

1963

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

A. Pratt Kesler; Ray, Quinney & Nebeker; Attorneys for Appellants;

Marr, Wilkins & Cannon; Attorneys for Respondent;

Recommended Citation

Brief of Appellant, *Zion's First National Bank v. Taylor*, No. 9960 (Utah Supreme Court, 1963).
https://digitalcommons.law.byu.edu/uofu_sc1/4358

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT of the STATE OF UTAH

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

T 1 5 1963

Supreme Court, Utah
Case No. 9960

BRIEF OF APPELLANTS

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

RAY, QUINNEY & NEBEKER
By A. H. Nebeker
Attorneys for Appellants

MARR, WILKINS & CANNON
By Paul B. Cannon

J. Thomas Greene

Attorneys for Respondent

UNIVERSITY OF UTAH

APR 29 1965

LAW LIBRARY

TABLE OF CONTENTS

	PAGE
STATEMENT OF KIND OF CASE	1
DISPOSITION IN LOWER COURT.....	2
RELIEF SOUGHT ON APPEAL.....	2
PRELIMINARY STATEMENT.....	2
STATEMENT OF FACTS.....	4
ARGUMENT	22
POINT I	22
THE TRIAL COURT ERRED IN HOLDING THAT THE DEFENDANT BANK COMMISSIONER ABUSED HIS DISCRETION AND ACTED ARBITRARILY AND CAPRICIOUSLY IN GRANTING THE APPLICATION OF FIRST SECURITY STATE BANK.	
CONCLUSION	37

AUTHORITIES CITED

CASES:	PAGE
Chase v. Ind. Comm. 81 Utah 141, 17 P. 2d 205 (Utah 1932)....	36
In re Commercial State Bank, 179 N.W. 1021 (Neb. 1920).....	31
Community National Bank of Pontiac v. Saxon 310 F. 2d 224 (CCA 6-1962).....	35

Dole v. Industrial Commission, 115 Utah 311, 204 Pac. 2d 462 (Utah 1949).....	36
In re Mee, 189 N.W. 675 (1922).....	28
Northwest Bancorporation v. Board of Governors, 303 F. 2d 832 (CCA 8-1962).....	24
National Broadcasting Co. v. The United States et al, 87 L. Ed. 1344, 319 U. S. 190 (1943).....	28
Opp Cotton Mills v. Administrator, 85 L. Ed. 624, 312 U. S. 126 (1941)	28
Overman v. Industrial Commission, 103 Utah 468, 136 P. 2d 945 (Utah 1953).....	36
State ex rel. Dybdal v. State Securities Comm. 176 N.W. 759 (1920)	31
State ex rel. Saari v. State Securities Comm. 182 N.W. 910 (Minn. 1921).....	30
State v. Dept. of Public Service 86 P. 2d 1109 (Wash. 1939).....	32
Southern California J. Club v. California Horse R. Bd. 223 P. 2d 1 (Cal. 1950).....	36
U. S. v. Pierce Auto Freight Lines, 327 U. S. 515, 90 L. Ed. 821 (1946)	33
Wall v. Fenner, 76 N.W. 2d 722, (S. Dak. 1956).....	32
TEXT:	
Utah Code Annotated (1953) 7-3-6.....	2, 5

IN THE SUPREME COURT of the STATE OF UTAH

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

Case No. 9960

BRIEF OF APPELLANTS

STATEMENT OF KIND OF CASE

This is an action to rescind and vacate the order of Spencer C. Taylor, Bank Commissioner, authorizing First Security State Bank to establish a branch bank in the Cottonwood Mall, Salt Lake County, Utah, on the ground the Bank Commissioner acted arbitrarily and capriciously.

DISPOSITION IN LOWER COURT

The case was tried to the Court. It held the defendant and appellant Bank Commissioner acted arbitrarily and capriciously and rescinded his order.

RELIEF SOUGHT ON APPEAL

Defendants seek reversal of the judgment of the Trial Court and judgment in their favor, as a matter of law, or that failing a new trial.

PRELIMINARY STATEMENT

It will assist the Court to recognize the narrow issue involved on this appeal if a brief narrative of what the case is about is given at this point.

On February 1, 1960 the plaintiff established its branch in the Cottonwood Mall. Since it is a national bank it obtained authority from the Comptroller of the Currency. It was not necessary to get authority from the State Bank Commissioner. On November 16, 1961, the First Security State Bank filed its application with the State Bank Commissioner for authority to establish a branch in the Cottonwood Mall. On October 16, 1962 the authority was granted. The trial court held the action of the Bank Commissioner was arbitrary and capricious and rescinded the order.

The law relating to branch banking in Salt Lake County provided (Section 7-3-6 UCA 1953 as amended):

“* * * 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 and office * *”

“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.”

It will be the contention of the appellant, that the decision of the Bank Commissioner and the Governor that the establishment of the First Security State Bank Branch in the Cottonwood Mall would serve the public convenience, and would not unreasonably interfere with the business of Zions First National Branch, is not arbitrary or capricious and finds substantial support in the record. The question is one of fact for the Commissioner and his decision, supported by the evidence, was binding on the trial court. The Honorable Trial Court substituted his judgment for the judgment of the Commissioner on the question before the Bank Commissioner as though the Trial Judge was the trier of the facts. He refused to recognize that he was bound to affirm the decision of the bank commissioner if it found substantial support in the record.

The Utah statute relating to Branch banks did not require a hearing before the Commissioner, but both sides were given ample opportunity to present their views and evidence to the Bank Commissioner and the Governor. Twelve days after the First Security filed its application and on November 28, 1961, Zions Bank wrote

a letter of protest to the Bank Commissioner which stated in part:

"It was the estimate of the bank that it would be at least three years after the shopping center opened before its branch there would become self-sustaining. Such estimates were, of course, based upon the reasonable assumption that such branch would be protected from undue additional banking activities.

