1969

Walker Bank & Trust Company v. W. S. Brimhall, Commissioner of Financial Institutions of Utah, Bank of Utah, Bank of Ben Lomond, Citizens National Bank, First Security Bank of Utah, N.A., and Commercial Security Bank : Brief of Appellants

IN THE SUPREME COURT OF THE STATE OF UTAH

WALKER BANK & TRUST COMPANY,
A Utah Corporation,
Plaintiff and Respondent,
vs.
W. S. BRIMHALL, Commissioner of Financial Institutions of Utah, BANK OF UTAH, BANK OF BEN LOMOND, CITIZENS NATIONAL BANK, FIRST SECURITY BANK OF UTAH, N.A., and COMMERCIAL SECURITY BANK,
Defendants and Appellants.

Case No. 11628

BRIEF OF APPELLANTS

Appeal from a Summary Judgment of the Third Judicial District, Salt Lake County
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STATUTES CITED

CASES CITED

*This case is unreported, but there has been filed with the Clerk of this Court a copy of Judge Eschbach's decision as the same was received from the Clerk of the United States District Court, Fort Wayne Division, Fort Wayne, Indiana.

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NATURE OF THE CASE

This is an action brought in the District Court of Salt Lake County by plaintiff, Walker Bank and Trust Company, against the defendant W. S. Brimhall, as Commissioner of Financial Institutions of Utah, (hereinafter generally referred to as Bank Commissioner, or Commissioner) to review a decision of the Bank Commissioner denying plaintiff's application for a branch bank to be located in South Ogden, Utah. The action is authorized by Section 7-1-26, U.C.A. 1953, as amended.

The several defendant banks, who were protestants in the proceedings before the Bank Commissioner, intervened as parties defendant.

DISPOSITION IN LOWER COURT

Plaintiff's motion for summary judgment was granted by Judge Stewart M. Hanson in a Memorandum Decision in writing under date of March 18, 1969. Thereafter, and on March 20, 1969, Judge Hanson signed and entered his Declaratory Judgment and Decree whereby he (1) set aside the Bank Commissioner's decision denying plaintiff the branch in South Ogden, and (2) he "ordered and directed (the Bank Commissioner) to grant the application of plaintiff * * * for the establishment of a branch bank in the City of South Ogden."

The Findings, Conclusions and Order of the Bank Commissioner denying plaintiff's application, with the Opinion of the Attorney General appended thereto, and the judgment of the lower court are set out in the appendix hereto.

RELIEF SOUGHT ON APPEAL

All defendants have joined in this appeal and join in this common brief. They seek to have the judgment of the lower court reversed, the order granting plaintiff's motion for summary judgment set aside, plaintiff's action dismissed, or in the alternative, the case reinstated in the lower court.

STATEMENT OF FACTS

The basic facts are not in dispute. Essentially they are set out in the Commissioner's "Findings of Fact, Conclusions and Order" (R. 5), and in the opinion of the Attorney General of Utah appended thereto (R. 8). Additionally, the lower court received into evidence the transcript of the testimony in the hearings before the

Commissioner and transcript references herein refer to such transcript. The exhibits in the hearing before the Bank Commissioner were not before the lower court, but certain thereof are included in the record on appeal by stipulation of the parties. When referred to herein they are designated as Applicant's (Plaintiff) or Protestant's (Defendants) exhibits.

Ogden City is a city of the second class, with a population of approximately 75,000. South Ogden City, a city of the third class with a population of approximately 7,500 adjoins Ogden on the south. Thirty-sixth Street, running east and west, is the dividing line between the two municipalities, and Washington Boulevard is the main street running north and south through both South Ogden and Ogden. There is no city of the first class in Weber County.

On March 21, 1968, plaintiff, a state banking corporation with its principal office in Salt Lake City, filed its application with the Bank Commissioner for leave to establish a branch bank in South Ogden at a location on Washington Boulevard near 36th Street. Thus the proposed location was at the extreme northerly edge of South Ogden, and immediately adjacent to the south boundary of Ogden.

At this time Ogden had five unit banks located within its corporate limits, —Bank of Utah, Bank of Ben Lomond, Citizens National Bank, First Security Bank of Utah, N.A., and Commercial Security Bank. In addition, First Security Bank and Commercial Security Bank each had a branch situated in Ogden. South Ogden had no unit banks located within its corporate limits, but Bank

of Utah, First Security Bank and Commercial Security Bank each had and have a branch located therein.

Written protests to the application were filed by the five Ogden banks (all appellants herein), and the application was duly noticed by the Commissioner for public hearing. At the commencement of the hearing, appellants objected to the granting of the application upon the grounds that the primary objective of the proposed branch was not to serve South Ogden, where it was to be located, but rather to serve Ogden, where it was prohibited by law from locating, and that the granting of the application under such circumstances would be contrary to law. Similar objections were interposed by appellants at the conclusion of plaintiff's evidence, and again at the close of all the evidence. The Bank Commissioner took the objections under advisement, stating that he would seek the opinion of the Attorney General upon the legal question involved.

Subsequently the Commissioner found as facts, the following matters here deemed pertinent:

Plaintiff is one of the oldest and largest state chartered banks in Utah. Its main office is in Salt Lake City, and it has twelve branches in Salt Lake County. Additionally, it has branches in Price, Provo and Logan. (Finding 7, App. II).

Plaintiff has capital to the amount required by statute for each present branch, and the additional amount required for the proposed branch. (Finding 9, App. II).

The economic effect of the proposed branch and its sources of business would encompass the Ogden Metropolitan Area, which is comprised of Weber County and

North Davis County, including both incorporated and unincorporated areas therein. The Ogden Metropolitan Area is, for many purposes, a single economic and trade area, with Ogden as its major city. The area has experienced considerable economic growth over the past several years, and growth of the economy is likely to continue. (Finding 16, App. IV).

Unit banks exist in the Ogden Metropolitan Area in the municipalities of Ogden, Clearfield, Layton and Kaysville. Additionally, one or more branch banks are established in each of the municipalities of Ogden, North Ogden, South Ogden, Washington Terrace, Riverdale, Roy, Sunset, Clearfield, Syracuse and Layton (a total of fourteen branch banks), plus banking facilities at Hill Air Force Base and Ogden Defense Depot. The established banks and branches are financially sound and secure, and the establishment of new banks and branches in recent years has not prevented all banks from increasing their loans and resources. (Finding 11, App. II).

The proposed branch would supply the full range of banking services and would offer services to plaintiff's customers in facilitating inter-branch and between city banking transactions. (Finding 12, App. III).

Plaintiff bank has a number of existing customers in the Ogden Metropolitan Area. (Finding 14, App. III).

The financial condition and history of plaintiff and its management demonstrate its capacity to successfully manage and operate the proposed branch. (Finding 15, App. III).

The Ogden Metropolitan Area has a population per banking office of 8,333 persons, compared with 6,247 for the state as a whole. (Conclusion 3, App. IV).

The public convenience and advantage would be subserved and promoted by the establishment of the branch at the location proposed, and the general public would be afforded the choice of another banking facility with substantially larger lending limits than any other state bank in the area. (Conclusion 4, App. V).

The Commissioner further found that it was the contention of protestants that the establishment of the proposed branch would circumvent the branch banking law, because the primary objective of plaintiff in seeking a South Ogden location was not to serve the needs and convenience of South Ogden, but rather to provide a facility that would compete with the banks in Ogden City. (Finding 17, App. IV).

That the Attorney General of Utah in an opinion to the Commissioner dated August 15, 1968, had ruled that as a matter of law a branch bank could not be established by applicant at the location proposed, and that he (the Commissioner) deemed it proper to deny the application upon the basis of the Attorney General's opinion. (Conclusion 5, App. V).

Additionally, there was direct testimony on behalf of plaintiff through its economist, J. Whitney Hanks, that the establishment of the proposed branch in South Ogden would serve the needs and convenience of the Ogden Metropolitan Area and in a broader sense, the needs and convenience of the entire Wasatch front. (Tr. 73, 74, 76, 77, App. Ex. 1, Pg. 65). He further testified, the statutes notwithstanding (Tr. 79), that the public convenience and advantage is better served through branch banks than through unit banks, and that the state generally will benefit more from the establishment

of new branches of already established banks, than from the establishment of new unit banks. (Tr. 80, 84, 85, App. Ex. 1, Pg. 68).

