions of the
Attorney General, No. 7

March 25, 1960

The Honorable A. H. Romick
Commissioner of Commerce
Alaska Office Building
Juneau, Alaska

Re: Procedure to be Followed in Holding Hearings Under Sec. 2.104 (B), Ch. 129, SLA 1951. (Alaska Banking Code).

Dear Mr. Romick:

The following is submitted in response to your inquiry regarding the type of hearings required in passing upon applications received for bank charters and certificates of authority for branch banks.

As discussed in a previous memorandum from this office Section 2.104 (B) of the Alaska Banking Code, (Ch. 129, SLA 1951), provides that notice and hearing shall be provided in advance of any action taken by the Alaska Banking Board and the Administrative Procedure Act provides that the Board (and the Commissioner of Commerce as successor to the Board) shall be subject to the Administrative Procedure Act.

Chapter 1 of the Administrative Procedure Act sets forth the procedure which must be followed for adoption of regulations. Chapter 2 of the Administrative Procedure Act sets forth the procedure which must be followed for administrative adjudication. Thus, the Administrative Procedure Act provides for two types of proceedings, rule making and adjudication. Under Chapter 1 there are provisions for what may be designated "arguments" and under Chapter 2 "trials." The difference between the two kinds of hearings has been explained as follows:

> "A 'hearing' is any oral proceeding before the tribunal. Hearings are of two principal kinds--trials and arguments. A trial is a process by which parties present evidence, subject to cross-examination and rebuttal, and the tribunal makes a determination on the record. The key to a trial

> is opportunity of each party to know and to meet the evidence and the argument on the other side; this is what is meant by the determination 'on the record.' The opportunity to meet the opposing evidence and argument includes opportunity to present evidence, to present written or oral argument or both, and to cross-examine opposing witnesses. The term 'hearing' is often used by legislatures, courts, and agencies to designate what might more precisely be called 'argument.' A typical hearing before an appellate court is an argument, not a trial. A hearing before an administrative agency may be either a trial or an argument. A constitutional or statutory requirement of a hearing could have to do either with a trial or an argument. The Administrative Procedure Act makes the distinction through the rather awkward phraseology of rule making or adjudication 'required by statute to be made on the record after opportunity for an agency hearing.'" 1 Davis, Administrative Law Treatise, 407 (1958).

It is important to recognize the distinction between "adjudicative facts" and "legislative facts" and the reasons for requiring a trial in the determination of adjudicative facts and not for the determination of legislative facts. This has been stated as follows:

> "Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.
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> "Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial.

> The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts. Yet people who are not necessarily parties, frequently the agencies and their staffs, may often be the masters of legislative facts. Because the parties may often have little or nothing to contribute to the development of legislative facts, the method of trial often is not required for the determination of disputed issues about legislative facts."
> 1 Davis, Administrative Law Treatise, 413 (1958)

Chapter 1 of the Administrative Procedure Act sets forth the procedure which must be followed when an agency exercises its quasi-legislative power. Article IV of Chapter 1 provides in part:

> ". . . . the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute." (Emphasis added)

Section 2, Article IV, Chapter 1, provides in part:

> "The provisions of this Article shall not apply to any regulation not required to be filed with the Secretary of State under this Chapter. . . ."

Section 1, Article II of Chapter 1 sets forth certain exceptions to the requirement for filing regulations including the following:

> "(c) Is directed to a specifically named person or to a group of persons and does not apply generally throughout the State."

Thus, Chapter 1, subject to certain exceptions, is made applicable to any proceeding in which the agency exercises its quasi-legislative power in the adoption, amendment, and repeal of regulations.

Chapter 2 provides for adjudication and the kind of hearing which would be designated a trial. A trial would not be necessary or desirable in a quasi-legislative

proceeding. This is recognized in the statute by the provision for a different kind of hearing based upon argument in Chapter 1 which is made applicable to quasi-legislative proceedings. Therefore, it is believed that Chapter 2 was intended to be applicable to quasi-judicial proceedings and not quasi-legislative proceedings.

Difficulty is encountered when attempting to characterize an entire proceeding as either legislative or judicial. For example, Section 5 of Chapter 2 specifically provides for a determination as to whether a "right, authority, license or privilege should be granted." Section 3.216 of the Alaska Banking Code requires the exercise of quasi-legislative power as it requires a determination before granting a charter that "the addition of the proposed facilities in the community is not detrimental to a sound banking system."

