

1964

# Zion's First National Bank v. Spencer C. Taylor et al : Respondent's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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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.*

Supreme Court, Utah

Case  
No.  
9960

RESPONDENT'S PETITION FOR REHEARING  
AND BRIEF IN SUPPORT THEREOF

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

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# IN THE SUPREME COURT of the STATE OF UTAH

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*Defendants and Appellants.*

Case  
No.  
9960

## PETITION FOR REHEARING

Plaintiff-Respondent respectfully moves the court, pursuant to Rule 76(e) of the Utah Rules of Civil Procedure, to reconsider its opinion in this case, grant a rehearing, and upon said reconsideration and rehearing to modify its prior decision, eliminating the direction by the Court to remand the branch bank application of appellant, First Security State Bank, to the Bank Commissioner for further proceedings.

The decision should be reconsidered and a rehearing granted for the following reasons:

I. There is a legally sufficient record before this Court upon which to base an absolute affirmance of the Trial Court's ruling without remand for further proceedings.

- A. The deposition of Spencer C. Taylor, Bank Commissioner, constitutes a proper part of the record in that it was stipulated into evidence as constituting the basis upon which his disputed decision was rendered.
- B. The deposition of Spencer C. Taylor, Bank Commissioner, constitutes a proper part of the record in that it established the factual basis upon which his disputed decision was rendered, as distinguished from inquiry into his mental processes.

II. Under the affirmative facts in the record before this Court, there was “unreasonable interference” by reason of “such close proximity” in violation of the branch bank statute applicable to unincorporated areas of Salt Lake County, Utah.

Respectfully submitted,  
MARR, WILKINS & CANNON  
J. Thomas Greene  
Paul B. Cannon  
*Attorneys for Respondent*

BRIEF OF PLAINTIFF-RESPONDENT IN  
SUPPORT OF PETITION FOR REHEARING

## PRELIMINARY STATEMENT

This was an action brought by Zions First National Bank challenging as unauthorized in law and without foundation in fact the order of Spencer C. Taylor, Bank Commissioner of 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 City, Utah. The Trial Court found that the Bank Commissioner abused his administrative discretion in that he failed to take account of or ignored the branch banking statute applicable to unincorporated areas of Salt Lake County (7-3-6 U.C.A. 1953, as amended). Respondent sought affirmance of the Trial Court's ruling on the ground of abuse of administrative discretion (both in ignoring the "close proximity" statute by failing to make factual determinations contemplated thereby, and in rendering an alleged determination that the new branch would "subserve the public convenience and advantage"), but also upon the broader ground that under affirmatively shown facts in the record, there was "unreasonable interference" as a matter of law occasioned by "*such* close proximity" within the meaning of 7-3-6 U.C.A., 1953, as amended. The decision of this Court, filed April 7, 1964, affirmed the lower Court's judgment setting aside the order granting the branch bank charter, but remanded the

application to the Bank Commissioner for further proceedings. It appears that the principal reason for remand was that a portion of the record, namely the deposition of the Bank Commissioner, was regarded as not reviewable or properly before the Court, although the said deposition was taken by plaintiff without objection, offered into evidence by the defendants, and stipulated as a part of the record by all parties. *The legal sufficiency of the said deposition as a reviewable part of the record has never been argued by counsel for either side.*

## ARGUMENT

### POINT I

THERE IS A LEGALLY SUFFICIENT RECORD BEFORE THIS COURT UPON WHICH TO BASE AN ABSOLUTE AFFIRMANCE OF THE TRIAL COURT'S RULING WITHOUT REMAND FOR FURTHER PROCEEDINGS.

The basis for the Court's order of remand essentially appears to be that a legally reviewable record was not before the Court, and that a public hearing should be held to create a proper record. In this connection, the Court stated that the deposition of Spencer C. Taylor, Bank Commissioner, "should never have been taken." Petitioner requests to be heard as to these matters. *Counsel has had no opportunity at any stage of these proceedings to present authorities or to submit argument with reference to these points.* Accordingly, this petition is filed primarily for the purpose of presenting authorities and argument which would justify this Court in



reviewing the entire record before it, *including the Bank Commissioner's deposition*, and rendering a decision without necessarily remanding this cause for further proceedings.