Also, that plaintiff had made no economic study of the needs or convenience of South Ogden, as South Ogden's needs were deemed "irrelevant" (Tr. 89) and that "realistically" plaintiff was looking beyond South Ogden (Tr. 120).

No finding was made by the Commissioner that the needs and convenience of that portion of the public comprising South Ogden would be in any way advantaged by the establishment of the proposed branch within its corporate limits. Indeed the evidence showed, and the Commissioner found, that South Ogden, a city of 7,500 population, was already being served by three branch banks within its limits, and was immediately adjacent to Ogden with its five unit banks and two additional branch banks. (Finding 11, App. II, Applicant's Exhibit 1, Pg. 57).

Following the conclusion of the hearings before the Bank Commissioner and in conformity with his statement that he would seek the advice of the Attorney General upon the legal question raised by the protesting banks, the Commissioner submitted to the Attorney General the following question:

> "Should the Commissioner of Utah Financial Institutions find that the public convenience and advantage would not be subverted, may a branch bank be lawfully established within the corporate limits of South Ogden, Utah, a city of the second class in which no unit bank is located, but which is immediately adjacent to Ogden, Utah, another city of the second class in which are presently

located five unit banks, *where it is shown by the evidence that the primary objective of the branch bank is not to serve South Ogden, Utah, in which it is physically to be located, but rather to serve Ogden, Utah?*" (Emphasis added).

The written opinion of the Attorney General (Phil L. Hansen) in response to such question was released under date of August 15, 1968, and on September 9, 1968, the Bank Commissioner issued his decision in writing denying plaintiff's application for the branch. The opinion of the Attorney General was referred to in the decision as the basis for the decision, and was appended to the decision. (App. VI).

Thereafter, plaintiff brought this action in the lower court for a "review" of the decision as provided under Section 7-1-26, U.C.A. 1953. After issue was joined by all parties, plaintiff moved for summary judgment, which motion was granted and summary judgment entered on March 20, 1969, in favor of plaintiff and against defendants. (R. 67). By such judgment (which is set out in full at page IX of the Appendix hereto) the lower court decreed (1) that the decision of the Bank Commissioner was unlawful and was set aside, and (2) that the Bank Commissioner is ordered and directed to grant the application of plaintiff for the South Ogden branch.

ARGUMENT

1. THE ATTORNEY GENERAL'S OPINION REPRESENTS SOUND LAW, AND THE BANK COMMISSIONER'S DECISION, BEING BASED THEREON, WAS NOT CONTRARY TO LAW.

At the outset, we point out that Section 7-1-26, U.C.A. 1953, which vests the lower court with the power to "review" decisions of the Bank Commissioner, limits the power of the court as follows:

> "The reviewing court shall have power to hold unlawful and set aside any act, decision or ruling of the bank commissioner found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."

Thus the power of the lower court is limited to *setting aside a* decision of the bank commissioner found to be *not in accordance with law.*

It is unfortunate that the judgment of the lower court with which we are here concerned, while determining that the decision of the Bank Commissioner was "not in accordance with law", does not specify how, or by virtue of what circumstance, such decision was contrary to law. However, since the only contention of the plaintiff in the lowert court was that the Bank Commissioner's decision was wrong because it was based upon the Attorney General's opinion, which opinion plaintiff claimed was not legally sound, we assume that the decision of the lower court is based upon this same reasoning. We, accordingly, present as our first point of argument our contention that the Attorney General's opinion represents sound law. To do this we first consider the applicable statutes pertaining to branch banking.

APPLICABLE STATUTES

> Section 7-3-6, U.C.A. 1953, as amended, provides as follows:
>
> "The business of every bank shall be conducted only at its banking house and every bank shall

receive deposits and pay checks only at its banking house except as hereinafter provided.

"With the consent of the bank commissioner any bank having a paid-in capital and surplus of not less than $60,000 may establish and operate one branch for the transaction of its business; provided, that for each additional branch established there shall be paid in an additional $60,000 (capital and surplus).

"*All banking houses and branches shall be located either within the corporate limits of a city or town, or within unincorporated areas of a county in which a city of the first class is located.*

"*Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank.* No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years.

"The term 'branch' as used in this act shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received or checks paid or money lent.

"Any bank desiring to establish one or more branches or offices shall file a written application therefor in such form and containing such information as the bank commissioner may reasonably require. *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 that the public convenience and advantage will be subserved and promoted by the establishment of such branch or office. The bank commissioner may, at his discretion, hold a public hearing on any application to establish a branch. He shall give notice of such hearing by publication in three successive issues in a newspaper of general circulation in the County in which the branch is to be established. The decision of the bank commissioner granting or denying an application to establish a branch shall be in writing, stating the reasons therefore, and shall be mailed to the applicant and all protestants. The bank commissioner may by order permitting the establishment of such branch or office designate and limit the character of work and service which may therein be performed.

"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.

"Any corporation or officer thereof violating any of the provisions of this section is guilty of a misdemeanor." (Italics reflect the provisions which we deem particularly applicable to the question at hand.)

Section 7-3-6.3, U.C.A. 1953, as amended, provides as follows:

"From and after the effective date of this act no unit bank and no branch bank shall be established or authorized to conduct a banking business except as hereinbefore in Section 7-3-6 expressly provided."

LEGISLATIVE HISTORY

In the case of *Walker Bank & Trust Company vs. Taylor, 15 Utah (2) 234, 390 P. (2) 592*, this court made the following observation with respect to the prohibitive effect of the foregoing statutes, and their legislative history:

> "We are of the opinion that our statute is restrictive and, what it does not expressly permit, it prohibits. There is but one method of establishing a branch bank in a city of less than the first class having an existing unit bank and that is by 'taking over' such bank. The legislative history of branch banking is of great significance. In 1911, the legislature enacted a statute which absolutely prohibited branch banking. It was not until 1933 that the legislature relaxed this prohibition and permitted branching under certain conditions and circumstances. *During the period between 1911 and 1933 the legislature evidently was of the opinion that branch banking was not in the public interest, possibly because it might impair the stability of the existing banks. This reasoning could well have influenced the law makers when they saw fit to allow branch banking, but only under certain restrictive conditions.* The legislative history lends support to the proposition that what our branch banking laws do not permit they prohibit." (Italics added.)

EFFECT AND OBJECTIVE OF STATUTES

By the foregoing statutes the legislature has affirmatively declared that only certain specified geographical areas are open to the establishment of branch banks, other than by the so-called "take over" method with which we are not here concerned. With the exception of Salt Lake County and Salt Lake City, as to which the legislature

has established different rules not applicable here, the geographical areas not automatically closed to branching are municipalities in which there are no unit banks. Or to state it in the negative, all unincorporated areas of the counties, and all municipalities in which are presently located a unit bank or banks, are closed to the establishment of branch banks. The Legislature has further affirmatively declared it to be the policy of Utah that as the public comprising the closed municipalities require additional bank facilities, such additional needs are to be provided through the establishment of new unit banks, and *not* by means of branching. Thus the legislative policy of Utah, as reflected in the foregoing statutory restrictions on branch banking, is one of encouraging the unit banking system and discouraging branch banking. This policy, as pointed out by the Attorney General in his opinion, serves a dual purpose, in that it is designed to protect existing unit banks from the competition of out-of-city banks through the branching process, and to promote the furnishing of additional banking competition through the establishment of local unit banks. The reasoning behind such policy is as suggested by this Court in *Walker Bank & Trust Co. vs. Taylor, supra,* namely, that unlimited branch banking

> "was not in the public interest, possibly because it might impair the stability of the existing banks."

PLAINTIFF WALKER BANK'S APPLICATION

Ogden City, a city of the second class, has five unit banks established and located within its corporate limits. Thus Ogden City is closed to de novo branching. Plaintiff sought permission to establish a branch in South Ogden, a city of the third class which adjoins Ogden on

the south, and which presently has three branch banks located and established within its corporate limits, but no unit bank or banks. Thus South Ogden is not closed to the establishment of the proposed branch *if it is demonstrated to the satisfaction of the Bank Commissioner that the needs and convenience of South Ogden require additional banking facilities.* However, that is not this case, and it does not involve the question upon which the Attorney General's opinion was based, as plaintiff's evidence by plaintiff's own admission was not directed toward the needs and convenience of South Ogden.