* * * * *

"It has taken a lease on a space 40 x 120 feet in which Salt Lake area's finest suburban bank is being completed. It is, of course, more than adequate for present needs but is designed to be in keeping with the quality of the center and the longer term requirements of the area.

* * * * *

"It is respectfully submitted that the bank which is first granted the franchise in an area should be given a reasonable time to develop it. To do otherwise is not in the interest of the public or of the banking industry." (R 25)

STATEMENT OF FACTS

The application of First Security State Bank is contained in the record at pages 11 to 24, including three maps attached. The protest of Zions First National Bank is found at pages 25 to 27 of the record. The application and protest were referred to C. B. Quinn, of the State Banking Department, for branch investigation report, which is found at pages 28 to 38 of the record. The exact date of filing the investigation report in the

office of the Bank Commissioner is not shown, but it refers to interviews held on February 15, 1962, and the Commissioner in his deposition said the last date mentioned in the report was February 22, 1962, and he thought it was filed in the spring of 1962, just after some date he mentioned in the report (Deposition p. 10).

After receiving the report from Mr. Quinn, the Commissioner continued his investigation by visiting the Cottonwood Mall at intervals and observing its growth and development and having further informal conferences with representatives of Zions Bank and with Scharf Sumner and Sid Horman, manager of Western Savings & Loan, and owner of Cottonwood Mall, respectively. (Deposition 20-22). No additional written material was put in the record in any form, and there is no indication that either plaintiff or defendant, First Security State Bank, offered any further written testimony or information, for the record.

No formal findings of facts were required by the law to be made by the Commissioner and he made none except the certificate itself, which provided:

"STATE OF UTAH—OFFICE OF THE
BANK COMMISSIONER CERTIFICATE

I, Spencer C. Taylor, Bank Commissioner of
the State of Utah,

DO HEREBY CERTIFY

That *FIRST SECURITY STATE BANK, Salt
Lake City, Utah* has complied with all the provisions of Section 7-3-6, Utah Code Annotated 1953,

relative to the establishment of a branch bank and is hereby authorized to conduct a branch bank in the Cottonwood Mall, Salt Lake County, Utah, with full power to conduct a general banking business at said branch.

Dated at Salt Lake City, Utah, this 16th day of October, 1962.

Spencer C. Taylor, Bank Commissioner

Approved this 16th day of October, 1962.

GEORGE D. CLYDE, Governor of the State of Utah"

Defendants' Exhibit D6 are two colored photographs of the Cottonwood Mall taken in October, 1962, which show the enclosed Mall and shops on both sides with entrance from the Mall.

Plaintiff's Exhibit P5 are four pictures of Zions Bank in the Mall taken on June 4, 1962, when the Branch was opened in that location. From February 1, 1960, when it was first established, (R 30) to June 4, 1962, (Dep 32) the Branch of plaintiff's bank operated in the Mall in temporary quarters.

Examiner Quinn's report concluded:

"The area involved appears to be adequately serviced by banking facilities at the present time. However, the potential growth of the area and particularly the potential business growth of the Cottonwood Mall as presently established, together with its increased facilities planned for the future, could change this picture so that an additional banking facility in this area would be justified."
(R 38)

The statement of condition of First Security State Bank as of October 31, 1961, is found at page 24 of the record. It shows total resources of \$13,020,205.56. The bank service area had a population of approximately 43,000. The regional trading area has a population of 175,000. The bank service area is between 3900 and 7800 South and east of 900 East (R 19). It is estimated, based on anticipated rate of growth, the population of this bank service area should exceed 60,000 by the year 1970. (R 19)

The application of First Security State Bank stated there were three branch banks within the primary bank service area—Zions First National in the shopping center (opened in March, 1960 R 30), Tracy-Collins Bank and Trust Company in Holladay (opened in December, 1956), and Valley State at 6065 South Highland Drive (opened in January, 1960). (R 22 and 30) First Security State Bank has a bank on the fringe of this area and Valley State had recently received approval for a branch on the fringe at 900 East 5600 South. Within the area itself, counting the application of First Security, there would be one branch for 10,750 people (R 19).

The application stated that in regional shopping centers in other states, particularly in California, there are two or three branch banks directly within the center (R 20).

We quote from pages 20 and 21 of the record:

“The Cottonwood Shopping Center is the first unified and completely regional shopping located outside city limits in Utah. This means the first shopping center of major proportions both

as to types of facilities and size.

"This regional shopping center is distinguished from all other shopping centers which serve more limited areas. The investment including the construction and facilities totals approximately \$12 million. The total area covers some 35 acres. Additions to this area are anticipated—an addition of some 30 acres.

"Major Establishments

"The major establishment in the Cottonwood regional center is the branch of Z.C.M.I., the largest department store in the Intermountain Region. Z.C.M.I. will occupy 128,000 sq. ft. of space of the 500,000 total in the buildings and connected malls in the first unit. There are some 50 additional business establishments to be located within this complex of buildings and mall.

"Included are:

"1. A major restaurant, the Hot Shoppes, known primarily on the coast (East) and centered at Washington, D.C., but with one branch in downtown Salt Lake. This, then, is the second Utah branch of this national restaurant.

"2. Albertson's grocery-drug store.

"3. F. W. Woolworth

"4. Arthur Frank (Utah's largest top-quality men's clothing store.) This is the only branch. Headquarters are in downtown Salt Lake City.