A. THE DEPOSITION OF SPENCER C. TAYLOR CONSTITUTES A PROPER PART OF THE RECORD IN THAT IT WAS STIPULATED INTO EVIDENCE AS CONSTITUTING THE BASIS UPON WHICH HIS DISPUTED DECISION WAS RENDERED.

The deposition of Spencer C. Taylor, Bank Commissioner, was taken *without objection* by either counsel for the defendant Bank Commissioner or counsel for the defendant First Security. At the trial, it was offered into evidence by the *defendants*, and it was *stipulated* into evidence by all parties after deletion of certain portions which related to information obtained by the Commissioner *after* the date of his decision and therefore couldn't have been considered by him as a basis for the disputed decision.

It would appear that any claim of privilege which might otherwise have been asserted relative either to the initial deposition or its introduction into evidence was conclusively waived by reason of failure to object thereto. 16 Am. Jur., Depositions, § 138. In any event, the factual content of the deposition, pertaining to what was before the Commissioner, became a matter of stipulation. The stipulation agreed upon provided in part:

“. . . it is stipulated by and between the parties herein that the deposition of Spencer C. Taylor, bank commissioner of the State of Utah, taken

before Lois P. Crowder, notary public, on April 22, 1963, *offered by defendants*, may be admitted in evidence as the testimony of said Spencer C. Taylor in support of the issuance of the certificate dated October 16, 1962, for the establishment of a branch bank by First Security State Bank in Salt Lake County, Utah, subject, however, to the following conditions: . . . .”

(R. 107) (Emphasis added)

The general law applicable to stipulations is that:

“ . . . stipulations made by parties to a judicial proceeding, or by their attorneys, within the scope of their authority, are *binding upon those who make them and those whom they lawfully represent, and also upon the trial and appellate courts*, in the absence of any valid ground or reason for refusing enforcement.” (Emphasis added.)

50 Am. Jur., Stipulations, § 9

The authors of American Jurisprudence have noted that stipulations may supplement otherwise deficient records for purposes of judicial review in administrative proceedings:

“While it is better practice for an appealing party to file in court a verbatim record of testimony taken before the agency, where the *statute providing for the appeal does not require such record* it was held there was no error in permitting the filing of a transcript *certified to by the commission as constituting the substance of the testimony heard by it* ‘to the best of our recollection.’ . . . by the grace of court, and in the *absence of objection*, an appeal may be heard on an irregular record.” (Emphasis added.)

2 Am. Jur., Administrative Law, § 722 at p. 623

This Court has recognized the principle that stipulations of fact are not only binding upon the parties, but upon the courts. Thus, in *Rickenberg v. Capitol Garage*, 68 Utah 30, 249 Pac. 121 (1926), a stipulation was upheld even though evidence was presented which the court noted supported a contrary contention. The court said:

“We remark, a complete answer to the foregoing contention is that it was stipulated at the hearing in the court below, and the stipulation appears in the record, that the respondent was convicted of the offense of driving an automobile while intoxicated. *Respondent is bound by that stipulation, and so are we.*” (Emphasis added.)  
249 P. 2d at 122

(See also *Volker-Scowcroft Lumber Co. v. Vance*, 36 Utah 348, 103 Pac. 970 (1909).)

In *Denver & R.G.W.R. Co. v. Central Weber Sewer I. Dist.*, 4 Utah 2d 105, 287 P.2d 884 (1955), this Court judicially reviewed an administrative decision wherein the record was otherwise deficient, since the record was bolstered by additional stipulated facts. In that case Justice Henriod said:

“Ordinarily on writ of review the certified record alone is examinable. *Not so, however, where the record and determination of the commission or board are unsupported by some kind of reasonably substantial proof.* In that event the judiciary may awaken to question their warrant, and in doing so, *may receive, examine and weigh evidence, if necessary, as it did here on stipulated facts, to the end that due process guarantees will*

maintain.” (Emphasis added.)  
287 P.2d at 886, 887

In this case the parties desired to stipulate and did stipulate in effect that what the Bank Commissioner, Spencer C. Taylor, testified to in his deposition was in fact the evidence which was before him and constituted the evidence upon which he based his administrative decision. By virtue of this stipulation of fact the record became *established* and properly reviewable *quite independent of the question whether or not the deposition should have been taken in the first place*. Since the *Bank Commissioner has stipulated* as to the facts upon which he based his Certificate for a branch bank issued October 16, 1962, and the question before this Court is whether or not that Certificate was valid *when issued*, a hearing before the Bank Commissioner now conducted for the purpose of determining the validity of the Certificate already issued cannot properly develop any facts other than or in addition to those already stipulated to by the Bank Commissioner. The record is properly reviewable as to matters previously argued before this Court, then, since it constitutes a stipulated record.