Thus, the legal question involved became one of whether the law permitted Walker Bank to establish a branch in South Ogden, based not upon the needs and requirements of South Ogden, or with the primary objective of serving South Ogden, but rather upon the basis of a claimed need for additional banking services in Ogden and other closed areas in Weber and North Davis County, *and with the primary objective of serving and fulfilling those asserted needs.*

This was the legal question submitted by the Commissioner to the Attorney General, and in response to which the Attorney General ruled that Utah law does not permit the establishment of the proposed branch *under such circumstances.*

We concur in such opinion, and submit that any other view must literally result in the destruction of the Utah legislative policy designed to protect unit banks from the competition of de novo branches. Ogden City provides a prime example, as it is adjoined on the north by North Ogden, and on the south by South Ogden, —with branch banks in both, but no unit banks in either.

A view contrary to the Attorney General's ruling would permit Ogden to be surrounded by branch banks located adjacent to it but in the adjoining incorporated areas, and justified only on their ability to serve Ogden City where they are prohibited from branching. Such a subversion of the legislative restrictions on branch banking must be of necessity unlawful.

Plaintiff's entire case in the lower court rested upon its contention that where what it referred to as the "statutory requirements" are found to exist, then the applicant has the *right to establish the branch as a matter of law.* The statutory requirements, or criteria, claimed by plaintiff to give rise to this right are (1) adequate capital and surplus, (2) that the branch be located in a municipality in which there is no unit bank, and (3) that public convenience and advantage would be served by its establishment. This, likewise, must have been the conclusion of the lower court in the light of its judgment that the decision of the Bank Commissioner was "not in accordance with law", and in ordering the Bank Commissioner as a matter of law to grant the application.

On the other hand, the defendants contend, and this is the thrust of the Attorney General's opinion, that the existence of these criteria do not give rise to a *right* to establish a branch, but rather that they are factors that must exist as conditions precedent to the approval of a branch. In other words, if any of the criteria do not exist, the statute itself closes the door to the proposed branch. On the other hand, where the criteria are shown to exist, the discretionary approval by the Bank Commissioner is still required. This discretionary approval by the Bank Commissioner is in a sense a *fourth* criteria.

This is obvious from even a casual reading of the statute (Section 7-3-6). With respect to capital it provides:

> "*With the consent of the bank commissioner* any bank having a paid in capital and surplus of not less than $60,000 may establish and operate one branch for the transaction of its business; provided that for each additional branch established there shall be paid in an additional $60,000 capital and surplus." (Emphasis added.)

Thus the key words there are "With the consent of the bank commissioner".

> With respect to location, the statute provides: ". . . no branch shall be established in any city or town in which is located a bank or banks . . ."

The significance here is the negative approach. No branch may be established in a municipality where there is a unit bank. Nowhere does the statute provide, other than with the consent of the Bank Commissioner, that branches shall be permitted in municipalities in which there are no unit banks.

And finally 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 that the public convenience and advantage will be subserved and promoted by the establishment of such branch or office."

Here again is the prohibitive approach. Without convenience and advantage the branch may not be established. Convenience and advantage is a condition precedent to the bank commissioner's approval, but its mere existence does not give rise to a *right* to such approval. Obviously where the initial three criteria are shown to

exist the bank commissioner may not arbitrarily withhold his approval, but our point is, and this is the essence of the Attorney General's opinion, that where it is additionally shown that the primary objective of the proposed location is not to serve the area where it is to be located, but rather to serve an adjoining area which the legislature has declared to be off-limits to branching, then the bank commissioner has not only the right, but also the duty to withhold his approval, and such withholding of approval cannot be said to be "contrary to law".

JUDICIAL TREATMENT OF SCHEMES TO EVADE BRANCH POLICY

The laws relating to branch banking vary from state to state. Some states permit unlimited branch banking. Others prohibit it entirely. The majority, like Utah, permit it subject to limitations and restrictions, which limitations and restrictions vary from state to state.

The merits of one policy as compared to another is open to debate, as evidenced by unlimited branching in some states and complete prohibition in others. However, we are not here concerned with varying philosophies upon the subject, but only with applying the law as it exists in Utah, to the end of meeting the objectives of the legislature. As stated by this court in *Walker Bank & Trust Co. vs. Taylor, supra,*

> "It is acknowledged that the State has the right and prerogative to regulate banks and banking within its jurisdiction. Therefore, the disposition of the problem must be resolved by the interpretation of the applicable statutory law relating thereto."

And further in the same case:

> "We are of the opinion that our statute is restrictive and, what it does not expressly permit, it prohibits."

In the light of the varying philosophies as to the merits of liberal branching policies as compared to restrictive branching policies, it is not surprising that schemes designed to evade state branching law from time to time develop, but the Courts that have had occasion to consider such schemes invariably recognize them for what they are and strike them down. For example, in one case, *Marion National Bank v. Camp, April 5, 1968 (unreported,* but a copy of the decision had been filed with the Clerk of this Court), a bank sought to "move" its principal office approximately 12 miles to a location where it could not legally establish a branch and to retain its former office as a branch. The United States District Court for the Northern District of Indiana held that:

> "This Court cannot permit the legislative scheme to be emasculated by an arid emphasis on such terms as 'branch' and 'main office' without regard to the legislative purpose which these terms were really intended to express. The clear preponderance of evidence in this case is that the plan which Van Buren Bank and the Comptroller characterize as a 'relocation' of the 'main office' in Marion coupled with a 'branch' into Van Buren is in fact intended as a subterfuge for what is essentially an attempt by an established bank in Van Buren, Indiana, to establish a branch in Marion.
>
> * * * *
>
> . . . the court finds that the plan is contrary to the legislative policy of Indiana . . .
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> * * * *
>
> . . . The plan . . was clearly intended to and does circumvent the relevant Indiana statute . . .

* * * *

> It is therefore CONSIDERED, ORDERED, DECREED AND DECLARED that the proposed (plan) . . . is, and would be illegal and unlawful . . ."

Similarly, in striking down the application of a Michigan bank to establish a branch just across the street from a village but purportedly in a "new area", the U. S. Court of Appeals for the Fourth Circuit *(American Bank & Trust Company v. Saxon, 373 F(2) 283, (1967)* stated:

> "It takes little imagination to be aware that the Dart bank moved across the street, not to serve the separate village, but to be immediately adjacent to the new Holt Shopping Center . . ."

Bank of Dearborn vs. Saxon, 244 F. Supp. 294, 373 Fed. (2) 283, involved a situation where the Comptroller of the Currency approved an application by Manufacturers National Bank to establish a new branch in the County just across the boundary from Dearborn, and in close proximity to an existing branch of Manufacturers' National Bank. Concurrently, the Comptroller approved an application to "move" the existing branch to a new location which was not open to de novo branching under Michigan law. Protesting unit banks in Dearborn contended that the two proposals taken together constituted a subterfuge and evasion of Michigan law, and that the Comptroller abused his discretion in approving them.

In agreeing with this contention, the District Court said:

> "Maybe the laws should be amended to permit the utmost flexibility in branch banking. Maybe they should not. Congressional debate on this issue has

> gone on for years. But it is not for defendant Saxon and defendant bank to amend our 'antiquated' laws by clever devices of evasion, . . ."

In re Princeton Bank & Trust Company (N. J.) 208 A. (2) 820 involved a novel scheme which the Superior Court of New Jersey held to be but a subterfuge designed to circumvent New Jersey branch banking laws.

Princeton Bank had its principal office in the municipality of Princeton, and a branch in Princetown Township (County). It desired to establish another branch in the county, but was precluded by New Jersey law from so doing because its principal office was in Princeton municipality. It accordingly (and this was legal under New Jersey law) changed its principal location to the premises in the County occupied by its existing branch, and changed the location of its branch to the premises formerly occupied by the main office. It was then free to seek the additional branch, which it did. First National Bank of Princeton appealed from the decision of the Commissioner of Banking granting the application. We quote from the decision of the Court reversing the Commissioner of Banking:

> "First National's principal contentions on this appeal are that (1) Trust Company's actions were merely a device to circumvent the branch bank limitations of the Banking Act of 1948, as amended (N.J.S.A. 17:9A-1 et seq.) and (2) the Commissioner's findings that Trust Company had met the requirements of N.J.S.A. 17:9A-20 are not supported by substantial evidence and should be reversed."
>
> * * * *
>
> "We come, then, to the first of the two main arguments projected by First National, namely, that

Trust Company's actions were a subterfuge and a device for circumventing our banking laws, and that there was not a bona fide transfer of its principal office to Princeton Township.