"5. Zinik's Sporting Goods, Utah's largest sporting goods store. This is the only branch. Headquarters are on Main Street, downtown Salt Lake City.

"6. Pearson Hardware, Salt Lake's largest hardware store. This is the company's only branch. Headquarters store is in Sugar House.

"7. Deseret Book Company, Utah's largest bookstore. This is the only branch. Headquarters are in downtown Salt Lake City.

"8. Western Savings and Loan. This is Western's only branch.

"9. International Shoe

"10. Edison Shoe

"11. Gallen-Kamp Shoes

"12. U.S. Shoes

"13. Ferri Auto Parts

"14. Zale Jewelers. Branch is from downtown headquarters.

"15. Singer Sewing Machine Center.

"Other establishments include a branch of Zions First National Bank, a Junior Department store, a ladies ready-to-wear, a fur store, a drug store. In addition, such service establishments as barber and beauty shops, cleaning and dyeing shops are also to be located in this regional shopping center. The first units are now being opened. Blacktop parking space is provided at this center for approximately 3,000 cars."

The Cottonwood regional shopping center is designed to serve a population currently listed at about 175,000 people, including the most rapidly growing area in the unincorporated portion of Salt Lake County.
(R 22) The first branch banks established outside the

incorporated cities in the southeast section was in 1953 by First Security Bank of Utah N.A. and in 1954 by Valley State, both on Highland Drive between the south city limits of Salt Lake City and 3300 South. Since that time Valley State has established branches at 2700 East 3300 South (1957) and at 900 East 5600 South. In 1960 Tracy Collins opened a branch at 4500 South and 900 East. (R 23)

The application concluded:

"First Security State Bank can provide additional banking facilities in the Cottonwood area in keeping with growth and development, and better service to present customers. It is estimated that within one year after opening, deposits would total in excess of \$1 million, within three years, \$3 million. Part of these deposits would be from new customers. Part would be transferred from customers now maintaining accounts in downtown, and from other banks, especially from First Security Bank of Utah, N.A.

A location within the center is available within the next month. Bank operations could begin with opening of major stores in the area. The major need for credit is mortgage credit, but significant amounts of other credit would also be handled.

Operations would not be as expensive as would normally apply to branches because of centralized bookkeeping at 8th South in Salt Lake City for all First Security Banks in the area." (R 23)

Examiner Quinn said in his report that the applicant

was operating three branch banks and had 2 applications pending including this application. The policies of the applicant regarding branches have been sound. All existing branches are reported to be operating on a profitable basis. The applicant has in excess of the capital requirement for present and proposed branches. The strength of applicant's management is adequate to justify the proposed branch expansion. It does not have asset problems which would be a factor against expansion. (R 29)

Mr. Quinn reported that applicant had an office at 3983 Wasatch Blvd. established 11/16/60 and it had \$475,000 deposits and \$742,000 in loans. (R 39)

This office is 4.6 miles from the proposed branch in the Cottonwood Mall.

Section II of the Quinn report is a field investigation and indicates a list of persons who were interviewed in person or by telephone at various dates. The list and their positions in the banking business are:

O. K. Carlson	Senior Vice President Walker Bank & Trust Company
S. M. Horman	Partner Horman Construction Company
Arthur N. McKell	Manager Zions First National Bank Cottonwood Branch
W. E. Myrick	President Valley State Bank
Kenneth E. Coombs	Manager Valley State Bank Cottonwood Branch

F. A. Fornelius	Manager Valley State Bank Cottonwood Branch
Jay D. Knudsen	Manager First Security State Bank Olympus Branch
Richard M. Mercer	Manager Western Savings and Loan Co. Cottonwood Office
Newell B. Dayton	President Tracy-Collins Trust Company
Thomas L. Davis	Assistant Cashier and Manager Tracy-Collins Bank & Trust Com- pany County Office
Ames K. Bagley	Vice President Zions First National Bank
W. La Mar Webb	President Zions First National Bank (R 31)

The report does not state what the conversation was between Mr. Quinn and the gentlemen interviewed. It is fair to infer that they were asked if they thought there was need for another branch bank in the Cottonwood Mall and since they were officers of competing banks, it is fair to infer they said no.

Page 32 and 33 of the report contains a list of business men in the area, giving their occupation and present banking connection. They were interviewed on February 16, 1962. The report does not state the nature or

purpose of the interview or what they told Mr. Quinn.
(R 32-33)

On January 26, 1962, Mr. Quinn made a survey of the area involved in the application. *The Cottonwood Shopping Center was for the most part still under construction. One establishment was open for business.*
(R 33)

The Center will contain 50 business shops on the ground floor and a medical center for 12 doctors on the second floor. The center will contain 515,000 square feet all under roof. Future plans call for an addition to increase the overall size by one third. (R 33)

The estimated population of the primary area is 43,000. The area to be served is between 3900 and 7800 South Streets east of 900 East to the Wasatch range. It is estimated the population of the area will be 70,000 by 1970. The Cottonwood Shopping Center, when completed, will be by far the largest group of businesses in the area. (R 34)

According to applicant's records Olympus Hills branch (of applicant) which has been operating over a year, has \$742,000 in loans. (R 36) The report states that applicant estimates the annual expense of operation of the branch at \$18,650. *The examiner estimates the proposed branch will be on a profitable basis within a 12 to 18 months period.* Both estimates appear to the Examiner to be reasonable. (R 36) Applicant estimates the cost of leasehold improvements at \$4,000. to \$5,000. and furniture and equipment at \$22,500. (R 36)

The Branch Manager and his assistants will be re-

cruited from the experienced staff at Head office or from the branches of the bank. (R 37)

Under Conclusions and Recommendation of the Examiner it is stated that there are 5 operating branch bank facilities and one that has been approved but not yet established and a savings and loan branch facility. The only protest filed against the establishment of the proposed branch is the protest by Zions Bank.