B. THE DEPOSITION OF SPENCER C. TAYLOR, BANK COMMISSIONER, CONSTITUTES A PROPER PART OF THE RECORD IN THAT IT ESTABLISHED THE FACTUAL BASIS UPON WHICH HIS DISPUTED DECISION WAS RENDERED, AS DISTINGUISHED FROM INQUIRY INTO HIS MENTAL PROCESSES.

The Court's decision apparently regards the deposition which was taken of the Bank Commissioner as an

unwarranted attempt to probe the mental processes of an administrative officer in his quasi-judicial capacity. In this regard, the Court said that the deposition “. . . in effect, attempted to elicit his reasons.” The authority cited and quoted by the Court as applicable and controlling is the fourth of the so-called protracted “Morgan Cases,” *Morgan v. United States*, 313 U.S. 409 (1941). As already noted, *there has been no opportunity heretofore for counsel to comment or submit argument with respect to the relevance of the said Morgan case*, which authority was set forth for the first time in these proceedings in this Court’s opinion. It is submitted that both the facts and the principle set forth in the Morgan case are fundamentally distinguishable from the case at bar!

In Morgan there was a *mandatory statutory requirement for a “full hearing” before the Secretary of Agriculture*. Such a hearing was held and a voluminous *record was made*. The deposition of the Secretary was authorized *over the Government’s objection*, and it was apparent that the purpose of the deposition was not to elicit factual data otherwise unavailable, but fundamentally *the purpose was to probe the relative weight given by the administrator to various portions of the existing record*. Under this state of facts the U.S. Supreme Court regarded the examination essentially as an inquiry or probe into the Secretary’s mental processes.

On the other hand, in the case at bar, Justice Callister correctly observed that there was *no statutory right*

to a hearing before the State Bank Commissioner, and commented that "the legislature saw fit in 1957 to eliminate the mandatory requirement that public hearings be held." Since the old statute, U.C.A. 1953, 7-3-6, had been repealed and there was no law on the books relative to public hearings at pertinent times herein, the Bank Commissioner held no hearing and *no record was made*. Accordingly, the deposition of the Bank Commissioner was taken *without objection* as the only practicable means of *determining the facts, if any, which were before him as the basis for the decision which had already been rendered*. The deposition wasn't meant to "elicit reasons" or "probe mental processes." Rather, it was designed to and did simply *determine the facts* which were before the Commissioner.

A fundamental distinction exists between taking depositions of administrative officers to "probe mental processes" as compared with necessary inquiry into the factual basis for the decision in question. The Morgan cases are consistent with such a distinction. Actually, while the fourth Morgan case referred to in the Court's decision herein has been regarded as modifying somewhat the previous Morgan cases as to the propriety of taking depositions of administrative officers, the Morgan cases are not necessarily inconsistent with themselves and the Court did not expressly retreat or recede from its former statements. In the first Morgan case the Court required defendants (including the Secretary of Agriculture) to answer allegations that a rate order was made "without

having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiff submitted." *Morgan v. United States*, 298 U.S. 468, 478 (1936). Similarly, while in the second Morgan case the Secretary's order was upset because of procedural defects, the Court recognized the necessity of administrative officers' decisions being based upon considerations of evidence. The Court said:

"In the light of this testimony *there is no occasion to discuss the extent to which the Secretary examined the evidence*, and we agree with the Government's contention that it was not the function of the court to probe the mental process of the Secretary in reaching his conclusions if he gave the hearing which the law required." (Emphasis added.)

*Morgan v. United States*, 304 U.S. 1, 18 (1938);

In any event, the authors of American Jurisprudence have noted a line of cases distinguishable from the Morgan case under which circumstances similar to the case at bar justify the taking of depositions of administrative officials:

"The decision in the first Morgan Case that the officer who decides in administrative proceedings must consider the evidence taken before another official raised the problem whether on review the party seeking relief from an administrative order might examine the officer or subject him to interrogatories regarding the process by which he reached his conclusions. However, the later Morgan Cases settled that just as a judge cannot be subjected to such scrutiny, so the

integrity of the administrative process must be equally respected. Earlier cases stated the same principle. It has been held in some state courts that where an *order is only prima facie correct* and is *required to be made upon evidence* and *no record of the evidence is required to be kept, the officers making the order may be called as witnesses and required to testify whether in fact any evidence was submitted to and considered by them as the basis for such order.*" (Emphasis added.)

