BANKING CODE--BOARD OF APPEALS: IN INCORPORATION OF BANKS

December 5, 1946

Senate Bill #196 recently passed by the Legislature, has no bearing upon, nor does it interfere with the duties of the Board of Appeals in bank incorporation matters provided for in Sections 7942 and 7943, because said sections, with other sections cited, provide for a complete plan for appeal and review by the Courts.

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Honorable H. G. Shaffner
Commissioner of Finance
Jefferson City, Missouri

Dear Commissioner Shaffner:

This will acknowledge your letter of recent date, requesting an opinion from this Department as to whether Section 7943, R.S. Mo. 1939, making the Governor, the Attorney General and the State Treasurer a Board of Appeals in the application of the corporators of a bank for a certificate to organize a bank has been amended, or if Senate Bill #196, has any effect thereon. Your letter reads as follows:

> "Sec. 7943, R.S. Missouri 1939, provides that a Board composed of the Governor, Attorney General and the State Treasurer shall accept an appeal and render a decision in cases where this Department refuses to issue a new bank charter.
>
> "Has there been an amendment to this section or does SB 196 have any bearing thereto?"

Section 7942, R.S. Mo. 1939, also states, in the last paragraph thereof, that the Governor, the Attorney General and the State Treasurer shall constitute such Board of Appeals, and is to be read in connection with said Section 7943.

Section 7942, R.S. Mo. 1939, was amended by the Legislature, Laws of Missouri, 1941, pages 671, 672, but there was no change with respect to the official personnel of the Board of Appeals. The amendment, Laws of Missouri, 1941, pages 671, 672, leaves the same paragraph and in the same words as were in said Section 7942 as it stood in the Revised Statutes of Missouri, 1939.

Section 7943, R.S. Mo. 1939, has not been changed at all. So that the amendment of the Session Acts of 1941 of said Section 7942, and the terms of said Section 7943 of the Revised Statutes of Missouri, 1939, remain identical as they were in the Revised Statutes of Missouri, 1939.

The writer has carefully checked the index of laws passed by the Legislature of 1945, and has also checked the table and list of Bills passed as affecting old statutes already in existence. We find that Section 7943, R.S. Mo. 1939, has never been amended since the revision of 1939. There was no amendment thereto in 1941 or 1945 by the Legislature.

That part of Section 7942, Laws of Missouri, 1941, pages 671, 672, providing for an application by incorporators of a bank under the banking laws of this State, is, in part, as follows:

> "* * * In case the commissioner shall not be satisfied, as the result of such examination, that the character, responsibility and general fitness of the persons named in such articles of agreement is up to the standard above provided, or that the convenience and needs of the community to be served justify and warrant the opening of such bank therein, or that the probable volume of business in such locality is sufficient to insure and maintain the solvency of the new bank and the solvency of the then existing banks or trust companies in such locality, without endangering the safety of any bank or trust company in said locality as a place of deposit of public and private moneys; and on these accounts or any one of them shall refuse to grant the certificate of incorporation, he shall forthwith give notice thereof to the proposed incorporators from whom such articles of agreement were received; who, if they so desire, may within ten days thereafter appeal from such refusal to a board composed of the governor, the

> attorney general and the state treasurer, which board shall within twenty days thereafter finally decide the matter, and the commissioner shall act in accordance with such decision but the decision of the board may be reviewed by the circuit court in the manner prescribed by Section 5690, R.S. 1939. Such board may prescribe rules and regulations for the proceedings in connection with such appeal."

It will be seen at once that that part of said Section 7942, Laws of Missouri, 1941, provides for not only an appeal from the Commissioner of Finance to the Board of Appeals, the personnel of which is the Governor, the Attorney General and the State Treasurer, but it also provides that their action may be reviewed by the Circuit Court in the manner prescribed by Section 5690, R.S. Mo. 1939.

Section 5690, R.S. Mo. 1939, was amended, Laws of Missouri, 1943, page 334, to give concurrent appellate jurisdiction with the Circuit Court to Common Pleas Courts in appeals in certain awards, decisions and determinations of the orkmen's Compensation Commission, the Unemployment Compensation Commission and the State Social Security Commission, and to issue writs of certiorari and the right to review findings and orders of the Public Service Commission of this State. But the amendment in nowise touched or affected the terms or provisions of said Section 7942, Laws of Missouri, 1941, pages 671, 672, providing for appeals to the Board of Appeals in such bank proceedings or the power of the Circuit Courts to review the decisions of the Board of Appeals composed of the Governor, the Attorney General and the State Treasurer. There still remains undisturbed and unamended, the complete scheme and plan for appeal and review as is contained in said Section 7942, Laws of Missouri, 1941, and in said Section 7943, Laws of Missouri, 1939.