"Standing in isolation and away from the realities of what actually happened, the interchange of the principal and branch offices which Trust Company sought to effect in May 1962 would appear to be legally unassailable. Its executive committee had authorized that the principal office be changed from Nassau Street in Princeton Borough to the Princeton Shopping Center in Princeton Township, then occupied by its branch office, and that the Nassau Street Office thereafter be maintained as a branch office. The necessary certificate of change was filed with the Department of Banking and Insurance on May 28, five days later. (Whether the principal office was actually transferred to the shopping center will shortly be considered.) However, the interchange was but the first step of a plan which would enable Trust Company to apply to the Commissioner of Banking and insurance for a branch office at the proposed new site in the northeastern section of Princeton Township. That application was authorized to be filed with the Department of Banking and Insurance by action of the executive committee taken within the month, on June 20.

"The sequence of events speaks eloquently of Trust Company's purpose. It had Mr. Cook, the local realtor, checking the surrounding area for a possible branch site for some time prior to the actions taken by the executive committee, described above. He negotiated for the proposed site around the first of 1962, and the option agreement for the property was executed in March. President Cosby had also been investigating the possibilities of the area. He reported to the bank's board of directors

regarding 'recent developments' on April 11, 1962, at which time the board authorized its executive committee to resolve the matter of the bank's new quarters as quickly as possible. Then came the executive committee's resolution of May 23, 1962, authorizing the change of the principal office from the borough to the shopping center in the township, followed soon after by its resolution authorizing the filing of an application with the Commissioner for approval of the new branch office in the northeastern section of the township.

"We need not base our conclusion that what Trust Company did was a device to circumvent the provisions of N.J.S.A. 17:9A-19 on this factual sequence alone. President Cosby, in his testimony at the Department hearings, candidly admitted the true purpose of the change. In the course of his cross-examination he said:

> 'I knew that under New Jersey law we could not establish a second branch in the township without the prior step of moving the principal office into the township'."

* * * *

"What Trust Company could not do directly, it sought to do indirectly. The Banking Act, and particularly N.J.S.A. 17:9A-23, the interchange provisions, cannot be used to that end."

* * * *

"The determination of the Commissioner of Banking and Insurance is accordingly reversed."

The case of *Dickinson vs. First National Bank in Plant City (5th Cir. Sept. 12, 1968,) 400 Fed. (2) 548,* involved an off-premises night depository and an armored car pick-up and delivery service, and the question of whether the same constituted an illegal branch operation under Federal and state law. In concluding the operation

constituted illegal branching, the court commented upon the defendant's contrary arguments as follows:

> "The above analysis by Judge Lindberg represents an accurate and perceptive application of our statement of policy in Jackson, and we subscribe to it without hesitation. We do so on two important grounds.
>
> "*First, we cannot aid and abet First National's attempt to evade the wishes of Congress by an adroit manipulation of statutory language.* Second, we will not choose to overlook state law in penumbral areas when the thrust of the National Banking Act is 'competitive equality' between national and state branching authority.
>
> "Congress is in the defining business and is knowledgeable as to how to immunize or deimmunize an activity from its statutory engulfment. In Section 36 (f) Congress provided only that the term 'branch' 'shall be held to include' these offices which engage in the receipt of deposits, the paying of checks, or the lending of money. Such a provision is hardly adequate as a definition because it merely sets out in general terms what everyone knows to be the life-blood functions of banking. *If we construed Section 36 (f) as permitting paper evasions from state anti-branching laws, we would be letting the left hand give and the right hand take away. Statutory construction has not fallen to such legalistic depths.* We repeat the words of Judge Gewin, speaking for our Court en banc, in Miller vs. Amusement Enterprises Inc., 5 Cir. 1968, 394 F.2d, 342,353:
>
> > 'We are not only dealing with the language of the statute, but we must look as well to the logic of Congress and the broad national policy which was evidenced by its enactment. *Our system does not favor mechanical juris-*

> *prudence; it seeks to find the purpose and spirit of a statute and the intention of its makers.* Holy Trinity Church vs. United States, 143 U.S. 457,459, 12 S.Ct. 511, 36 L. Ed. 226,228; National Woodwork Manufacturers Asso. v. NLRB, 386 U.S. 612, 87 S. Ct. 1250, 18 L. Ed. 2d 357, 364'." (Italics added.)

We acknowledge that the foregoing cases are in many respects factually dissimilar from the one now under consideration. However, they are similar one with the other, and with this case, in that each involves a plan to evade legislative limitations imposed upon branch banking. In recognizing these schemes for what they are, namely, unlawful attempts to evade and frustrate legislative policy restricting branch banking the Courts have uniformly and without equivocation characterized them as such, and nullified them.

We are not unmindful of the fact that cases can be found in which as a result of appropriate planning, branching restrictions have been avoided. Two such cases which plaintiff relied upon in the Court below, and which we assume it will cite to this Court, are *First National Bank of Canton vs. Canton Exchange Bank (Miss.) 1963, 156 So. (2) 580,* and *Application of Howard Savings Institution of Newark (N.J. 1959) 159 Atl. (2) 113.* We briefly discuss these two cases at this point.

In the Canton case, Mississippi law permitted Canton Exchange Bank to establish a branch *office* (which is different from a branch bank under Mississippi law) in the County of Madison, outside the town of Ridgeland, but not within the corporate limits of Ridgeland. Nevertheless, it established an office in Ridgeland, but when it discovered its location there was unlawful, it moved the

office outside the corporate limits and into the County. This move was approved by the State Comptroller. First National Bank of Canton sought to enjoin the operation at the new location, and claimed that the move outside the corporate limits of Ridgeland was but a maneuver to circumvent Mississippi law. The Court upheld Canton Exchange Bank, ruling that approval of the new location was within the discretion of the Comptroller. We do not quarrel with the decision, and point out that the necessary ingredient for a contrary decision was there missing. *That ingredient was the determination by the Comptroller or the Court that the move was motivated by the objective of evading and circumventing legislative policy.* Had that determination been made, as it was here the basis of the Attorney General's opinion, we have no doubt but that the Mississippi Court, like other courts we have referred to above, would have refused to give its approval.

The Howard case was concerned with a statute far different from ours. The New Jersey statute provides that the Commissioner *shall approve* a branch application if he determines that the public convenience would be served, and the proposed operation has reasonable promise of successful operation. Thus, in New Jersey, after these criteria have been found, it is not only a matter of legislative policy, but the statute expressly declares, that the branch be granted. No contention was urged, and no determination was made that the application was motivated by improper objectives. All that was involved was whether the Commissioner abused his discretion in finding the essential criteria existed.

Further than that, and at the other end of the spectrum, is the case of *In re Princeton Bank,* cited by us *supra,* wherein the same New Jersey court in a later deci-

sion, *and upon a finding that what the bank did* was a device designed to circumvent the law, refused to sanction the attempt.

We submit, accordingly, that the opinion of the Attorney General reflects sound principles of law in the light of statutory limitations upon the establishment of branch banks. The thrust of his opinion, as previously noted, is that the legislature has effectively closed certain geographic areas to the establishment of de novo branch banks. That these closed areas include, insofar as Davis and Weber Counties are concerned, the unincorporated portions of those counties, plus the municipalities in which there is already located a unit bank. That the legislature has affirmatively declared a method whereby the banking needs of these closed areas is to be met, namely, through the establishment of new unit banks, —not by branching. That legislative policy, as reflected in these statutory limitations, is designed to protect existing unit banks from the competition of branch banks, and to encourage the establishment of new unit banks to meet growing banking needs, and that this legislative policy is not to be frustrated by the establishment of branch banks immediately adjacent to closed areas for the primary purpose of serving these closed areas and competing with existing unit banks therein.

Who can say that these conclusions so reached by the Attorney General are not sound legally? Or that the Bank Commissioner in following and applying them in the discharge of the duties of his office acted unlawfully and contrary to law?