"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." * *

"The area involved appears to be adequately serviced by banking facilities at the present time. However, the potential growth of the area and particularly the potential business growth of the Cottonwood Mall as presently established, together with its increased facilities planned for the future, could change this picture so that an additional banking facility in this area would be justified."
(R 38)

The plaintiff took the deposition of the defendant Spencer C. Taylor. It was introduced in evidence with certain portions deleted by stipulation.

Mr. Taylor testified that the written documents which he had before him when he issued the certificate were:

- a. The application of First Security State Bank with supporting information and maps.

- b. The protest letters of Zions First National Bank dated Nov. 28, 1961
- c. Copy of Branch Investigation report of C. B. Quinn
- d. Copy of certificate dated October 16, 1962

Mr. Taylor's testimony is paraphrased as follows:

(Dep. 12) There were lots of verbal conferences with the Governor but I think nothing was put in writing.

(Dep. 13) I had occasion to make personal observations regarding this matter. We had conferences with both sides you understand and each time we had a conference, I would make it a point to go out there. I can't remember the dates. Mr. Flint and a representative from Zions First National came up and I also met with the First Security, probably more than once. (Dep. 14)

I went out on occasions because my son was working out there at Bakers shoes. During the period of time he worked there, I believe I went out there quite frequently. It was just a matter of walking around the Mall and watching the progress. (Dep. 19)

I generally talked to the Western Savings & Loan out there—to Scharf Sumner. I saw him at the opening of his new place there. I saw him both at the opening of his temporary quarters and also the permanent quarters and I was also out there at the opening of Zion's permanent quarters. I think we talked about the growth of the Mall out there and what a tremendous thing it was. I talked to him about the competitive situation in terms of banking. I asked Mr. Sumner if he had any objection to the First Security State Bank going into the Mall, and he said that he had none. (Dep. 20)

I made no attempt to recontact any of the individuals listed in Mr. Quinn's report. I did not question that they had made the statements to Mr. Quinn, which he had listed in his report. A lot of them were bankers. I talked to Mr. Sid Horman about the growth of the Mall and congratulated him on a marvelous job. He probably told me a little of the history of the Mall and what they expected to do in the future. (Dep. 22)

On my visits to the Mall I observed particularly the crowds of people who used it. 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. I don't believe there was anytime before October 16, 1962 that I couldn't find a parking place. I always noticed a pretty good crowd out there but that is as far as I went. (Dep. 23)

Based on my recollection, I would say that at least half of the 50 predicted business establishments had been opened by October 16, 1962. Those that started subsequent to October 16, were practically ready to open. There were a number that opened shortly after that that were practically all ready to open. It was my observation that the Mall was a tremendous thing. I was impressed with the type of tenants they had out there and the size. (Dep. 25)

The Governor was advised of the Quinn report. I couldn't tell you the date. I understood that representatives of Zions First National Bank or First Security State Bank had conferences with the Governor relative to this matter. I don't know what was before the Governor from the Bank. The Governor and I talked freely about

it back and forth. I think he was concerned about it and I was concerned about it. We just wanted to do the right thing and I am sure he did too. The Governor and I both arrived at the decision on October 16, 1962—to grant the application. (Dep. 27)

About the only thing I can tell you about my conferences with the two banks involved was that Zions was against the application and First Security was in favor of it. (Dep. 29). In addition to the application and the data supporting it, I think the growth of the Mall was the real basis for the decision. (Dep. 30)

Mr. Flint and Mr. Marr had conferences with me representing Zions. In substance they thought there was no need for additional service in the Mall. (Dep. 31) The substance of what was said to me orally would be approximately what was said in the letter itself. (Dep. 31) I had occasion at the opening on June 4, 1962 of Zions Branch to physically look at the facility and go all through it. (Dep. 32)

I think the Zions bank people mentioned to me that they needed a period of time free from the injection of another competitive bank right next to them to get on their feet. (Dep. 34)

I don't recall them mentioning anything specific about overbanking. I think I talked to Mr. Flint one time down at the Hotel Utah. This would be along in June of 1962 because that is when I held the District Convention of the National Association of Supervisors of State Banks there. He renewed his objection to a new branch and I told him I was a little up in the air at the

time, but I thought it was going to be a tremendous thing out there. (Dep. 35)

The Quinn report shows that from the time when the Zions branch was first established, which was February 1, 1960 to November 22, 1961, they had \$839,600 in deposits and \$76,400 in loans. On November 22, 1961 they were still in their old temporary quarters. (Dep. 37)

(Page 41) It has been my observation that we establish a branch out here, maybe it is next door to another branch; but the branch that is already in business doesn't seem to lose any deposits, they both continue to gain. That has been my observation in the past. If we reach the saturation point that certainly would not be true; but that has been my experience in the past and I think I can prove it by figures, statements published by the bank. (Dep. 42)

I consider the service area that we are talking about to be pertinent, but I consider that the Mall itself would draw probably beyond the areas that either bank would draw from, considering the size of the Mall. Stores like Z.C.M.I., Makoff's and Arthur Frank's draw from all over the State, and particularly all over the valley. I would say that the area that is delineated as a bank service area is correct. (Dep. 44-45)

Q. You would say as there tended to be less than eight to ten thousand people per institution, the area is getting overbanked, is that right?

A. Well, I wouldn't make that as a statement because I haven't had experience in a place where the area was actually overbanked.

