

1963

# Zion's First National Bank v. Spencer C. Taylor et al : Brief of Respondent

Utah Supreme Court

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# IN THE SUPREME COURT of the STATE OF UTAH

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ZIONS FIRST NATIONAL BANK,  
N.A.,

*Plaintiff and Respondent,*

—vs.—

SPENCER C. TAYLOR, BANK  
COMMISSIONER OF THE STATE  
OF UTAH and FIRST SECURITY  
STATE BANK,

*Defendants and Appellants,*

FILED  
Supremo Court Utah

Case No. 9960

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## BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT OF THE THIRD  
DISTRICT COURT FOR SALT LAKE COUNTY  
HONORABLE A. H. ELLETT, JUDGE

A. PRATT KESLER, *Attorney General*  
by H. Wright Volker

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UNIVERSITY OF UTAH

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N.A.,

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SPENCER C. TAYLOR, BANK  
COMMISSIONER OF THE STATE  
OF UTAH and FIRST SECURITY  
STATE BANK,

*Defendants and Appellants,*

Case No. 9960

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## BRIEF OF RESPONDENT

---

### STATEMENT OF NATURE OF CASE

This is an action challenging as unauthorized in law and without foundation in fact the order of Spencer C. Taylor, Bank Commissioner for the State of Utah, which granted First Security State Bank (hereinafter referred to as First Security) a charter to establish a branch bank in the Cottonwood Mall in Salt Lake County, Utah.

### DISPOSITION IN LOWER COURT

The case was tried to the court, which held that the defendant Bank Commissioner abused his administra-

tive discretion and acted arbitrarily and capriciously in awarding the defendant First Security the Certificate of authorization to operate a branch. The Certificate was therefore rescinded, vacated and set aside, and the defendant First Security was enjoined from establishing or conducting a branch bank in the Cottonwood Mall, Salt Lake County, Utah, pursuant to the said Certificate.

## RELIEF SOUGHT ON APPEAL

Defendant-appellant seeks reversal of the judgment of the trial court rescinding and vacating the Bank Commissioner's action, and issuing an injunction against First Security from establishing a branch bank pursuant thereto. Plaintiff-respondent seeks affirmance of the judgment, and to broaden the grounds upon which such judgment rests by construction of the applicable branch banking statute via declaratory judgment that the establishment of the First Security Branch at the location contemplated within the Cottonwood Mall would be "such close proximity" as to constitute "unreasonable interference" as a matter of law.

## PRELIMINARY STATEMENT

The trial court found that the Bank Commissioner abused his administrative discretion in that he failed to take account of or ignored the recently enacted (1953) unique *branch* banking statute which is applicable *only* to the *unincorporated* areas of *Salt Lake County*, and

failed to make the factual determinations contemplated thereunder. The statute provides:

“No branch shall be established at a location outside of the corporate limits of a city or town in *such close proximity* to an established bank or branch as to *unreasonably interfere with the business thereof.*”

(section 7-3-6 U.C.A. 1953, as amended. Emphasis added.)

Accordingly, one issue properly before this Court is whether sufficient evidence exists in the record to support the lower court's finding.

A broader question of law is also presented by the record, i.e., whether under the facts of this case—which is a near *ultimate* case in terms of “close proximity” of two banks—there is “unreasonable interference” as a matter of law by virtue of unimpeachable facts which establish the sole statutory standard of “close proximity.”

An additional issue before this court as to which the trial court failed to make a finding is whether the Bank Commissioner abused his discretion in “finding” the existence of “public convenience and advantage,” which is another statutory condition precedent to action by the Bank Commissioner.

## STATEMENT OF FACTS

The Statement of Facts in appellants' brief is deficient in that it fails to set forth vital findings and evi-



dence, primarily as relates to the concept of "close proximity" and its effect upon previously established bank business. In particular, the paraphrasing of Bank Commissioner Taylor's testimony tends to deemphasize the obvious inattention given by the said Commissioner either to the statute itself or to any aspect of the business of the Zions' branch as such might be affected by the granting of the First Security charter. Also, the findings and evidence which affirmatively show "unreasonable interference" by reason of "such close proximity" are neglected. Accordingly, this supplementary recitation of facts is meant to set forth more fully the material facts which are felt to be determinative of the legal issues involved.

*Location: Close Proximity—*

The lower Court found:

"7. The Cottonwood Mall, sometimes referred to as the Cottonwood Shopping Center, is located in an *unincorporated area of Salt Lake County, Utah*. (R. 87, Emphasis added.)

"8. The proposed new branch of defendant First Security State Bank will be *located substantially adjacent to the present branch bank of plaintiff, Zions First National Bank*, the branches being located on opposite sides of the covered Mall and separated by 182 feet across the width of the covered Mall. (R. 87, Emphasis added.)

\* \* \*

"10. Placement of the proposed branch bank of defendant First Security State Bank at the contemplated location within the Cottonwood

Mall *constitutes close proximity.*" (R. 88, Emphasis added.)

The factual support for these findings is unquestionable. Both defendants admitted in the pleadings that the two branch banks would be "immediately adjacent" to each other. (R.5 and R. 10), and the Bank Examiner characterized the locations as "contiguous." (R. 30) The findings are likewise supported by Exhibit P-4 (R. 43, 44), which is an architect's plat supported by affidavit which shows that the branches would be located in the same portion of the Cottonwood Mall Building, covered by the same roof and separated only by 182 feet across the width of the Mall itself.

*No investigation of effect of "close proximity," "unreasonable interference" or "business (of) established bank"*

The lower court found:

"9. It *affirmatively appears* that no determination was made by defendant Spencer C. Taylor, Bank Commissioner of the State of Utah, as to whether placement of the proposed First Security State Bank branch within the Cottonwood Mall would constitute close proximity to the existing Zions Cottonwood branch so as to *unreasonably interfere with the business thereof.*" (R. 88, Emphasis added.)

\* \* \*

"11. The [*close proximity*] statute] . . . was ignored, and it *affirmatively appears* that the facts with respect to whether the proposed branch bank would unreasonably interfere with the exist-

ing branch bank were *not sufficiently inquired into* by the defendant Spencer C. Taylor, Bank Commissioner of the State of Utah, prior to October 16, 1962, the date of execution of the Certificate authorizing the conducting of a branch bank by defendant First Security State Bank in the Cottonwood Mall . . ." (R. 88, Emphasis added.)

\* \* \*

"12. On or before October 16, 1962, the defendant Spencer C. Taylor, Bank Commissioner of the State of Utah, did not know and it *affirmatively appears that he had not made sufficient inquiry to form a judgment as to what effect in terms of unreasonable interference* granting the application for placement of the proposed new branch bank of defendant First Security State Bank within the Cottonwood Mall would have upon the *business of the pre-existing branch bank of plaintiff* located within the Cottonwood Mall by reason of close proximity thereto." (R. 88, Emphasis added.)

\* \* \*

"13. It *affirmatively appears that no inquiry or investigation was made* by defendant Spencer C. Taylor, Bank Commissioner of the State of Utah, nor the State Banking Department before granting the Certificate on October 16, 1962, as to the *effect* which granting the First Security State Bank application would have upon the *business of the pre-existing Zions Cottonwood Branch Bank* by reason of proximity thereto." (R. 88, Emphasis added.)