This difficulty has been discussed as follows:

> "One obvious reason why whole proceedings cannot properly be labeled 'judicial' or 'legislative' is that in a single proceeding a tribunal commonly acts both judicially and legislatively. The process of resolving disputed facts about particular parties is the essence of the judicial and calls for a trial type of hearing. But even in a judicial proceeding before a court, the process of creating law or policy which will be applicable in future cases of the same sort is rather clearly legislative, and a trial type of hearing ordinarily is not required for this part of the proceeding. . . .
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> "Is the determination of whether to grant or to deny an application for a license a judicial function or a legislative function? In an ultimate sense the question is necessarily unanswerable, unless the question is answered by saying that the label must be affixed not on the basis of analysis of the nature of the function but on the basis of desirability or undesirability of the consequences that will flow from any particular label in any particular circumstance.

> The Supreme Court has held that granting or denying a radio license is nonjudicial for purposes of deciding whether the Court could provide a de novo review. But the Administrative Procedure Act provides that licensing is adjudication. Then is a trial type of hearing required? The sound answer is necessarily both yes and no, depending upon whether or not adjudicative facts are in dispute. . . .
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> "The crucial question is not characterization of the whole proceeding as judicial or nonjudicial but the presence or absence of issues of adjudicative facts." 1 Davis, Administrative Law Treatise, 417 (1958)

Elsewhere the author states:

> "The central proposition of full hearing is that adjudicative facts--facts pertaining to a particular party--normally ought not to be found without allowing the party a chance to rebut, explain, and cross-examine. The key is not characterization of a whole proceeding as judicial or legislative; even in a judicial proceeding procedural safeguards are often relaxed with respect to legislative facts--facts which do not pertain to a particular party but which bear upon law, policy, or discretion. Thus an applicant for a license is entitled to a trial type of hearing on issues of fact concerning his qualifications but not necessarily on issues of fact concerning need for the service or conditions in the territory to be served." 1 Davis, Administrative Law Treatise, 506 (1958)

Whether an applicant for a license would be entitled to a hearing under the Alaska Administrative Procedure Act would depend upon whether there was any issue of adjudicative fact. A hearing would not be required under the Administrative Procedure Act unless there was an issue of adjudicative fact which could be determined under Chapter 2 of the Act.

Section 3.216 of the Alaska Banking Code sets forth the facts which must be determined before granting a charter as follows:

"1. The addition of the proposed facilities in the community is not detrimental to a sound banking system.

2. The incorporators have proceeded in a lawful manner.

3. The name is not deceptively similar to that of another bank or otherwise misleading.

4. The persons who will serve as directors and officers, insofar as such persons are known, are qualified by character and experience.

5. The capital is not less than the required minimum."

Under Section 3.221 (B) of the Alaska Banking Code similar facts must be determined for the issuance of a certificate of authority for the operation of a branch bank, or for the operation of the principal office of a bank, or of a branch bank, in a changed location.

A determination as to whether the addition of the proposed facilities in the community would be detrimental to a sound banking system would be a determination of a legislative fact and a hearing for such determination would not be under the Administrative Procedure Act, since it does not have the effect of a rule or regulation of general application and is directed to a specifically named person or to a group of persons. A determination of the remaining factors would appear to involve a determination of adjudicative facts. Therefore, if there was an issue as to those facts a hearing would be required under Chapter 2 of the Administrative Procedure Act.

Section 2.104 (B) of the Alaska Banking Code provides that notice and hearing shall be provided in advance of any action taken by the Board. It appears, after reading case law and the administrative law treatise by Davis, that a hearing would not be required under this section unless the application states a valid basis for a hearing. See United States v. Storer Broadcasting Company, 351 U.S. 192, 205 (1955); 1 Davis, Administrative Law Treatise, 411 (1958). If there is a dispute as to an adjudicative fact a hearing would be required under Chapter 2 of the Administrative Procedure Act. If the application is denied on the ground that the addition of the proposed facilities in the community would be detrimental to a sound banking system it would be necessary for the applicant to set forth reasons

which might be sufficient to sustain a contrary finding before it would be necessary to grant a hearing under Section 2.104 (B) of the Alaska Banking Code and such a hearing would not be under the Administrative Procedure Act.

From the foregoing the following procedure may be summarized:

1. When passing on an application where there is an adjudicative fact in issue the applicant should be afforded an opportunity for a hearing conducted under Chapter 2 of the Administrative Procedure Act.

2. When the application places in issue a legislative fact the applicant should be granted a hearing under Section 2.104 (B) of the Banking Code but this hearing would not be subject to the Administrative Procedure Act.

3. When the applicant fails to place in issue an adjudicative or legislative fact there is no reason or useful purpose for holding a hearing and none need be granted. When an application is denied a statement setting forth the reasons for such denial should be given the applicant. If after giving such statement the applicant raises an issue as to an adjudicative or legislative fact and requests a hearing, a hearing should be granted.

Very truly yours,

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