Q. That is, what is an overbanked area?

A. That is what I am asking you. You asked me that. I don't know; I haven't experienced it.

I think when there are so many banks in an area that the banks can't operate profitably that you would be reaching that point and I don't know where it is. (Dep. 52-53)

I did not agree with Mr. Quinn's opinion that granting of applicant's proposed branch would create an overbanked condition. My opinion would be just the opposite; based on the past experience with branches that we have granted, and none of them to my knowledge are operating at a loss. (Dep. 54) We have granted branches with much less population than there is out here for a branch and they are operating profitably. Population is not the only ground upon which we consider the question of overbanking. We also consider deposit volume. (Dep. 54)

The information that was before me that caused me to disagree with Quinn's statement that granting this application would create an overbanked condition, was the growth of the Mall. I think that was the deciding factor. (Dep. 55)

If you had 20 businesses out there and you suddenly got 50, it just naturally follows that you would have about two or three times as much in deposit volume from the new businesses. I am sure that Zions is going to operate profitably out there. That is my judgment, based on the deposit volume Ames just told me they had. I

did not know that before I granted the application. That was revealed just now by Mr. Bagley. (Dep. 56)

Q. What is the evil that would be aimed at in the prevention against overbanking?

A. The primary obligation I think of any supervisor is to keep a strong, healthy banking business; and from past experience during the Depression, we found that overbanking leads to bidding for interest rates and bidding for loans and generally has a destructive effect on banks. However, healthy competition is just as healthy as—in fact more so than no competition at all. Monopoly certainly doesn't lead to a healthy situation either. (Dep. 59)

A competing branch bank at the proximity of a pre-existing bank could have two effects. It could attract business or it could take business away. It creates more business for both banks. It brings more business to the area. I think it brings more business to Zions. I have read a lot on the subject and this is true with grocery stores, gasoline stations and shoe stores. I think placing First Security where it is intended to be placed would create a healthy situation. (Dep. 64) I don't know whether it would increase the business volume of Zions. I don't have any reason to think it would actually increase the business volume of Zions, but it has been my observation that if you establish another bank to the side of an existing bank or branch, that it has been the history that the existing bank may level off for awhile but the growth is always up. (Dep. 64)

There was a time before actually granting the appli-

cation that I disagreed with Items 14 (a) and 14 (b) and the statement about potential deposit volume on page 8 (of the Quinn report). Other than that I accepted everything else in the report. (Dep. 75) The reasons I disagreed with those parts of the Quinn report was my observation of the Cottonwood Mall myself. With regard to the Mall itself, I considered that something had changed between the time Mr. Quinn filed his report and the time that I granted the application. I think the growth of the Mall and the type of businesses they got out there were quite a factor. I think Mr. Quinn had probably taken into consideration these factors where he concluded:

“The area involved appears to be adequately serviced by banking facilities at the present time. However, the potential growth of the area and particularly the potential business growth of the Cottonwood Mall as presently established, together with its increased facilities planned for the future, could change this picture so that an additional banking facility in this area would be justified.” (Dep. 76)

It was my responsibility to make the decision not his. (Dep. 78)

I made the determination that there would be public convenience to have this application granted. In making my determination, I was primarily concerned about the public convenience; that was the basis for my decision. We made the decision that it would not unreasonably interfere with Zions. I think the primary reason it would not unreasonably interfere with Zions was the growth of

the Mall. I am sure that Zions First National Bank is going to be successful whether we granted the branch or not. (Dep. 79)

It is my opinion that there is sufficient volume out there to support two and I think due to the management of Zions they could get their share of the business, and I think due to the management of First Security they will operate at a profit, and I see no reason to have any fear of either of them losing money. (Dep. 80)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN HOLDING THAT THE DEFENDANT BANK COMMISSIONER ABUSED HIS DISCRETION AND ACTED ARBITRARILY AND CAPRICIOUSLY IN GRANTING THE APPLICATION OF FIRST SECURITY STATE BANK.

The Honorable Trial Court stated the correct legal principle when it said to counsel for plaintiff:

“You are alleging an abuse of discretion, and I suppose the burden is on you to show it.” (R 99)

The Trial Court found there was no evidence before the Bank Commissioner upon which to base a determination that the proposed establishment of the First Security State Bank branch within the Cottonwood Mall would not be in such close proximity as to unreasonably inter-

fere with the business of the pre-existing Zions Cottonwood Branch Bank. (R. 89)

As a conclusion of law the Court concluded that the action of the Bank Commissioner was without foundation, in fact, constituted an abuse of administrative discretion, was arbitrary and capricious and was null and void. (R 89)

It is the contention of appellants and defendants that the evidence and record sustains the decision of the Bank Commissioner and does not sustain the decision of the Trial Court. We have referred to the findings of the Trial Court to indicate that the case was tried below on the agreement of Court and counsel that the Bank Commissioner was the fact finder. We respectfully submit that while the Trial Court announced this rule of law, it refused to apply it to the facts of the case.

The unusual nature of the administrative proceeding and decision made by Bank Commissioner must be fully understood. While there was no formal hearing there was nothing ex parte or secret about the proceeding. The application of First Security was filed November 16, 1961. The protest letter of Zions First National was dated November 28, 1961. The proceeding was pending before the Bank Commissioner until October 16, 1962, when the authority was granted. During this year Zions Bank knew the Bank Commissioner was visiting the Cottonwood Mall and taking judicial (or administrative) notice of its apparent growth and impact on the business community. Zions Bank had every opportunity to put any evidence or facts or argument before the Commissioner in the form of additional letters like its letter

of November 28, 1961 or in oral form like the conferences Mr. Flint and Mr. Marr had with Mr. Spencer Taylor.