Chief Bank Examiner Quinn conducted an investigation for the Banking Department (R. 28-38) and inquired into various matters and areas of importance which were

regarded by Bank Commissioner Taylor as adequate and calling for all "essential information" (Dep. 6). However, the investigation failed to call for a finding or information relative to the unique law applicable to *unincorporated areas of Salt Lake County*, i.e., the effect (possible *unreasonable interference*) upon the business of an established bank by reason of the "close proximity" of a proposed branch bank.

The Bank Commissioner neither made nor caused to be made any study or investigation relative to the matter of the possible effect which "close proximity" might have upon the business of the Zions Cottonwood Branch. Actually, it seems clear that any ideas the Commissioner had as to "close proximity" were very general and *not based upon facts applicable to the specific situation*, or for that matter upon facts of essential consideration under the statute *applicable to the unincorporated areas of Salt Lake County*:

"Q. And you considered close proximity in the Cottonwood Mall area in the same sense that you would consider it in Salt Lake City proper?

A. Yes, or Logan or Brigham or Cedar City.

Q. Or any other area?

A. Yes.

(Dep. 62. Emphasis added.)

\* \* \*

Q. . . . Have you ever had any occasion to make any studies of the effect that proximity has to the business of a pre-existing branch bank,

that is proximity of another competing branch bank?

A. I have made some observations. *Down in California* they put a branch on one corner and following a few days (doors?) from there there would be a branch on the other corner, just cater-cornered. And I don't know what the reasoning is but banks seem to want to compete with each other right on the ground.

Q. Have you made any studies in Utah on this matter?

A. Just as I have stated, that *wherever there are banks that they are generally—where there is more than one bank they are generally in pretty close proximity.*" (Dep. 63. Emphasis added.)

Commissioner Taylor testified that for purposes of his decision *he made no special finding as to the matter of close proximity* (Dep. 67), although by the time of his deposition he did regard the placement of the two banks in the proposed location within the same building as "close proximity" (Dep. 67). Actually, the Commissioner had the rather startling notion that banks in "close proximity" would actually *benefit* each other, which was certainly not based upon any investigation of *banks*, but rather appeared to be based upon hearsay as to certain other businesses:

"Q. Is it your statement that you believe that placing a competing branch bank right next to a pre-existing branch bank could help the first bank?

A. Well it creates more business.

Q. For what branch?

A. Both banks.

Q. How does placing First Security right next to Zions bring more business to Zions?

A. Well it brings more business to the area.

Q. But does it bring more business to Zions?

A. I think so.

Q. Have you ever made any studies to show that placing a branch right next to another one actually helps the first branch?

A. I have read a lot on the subject and *this is true with grocery stores and gasoline stations and shoe stores.*

Mr. Nebeker: Off the record.

(Discussion off the record.)

“BY MR. GREENE:

Q. Do you think that placing First Security State Bank where it is intended to be placed would help the business of Zions?

A. I think it would create a healthy situation.

Q. But would it increase the business volume of Zions?

A. *I don't know.* That is a loaded question; *I don't know.*

Q. Well do you have any reason to think that it would actually increase the business volume of Zions?

A. *No, I wouldn't have any.”*

(Dep. 63, 64. Emphasis added.)

As to the matter of *possible unreasonable interference or adverse effect upon the business* of the Zions' Cottonwood Branch bank, Commissioner Taylor *failed to inquire into any aspect of the business of the Zions branch*. This in spite of the fact that the unusual quality, design and size of "Salt Lake area's finest suburban bank" (R. 26) was emphasized to the Bank Commissioner, and he recognized the "lush" nature of the Zions' branch and that such "was in keeping with the rather nice decor and nature of the decorating in the Mall itself." (Dep. 33) (See representative pictures—Exhibit P-5.):

“Q. Now did you make any studies with regard to the expenses of Zions First National Bank Cottonwood branch?

A. No. I had no occasion to do that.

Q. Did you consider the cost of its leasehold?

A. I had no occasion to do that.

Q. The matter of its square footage?

A. No.

Q. Or the kinds and types of business equipment that it had?

A. No.

Q. The cost and the number of employees and personnel employed to operate that branch?

A. No.

Q. The expenses per month?

A. Of Zions?

Q. Yes.

A. No.”

(Dep. 43)

Although the Commissioner testified that the “*break-even*” point was and is an essential consideration in analysing profitable branch banking (R. 43), he made no inquiry into the factors which would establish the break-even point of the Zions-Cottonwood branch (Dep. 43, 44). The Bank Commissioner had no knowledge of the critical matter of Zions’ Cottonwood Branch *deposit volume* at any time during the pertinent period of time before the First Security application was granted (Dep. 56, 57), and he made no computations as to Zions’ deposit volume or as to the total potential deposit volume for all banks and financial institutions in the so-called “bank service area.” (Dep. 81) It had been called to his attention, and Commissioner Taylor was well aware, that the Zions Branch was so located and planned as to have foregone the free standing, drive-in type bank business (Dep. 33) and that *its success depended upon attraction of the business accounts primarily within the Mall itself* (R. 26). Also, the Commissioner knew that First Security emphasized as a condition to its anticipated success in the area, the acquisition of “business accounts primarily from the shopping center itself . . .” (R. 20). Notwithstanding these facts, Commissioner Taylor failed to make or cause to be made a study or survey as to the effect which placing another institution *within the Mall* would have upon the potential attraction of business accounts away from Zions’ previously established business.



As a matter of fact, the *only evidence* Commissioner Taylor had before him as to the effect granting this application would have upon Zions was that it would be *detrimental to Zions*. The allegation in plaintiff's Complaint, that Zions had presented evidence to the Bank Commissioner that the plaintiff "is losing money as a result of the operation of its branch in the 'Cottonwood Mall' and that the addition of another branch in the area would have an adverse financial effect upon the business of the Cottonwood Branch of the plaintiff," was admitted (R. 5, 10). Officials of Zions, both by letter and conference, emphasized to the Commissioner that the branch would need at least a three-year period of time after the shopping center opened to "become self-sustaining" (R. 26) and to get "on its feet" (Dep. 34). (Zions' formal opening was June 4, 1962 (Dep. 32); about half the stores were open in the Mall by the time Commissioner Taylor granted the First Security charter (R. 24); the formal opening of the Mall was in Spring 1963.)

*Overbanking: No need for additional banking facilities—*

The lower court found:

"5. C. B. Quinn, Chief Examiner for the Utah State Banking Department, undertook an *official examination of the facts and circumstances* relative to the application of First Security State Bank for a branch in the Cottonwood Mall and prepared a written report to defendant Spencer C. Taylor, Bank Commissioner of the State of Utah, relative thereto. The said report was filed with defendant Spencer C. Taylor, Bank

Commissioner of the State of Utah, in the spring of 1962, and concluded that granting the application of defendant First Security Bank would create an *over-banked condition* and that *no need exists for additional banking facilities in the area in question.*" (R. 87, Emphasis added.)