Who can so say? The lower court so said, and that is why we are here. For if a branch bank may lawfully

be established, not for the purpose of serving the needs of the community in which it locates, but for the primary purpose and with the primary objective of serving an adjacent area which the legislature has declared closed to the establishment of branch banks, then the legislative limitations on branch banking have been effectively frustrated and negated, as there is not a "closed" area in the state that would not be subject to effective invasion by branch banks. To what end has the legislature declared Ogden City (and many other geographic areas) off limits to the establishment of de novo branch banks, if branch banking can lawfully be conducted therein by the physical location of branch banks outside the limits of the forbidden areas, but immediately adjacent thereto?

We are not, of course, discussing the situation where a lawfully established branch bank incidentally serves customers living in other areas, which we acknowledge as being entirely lawful. What we are dealing with is a situation where a branch bank proposes to locate in an area not closed to branching, not for the primary purpose of serving that area, and but incidentally serving customers living or doing business elsewhere, but for the primary purpose and with the primary objective of serving an adjacent area which the legislature has declared closed to branching. It is this purpose and objective which, under the Attorney General's opinion, renders unlawful the establishment of the branch in question.

We submit that the legal conclusions so reached by the Attorney General are sound, and that the Bank Commissioner in adopting them as the basis for his decision acted in accordance with law.

II.

THE DECISION OF THE BANK COMMISSIONER WAS NOT CONTRARY TO LAW FOR REASONS UNAFFECTED BY THE ATTORNEY GENERAL'S OPINION

As we briefly noted under Point I of our argument, it was plaintiff's contention in the lower court (and concurrence therein is of necessity the basis for the lower court's decision), that the statute lays down but three criteria, or "requirements" for the granting of a branch, i.e., (1) the required capital, (2) public convenience and advantage, and (3) its location in a municipality in which there is then no unit bank or banks. Therefore, argued the plaintiff, *and so ruled the Court,* since the Commissioner's Findings favorably covered these items, the plaintiff was entitled to the branch *as a matter of law,* and this notwithstanding that the evidence disclosed that the South Ogden location was sought, not for the purpose of serving the needs and convenience of South Ogden, but for the purpose of serving other geographic portions of the Ogden Metropolitan Area which the legislature had closed to branching.

On the other hand, the conclusion reached by the Attorney General was that where the true purpose and object of the applicant was not to serve the needs and convenience of the municipality in which it sought to locate, but to serve adjacent areas which the legislature has closed to branching, then the application must be *denied as a matter of law.*

These are the two extremes. The plaintiff contended, and the lower court ruled, that plaintiff was en-

titled to the branch as a matter of law. The Attorney General ruled that the application must be denied as a matter of law. The defendants concur in the conclusions of the Attorney General, but also urge that the extreme position of the Attorney General need not necessarily be accepted as the basis for the ultimate decision in this case. This by reason of the fact that it is not the opinion of the Attorney General that is here under review, but rather the question of whether the decision of the Bank Commissioner in denying plaintiff's application for a South Ogden branch was a lawful decision. If the Court accepts the ruling of the Attorney General as sound, the denial of the application by the Bank Commissioner was obviously "in accordance with law", and that is the end of this case. But on the other hand, if the conclusion of the Attorney General is not accepted, then the decision of the Bank Commissioner can be said to be "*not* in accordance with law" only if this Court accepts plaintiff's thesis that once the three statutory criteria are shown to exist the applicant is entitled to its branch as a matter of law. This simply cannot be if the statute is to be given any effect whatever.

As we further noted under Point I, the statute vests the Commissioner with a broad discretion in granting or denying branches, subject, of course, to legislative limitations and restrictions embodied in the three criteria. When the evidence is such as to support a finding that these three conditions of proper capital, public convenience, and no existing unit bank have been met, the law does not require that the Commissioner's discretion be directed in but the single channel of approval, as that would negate any exercise of discretion. Many reasons may exist why the Commissioner in the exercise of his

discretion may and should deny the branch. Without attempting to be all inclusive, we suggest several sound reasons why the Commissioner in any given case may properly and lawfully deny an application for a branch, even after he has determined that the applicant has (1) proper capital, (2) that public need and convenience would be served and (3) there is no existing unit bank in the municipality in which the branch is to be located.

For example, the Commissioner may determine that the plan of operation of the proposed branch is not in accord with sound banking practice. Or that the branch will be understaffed. Or that the individuals proposed to manage the branch are not sufficiently experienced. Or that the interests and the needs and convenience of the area would be better served through the establishment of a new unit bank, instead of the branch. Or that another location would be more suitable. Or that, as in the instant case, that the applicant was not really interested in the South Ogden location as such, or in serving South Ogden, but rather sought the branch for the primary purpose of serving Ogden, Clearfield, Layton, Kaysville, and other portions of Weber and North Davis Counties in which the legislature had denied it the legal right to locate. Each of these examples provide sound reasons why, in any given case, a branch application may properly be denied from a purely discretionary standpoint, notwithstanding the existence of the three criteria above mentioned.

Thus, the essence of this point of our argument is that it is *the decision of the Bank Commissioner* in denying the branch that is under review, and not the validity of the Attorney General's opinion. Section 7-1-26, U.C.A. 1953, vests the reviewing court with power to set aside a

decision of the Bank Commissioner which the Court determines to be "not in accordance with law". The lower court, in entering its judgment herein setting aside the decision of the Bank Commissioner for the reason that the decision was "not in accordance with law", and in directing the Commissioner to issue a new decision granting the application, can be supported only upon the premise that a decision approving the application was *the only decision the Commissioner could lawfully make.* This cannot be, as such reasoning effectively deprives the Commissioner in all cases of any discretion in the matter of approving branch banks.

The conclusion of the Attorney General may be deemed to be entirely wrong, yet the decision of the Bank Commissioner, i.e., the denial of the application, be entirely right, proper and lawful. The decision of the Bank Commissioner does not stand or fall upon the acceptability of the Attorney General's opinion, but upon the question of whether it was, in its final analysis, a decision which he could lawfully make.

We submit, accordingly, that the denial of the application was a decision that the Bank Commissioner could lawfully make, and this irrespective of the acceptability of the opinion of the Attorney General. Since it was a decision he could lawfully make, the lower court erred in setting it aside on the grounds that it was contrary to law.

III.

THE LOWER COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AS THERE WERE GENUINE ISSUES OF MATERIAL FACTS LEFT UNRESOLVED

Plaintiff, by its complaint in the lower court, sought a declaratory judgment that the decision of the Bank Commissioner be declared erroneous and not in accordance with law, that such decision be set aside, that its application for the branch in South Ogden should have been granted, and that the court direct the Bank Commissioner to grant the application forthwith. (R 1). The complaint, and the ruling sought thereby, was predicated upon the narrow ground that,

> "8. Said opinion (Attorney General's) and the decision of the defendant (Brimhall) which adopted said opinion is erroneous as a matter of law in that the branch banking statutes permit a branch bank to be located in any city or town in which a unit bank is not located." (Par. 8 of Complaint, R. 3).

The answer of the Bank Commissioner denied generally the alleged unlawfulness of his decision, and denied particularly the allegations of Paragraph 8, *supra.* (R. 14.)

The answer of the defendant banks denied generally the allegations of said Paragraph 8, denied the alleged unlawfulness of the Bank Commissioner's decision, and additionally raised the defenses,

1) that the finding of the Bank Commissioner that the public convenience and advantage would be promoted and subserved by the establishment of the proposed branch was arbitrary, capricious, an abuse of discretion and not in accordance with law, in that it was wholly without support in the evidence, and,

2) that the Bank Commissioner failed to find that the public convenience and advantage of that portion of the public comprising South Ogden

would be in any way promoted or subserved by the establishment of the proposed branch (R. 19, 20).

Thus the answers collectively raised the defenses of (1) the lawfulness of the decision from an over-all standpoint, (2) the sufficiency of the evidence to support the Commissioner's general finding of public convenience and advantage as compared to a finding of public convenience and advantage specifically related to the municipality in which the branch is to be located. All of these defenses obviously relate to the lawfulness of the decision under attack, and the latter two particularly for the reason that if either is valid there is then an absence of one of the three criteria even plaintiff acknowledges to be essential to support an approval of the application—in which event the Commissioner's decision denying the application was the only decision that lawfully could be made.

Following the filing of the answer of defendant banks, the plaintiff moved to strike therefrom the defense that the general finding of the Bank Commissioner on the question of public convenience and advantage was not supported by the evidence, and as ground of its motion asserted,

> "that the quoted portion of said answer is an improper and insufficient defense and immaterial to the determination of the above entitled cause." (R. 42.)