Returning for the time to said Section 5690, R.S. Mo. 1939, which was, as above stated, undisturbed

and unchanged by the amendment of Laws of Missouri, 1941, giving the Common Pleas Courts jurisdiction therein, we find that said Section 5690 is a part of the procedure before the Public Service Commission and Courts having appellate jurisdiction over their proceedings. Having in mind the provisions of said Section 7942, that incorporators of a bank, aggrieved by the decision of the Board of Appeals provided for in said Section, may have such decision reviewed by the Circuit Court in the manner prescribed by Section 5690, R.S. Mo. 1939, we turn again to said House Bill #196.

This is a general statute or Act passed by the Legislature to meet the lack of the right to appeal or have a review made by the Courts of proceedings of some of the administrative bodies of this State already existing under the statutes.

Senate Bill #196 prescribes a comprehensive plan of procedure for appeals and review by the Courts in such matters as come before administrative bodies. The Act clearly defines "Agency", "Rule", "Contested case" as explanatory of the subjects to which said Act shall apply. Said Senate Bill #196 is quite too lengthy to quote here, but it is readily accessable to any one inquiring. Indeed, that is the only Section of said Senate Bill #196 that definitely and particularly applies to the question being pursued here.

We have already shown, we think, very clearly that there is a definite method of appeal and review set forth in the statutes hereinbefore cited and quoted in matters of the incorporation of banks.

This brings us to that part of said Senate Bill #196 which, we think, definitely controls this problem and points out that the Legislature was mindful in the enactment of said Senate Bill #196 that there already existed provisions in certain statutes providing for the appeals from and review of the activities of some of the administrative bodies, and in particular the one here, being considered, in this State by the Courts of this State when the legislative body came to incorporate Section 10(a) in said Senate

Bill #196. Said Section 10(a) is as follows:

> "Section 10 (a) Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof, as provided in this section, unless some other provision for judicial review is provided by statute; provided, however, that nothing in this act contained shall prevent any person from attacking any void order of any agency at any time or in any manner that would be proper in the absence of this section. Unreasonable delay on the part of any agency in deciding any contested case shall be grounds for an order of the court either compelling action by the agency or removing the case to the court for decision."

We believe that under the provisions of said Section 10(a) in Senate Bill #196, providing "* * * a final decision in a contested case,whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof as provided in this section, unless some other provision for judicial review is provided by statute; * * * " any person interested in bank incorporation cases would have the right to have the whole case reviewed by the Circuit Court under Section 7942, Laws of Missouri, 1941, and Sections 7943 and 5690, R.S. Mo. 1939, supra. Said sections are still in full force and effect in this State, and constitute full and adequate authority for "judicial review" of all proceedings in the matter of the incorporation, or the denial of the right to incorporation, in bank matters.

Section 7942, Laws of Missouri, 1941, pages 671, 672, and Sections 7943 and 5690, R.S. Mo. 1939,

constitute a special plan of the statutes dealing with a special subject. It is a complete scheme and plan for appeal and review of the proceedings of the Commissioner of Finance and the Board of Appeals in the matter of the incorporation of banks.

There is not a single word in Senate Bill #196 repealing outright, Section 7942, Laws of Missouri, 1941, pages 671, 672, or Section 7943, or Section 5690, R.S. Mo. 1939, or amending them or either of them, or calling them in question in any particular whatsoever.

Section 10(a) of Senate Bill #196 is a general statute dealing with general matters of appeal and review in proceedings had before administrative bodies, "* * * unless some other provision or judicial review is provided by statute; * * * ".

59 C.J., pages 1057 and 1058, reciting the rule of construction of the effect of special statutes and general statutes on the same subject has this to say:

> "* * * It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication. * * * ".

The Supreme Court of Missouri in the case of State vs. Imhoff, 291 Mo. 603, l.c. 617, on this question said:

> "* * * We have said, not once, but a number of times, that where there are

> two acts and the provisions of one have special application to a particular subject and the other is general in its terms and if standing alone would include the same matter and thus conflict with the special act, then the latter must be construed as excepted out of the provisions of the general act, and hence not affected by the enactment of the latter. * * * ".

Our Supreme Court in the case of State vs. Fidelity & Deposit Company, 296 Mo. 614, l.c. 626, on the same principle of law again said:

> "'Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' * * * ".