The Quinn report (R. 28-38) inquired into and established facts as to the statutory requirement of "public convenience and advantage," which is applicable to all areas of the state where branch banking is permitted, including the unincorporated areas of Salt Lake County. The conclusions of this report, based upon the factual study contained therein, were adverse to "public convenience and advantage":

"It is this examiner's opinion that the *granting of applicant's proposed branch will create an overbanked condition.*"

(Item 14(a), R-35. Emphasis added.)

\* \* \*

"It is this examiner's opinion that *no need exists for additional banking facilities in this area.* In the very core of the primary area involved there are three operating banking facilities and one savings and loan outlet. On the fringe of this area there are two operating banking facilities (*one of which is operated by the applicant*) and one which has been approved but not yet established."

(Item 14(b), R-35. Emphasis added.)

\* \* \*

"Applicant's (First Security's) projected estimate of potential deposit volume may be *overly optimistic when compared to the experience of*

*the established banks in the general service area."*

(Item 16, R-35. Emphasis added.)

\* \* \*

"A protest against the granting of this branch was entered with this department on November 28, 1961 by the Zions First National Bank. No other formal protests have been filed with this department against the establishment of the proposed branch. However, the officers and managers of the financial firms that are represented in this area were of the opinion that *the area is being well serviced with present facilities and the granting of an additional facility would not be ethical or proper.*"

(Item 26, R-38. Emphasis added.)

The Quinn report was filed with Commissioner Taylor in the Spring of 1962, perhaps as late as June (Dep. 11). At the time it was filed Commissioner Taylor agreed with all aspects of the report, including the conclusions and comments stated above (Dep. 59, 69, 75). On or about October 16, 1962, Commissioner Taylor told Mr. Quinn that he was "going to decide against him," but Mr. Quinn never advised Mr. Taylor that he had changed his mind as to the report or the matters contained therein (Dep. 77, 78). However, on October 16, 1962, in conference with Governor Clyde, Commissioner Taylor's mind was changed, and the application of First Security was granted (R. 28). Commissioner Taylor had before him no additional studies or reports upon which to base a decision in effect overruling his own Banking Department.

Probably the most crucial single factor with regard to "public convenience and advantage," which involves

the question of "need" for other banks and "overbanking," is the matter of ratio of banking institutions per capita of population within the primary or "bank service" area. As to this matter Commissioner Taylor discarded the only evidence before him, which was supplied by First Security. That evidence was that one branch bank per 10,750 population within the "primary bank service area" is "generally standard" (R. 19). Commissioner Taylor said that his standard was one branch per 8,000 to 10,000 people:

"Q. *I am trying to get what your standard would be in determining whether or not an area is overbanked in terms of population.*

A. *I say eight to ten thousand people.*"  
(Dep. 52. Emphasis added.)

As to the number of units per population within the "bank service area," which area was defined both in the First Security application (R. 19) and the Quinn report (R. 34) as the area between 3900 and 7800 South Streets and between 900 East and the Wasatch Mountain Range, Mr. Taylor agreed that the seven branches listed by Examiner Quinn (R. 30) would compete within the "bank service area," which contains a population of approximately 43,000 people (R. 19; R. 34; Dep. 46). He further agreed that banks on the fringe of the area obtain the "bulk of their potential deposit volume . . . from the primary area in question." (Dep. 74)

The net result as to the population factor is that Commissioner Taylor recognized that at least eight in-

stitutions within the bank service area “would directly compete with each other.” These are :

Zions First National Bank, Cottonwood Mall  
Branch

Tracy-Collins Bank & Trust Co., Holladay Branch

Tracy-Collins Bank & Trust Co., County Office

Valley State Bank, Cottonwood Branch

Valley State Bank, 56th South Branch

Valley State Bank, Olympus Branch

First Security Bank of Utah, N.A., Highland  
Drive Branch

First Security State Bank, Cottonwood Mall  
Branch

Simple mathematics shows that 8 into 43,000 is *one branch per every 5,375 people, well below the Bank Commissioner's own standard, and about one half the standard as advocated by First Security.* This excludes the banks on the fringe of the area which the Commissioner recognized would also compete. It should be carefully noted that this analysis is very conservative, and does not take account of the effect of a pending branch application of Murray State Bank at 7335 South Ninth East (east side of street) (Dep. 49), the Beehive State Bank branch application at 9400 South Seventh East (Quinn Report R. 37), the Western Savings and Loan Office within the Cottonwood Mall (Quinn Report, R. 30) or the *Olympus Hills Branch of First Security State Bank* which is just outside the area in question *but which Mr. Quinn found to be servicing the area in question* (Quinn

Report, Item 26, R. 38). It should be noted that the contemplated branch of Murray State Bank was to be located within the prime service area some three miles closer than the pending Beehive State branch application *which Mr. Quinn had predicted would overlap the trade area* (Item 23, R. 37). Also, it is pertinent here to observe that *since the hearing an additional branch bank charter has been granted in the same area*, namely, a charter to Walker Bank & Trust Company "in the immediate vicinity of 3900 South and Highland Drive" which further saturates the "bank service area" and dilutes the gross available to each competing institution in such a manner as to accentuate the problem of "overbanking" already found to exist in the area. If all of the banking institutions enumerated were to be considered in assessing the matter of bank-population ratio as bearing upon "public convenience and advantage," we would have at least twelve institutions, which, when divided into 43,000, gives the ridiculous and obviously unworkable ratio of one bank per 3,583 people!

*Bank Commissioner's "Investigation" as to "growth of the Mall": inadequate and based upon incompetent "data"—*

The lower court found:

*"14. No substantial evidence and no substantial competent evidence was before the defendant Spencer C. Taylor, Bank Commissioner of the State of Utah, from any source upon which to base a determination that the proposed establishment of the First Security State Bank branch in*

the contemplated location within the Cottonwood Mall would <sup>Not</sup> be in such close proximity as to unreasonably interfere with the business of the pre-existing Zions Cottonwood Branch Bank." (Emphasis added.)

The deposition of Commissioner Taylor clearly demonstrates that he based "his" decision to grant First Security's application upon a *nonstatutory* test, i.e., the *purported* "growth of the Mall" (Dep. 30, 36, 55, 75, 78), though the supposed growth as disclosed by the deposition was nothing more than guesswork. This was also the basis for a purported "determination" that the business of Zions' Cottonwood branch would not be unreasonably interfered with. Commissioner Taylor testified:

"Q. Well now in determining that placing First Security there wouldn't unreasonably interfere with Zions, I believe you said the primary consideration was the *growth of the Mall*, is that right?

A. Right.

Q. Now *were there other considerations in making that determination* that there wouldn't be unreasonable interference?

A. *Oh none* except that I have every confidence in Zions First National Bank."

(Dep. 80. Emphasis added.)

As to the alleged "growth of the Mall," the Commissioner relied almost exclusively upon his own personal observations. The nature of these observations was casual — "just a matter of walking around the Mall and watching the progress" (Dep. 19). Mr. Taylor felt that

the Mall “was a tremendous thing” (Dep. 25), but there was no attempted scientific analysis or factual determination:

“I made no study. The extent of my study, as I told you, was visiting the Mall and watching the growth out there.”  
(Dep. 58)

The first “observation” of Commissioner Taylor was with regard to supposedly large numbers of people using the Mall. However, Mr. Taylor’s “information” was based upon surmise and speculation and even events *subsequent* to the granting of First Security’s application:

“A. Yes. I was out there I guess before Christmas and *we just couldn’t find a parking place there*, as many parking places as they have.