Plaintiff's argument to the lower court in support of its motion to strike was to the effect that plaintiff had framed its complaint for review upon the narrow ground of the alleged invalidity of the Attorney General's opinion; that the lawfulness of the Bank Commissioner's deci-

sion was to be judged solely from the standpoint of that opinion; that the issues were restricted to the single issue so raised by plaintiff; and that there was and could be no defenses of the type pleaded by the defendant banks. (R. 43.)

The lower court accepted plaintiff's views on the matter, granted plaintiff's motion to strike, and thus removed from the case any question of the sufficiency of the evidence to justify the relief plaintiff itself was seeking.

The position of the defendant banks with respect to this particular defense was, and now is, that it presented a defense directly related to the question of (1) whether the decision of the Bank Commissioner was in accordance with law, and (2) whether the plaintiff in any event was entitled to the relief it sought. Not only were the defendants entitled to raise this issue, but the court was obliged to consider and pass upon it in its determination of the ultimate question of whether the decision under review was a lawful decision.

The defense of insufficiency of the evidence to support a finding of public convenience and advantage is a valid defense in any proceeding to procure the establishment of a branch bank, but it was of particular significance here in the light of the gamut plaintiff's evidence on the subject ran. Not only were the needs and convenience of the Ogden Metropolitan Area (of which South Ogden comprises but a small fraction) to be served by this branch, but the whole Wasatch front would be advantaged thereby (App. Ex 1, Pg. 65). Beyond that, the state as a whole would benefit generally (Tr. 84, 85). The finding of the Commissioner upon the subject is phrased in but the most general terms, as indeed it had

to be in the light of this evidence. His finding is (App. V).

> "The public convenience and advantage would be subserved and promoted by the establishment of such branch at the location proposed * * *."

What public is the subject of this finding? Certainly not South Ogden, as the plaintiff deemed South Ogden's needs irrelevant. Is it the public comprising the Ogden Metropolitan Area? Or the Wasatch front? Or the state as a whole?

It was the contention of the defendant banks that the evidence on the subject of public need and convenience was so general and ephemeral as to be insufficient to support any relevant affirmative finding thereon. If the evidence was indeed insufficient, as so contended, that was an end to plaintiff's case, because a denial of the branch under that circumstance was the only decision the Commissioner could lawfully make.

In this connection we again call attention to the fact that Section 7-1-26, U.C.A. 1953, which vests the lower court with authority to review decisions of the bank commissioner, vests the court with power to set aside any such decision only upon a determination that the decision is "not in accordance with law". How can the court determine whether a decision of the bank commissioner is unlawful unless it first permits parties affected by the decision to advance reasons supporting its lawfulness as well as its alleged unlawfulness? And equally important, how could the lower court rationally determine whether the plaintiff was entitled to a contrary decision, except as it permitted inquiry into the question of plaintiff's entitlement to a contrary decision?

There can be no doubt but that a denial of the application was the only lawful decision the Bank Commissioner could have made if, as contended by defendant banks, there was no evidence to support a relevant finding of public convenience and advantage. The Commissioner may have assigned the wrong reason as the basis for his decision, but nevertheless the decision was fundamentally and inherently lawful and right if this issue so raised by defendants proved true.

Accordingly, defendants submit that the lower court erred in striking the defense challenging the sufficiency of the evidence to support a finding of public convenience and advantage, and thereby foreclosing the defendant banks of the opportunity of advancing it. This defense raised a genuine issue of fact upon the question of plaintiff's entitlement to the relief sought by it, and upon which the defendants were entitled to be heard. The lower court erred in striking such defense and in thus depriving defendants of this defense.

IV.

THE LOWER COURT ERRED IN INCLUDING IN ITS JUDGMENT AN ORDER TO THE BANK COMMISSIONER THAT PLAINTIFF'S APPLICATION FOR A SOUTH OGDEN BRANCH BE APPROVED.

In addition to setting aside the present decision of the Bank Commissioner, the lower court included in its judgment an order to the Bank Commissioner that he grant the application of plaintiff for a South Ogden branch. Defendants contend that this portion of the judgment is clearly in excess of the lower court's power and authority.

Section 7-1-26, U.C.A. 1953, under which this action

was brought, vests the court with the limited authority to "set aside" an existing decision of the Bank Commissioner which the court determines to be not in accordance with law. This is the measure and extent of its power. No authority is granted the court to direct the Commissioner as to what his new decision may be. This case provides an excellent example of why the ultimate decision of whether to grant or deny this application must still be with the Commissioner, and not with the court, but subject to the court's right again to review the lawfulness of the new decision—whatever it may be.

Here the Commissioner denied the application *as a matter of law,* because that is what the Attorney General told him to do. He considered the evidence to the extent of making findings with respect to the three statutory conditions, but in the light of the Attorney General's opinion he was not called upon to consider the merits of the application from the standpoint of the discretionary powers vested in him. The lower court has now determined that the decision of the Commissioner is to be set aside because it was contrary to law, but in so holding the Court has only determined that the Commissioner was wrong in following the Attorney General's advice and denying the application as a matter of law. Thus, if the Commissioner was wrong in following the Attorney General's ruling, the case must go back to the Commissioner for a new decision granting or denying the application on its merits and from a factual standpoint, but disregarding the opinion of the Attorney General.

What that new decision may be, must in the first instance be with the Commissioner. The fact that the present decision denying the application on the basis of the Attorney General's opinion is held to be contrary to

law doesn't mean that the new decision must grant the application. Many reasons may exist why the application should yet be denied on its merits. We have already suggested one such reason: namely, that the objective of the plaintiff in seeking this branch at this location frustrates and defeats legislative policy in its geographical limitations on branching. While the lower court has held that this factor alone is not sufficient to justify denial of the branch as a matter of law, we do not understand that the lower court has held that this is a circumstance which may not be weighed by the Commissioner, along with others, in the exercise of his ultimate discretion.

Let us suggest another reason why the court must permit the Commissioner a further look at this application, rather than for the Court to attempt to dictate its disposition.

Nearly a year has now passed since the Commissioner conducted his hearings. The case then made by the plaintiff for the branch, considered in its most favorable light, was that the economy of the Ogden Metropolitan Area, consisting of Weber County and North Davis County, was such that it required additional banking services of the type the plaintiff would provide, and that the proposed South Ogden location would provide a suitable base for the establishment of its facility. That from such a location plaintiffff would draw upon the economy of North Davis County and the whole of Weber County, and such draw would make the operation of the branch at the South Ogden location economically feasible. This is the essence of the Commissioner's findings on the subject, and for the purpose of this point of our argument we accept them as having support in the evidence. We also disregard for the moment the fact that a major portion

of the Ogden Metropolitan Area has been declared to be off-limits to the location of branch banks.

This was the factual situation a year ago, as outlined and testified to by plaintiff. But what is it now? How, if at all, has it changed? The fact is that now it's a whole new ball game, and the Commissioner of necessity must have an opportunity of re-examining it. A year ago the plaintiff intended to support its South Ogden branch by drawing upon the whole Ogden Metropolitan Area—an area in which it was not presently represented. However, since the hearings a year ago, the plaintiff has filed with the Commissioner, and the Commissioner now has pending, plaintiff's application for a branch in Roy, which, if granted, would effectively cut off North Davis County and a substantial portion of Weber County from the area proposed to be served by the South Ogden branch, and from the area from which the South Ogden branch would draw for its economic support.

Can the Ogden Metropolitan Area support two new branches by plaintiff, one in South Ogden and one in Roy? Do the needs and convenience of the public justify two branches? If not, which should be granted, and which should be denied? Or should both be granted, or both denied? These are the factual questions to which the Commissioner must give his personal attention to the end of discharging the duties of his office.

We submit, accordingly, that the portion of the judgment of the lower court which constitutes an order to the Bank Commissioner to grant plaintiff's application for a South Ogden branch must in any event be vacated and set aside.