The Utah statute here involved (7-3-6) as contained in the 1953 code, provided that whenever application is made for the establishment of any branch, the Commissioner shall give notice thereof by publication in a newspaper of general circulation in the City or town in which such branch is to be established and shall hold a public hearing at a time and place within such city or town, in such notice specified, at which any citizen may appear in support of or opposition to such application. The foregoing provision was repealed by Session Laws of 1957 Chapter 7 to provide that the Bank Commissioner and the Governor may grant permission to establish branch banks "without conducting a public hearing."

Having repealed the provision of the law providing for a public hearing, it is fair to infer the legislature intended that the Bank Commissioner should proceed with an application and investigation as was done in this case. It is obvious that the legislature intended to leave to the discretion of the Bank Commissioner and the Governor, the question of what procedure should be adopted to arrive at a showing to the satisfaction of the Commissioner and the Governor that the establishment of the branch bank would serve public convenience and advantage.

In *Northwest Bancorporation v. Board of Governors* 303 F. 2d 832 (CCA 8-1962) the Board of Governors of the Federal Reserve Bank, whose duty it was to decide the issue, had held that it was contrary to the public interest

for Bancorporation to acquire stock ownership of a bank in Pipestone, Minnesota. The Bancorporation in its brief before the Circuit Court of Appeals, contended that the Board reached the wrong conclusion:

“Between these admitted facts and the Board’s ultimate conclusion—between the starting point and the destination—there is no designated connecting highway. Petitioner explored this uncharted area and found that the road led to an entirely different destination; that competition would be enhanced rather than adversely affected by the proposed acquisition.”

The Court said:

“Where either one of two inferences may reasonably be drawn from undisputed facts, the inference adopted by the agency or board whose duty it is to draw the inference from which it is to formulate its judgment may not be disturbed on appeal.

“The drawing of an inference and the making of a judgment based thereon, particularly in this kind of case where the question is whether the acquisition of bank by petitioner will, in the future, adversely affect the public interest and lessen competition in the field of banking, necessarily requires the making of a prophecy. Here that prophecy has been made. The Board, upon whose special competency Congress relied in delegating the authority to approve or disapprove bank acquisitions by holding companies, concluded that in the overall picture the public interest would be adversely affected and competition would be lessened by the acquisition. Through use of the

same facts, petitioner finds that by the acquisition competition would be enhanced and the public welfare unimpaired. This is no more than a disagreement with the Board's conclusion. The responsibility of making the determination was vested by Congress with the Board and its conclusion must prevail.

"This court, no matter what its economic views might be, no matter what it might determine to be good or bad banking, or what it might think the effect such acquisition might have on sound banking, the public interest or competition in the field of banking, may not substitute its findings and its judgment for the findings and judgment of the Board, provided of course, the findings of the Board as to the facts are supported by substantial evidence. Section 9 of the Act, 12 U.S.C.A. Section 1848, as amended. Where basic facts are not in dispute, it is then particularly true that the Board here, or a like governmental agency under similar situations, brings to bear its experience and its particular expert judgment."

In the Bancorporation case, it was urged on appeal, that the Board's denial of a hearing was a denial of due process. It is important to note that the Utah statute does not require a hearing but the record here shows that Zions First National filed a written protest and appeared before the Bank Commissioner and orally protested the application of First Security State Bank. We call attention to this feature of the case because many administrative bodies or agents have rather formal hearings and keep records of sworn testimony much like a trial court. But administrative agencies dealing with banks (both state and national) seem to follow the methods of the business

man in reaching decisions rather than the methods of the Judge in his Courtroom.

The Court held such methods, where they are in harmony with the statute, do not result in a denial of due process. The following quotation is illuminating:

"Professor Davis, in his most comprehensive work, 1 Davis, Administrative Law Treatise, Section 4.04, pp. 247-248 states:

'Probably the outstanding example in the federal government of regulation of an entire industry through methods of supervision, and almost entirely without formal adjudication, is the regulation of national banks.*** The system may be one of the most successful, if not the most successful.

* * * * *

'The striking fact is that whereas the non-banking agencies administer their systems of requiring licenses and approvals by conducting formal adjudications in most cases involving controversies, the banking agencies use methods of informal supervision, almost always without formal adjudication, even for the determination of controversies. The contrast is a striking one with respect to each parallel problem; for instance, the problem of the extent of community need is about the same whether the application is for establishment of a bank, a television station, or an airline, and yet the problem is handled in the banking field by the methods of the business man and in the other fields by the methods of the Judge in his courtroom.'

"In connection with the request for hearing, it should also be noted that following the filing of

the original application petitioner was given every opportunity to submit to the Board whatever facts, data, theory or argument it desired. Petitioner failed in this proceeding to direct attention to any facts not presented to the Board or overlooked by it. Apparently, petitioner presented everything it had."

In *National Broadcasting Co. v. The United States et al*, 87 Law Ed 1344, at page 1368, 319 U.S. 190, (1943) the Supreme Court affirmed the decision of the District Court and held:

"A procedural point calls for just a word. The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial de novo of the matters heard by the Commission and dealt within its report would have been improper."

In *re Mee*, 189 NW 675 (1922) the Court said:

"Certainly whether another bank should be allowed in this particular banking community, even if not within the absolute discretion of the banking department, should not be controlled by the courts unless there is a clear abuse of discretion and power vested in such banking department."

Opp Cotton Mills vs. Administrator 312 US 126, 85 L. Ed. 624 (1941)

Certiorari to Supreme Court to review judgment of Court of Appeals sustaining an order of the Administrator

of the Wage and Hour Division fixing a uniform minimum wage for employees in the textile industry.