Q. That was before Christmas 1962?

A. Yes.

Q. Was there a time before October 16th, 1962, that you couldn’t find a parking place?

A. *No, I don’t believe so.*

Q. *Well the crowds of people that you are particularly talking about would be the Christmas shoppers then, is that right?*

A. *Yes.”*

(Dep. 23. Emphasis added.)

As to the potential number of bank customers in the pertinent areas, Commissioner Taylor never became aware and never made or caused to be made any survey as to the number of people using the Mall (Dep. 24), and



he had no knowledge as to what areas the people using the Mall came from (Dep. 24, 25). Notwithstanding the lack of factual data, Mr. Taylor made some personal guesses, such as the statement that the Mall would "... draw probably beyond the areas that either bank would draw from . . ." (Dep. 44) and that a store within the Mall, such as ZCMI, "draws from all over the State" (Dep. 44), but he made no study to determine what pull, if any, *applicable to banking* there might be from areas beyond the "bank trading area" described in the Quinn report (Dep. 57, 58). Further, Commissioner Taylor said that he did not consider the population (Dep. 57) or the effect of other existing branch banks within the larger "shopping center trading area", although he stated that that would have been proper had the larger area been considered (Dep. 58).

The next "observation" made by Commissioner Taylor was as to the businesses within the Mall. It had been estimated by First Security in its application (R. 20, 21) and in the Quinn Report (R. 33) that some 50 businesses would be established within the Mall in the course of its completion. Mr. Taylor observed some of these previously contemplated businesses open for business to the public, and by the time he granted First Security's application he estimated that about half of the forecasted businesses had opened (Dep. 24). However, as to any specific analysis of the matter, it was apparent that the whole rationalization was largely an afterthought, and specific data relative thereto had been compiled only *after* granting the application to First Security. Some-

time after October 16, 1962, Mr. Taylor obtained a list of businesses which had as predicted opened for business within the Mall (Dep. 23, 24) :

"Q. How many of the some predicted 50 business establishments would you say had been opened by the time October 16th, 1962, rolled around?

A. *I wouldn't tell you without referring to the dates there.*

Q. *The dates you have reference to would be on the list that was supplied to Mr. Nebeker?*

A. *Yes.*

Q. Well would you say based upon your recollection that *half of them*—

A. *I would think so, yes."*

(Dep. 23, 24. Emphasis added. See also Taylor Dep. 14-18, which was stricken by agreement since it related to matters obtained subsequent to the granting of the application.)

Actually, Mr. Taylor could point out no business establishment within the Mall which opened before the First Security application was granted (Oct. 16, 1962) which was not anticipated or known at the time of First Security's application in November of 1961 or at the time the Quinn report was submitted to Commissioner Taylor in about April of 1962.

The personal contacts made by Commissioner Taylor were equally casual. First, and foremost, Mr. Taylor stated that he relied upon information supplied by Wayne F. Richards, the manager of the Mall. Virtually all of that information, which was vague in any event, was

supplied to Commissioner Taylor *after* he granted the application, so it was stricken by agreement from the record. (See Taylor Dep., page 14, line 18 through page 18, line 28.) Next, Mr. Taylor referred to a brief and very casual conversation with Sid Horman, the builder of the Mall. The conversation, in Mr. Taylor's words, was not "pertinent" (Dep. 19), had nothing to do with the banking business (Dep. 22), and consisted primarily in congratulations for the marvelous job done at the Mall (Dep. 22). Mr. Taylor also talked with Scharf Sumner on a casual occasion at the opening within the Mall of Western Savings and Loan (Dep. 19).

In his deposition, Commissioner Taylor stressed the "growth" of the Mall, but the record fails to show "growth" in the sense of the addition of things new or in the sense of enlarging the basic physical plant. The Cottonwood Mall Building itself was fundamentally completed at the time Mr. Quinn made his report, and the largest store—ZCMI—had opened some time prior to the Quinn examination. However, Mr. Taylor testified that certain elusive "changes" came about from the period of the receipt by himself of the Quinn report (Spring 1962—perhaps as late as June (R. 11)) to the date he granted the application of First Security (October 16, 1962 (R. 39)). Upon analysis, these "changes" weren't really anything new:

"Q. With regard to the Mall itself, did you consider that something had changed between the time that Mr. Quinn filed his report with

you and the time that you granted the application?

A. Yes. I think the growth of the Mall and the type of businesses they got out there were quite a factor.

Q. But hadn't Mr. Quinn taken that into consideration, the probability that these things would be opened as outlined in the First Security State Bank application?

A. Well the statement, where he concluded, I think probably he might have done."

(Dep. 76)

\* \* \*

"Q. You say the population had changed in the six-month period?

A. Yes, the population had grown too.

Q. How much had the population grown—

A. I couldn't answer that.

Q. —from the spring of 1962 to the fall of 1962?

A. I couldn't answer that but it is growing at a rapid rate.

Q. Did you have any figures to make you think that—

A. I didn't take this into consideration. I told you the primary deciding factor with me was the growth of the Mall itself."

(Dep. 78)

It is asserted by counsel for appellants that Zions Bank had "every opportunity" to put evidence, facts and argument before the Commissioner (Appellants' Brief,

pp. 23, 24), and that the approach the Bank Commissioner took was to follow "the methods of the businessman" (Appellants' Brief, pp. 26, 27). It is true that Zions had presented facts to the Commissioner concerning probable damage and injury to its business as well as other facts bearing upon the statutory conditions of "public convenience and advantage" and "close proximity." (As a matter of fact, the evidence presented by Zions was the *only* evidence from *any* source which the Commissioner had before him as to "unreasonable interference" due to "close proximity.") With regard to the alleged "growth of the Mall," Zions presented no evidence or information because it was totally unaware that the matter had become an issue in the Bank Commissioner's mind. There was *no changed condition or growth beyond what had been planned and fully anticipated*. (As a matter of fact, the only change was the substantial delay which came about in accomplishing what had been planned.) It was known that salient facts respecting the Mall and the area were before the Commissioner and that the Chief Bank Examiner had made an official investigation respecting these matters. There was no additional evidence to be presented as to these matters!

As to the "businessman's" approach, Zions Bank had fully assumed that businesslike data and factual information would be employed in rendering the decision. Instead, the decision was based upon speculations of Mr. Taylor as to the "growth of the Mall," without benefit of any factual study or survey, without any Bank Examiner's investigation of such alleged "growth" and *without*

*notice or even the suggestion to Zions Bank that the supposed growth was being considered. In this connection, it should be clearly noted that there was no hearing as to Mr. Taylor's "investigations" and there was no invitation by Commissioner Taylor to representatives of Zions Bank in order for them to present their views and evidence on the subject of the alleged "growth of the Mall" (Taylor Dep. 36).*

## ARGUMENT

### POINT I.

THE ACTION OF THE STATE BANK COMMISSIONER OF UTAH IN GRANTING THE APPLICATION OF FIRST SECURITY STATE BANK FOR ESTABLISHMENT OF A BRANCH WITHIN THE COTTONWOOD MALL, SALT LAKE COUNTY, UTAH, WAS VOID IN THAT THERE WAS UNREASONABLE INTERFERENCE BY REASON OF CLOSE PROXIMITY AS A MATTER OF LAW.