CONCLUSION

It is a basic rule that statutes are to be construed to give effect to legislative intent and policy. The legislative policy of our present statutes restricting and limiting branch banking is clear—to protect existing unit banks from the competition of branch banks, and to promote banking competition through the establishment of new unit banks. The reason behind this policy was suggested by this court in *Walker Bank & Trust Co. v. Taylor, supra.*, as being the legislative belief that unlimited branch banking was not in the public interest. The statutes must be construed to implement this policy. Thus, a scheme to place a branch immediately across the boundary from a city in which it is prohibited by law from branching, with the primary object of serving the prohibited area and thus competing with unit banks therein, must be declared, as the Attorney General did declare it, an unlawful subterfuge. It may be, as some contend, that our branch banking laws are old-fashioned and out-moded and that they should be changed. Such contentions should, however, be addressed to the legislature instead of the courts.

The sum and substance of the Attorney General's opinion was simply this:

If the Bank Commissioner concludes from the evidence before him that the primary objective of plaintiff in seeking to establish a branch in South Ogden is not to serve the needs and convenience of South Ogden, but rather to provide a facility to serve Ogden, where it is prohibited by law from locating, and effectively competing in Ogden with the unit banks situate therein, then the establishment of the proposed branch *under such cir-*

cumstances, would not be in accord with legislative policy and would be unlawful. We submit that the legal conclusion so reached by the Attorney General is sound, and that the Bank Commissioner in adopting it as the basis of his decision in this case did not act contrary to law.

While defending the opinion of the Attorney General and urging its soundness, we carry the argument a step further to meet the exigencies of the present case—for the ultimate question before the Court is not whether the conclusions so reached by the Attorney General are sound, but whether the decision of the Commissioner was in accordance with law. If the opinion of the Attorney General is sound, then obviously the decision of the Bank Commissioner is in accordance with law, and that is an end of the matter. On the other hand, if the Court determines that the opinion of the Attorney General is not sound, there still remains the ultimate question to be decided—Was the decision of the Bank Commissioner in accordance with law? We say it was, because even if the objective and intent of the plaintiff to frustrate the law does not provide a basis for denying the application as a matter of law, it is nevertheless a factual circumstance to be considered from the standpoint of the Commissioner's broad discretionary powers, and provides adequate support for the Commissioner's denial of the application.

We submit, accordingly, that the opinion of the Attorney General is legally sound, but whether it is sound or not, the act of the Bank Commissioner in denying the applicant was a lawful act and not subject to being set aside by the court as being "not in accordance with law."

Two additional grounds are presented for setting

aside the judgment of the lower court, (1) that the lower court erred in granting summary judgment, as there were genuine issues of fact to be decided, and (2) the lower court was in error in ordering the Bank Commissioner to grant plaintiff's application, as such an order was in excess of the lower court's powers.

Respectfully submitted,

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APPENDIX

STATE OF UTAH

Office of the Commissioner of Financial Institutions

Salt Lake City

In the Matter of the Application of Walker Bank & Trust Company for Permission to Establish a Branch Bank in the vicinity of 36th Street and Washington Boulevard, South Ogden, Weber County, Utah

FINDINGS OF FACT, CONCLUSIONS AND ORDER

FINDINGS OF FACT

1. That on March 21, 1968, Walker Bank & Trust Company, 175 South Main Street, Salt Lake City, Utah, filed with the Commissioner of Financial Institutions its application for permission to establish a branch bank in the vicinity of 36th Street and Washington Boulevard, South Ogden, Weber County, Utah, using a branch bank application form prescribed by the Commissioner.

2. That the Commissioner had notice of the above application mailed to all banks in Weber County and others, and he had notice of the application published in three successive issues of the Ogden Standard-Examiner, beginning March 29, 1968.

3. That written protests to the granting of this application were received from the Commercial Security Bank, the Bank of Ben Lomond, the Bank of Utah, the North Davis Bank, the First Security Bank of Utah, N.A., and the Clearfield State Bank.

4. That the Commissioner called a public hearing for consideration of this application to be held in Room 313, State Capitol, Salt Lake City, Utah, at 10:00 A.M. on the 29th day of April, 1968. He had notice of the hearing mailed to all unit banks from Salt Lake County to the north end of the State and published notice of it in three successive issues of the Ogden Standard-Examiner, beginning April 23, 1968. The hearing was held as noticed and was continued on April 30 and on motion

of the protestants, it was continued to May 13, 1968, on which date it was concluded.

5. That Counsel representing applicant Walker Bank & Trust Company at the hearing was Mr. H. R. Waldo, Jr. Counsel representing protestants at the hearing were: Neil R. Olmstead for Commercial Security Bank, David S. Kunz for Bank of Utah, Max D. Lamph for Citizens National Bank, Raymond W. Gee for Clearfield State Bank, and Don B. Allen for First Security Bank of Utah, N.A. Others who had filed written protests to the application were not represented at the hearing.

6. That written briefs were filed with the Commissioner by attorneys for both the applicant and the protestants.

7. That Walker Bank & Trust Company is one of the oldest and largest state chartered banks in the State of Utah. Its main office is in Salt Lake City and it has twelve branches in Salt Lake County (eleven of which are presently operating) and branches in Price, Provo and Logan which are presently operating.

8. That South Ogden City is a city of the third class and there are no banks (as distinguished from branches of banks) located within the city limits of said City. There is no city of the first class in Weber County.

9. That applicant bank has capital and surplus of not less than $60,000 for each branch it is presently operating and an additional $60,000 of such capital and surplus for the proposed branch (Exhibit 12).

10. That the proposed branch would be located on a parcel of land fronting on Washington Boulevard near the corner of 36th Street and such parcel of land is entirely within the city limits of South Ogden City, Weber County, Utah.

11. That there are within the city limits of South Ogden City a branch of the Bank of Utah, a branch of Commercial Security Bank and a branch of First Security Bank of Utah, N.A. Other banks and branches in the Ogden Metropolitan Area, the dates such banks or branches were organized or established and the distance of such banking facilities from the proposed branch of

applicant are as shown on Page 57 of Exhibit 1, Table III-3. All of such banks and branches (excepting only the proposed Bank of Northern Utah and the Syracuse Branch of The First National Bank of Layton, neither of which banking facilities are operating) have operated from the locations indicated a sufficient period of time to have an established business at such locations and all of such banks and all of the banks operating such branches are financially stable and secure institutions. Existing banks have been able to compete successfully with other financial institutions, (Tr. 306-309) and new banks have in recent years been able to enter the area, become established and increase their loans and resources without preventing the other banks from increasing their loans and resources also (Exhibit 1, Chapter III, pp. 51-64; Tr. 65-73, 230-234, 315-317, 349-350).

12. That the proposed branch would supply the full range of banking services offered by the applicant bank in its other banking offices including drive-in tellers windows, safe-deposit boxes, checking and savings accounts, the Walker Bankard (a bank credit card service) and access to the trust department operations of the applicant bank (Tr. 204). In addition, the applicant bank, being essentially a statewide bank, would offer services to its customers in facilitating inter-branch and between-city banking transactions (Tr. 158).

13. That the applicant bank has a lending limit to any one person or corporation of approximately $2,800,000 (Tr. 204). In the Ogden Metropolitan Area only First Security Bank of Utah, N.A., has a larger lending limit and the other banks in the area have limits of $800,000 or less (Tr. 81). The ratio of banking facilities to population indicates that there are fewer banking facilities in the Ogden Metropolitan Area to serve the population than in the State as a whole (Exhibit 1, p. 56; Tr. 67, 108-113).

14. That applicant bank has a number of existing customers having offices or places of business in or serving the Ogden Metropolitan Area. (Tr. 150-162, 210, Ex. 7).

15. That the financial condition and history of the applicant bank,

and the management demonstrate its capacity to successfully manage and operate the proposed branch.

16. That applicant contends the economic effect of the proposed branch and its sources of business would include all of the South Ogden City, Ogden City and other cities and towns and unincorporated areas of Weber County and of North Davis County (which area is referred to for convenience as the Ogden Metropolitan Area) (Tr. 33, 68, 96-97, 118-119, 137-138, 236, 344-345). The Ogden Metropolitan Area is for many purposes a single economic and trade area with Ogden as its major city. This Area has experienced a substantial growth in recent years as measured by wages, employment, income and assessed valuation (Ex. 1, pp. 7-50, Ex. 2, 3, 4, and 5; Tr. 34-62, 89-92, 113, 318-331, 349). Population has increased substantially (Ex. 1, pp. 11-12, 15-17, 38-44; Tr. 40-42, 44-45, 54-58) and estimates of future population for the Area indicate a substantial growth, with particular growth in the southeast and southwest portions of Weber County (Ex. 1, pp. 23-30; Tr. 21-26, 252-256). Growth of the economy in the future is likely to continue (Ex. 1, p. 13, 46; Tr. 74).