42 Am. Jur., Public Administrative Law, § 242.

An A.L.R. annotation also discusses the most recent Morgan decision together with cases which take the contrary position. 18 A.L.R. 2d 606 (1951).

In *State v. Florida East Coast Ry. Co.*, 72 Fla. 379, 73 So. 171 (1916), the court was confronted by the contention that Railroad Commissioners had made an order relating to carriage of freight without any evidence before them upon which to base such an order. The court ruled that the commissioners could be called as witnesses and required to testify whether, in fact, any evidence was submitted to and considered by them. The court said:

"We have considered the testimony of the railroad commissioners, Mr. Burr, Mr. Blich, and Mr. Dunn, in this case, and overrule the point made by their attorney that it is contrary to public policy 'that a railroad commissioner should be called as a witness to impeach their own orders.' This court has said that, although the law gives to administrative action the effect of *prima facie* reasonableness, the courts may inquire into the reasonableness of the action..."



The parties have had their day in court, have been heard upon the law and evidence before the tribunal possessing the power and authority to determine the questions, but *the very authority of the railroad commissioners in making such an order as the one involved in this case depends upon the fact that evidence was before them upon which to base the order. To say that a carrier against whom such an order is made cannot call a railroad commissioner as a witness to show that he had no evidence before him on which to base the order, or the character of evidence which was before him, would be in effect to hold the order itself conclusive of its reasonableness and accomplish indirectly, by a technical rule of evidence made for the occasion, that which admittedly cannot be directly accomplished by legislative enactment.* It would render meaningless the language of the Supreme Court of the United States in *Louisville & N. R. Co. v. Railroad Commissioners*, 235 U.S. 601, 35 Sup. Ct. 146, 59 L. Ed. 379; *Interstate Commerce Commission v. Union Pac. Ry. Co.*, 222 U.S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308. *How could it be shown that no evidence was before the commissioners, and none considered by them in making the order, unless by the very person before whom it was pretended to be submitted? The law does not require them to preserve the evidence in writing and file it, nor recite it in their orders; therefore the absence of any such record from the files of their office raises no presumption that no evidence was heard.*" (Emphasis added.)

73 So. at 176

In *State ex rel. Madison Airport Co. v. Wrabetz, et al.* 231 Wise. 147, 285 N.W. 504 (1939), a writ of mandamus was sought relative to commanding the State

Industrial Commission to correct an award so as to conform to true facts. The court ruled that petitioner would be entitled to introduce proof that members of the Industrial Commission did not in fact base their review on necessary evidence and said:

“Although it is not within the court’s functions or province to probe the mental processes of administrative officials in reaching conclusions, the recitals of their orders as to their procedure in conducting quasi-judicial proceedings are *not conclusive in actions to determine whether a plaintiff is entitled to have an order vacated on the ground that the officials acted without or in excess of their powers, and in such actions the plaintiff is entitled to have the court receive his proof and render a decision on that issue.*”  
285 N.W. at 508. (Emphasis added.)

In *National Labor Relations Bd. v. Cherry Cotton Mills*, 98 F.2d 444, (CA 5, 1938), reh. den. 98 F.2d 1021, it was held that interrogatories for discovery might be addressed to members of the National Labor Relations Board where it was claimed that there had not been a fair hearing and that there was failure to give proper consideration to evidence submitted. Such was permitted in order to preserve judicial review of pretended findings.

In a very recent case arising in the district of Utah, the Tenth Circuit Court of Appeals recognized the right of inquiry into the facts before the Securities & Exchange Commission with reference to the issue of abuse of administrative discretion. In that case, the appellate

court set aside a judgment enforcing an administrative subpoena in view of an uncontroverted affidavit that the Commission was proceeding in an arbitrary and unfair manner. *Shasta Minerals & Chemical Company v. Securities & Exchange Commission*, 328 F.2d 285 (CA 10 1964).