The 1953 amendment to the Utah branch banking statute which is applicable *only* to the *unincorporated areas of Salt Lake County*, provides:

*"No branch shall be established at a location outside the corporate limits of a city or town in such close proximity to an established bank or branch as to unreasonably interfere with the business thereof."*

(U.C.A. 1953 7-3-6, as amended. Emphasis added.)

It is submitted that a declaratory judgment should be rendered interpreting this statute, which has never been construed, *to forbid virtually adjacent and contiguous branch banking in Salt Lake County.*

The *sole* statutory standard with reference to the existence of “unreasonable interference” with the business of an “established bank or branch” is “*such close proximity*.” Under our statute, “*close proximity*” is equated with “*interference*”. The statute *forbids* “*unreasonable interference*,” which is to be ascertained *solely* by “*such close proximity*.” Accordingly, the legislature contemplated that there would be situations where a *proposed branch bank location relative to a pre-established bank or branch location would itself be unreasonable*. Since the effect of contemplated locations would obviously vary depending upon distance or “proximity” from the pre-established banks or branches, the statute contemplates a factual determination by the Bank Commissioner as to which locations would be so close as to be unreasonable, *except that some locations would be so close as to be unreasonable as a matter of law*. Such “*bedrock*” locations would be those placed adjacent, contiguous, and virtually “*under the same roof*” with pre-established banks or branches. Such locations go beyond mere “close proximity” and become “*such*” close proximity within the statutory prohibition. Hence, it might be said that adjacent or contiguous branch banks in the unincorporated areas of Salt Lake County constitute unreasonable interference *per se*. If the statute isn’t violated in such situations it could never be violated!

In any event, it is submitted that under the facts of this case there is “unreasonable interference” by reason of “such close proximity” as a matter of law. The

facts herein present a "bedrock" or near ultimate situation in terms of closeness of branch bank locations. Additionally, the record *affirmatively* shows that injection of the new branch bank within the Cottonwood Mall in "such close proximity" would "unreasonably interfere" with the "established" Zions branch bank. (As to this matter, among other things, Chief Bank Examiner Quinn had officially reported the existence of "overbanking" in the area and "no need" for further banking facilities (R. 35). Another branch charter in the same area could only aggravate the situation to the detriment of the pre-established branch bank.)

The arguments herein submitted are made without benefit of precedent. Not only is the statute under consideration uniquely and solely applicable to the *unincorporated* areas of Salt Lake County, but it appears to be a uniquely worded type of branch bank prohibition, no precise statutory or case precedents being existent from other jurisdictions to the writer's knowledge. It will be helpful, therefore, to consider the general historical development of our branch banking statutes in order to ascertain the legislative intent and public policy considerations applicable thereto.

As a preliminary matter, it should be recognized that banking is a necessarily regulated industry, being "affected with the public interest." (7 Am. Jur., Banks and Banking, Section 9 at p. 30; 9 C.J.S., Banks and Banking, Section 42 at p. 80. See also *Italy v. Johnson*, 200 Cal. 1, 251 Pac. 784 (Calif. 1927).) In this connection, this Court has recognized the public's concern in branch bank-



ing and the necessity for restrictions. (*Union Trust Co. v. Simmons*, 116 Utah 422, 211 P.2d 196 (1949)) (Petitioner conceded in this case the right of the legislature to prohibit branch banking in Utah.)

Until 1933 branch banking was absolutely prohibited in Utah, as it still is prohibited in a majority of states. (7 Am. Jur., Banks and Banking, Section 23; 9 C.J.S., Banks and Banking, Section 55) Since 1933, Utah has permitted branch banking in *certain areas and under certain conditions*. Caution in the expansion of branch banking in this state is apparent from analysis of stringent conditions which our legislature has imposed, which conditions fundamentally express the public policies of protection of the general public, as well as protection of the pre-established banks. Recognition of the evils of "overbanking" is apparent by the imposition of the said conditions. In this connection, the requirement of promoting the "public convenience and advantage" (protection of the general public) was enacted in the original statute (Laws of Utah 1933, Chapter 6) and has been carried forth as a condition relative to all areas wherein branch banking is permitted. (U.C.A. 1953 7-3-6, as amended.) Also, the requirement that a branch "take over an existing bank" (protection of pre-established banks) was in the original statute, and is still mandatory in some areas where branching is permitted (U.C.A. 1953 7-3-6, as amended). Accordingly, in 1951 when dealing with a city or town other than a city of the first class, the legislature maintained that absolute prohibition under certain conditions, as to the *entire* city or town.

(Laws of Utah 1951, Chapter 10) That is, instead of the "close proximity" test, the entire *corporate limits* of an organized municipal corporation was used as the boundary. The conditions made applicable were that if an *established bank was operating*, no new branch could be established unless the bank seeking to establish the branch *took over the operating bank*. Then, to further restrict the spread of branch banking, it was provided that a unit bank in such city or town could not be taken over as a branch until it had been in operation as a unit bank for a period of *five years*. This law is still applicable. (U.C.A. 1953 7-3-6, as amended.)

When the legislature, by amendment in 1953, came to deal *for the first time* with the establishment of a branch in an *unincorporated area*, it had to find appropriate language. (Note: the *only* unincorporated area wherein branch banking is permitted at all is Salt Lake County, since Salt Lake is the only county which contains a city of the first class as required by the statute. As to unincorporated areas of other counties, the pre-1933 policy of absolute prohibition still applies.) The legislature could not well say, as it had done with respect to a city or town, that only one branch bank could be established in the entire unincorporated area of a county. It was necessary that it look to the realities and impose such restrictions as were reasonably comparable to those applicable in the case of cities and towns. Hence, "close proximity" was used as the *area concept* instead of the entire town or city, and the formula of "unreasonable interference" with "established bank . . . business" as occasioned by "*such close proximity*" was used to embody

the concept already applicable to incorporated areas, namely, protection of *existing banking institutions* and the *general public* from *overbanking and unwarranted competition* within the *same basic area*.

Based upon the plain wording of the statute, as well as apparent legislative intent from analysis of the branch banking statutes, it is submitted that the "close proximity" statute should be construed as a matter of law to prohibit extremely close, "side by side" type banking locations, and in any event the contemplated location of First Security should be so construed in this case.

## POINT II.

SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS THAT THE DEFENDANT BANK COMMISSIONER ABUSED HIS DISCRETION IN IGNORING THE "CLOSE PROXIMITY" STATUTE AND IN FAILING TO MAKE THE FACTUAL DETERMINATIONS CONTEMPLATED BY THE SAID STATUTE.

The trial court held that the action of the Bank Commissioner in granting a branch bank charter to First Security was null and void in that it was *without foundation in fact*, thus constituting an abuse of administrative discretion. The holding is based upon the finding that the "close proximity" statute was not inquired into, and determinations contemplated thereunder were not made. This assumes, notwithstanding the admitted existence of "such close proximity," that there were still factual determinations to be made by the Bank Commissioner relative to the *effect* of "such close proximity," i.e., whether such would constitute "unreasonable interference" with the business of the "established bank or

branch." This was the theory of the statute adopted by the trial court, which is vigorously defended herein!