17. That protestants contend that establishment of the proposed branch bank would circumvent the branch banking law of the State, because the primary objective of applicant in seeking this location is not to serve the needs and convenience of South Ogden, but rather to provide a facility that will compete with the banks in Ogden City.

CONCLUSIONS

1. Due notice of the receipt of this application has been given as required by law and a hearing was held as permitted by law.

2. The applicant bank has the necessary capital and surplus to permit the establishment of an additional branch bank.

3. The Commissioner finds that, because of the substantial economic growth in the Ogden Metropolitan Area in recent years, increased competition from the proposed branch bank would not unreasonably interfere with the operation of the existing banks and branches which are located in this area. It would

not jeopardize the depositors of such banks, would not interfere with the ability of these banks to maintain their financial strength and would not impair their ability to compete with the applicant bank and other banks.

The vitality of this area is demonstrated by: per capita wages in 1967 of $2,100, when the per capita wage level for the State as a whole was $1,700, and the level of per capita wage receipts in the Ogden Metropolitan Area has consistently been above that for the State as a whole for the years 1960 through 1967. During this period there was a growth in population in the Area of 22% as against a growth in population in the State as a whole of 16%.

In 1967, the Area had a population per banking office of 8,333 people and the State as a whole had a population per banking office at that time of 6,247.

4. The public convenience and advantage would be subserved and promoted by the establishment of such branch at the location proposed and there is no reason to limit the character of work or service to be performed at such branch. Applicant bank has a number of existing customers having offices in or places of business serving the Ogden Metropolitan Area. Furthermore, the general public would be afforded the choice of another banking facility with substantially larger lending limits than any other state bank in the area if the proposed branch bank is established.

5. The Attorney General of the State of Utah in an opinion of law to the Commissioner dated August 15, 1968 (No. 68-055), a copy of which is attached hereto, has ruled that as a matter of law a branch bank may not be established by the applicant bank at the location proposed and the Commissioner deems it proper to follow such opinion and, accordingly, deny the application on the basis of the ruling of law set forth in the Attorney General's opinion.

Based upon the foregoing conclusion of law, the Commissioner of Financial Institutions hereby makes the following

ORDER

The application of Walker Bank & Trust Company for permission to establish a branch bank in the City of South Ogden, Weber County, Utah, in the vicinity of 36th Street and Washington Boulevard is denied.

Dated at Salt Lake City, Utah, this 9th day of September, 1968.

W. S. BRIMHALL
Commissioner of Financial Institutions
State of Utah

OFFICE OF THE ATTORNEY GENERAL
STATE OF UTAH

OPINION OF LAW

No. 68-055

Requested by W. S. Brimhall, Commissioner of Utah Financial Institutions.

Prepared by Attorney General Phil L. Hansen and staff.

QUESTION

Should the Commissioner of Utah Financial Institutions find that the public convenience and advantage would not be subverted, may a branch bank be lawfully established within the corporate limits of South Ogden, Utah, a city of the second class in which no unit bank is located, but which is immediately adjacent to Ogden, Utah, another city of the second class in which are presently located five unit banks, where it is shown by the evidence that the primary objective of the branch bank is not to serve South Ogden, Utah, in which it is physically to be located, but rather to serve Ogden, Utah?

CONCLUSION

No.

OPINION

This opinion is given in response to a letter dated August 14, 1968, and as a supplement to and to clarify Utah Attorney General Opinion No. 68-045, which was issued on the 26th day of July, 1968.

The primary legislation restrictions in the establishment of branch banks in the State of Utah are:

> Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years.
>
> * * * 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 that the public convenience and advantage will be subserved and promoted by the establishment of such branch or office.
> From and after the effective date of this act no unit bank and no branch bank shall be established or authorized to conduct a banking business except as hereinbefore in section 7-3-6 expressly provided.

From the foregoing, it is apparent that the Utah State Legislature has affirmatively declared that the geographical areas comprising municipalities in which a unit bank or banks are presently located, other than cities of the first class, are not open to the establishment of branch banks, other than by the so-called "take over" method, i.e., through the process of taking over an existing bank. The Utah State Legislature has further declared by the foregoing statutory enactments, that as additional banking facilities are

shown to be required to meet the needs and convenience of such an incorporated area, the Commissioner of Utah Financial Institutions may provide for such additional facilities by permitting the establishment of new unit banks therein, but it is abundantly clear that such additional banking facilities may not be provided through the establishment of branches.

The wisdom of the legislative policy in thus seeking to encourage the unit banking system, as compared to branching, may be debatable in some circles, but its validity from the legal standpoint is no longer open to question in Utah. Further, the same limitations upon branching have been applied to national banks located in Utah, as evidenced by the recent decisions of the United States Supreme Court.

This legislative policy as adapted to Utah serves a dual purpose. The first such purpose is to protect existing unit banks from competition by out-of-city banks through the branching process. The second such purpose is to promote the furnishing of banking competition through the establishment of local unit banks.

It appears from the facts presented in connection with the application of Walker Bank & Trust Company for a branch in South Ogden, Utah, at a location just outside the boundaries of Ogden, Utah, that the primary objective in seeking that location is not to serve the needs and convenience of South Ogden, Utah, but rather to provide a facility that will effectively compete with the Ogden banks in Ogden, Utah.

Thus, the instant question resolves itself into a determination of whether the legislative policy, as so reflected in the foregoing statutes, and which policy is designed to protect Ogden, Utah, unit banks and others in incorporated areas similarly situated from competition from out-of-city banks through branching, and which fixes the method for providing additional competition as the same is needed through new unit banks, may be evaded by the establishment of a branch by Walker Bank & Trust Company in South Ogden, Utah; which establishment is sought, not with the needs and convenience of South Ogden, Utah, as the determining factor, but with competition with Ogden, Utah, unit banks in Ogden, Utah, as its primary purpose.

It is the opinion of this office that the legislative policy may not be evaded. Statutes are to be construed to give effect to legislative policy and to implement legislative intent. The physical location of a branch bank in South Ogden, Utah, and just across the boundary line from Ogden, Utah, where it is prohibited by law from locating, for the primary purpose of serving Ogden, Utah, and competing with the unit banks in Ogden, Utah, is obviously a subterfuge designed to evade the law and render nugatory the legislative intent. It is the opinion of this office that the establishment of the branch under such circumstances would be unlawful, and the instant application should be denied.

Dated this 15th day of August, 1968.

Respectfully submitted,

PHIL L. HANSEN
Attorney General

IN THE DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

WALKER BANK & TRUST COMPANY, a Utah corporation,
Plaintiff,

vs.

W. S. BRIMHALL, COMMISSIONER OF FINANCIAL INSTITUTIONS OF THE STATE OF UTAH, BANK OF UTAH, BANK OF BEN LOMOND, CITIZENS NATIONAL BANK, FIRST SECURITY BANK OF UTAH, N.A., and COMMERCIAL SECURITY BANK,
Defendants.

DECLARATORY JUDGMENT AND DECREE

Civil No. 182203

This matter having come on regularly before the above entitled court on the 10th day of December, 1968, pursuant to plaintiff's motion for summary judgment and the matter having been fully argued and briefs having been submitted and the court determining that there is no genuine issue as to any material fact and that plaintiff is entitled to relief as prayed against the defendants

and each of them as a matter of law and the court being fully advised in the premises, now therefore,

IT IS HEREBY DECLARED, ORDERED, ADJUDGED AND DECREED that the denial by the defendant W. S. Brimhall, Commissioner of Financial Institutions of the State of Utah, of the application of Walker Bank & Trust Company for the establishment of a branch bank in the City of South Ogden, Weber County, Utah (which decision was dated September 9, 1968) is hereby declared to be erroneous and not in accordance with law, that plaintiff's application for a branch bank at such location should have been granted and that such decision, being unlawful, is hereby set aside.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant W. S. Brimhall, Commissioner of Financial Institutions of the State of Utah, be and he is hereby ordered and directed to grant the application of plaintiff Walker Bank & Trust Company for the establishment of a branch bank in the City of South Ogden, Weber County, Utah.

Dated this 20th day of March, 1969.

BY THE COURT

STEWART M. HANSON
District Court Judge