The administrator, in arriving at his decision, relied upon studies of statistical data gathered by government agencies concerning economic and competitive conditions in the industry, living and production costs, including wages.

The Supreme Court stated:

“* * * The statistics gathered, if regarded as of probative force, and the inferences drawn from them by the Administrator, taken with other evidence, amply support his findings.

The argument of petitioners is not that the record contains no evidence but rather that this class of evidence must be ignored because not competent in a court of law. But it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed. *Interstate Commerce Commission vs. Baird*, 194 US 25, 44, 48 L Ed 860, 869, 24 S Ct. 563; *Interstate Commerce Commission v. Louisville & N. R. Co.* 227 US 88, 93, 57 L Ed 431, 434, 33 S Ct. 185; *Spiller v. Atchison, T & S. F. R. Co.* 253 US 117, 64 L Ed 810, 40 S Ct. 466; *United States v. Abilene & S. R. Co.* 265 US 274, 288, 68 L Ed 1016, 1022, 44 S Ct. 565; *John Bene & Sons vs. Federal Trade Commission* (CCA 2d) 299 F 468, 471. We need not consider whether this class of evidence must be excluded from proceedings in court.”

State ex rel. Saari vs. State Securities Commission
182 NW 910 (Minn. 1921)

Certiorari to review an order of the State Securities Commission denying the application of J. S. Saari for a certificate authorizing a state bank in the village of Gilbert.

"Counsel for the relators make a vigorous attack on the finding. They contend that an impartial consideration of the undisputed evidence will demonstrate that the Commission acted arbitrarily and capriciously in denying the application. . . .

"Our examination of the record has led us to conclude that the real controversy is over the inferences which may properly be drawn from the evidence. In a review of the action of the Commission, the field of inquiry is limited. We do not have the same latitude as in reviewing judicial proceedings. Responsibility for the findings of facts rests on the Commission. Though we may not agree with its conclusions, we cannot interfere unless it appears that it has not kept within its jurisdiction, or has proceeded upon an erroneous theory of the law, or has acted arbitrarily, oppressively and unreasonably, so that its determination represents its will, and not its judgment, or is without evidence to support it. *State vs. State Securities Commission*, 145 Minn. 221, 176 NW 759. The evidence would have justified findings contrary to those made, but is not so inconsistent with them as to warrant us in holding that the Commission exercised arbitrary power instead of its candid judgment in denying the application."

Order affirmed.

Also, *State ex rel. Dybdal vs. State Securities Commission* 176 NW 759 (1920)

In re *Commercial State Bank*, 179 NW 1021 (*Nebraska* 1920) the issue was the denial of a bank charter.

"Where it appears that the state banking board has acted within its jurisdiction and that all jurisdictional facts essential to uphold its final order are sustained by same evidence competent for that board to consider, its order will be upheld in error proceedings to the district court." P. 1022.

It seems that the banking board employed one Van Riper, a bank examiner, to make investigations in the matter of this application for a charter. Van Riper made a report to the board, which report is in the bill of exceptions. Counsel for applicants requested permission of the banking board to examine this report, but were refused. In fairness to the applicants we have not considered this report in arriving at a decision in this case, because they had no opportunity to rebut it or to cross-examine Van Riper. The board, as shown by the record, based its findings and final order partly on this bank examiner's report, but it also appears that there is other independent competent evidence upon which to base the findings made.

The banking board was created by statute and is purely in the nature of an administrative body, and in such a procedure the statute must be strictly followed. Where it is clear that there has been no abuse of discretion, this court will not substitute its judgment for the findings made by that body."

The case is affirmed

State v. Department of Public Service, 86 P. 2d 1109 (Wash. 1939)

"A regulatory body may, undoubtedly, properly take into consideration the results of its own inspection of the physical conditions involved, results of its previous experience in similar situations, and the general information concerning the subject, which goes to make up its fund of expert knowledge. We have often so held."

Wall vs. Fenner, 76 NW 2d 722 (S. Dakota, 1956)

The defendants, the State Banking Commission, denied plaintiff's application for a bank for the "reason that it appears the public convenience and necessity do not justify the organization of said new bank and that the said City of Sisseton and adjacent territory are now provided with adequate banking facilities." Plaintiffs brought a mandamus action in trial court who reversed the action of the Commission.

"This appeal by the Commission is grounded on the claim that the trial court did not confine its review to the question of whether the Commission had abused its discretion in denying the incorporators' application for approval, but went further and substituted its determination for that of the Commission.

* * * * *

While the statutes under consideration do not provide for an appeal to the courts from the decision of the Commission, a judicial review of its proceedings may be had by mandamus. However, when the action under judicial scrutiny involves

the exercise of discretion by an administrative officer or agency, the judicial review is limited to ascertaining whether that discretion has been abused.

* * * * *

Responsibility for the findings of facts rests on the Commission. The function and inquiry of the court are limited, in respect of factual findings, to ascertaining whether the findings are supported by competent evidence. It is the function of the Commission and not of the Court on review to weigh the evidence and to draw the inferences therefrom. *Craig vs. Jensen*, 66 S.D. 93, 278, N.W. 545; 42 Am. Jur., p. 644, Sec. 217; 73 C.J.S. Public Administrative Bodies and Procedure, Sec. 225, p. 594; *State ex rel. Saari v. State Securities Commission*, 149 Minn. 101, 182 N.W. 910; *State ex rel. Duluth Clearing House Ass'n. vs. Department of Commerce*, Minn. 73 N.W. 2d 790. The Court in reviewing such findings may not interfere with the administrative judgment merely because there is ground for a difference of opinion, even though the court may reach a different conclusion."

Judgment reversed.