The "close proximity" statute constitutes a *limitation* or *restriction* upon the Bank Commissioner in that it sets forth a *mandatory condition* or *standard* that must be followed. The recitation of facts as set forth herein demonstrates that the Bank Commissioner failed to comply with the said *statutory condition precedent*. Actually, the facts show that notwithstanding the existence of "close proximity" in this situation, the Bank Commissioner failed to inquire into the *effect* which the said "close proximity" would have upon the established business of Zions, no investigation having been made in order to ascertain the existence or non-existence of "unreasonable interference."

With regard to the applicable law, it will be well first to comment with reference to the authorities contained in Appellants' Brief. Generally speaking, there is no quarrel with the authorities contained therein. There appears to be an attempt, however, in the use of certain authorities, to suggest a near absolute and unrestricted administrative discretion in banking matters. That is certainly not the law applicable in this jurisdiction *in view of our express statutory conditions and prohibitions*. Hence, the quotation from Professor Davis and the authorities construing the federal banking statute are in no wise appropriate with reference to Utah law. The reason for this is that the federal law contains almost no restrictions as to the actions of the Comptroller of the Currency, in sharp contrast with the Utah statute as to

the actions of the Bank Commissioner. Thus, in *Community National Bank of Pontiac v. Gidney as Comptroller of the Currency*, 192 F. Supp. 514 (E.D. Michigan 1961), it was noted as to *federal banking* that there was a Congressional intent "to place in the hands of the Comptroller almost complete control over many aspects of banking." (192 F. Supp. at 517) In this connection, the court commented upon ". . . the failure of Congress to provide any standards by which this court could determine whether the exercise of discretion by the Comptroller was 'reasonable' or whether it was 'arbitrary' . . ." (192 F. Supp. at 519)

It is submitted that the action of the Bank Commissioner with reference to the matter of granting or denying branch bank charters in unincorporated areas of Salt Lake County (as well as the other areas of the state) is *limited by standards* and must be based upon *substantial competent evidence*. In this connection, the Bank Commissioner's action *could not be based upon nonstatutory tests* or upon *personal "investigations" not factual in nature*. The applicable principles of law are as follows:

1. Limited Discretion of the Bank Commissioner — Conditions Precedent.

While it is proper to speak of an abuse of discretion as the standard in judging the propriety of the decision of the Bank Commissioner, it is not proper to consider that discretion in terms of an *unlimited* discretion. It is submitted that certain *statutory standards* have been given which *must* be followed by the Bank Commissioner and which must guide a re-

viewing court in deciding the question whether or not his decision was, in fact, arbitrary or capricious. This is "horn book" law applicable to administrative decisions in general:

"Since such action is not in accordance with law, is in excess of authority, and *presents a judicial question or a question of law for the court*, a court on review of action of an administrative agency, under express provisions of some statutes but *even in the absence of statutes providing for judicial review or relief* and in the face of statutes purporting to preclude judicial review, this being a matter of constitutional right in some instances, will pass on, and in a proper case grant relief from or set aside, agency action, findings, and conclusions which are *arbitrary, capricious, or both or either, unreasonable, or arbitrary or unreasonable, or an abuse of power or discretion.*"

504, 505. (Emphasis added.)

This Court has often taken note of these principles of administrative law, representative statements of the doctrine appearing in two cases involving review of decisions of the Department of Business Regulation:

"If they should fail to regularly pursue their authority, or refuse to do so, or act in any manner which is arbitrary, capricious or discriminatory as to the applicant, recourse to the courts is available."

*Clayton v. Bennett*, 5 Utah 2d 152, 298 P.2d 531 (1956)

\* \* \*

“Should the department, or its examining committee, fail to so properly discharge its duties or act in any manner that is capricious or arbitrary, the applicant would not be at the mercy of said department of such committee, but recourse to the courts would be available.”

*Alexander v. Bennett*, 5 Utah 2d 163, 298 P.2d 823 (1956)

It is well recognized law that where statutory standards are given, state banking department officials may not exercise an unlimited or absolute discretion. Statutory standards and conditions must be complied with, and such compliance is a *condition precedent* to valid administrative action. The Utah statute provides two fundamental standards, *both of which must be inquired into* by the Bank Commissioner in justification of any purported decision granting an application for branch banking in unincorporated areas of Salt Lake County. The first is the matter of “public convenience and advantage” and the second is the matter of “close proximity” — “unreasonable interference” (U. C.A. 1953 7-3-6, as amended). In other areas of the state, additional or other standards are applicable. Hence it was recognized in the Utah case of *Union Trust Company v. Simmons*, 116 Utah 422, 211 P.2d 196 (1949), that “petitioner has not complied with *any of the requirements* for the establishment of a branch bank under this method.” (The method referred to was the law applicable to Ogden, Utah, wherein it was necessary



to take over an existing unit bank in order to establish a branch therein.)

In *Wall v. Fenner*, 76 So. Dak. 252, 76 N.W. 2d 722 (S. Dak. 1956) mandamus to review denial of application for a bank charter was rejected and the Bank Commission's discretion was upheld. However, the court emphasized the responsibility in terms of *standards of the Commission*:

"When the Commission acts on an application it *must*, in carrying out this legislative mandate, *determine questions of fact*. In making such determination the Commission of necessity exercises a discretion. However, this statute *does not give the Commission an unlimited or absolute discretion*. Its actions must be based on *determinations of facts . . .* It requires the Commission to *inquire into specified factual areas thus limiting the Commission's concern to the areas enumerated*." 76 N.W. 2d at 724. (Emphasis added.)

*Accord*, *Speer v. Dossy*, 177 Ken. 761, 198 S.W. 19, 20 (Ky. 1917) wherein the court pointed out that the banking administrators' ". . . discretion must be exercised only within the limits prescribed by the statute."

The case of *Daughin Deposit Trust Co. v. Myers*, 388 Penn. 444, 130 A. 2d 686 (Penn. 1957) involved a proceeding for approval of articles of merger of two banks, which had been denied by the Department of Banking. The order of the Department of Banking disapproving the said articles of merger was reversed since the Department had based its decision upon a *nonstatutory test*. The statutory standard was



whether the merger was made for a "legitimate purpose," but the Banking Department had disapproved the merger on the ground that there was "no need".

In *Moran v. Nelson*, 322 Mich. 230, 33 N.W. 2d 772 (Mich. 1948), a suit was commenced to vacate and set aside an order by the State Banking Department and for permission to organize a new bank. The court upheld the applicants and directed the Bank Commissioner to grant their petition, holding that the Bank Commissioner had erroneously refused to grant the charter because of a *mistake in the interpretation of the statutory* meaning of the term "necessity." The court said:

"In the light of the foregoing we are constrained to hold that the plaintiffs did establish 'necessity' for another bank in Detroit and that as a matter of law defendant erred in his concept of the scope and meaning of necessity as used in the particular statute, which error primarily resulted in denial of plaintiff's petition."  
33 N.W. 2d at 779

(The later Michigan case of *Bank of Dearbourne v. Taylor*, 365 Mich. 567, 114 N.W. 2d 210 (Mich. 1962) involves a different result, but the same principles, in that the court emphasized the matter of the existence of a special law and of the standards set forth in particular laws. This is one of the cases wherein

the Bank Commissioner's discretion was upheld, but the court in upholding such discretion observed that it was able to do so only since there was an *absence* of a statutory provision prohibiting competitive banking. Had the Utah statute been in effect it is submitted that a different result would have followed.)