There is no conflict or repugnancy between Senate Bill #196 and Section 7942, Laws of Missouri, 1941, pages 671, 672, Section 7943 or Section 5690, R.S. Mo. 1939. They should be read together to give

effect to the first said three sections as a special law and the last, Senate Bill #196 as a general law on the same subject. Neither is there any repeal by implication in the enactment of Senate Bill #196 of the terms and provisions for appeal and review of the actions of the Board of Appeals as an administrative body created by said Section 7942, Laws of Missouri, 1941, pages 671, 672, or Section 7943, or Section 5690, R.S. Mo. 1939.

59 C.J. on this subject, page 912, states the rule as follows:

> "* * * Obviously, there is no implied repeal on the ground of inconsistency or repugnancy where there is no conflict, antagonism, inconsistency, or repugnancy between the acts in question, as where the later act is merely affirmative, cumulative, or auxiliary. * * * ".

The Supreme Court of Missouri in giving effect to the rule hereinabove stated in Corpus Juris, in the case of State vs. Fiala, 47 Mo. 310, said: (l.c. 320):

> "Repeals by implication are not favored. The rule in this State may be regarded as settled that a general statute, although inconsistent with the provisions of a prior law, will not repeal the latter unless there is something in the general law, or in the course of legislation upon its subject-matter, that makes it manifest that the Legislature contemplated and intended a repeal. * * * ".

Our Supreme Court again considering the same rule and principle of law, in the case of State vs. Buder, 315 Mo. 791, l.c. 797, again affirmed the same rule by saying:

> "* * * The repeal of statutes by implication is not favored by the

> courts, and the presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to appeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed. * * * ".

A repeal by implication may only be effected when absolutely necessary.

This was the holding by our Supreme Court in the case of White vs. Greenway et al., 303 Mo. 691, l.c. 697, 698, where the Court held as follows:

> "A repeal occurs by implication only when necessity demands it. (State ex rel. v. Wells, 210 Mo. l.c. 620; Manker v. Faulhaber, 94 Mo. 440; 26 Cyc. pp. 1073-1077.) The opinion in the Wells Case quotes from a textbook, as follows:
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> "'A repeal by implication must be by necessary implication. It is not sufficient to establish that the subsequent law or laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy.' (Anderson's Law Dict., p. 879.)
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> "In the Manker Case it was said that before a later act could repeal a former, 'the two acts must be irreconcilably inconsistent,' or it must appear that the Legislature

> intended by the act to prescribe the only rule that would govern in the case."

Our Supreme Court expressed its continued adherence to the support of the rule that a repeal of one statute by implication, by the enactment by another statute, must be a necessity, in the case of State vs. Wells, 210 Mo. 601, l.c. 620, when it said:

> "* * * 'A repeal by implication must be by necessary implication. It is not sufficient to establish that the subsequent law or laws cover some, or even all, of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy.' * * * ".

We must then conclude that if Section 7942, Laws of Missouri, 1941, pages 671, 672, together with Sections 7943 and 5690, R.S. Mo. 1939, provide a complete and adequate plan of appeal in, and review of, the actions of the Commissioner of Finance, and the Board of Appeals, composed of the Governor, the Attorney General and the State Treasurer of the State of Missouri, in the matter of the incorporation, or refusal to permit the incorporation, of banks, Senate Bill #196 does not in any way affect the actions of the State officers named or the validity of the said statutes authorizing and providing for the exercise of such administrative duties and functions.

We believe that Senate Bill #196 is supplementary to and in aid of Section 7942, Laws of Missouri, 1941, pages 671, 672, and Sections 7943 and 5690, R.S. Mo. 1939, and is not in conflict therewith. Senate Bill #196 does not have any effect or bearing upon the

above quoted Sections of law of 1941, or the Revised Statutes of Missouri, 1939, on the subject matter of this inquiry, because said Sections provide for a complete plan of appeal and review of matters concerning the incorporation of banks.

Since Section 10(a) of Senate Bill #196 specifically exempts such administrative bodies where there were provisions by law for appeal and review when said Senate Bill #196 was enacted, the duties and functions of said Board of Appeals in bank incorporation proceedings are not affected in any manner whatsoever by the terms of said Bill.

CONCLUSION.

It is, therefore, the opinion of this Department that:

1) Senate Bill #196 recently passed by the Legislature, has no bearing upon, nor does it in anywise interfere with the functions and duties of the Board of Appeals consisting of the Governor, the Attorney General and the State Treasurer, in matters of the incorporation of banks as provided for in Section 7942 and Section 7943, R.S. Mo. 1939.

2) There is no amendment of any kind in our statutes changing or interfering with the duties of said Board of Appeals as provided in said last numbered sections of R.S. Mo. 1939.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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