In *United States v. Pierce Auto Freight Lines*, 327 US 515, 90 L.ed. 821, (1946) p. 832, it was said and held:

"It is true that ordinarily an administrative agency will act appropriately, in a proceeding of this sort, upon the record presented and such matters as properly may receive its attention through "official notice." It is also true that this Court, in appropriate instances, has limited the use of the latter implement in order to assure that the parties

will not be deprived of a fair hearing. See *United States v. Abilene & S. R. Co.* 265 US 274, 286-290, 68 L ed 1016, 1021-1024, 44 S Ct. 565; *Interstate Commerce Commission v. Louisville & N. R. Co.* 227 US 88, 93, 94, 57 L ed 431, 434, 33 S Ct. 185. But in doing so it has not undertaken to make a fetish of sticking squarely within the four corners of the specific record in administrative proceedings or of pinning down such agencies, with reference to fact determinations, even more rigidly than the courts in strictly judicial proceedings. On the contrary, in the one case as in the other, the mere fact that the determining body has looked beyond the record proper does not invalidate its action unless substantial prejudice is shown to result. *Market Street R. Co. v. Railroad Commission*, 324 US 548, 561, 562, 89 L ed 1171, 1181, 1182, 65 S Ct 770; cf. *Opp Cotton Mills v. Administrator of Wage & Hour Division*, 312 US 126, 154, 155, 85 L ed 624, 640, 641, 61 S Ct 524. In these cases no more is necessary than to apply that rule."

* * * * *

"We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that "... the courts must in a litigated case, be the arbiters of the paramount public interest." This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court

is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

The National Banking Act, under which Zions First National Bank obtained authority to open its branch in the Cottonwood Mall, authorizes National Banks to establish branches when and where state banks are expressly authorized by the law of the State.

In *Community National Bank of Pontiac v. Saxon* 310 Fed. 2d 224, (CCA-6 1962) the court said:

"Under the applicable section of the National Bank Act (12 U.S.C. Sec. 36 (c)) a national banking association may, with the approval of the Comptroller, establish and operate branches only at such places within the state in which the bank is located as are expressly authorized for state banks by the law of the state in question, "* * * and subject to the restrictions as to location imposed by the law of State on State banks."

* * * * *

"By the National Bank Act, Congress committed to the Comptroller the initial responsibility of determining whether the several conditions under which a national banking association may establish a branch are met. One of those conditions is that the proposed branch be within a 'village' or 'city.' The finding of the Comptroller that the area in question is a 'village' is essentially a finding of fact."

Chase v. Ind. Comm. et al 81 Utah 141, 17 P. 2d 205 (Utah 1932) (at 150)

“By a long line of decisions, this Court has held that findings made by the Commission upon conflicting evidence are binding upon this Court. Such is the clear mandate of the Industrial Act of this state, Laws Utah 1919, chap. 63, pages 164, 165, Sec. 3148, subds. b and c. The evidence taken before the Commission is not such as to require, as a matter of law, a finding that Mr. Chase died as a result of an accident arising out of or in the course of his employment.”

Dole vs. Industrial Commission, 115 Utah 311, 204 P. 2d 462 (Utah 1949)

“In keeping with our previous holding, in order to warrant a reversal of this order the record must disclose such material, substantial, competent and uncontradicted evidence as to justify the conclusion as a matter of law that the commission acted arbitrarily in finding as it did.” P. 463

Overman vs. Industrial Commission, 103 Utah 468, 136 P. 2d 945 (Utah 1953)

In *Southern California J. Club v. California Horse R. Bd.*, 223 P. 2d 1 (Cal. 1950) (at page 7) the Court said and held:

“Thus it was for the board to determine whether plaintiff’s evidence was such that the burden had been met. This is especially true where most of the evidence consists of opinions, and the issues involved—public interest and purposes of the act—are general and incapable of exact defini-

tion. Indeed, plaintiff states in its brief: 'A moment's reflection upon the very nature of the determination that the board was required to make shows that such determination must be predicated, not upon provable concrete facts, but upon opinion evidence exclusively.' In such a case, wide discretion is necessarily vested in the factfinder."

The decision of the Honorable Trial Court completely ignores the fact that the legislature has lodged in an administrative Commissioner, with expert training, knowledge and experience, the solution of the questions of when and where branch banks should be authorized. The legislature intended the decision of the Commissioner, when supported by reasonable procedure and the record, to be final and binding on the Courts.

CONCLUSION

The record conclusively shows that:

1. The law provides the decision of the Bank Commission, when based on substantial evidence, is final and binding on the Courts.
2. The decision of the Bank Commissioner is based on substantial evidence. The applicant is qualified by capital structure and personnel and experience, to conduct a successful branch which will be on a profitable basis within a twelve to eighteen month period.
3. It is the opinion of the Bank Commissioner, based on the record and on his experience with other branch banks and based on his official or judicial notice of the Cottonwood Mall and the business it was attracting, that

there was and would in the future be enough business in the Mall to support two successful branch banks.

4. The plaintiff Zions First National Bank, though filing a protest and having many conferences extending over a year with defendant Bank Commissioner, did not produce any evidence or show any facts which indicate the decision of the Bank Commissioner on this vital question, was an abuse of discretion.

5. The Bank Commissioner's testimony in his deposition is entitled to the credit due an expert witness. His opinion given under oath and subject to cross examination that the location of First Security Bank in the Mall would not unreasonably interfere with the business of Zions Bank, stands uncontradicted in the record and supports his decision in favor of appellants.

Respectfully submitted,

A. Pratt Kesler, Attorney General
H. Wright Volker

RAY, QUINNEY & NEBEKER
A. H. Nebeker
Attorneys for defendants and
Appellants