## 2. Substantial Competent Evidence Rule.

It is submitted that there is no substantial evidence upon which the alleged finding of noninterference as occasioned by close proximity could be based from this record. Certainly the self-serving and legally objectionable portions of First Security's application (R. 14-24) do not constitute *competent* evidence upon which *alone* the decision could have been based. Accordingly, a Motion to Strike the legally insufficient portions thereof was filed. In any event, it is patently apparent that the *First Security application wholly fails to inquire into the crucial matter of the effect of close proximity upon the business of Zions-Cottonwood branch*. The application doesn't even purport to set forth any facts with respect to these matters. As to the Bank Commissioner's "investigations" and use of alleged "methods of the businessman" (Appellants' Brief, pp. 23, 24), it is submitted that such does not qualify as competent evidence. As a matter of fact, the alleged "businessman" type methods in fact were speculations as to possible "growth of the Mall" without benefit of factual data or survey of any kind. In any event, it is clear that

the Bank Commissioner made no inquiry as to the effect such close proximity would have upon the business of Zions. Actually, the only evidence before the Commissioner as to this matter was that the business of the Zions branch would be unreasonably interfered with, which would support a ruling directly opposite to that rendered by the Commissioner.

In any event, the rule is well established that there must be substantial competent evidence in the record on which to base such an administrative decision. It is submitted that there was and is no such evidence in this case. It is recognized in administrative law that the administrator is not bound by the ordinary rules of evidence. But nevertheless, there is still applicable to his actions the "legal residuum rule," i.e., that his decision must rest upon *substantial evidence*. Where is such evidence in this case?

This Court has been consistently insistent upon such requirement. In *Union Pacific Railroad Co. v. Public Service Com'n.*, 5 Utah 2d 230, 300 P.2d 600 (1956), the court said:

"The legislature has clothed the Commission with plenary power to determine public convenience and necessity and to decide what common carrier shall render service. The findings and conclusions of the Commission on questions of fact are subject to review by this court only to determine if they find *substantial support in the record*."

The substantial evidence in question must also be legally *competent*:

“‘It is not required that the facts found by the Commission be conclusively established, nor even that they be shown by a preponderance of the evidence. If there is in the record *competent* evidence from which a reasonable mind could believe or conclude that a certain fact existed, a finding of such facts finds justification in the evidence, and we cannot disturb it.’”

*Utah Freight Lines v. Public Service Commission*, 119 Utah 491, 229 P.2d 675 (1951), quoting *Mulcahy v. Public Service Commission*, 101 Utah 245, 117 P.2d 298 (1941).

In the case of *Moormeister v. Golding*, 84 Utah 324, 27 P.2d 447 (Utah 1933) this Court was considering a proceeding for the revocation of a physician's license. The Doctors' Board didn't have presented to it *competent* evidence upon which to base its recommendation relative to the physician in question. The court held that the physician's Board had no *jurisdiction to enter its order since it wasn't based upon competent evidence* (27 P.2d at 452). Further, this Court has held that an administrator *cannot proceed to render a decision ignoring competent evidence which would be indicative of a different result* (which is the situation which we submit exists in this case), *Jones v. California Packing*, 121 Utah 612, 244 P.2d 640 (Utah 1952). (Held, the Industrial Commission cannot disregard competent evidence and render a contrary decision notwithstanding the existence of same.)

The United States Supreme Court has defined “substantial evidence” to be:

“ . . . evidence which is substantial, that is, affording a *substantial basis of fact from which the fact in issue can be reasonably inferred*. (authorities cited) Substantial evidence is *more than a scintilla*, and must do *more than create a suspicion* of the existence of the fact to be established. ‘It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,’ (authorities cited) and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.” (Emphasis added.)

*National Labor Rel. Bd. v. Columbian E. & S. Co.*,  
306 U.S. 292, 59 S. Ct. 501, 83 L. Ed. 660  
(1939).

(Banking cases accord: *In re Commercial State Bank of Scottsbluff*, 105 Neb. 248, 179 N.W. 1021 (Neb. 1920); *Application of Millburn — Short Hills Bank*, 59 N.J. Super. 470, 158 A.2d 66 (Superior Court N.J. 1959); *Farb v. State Banking Board*, ..... Tex. ...., 343 S.W. 2d 508 (Tex. 1961))

It is submitted that upon analysis as to the “evidence” before Commissioner Taylor relative to the matters of close proximity and unreasonable interference with the business of Zions Cottonwood branch, such was *neither substantial nor competent*. The alleged determination was without foundation in fact!

### 3. Personal Investigations by the Bank Commissioner.

It is very clear that Commissioner Taylor *actually based* the decision which he rendered upon his *own* personal observations, which, to say the least,

were nonscientific and certainly speculative. There was no invitation to representatives of Zions to present to the Commissioner evidence and facts as to the alleged "growth of the Mall." So, certainly, there was no opportunity for the exchange of information or confrontation of the supposed "facts" in the Commissioner's possession (Dep. 36).

The law in this matter appears to be clear:

"Even though an administrative authority has statutory power to make independent investigations, *it is improper for it to base a decision or findings upon facts so obtained, unless such evidence is introduced at a hearing or otherwise brought to the knowledge of the interested parties prior to decision, with an opportunity to explain and rebut.*"

Anno. Administrative Law—Evidence, 18 A.L.R. 2d 552, 562. (Emphasis added.)

Further, the authors of American Law Reports have stated:

"While it is *obviously improper for an administrative tribunal to make a view of premises or physical inspection of a person without giving notice to the interested parties*, the courts are not in agreement as to whether the facts observed by the trier of facts at such an occasion may constitute a proper basis for the decision, *without being made a part of the record and presented to the parties.*

"On the one hand, it has been held that the knowledge gained by an administrative authority from a view of premises cannot be made the basis of decision, unless the pertinent facts are made

*part of the record and brought to the attention of the parties."*

Anno. Administrative Law—Evidence, 18 A.L.R. 2d 571-572 (Emphasis added.)

(A split of authorities is noted as to this matter, but it is submitted that the better view is as quoted and indicated.)

The principle in law that is particularly stressed is that the administrative decision must be based upon *known* evidence and not *secret* evidence. Hence, the authors of American Jurisprudence have stated:

"The principle that administrative adjudications must be made upon known evidence applies to any kind of information obtained by the administrative agency secretly and at a time or place other than that appointed for the hearing, including *ex parte* testimony and affidavits, evidence taken prior to the time the one against whom the decision runs was made party to the proceeding, and individual's own record, undisclosed statements or views of subordinates within the agency, the report of a hearing officer to the agency, and the report or recommendations of advisors to the determining agency."