In conclusion as to the right of factual inquiry, this court by its present opinion, consistent with many prior precedents, recognizes a *clear right to judicial review of the action of administrative agencies on the question of abuse of administrative discretion*. In this connection, Justice Callister noted that the Bank Commissioner's decision could stand only "if it is supported by any substantial evidence and is not arbitrary and capricious." Thus, we are confronted with the problem of having before us a decision which was clearly reviewable *if, but only if, there was an appropriate factual foundation upon which to base such judicial review*. It is submitted that under the circumstances of this case it was appropriate to take the Bank Commissioner's deposition in order to *establish facts* sufficient for consideration upon review.

## POINT II

UNDER THE AFFIRMATIVE FACTS IN THE RECORD BEFORE THIS COURT, THERE WAS "UNREASONABLE INTERFERENCE" BY REASON OF "SUCH CLOSE PROXIMITY" IN VIOLATION OF THE BRANCH BANK STATUTE APPLICABLE TO UNINCORPORATED AREAS OF SALT LAKE COUNTY, UTAH.

This point is urged as an independent ground in support of this Petition for Rehearing. With regard

to this matter, it is not urged that the Court modify or change its decision in any particular, but only that it be expanded so as to elucidate principles recognized by the Court in its opinion in view of facts before the Court in the record. It is acknowledged that the Court has ruled in effect that the matter of whether or not "close proximity" constitutes "unreasonable interference" is a question of fact and not of law. Thus, this Court stated that "'close proximity' does not in and of itself prohibit the establishment of a branch. The 'close proximity' must 'unreasonably interfere' with the established bank or branch." However, it *affirmatively appears* from *facts* within the record before this Court that there was "*such* close proximity" as to constitute "unreasonable interference."

The record affirmatively discloses by admission in the pleadings that Zions "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." (R. 5, 10) In this connection, evidence was presented to Commissioner Taylor that at least three years after the time the shopping center opened (which would be sometime in 1965 or 1966) would be required to enable the Zions branch to "become self-sustaining" (R. 26) and to get "on its feet" (Dep. 34), in view of the nature and location of the branch. The factual survey by the Bank Commissioner's office disclosed an unusual degree of

bank per capita saturation in the area resulting in an "over banked condition," and "no need" for additional banking facilities in the area in question (R. 87). In addition, it appears from the deposition of Commissioner Taylor that the Zions Branch being located within the Mall had foregone the advantages of 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). However, evidence before the Commissioner also disclosed that First Security emphasized as a condition to success at its contemplated location within the Mall the taking over of the very accounts necessary to sustain the new Zions Branch, namely, acquisition of "business accounts *primarily* from the shopping center itself . . . ." (R. 20) (Emphasis added.)

None of the foregoing facts are disputed anywhere in the record, and based upon such this Court could and should interpret the unique branch banking statute which is applicable only to unincorporated areas of Salt Lake County so as to give substance to it and to declare whether or not in the light of these facts there was a violation of the statute. It is submitted that these facts affirmatively show "*such* close proximity" as to constitute "unreasonable interference."

## CONCLUSION

The fundamental basis for this petition is that *the parties ought to be given an opportunity to present*

*argument* with respect to the action which has been taken in remanding the case to the Bank Commissioner for further proceedings. Remand to the Bank Commissioner for further proceedings was not requested by either party, was not argued, and *counsel for neither side has been heard as to this matter*. Rehearing is particularly requested so that the views of counsel may be presented and considered by the Court.

It is submitted that a proper record already exists before the Court and that the deposition of the Bank Commissioner constitutes a valid portion of such record both by virtue of the stipulation of the parties and by reason of the nature and purpose of the deposition itself as a necessary determination of facts. In any event, since the determinative question before the Trial Court and this Court is the validity of the Certificate for a branch bank issued October 16, 1962, and the defendants have stipulated as to all of the facts constituting the basis for the Certificate, a rehearing before the Commissioner on the present application cannot legitimately establish any other or different record than is now before this Court.

It is also submitted that the record presents sufficient undisputed facts as to show affirmatively a violation of the branch bank statute applicable to unincorporated areas of Salt Lake County, i.e., "unreasonable interference" occasioned by "*such close proximity*."

For the reasons asserted, plaintiff-respondent requests that a rehearing be held in this matter.

Respectfully submitted,

MARR, WILKINS & CANNON

J. Thomas Greene

Paul B. Cannon

*Attorneys for Respondent*