2 Am. Jur. 2d, Administrative Law, § 384 at page 191 (Emphasis added.)

A case that is very pertinent with regard to this matter is the banking case of *Elizabeth Federal Savings & Loan v. Howell*, 24 N.J. 488, 132 A.2d 779 (N. J. 1957). In that case the court held that where the determination of the banking commissioner obviously

rested in part upon information of which the objecting bank had no notice or access, the *proceeding should be remanded to the bank commissioner* for further findings and determination *based upon facts*. The court insisted upon a completion of the record so that further findings and a substantial basis could exist relative to the determination of the bank commissioner. The court then pointed out:

“Nevertheless, without recognizing them as ‘parties’ he (Commissioner) afforded the objectants an opportunity to present whatever evidence and argument they had in opposition to the application of Colonial. These proceedings, however, could by no means be characterized as a full hearing in the true sense of that word. *While the objectants were given every opportunity to present their own evidence, they were in substantial respects denied the opportunity to meet the evidence on the other side of the case and that relied upon by the Commissioner.* Some of the evidence was furnished *ex parte* by Colonial to the Commissioner and *not made available to the objectants.*”  
132 A.2d at 782 (Emphasis added.)

In the case at bar, Zions was never given an opportunity to meet the very “evidence” upon which Commissioner Taylor relied in making his decision, i.e., alleged “growth of the Mall.” Certainly evidence could have been presented by Zions to the Commissioner as to deposit volume, population, available business accounts and other data applicable and peculiar to the banking problem at hand *as related* (or more properly *not related*) to the alleged “growth of



the Mall." No evidence of any kind was before the Commissioner as to the relationship, if any, between the apparent growth of the Mall and the probability of noninterference occasioned by close proximity. This type of evidence could and should have been solicited by the Commissioner.

It is submitted that the basis for the alleged "findings" of the Bank Commissioner—his own secret personal observations—was and is insufficient in law. It could in no wise be considered as competent evidence, and since it was essentially secret and non-disclosed, it was improperly considered in any event.

### POINT III.

THE PRESUMED "FINDING" BY THE BANK COMMISSIONER OF THE EXISTENCE OF "PUBLIC CONVENIENCE AND ADVANTAGE" WAS WITHOUT FOUNDATION IN FACT AND CONSTITUTES AN ABUSE OF ADMINISTRATIVE DISCRETION.

The applicable statute imposes the additional statutory requirement that adequate inquiry be made into the matter of "public convenience and advantage." The statute provides:

"No bank shall be permitted to establish any branch or office until it shall first have been shown to the satisfaction of the bank commissioner and the governor that the *public convenience and advantage will be subserved and promoted by the establishment of such branch or office* and the bank commissioner may by order permitting the establishment of such branch or office desig-

nate and limit the character of work and service which may therein be performed.”

(Section 7-3-6, U.C.A. 1953. Emphasis added.)

The lower court found that the Chief Bank Examiner clearly determined on the basis of a factual study the *lack of need for an additional banking institution in the area, and the fact of overbanking in the area*. However, the lower court preferred to base its decision upon the sole ground of abuse of administrative discretion relative to the “close proximity” statute and requirements thereunder. It is equally true, however, that while the Bank Department didn’t ignore the matter of “public convenience and advantage,” the facts which were before the Bank Commissioner did not justify his decision of the existence of “public convenience and advantage” and the decision was without foundation in fact. Certainly, the written report of the Chief Bank Examiner failed to justify such a decision. There was no additional study or report before the Bank Commissioner upon which to base a decision in effect overruling his own Banking Department.

The same principles of law as set forth under Point II above as relating to applicable standards regarding abuse of discretion and the necessity of administrative determinations being founded in substantial competent evidence are applicable hereto.

With regard specifically to the matter of the evil of “overbanking”, which our legislature surely meant to eliminate by reason of the standard of “public conven-

ience and advantage," the following authorities are submitted:

In *Delaware County National Bank v. Campbell*, 378 Pa. 311, 106A.2d 416, 423 (Penn. 1954) the Pennsylvania court said:

"The legislature . . . did not exclude or intend to exclude competition between banks; it intended, inter alia, to exclude such competition *as would likely weaken or destroy some banks in an over banked community and thus weaken or injure the entire banking system to the detriment of depositors, creditors, stockholders and the public alike.*" (Emphasis added.)

In line with this judicial pronouncement is the economic and social viewpoint, summarized thusly:

"In the field of banking . . . it is firmly established that the benefits of unrestricted competition are not worth the inevitable price . . ."

*Harfield, Legal Restraints on Expanded Banking Facilities, Competition and the Public Interest*, 14 Business Lawyer 10116 (1959)

The relationship between proper competition and the public interest is astutely crystalized in an article appearing in the Banking Law Journal which thoroughly analyses the purport of the factor of "public convenience and advantage":

"Healthy competition is desirable, but *competition in an over-banked area is disastrous.* The standard will be interpreted so as to further the *prime public interest in having a sound banking system.* It may be that a monopoly will be the

incidental result of the furtherance of the *superior social interest*." (Empasis added.)

*Stokes, Public Convenience and Advantage in Applications for New Banks and Branches*,  
74 Banking Law Journal 921, 929 (1957)

## CONCLUSION

It is respectfully submitted that the action of the State Bank Commissioner in granting First Security's application is void as a matter of law. The Utah Legislature recognized that at some point the factor of close proximity would result in unreasonable interference. Certainly, that point is reached in contiguous or adjacent branch banking. Our "close proximity" statute should be so construed. In any event, in the face of the "bedrock" and virtually ultimate situation of "close proximity" under the facts of this case, the existence of "unreasonable interference" by reason of "such close proximity" became a matter of law, and the application of First Security should be rejected by virtue of the clear existence of the *sole statutory standard* of "*such close proximity*."

In any event it is submitted that the judgment of the trial court should be affirmed in that there is substantial evidence to support the findings that the action of the State Bank Commissioner constituted an abuse of administrative discretion, such being without foundation in fact. In this connection, the record is clear that the *statutory requirement of measuring the effect of close proximity upon the business of the pre-established branch*

*bank was totally and wholly ignored!* The Commissioner's alleged "determination" as to this matter is not supported by substantial evidence and in fact *is not supported by any information of any kind.* This is true in that it *affirmatively appears that no inquiry was made or attempted by the Bank Commissioner into this matter,* and the only evidence bearing upon the matter was presented by representatives of Zions and was to the effect that the proposed new branch bank would unreasonably interfere.

Substantial competent evidence supporting the alleged "determination" by the Bank Commissioner that the proposed new branch would satisfy "public convenience and advantage" is lacking. The facts contained in the report of Chief Bank Examiner Quinn, which Commissioner Taylor accepted as facts, demonstrate that because of the population, deposit volume and other factors bearing upon "overbanking" in the area, there was not only a lack of public need, but the presence of probable detriment both to the public in general and to the banking institutions in the area in particular!

Based upon the foregoing, plaintiff-respondent respectfully seeks affirmance of the judgment of the trial court rescinding and vacating the Bank Commissioner's action and issuing an injunction against First Security from establishing a branch bank pursuant thereto. Plaintiff-respondent also respectfully seeks affirmance of the judgment on the broader ground that the proposed lo-

cation of the First Security branch bank would violate the "close proximity" statute as a matter of law.

Respectfully submitted,

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