

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 Respondent**

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IN THE SUPREME COURT OF THE STATE OF UTAH

WALKER BANK & TRUST COM-
PANY, 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 RESPONDENT

Appeal from a Summary Judgment of the
Third Judicial District, Salt Lake City,
Honorable Stewart M. Hanson, Presiding Judge.

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W. S. BRIMHALL, Commissioner of
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FIRST SECURITY BANK OF UTAH,
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Defendants and Appellants.

} Case No.
11628

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action brought by Walker Bank & Trust Company ("Walker Bank") against W. S. Brimhall, Commissioner of Financial Institutions of the State of Utah, (the "Commissioner") pursuant to Section 7-1-26(4), Utah Code Annotated 1953, as amended, for a judicial review of the decision of the Commissioner denying the application of Walker Bank for permission to

establish a branch bank to be located in South Ogden, Utah. The other defendant banks were protestants to the application in the proceedings before the Commissioner and in the District Court were permitted to intervene as parties defendant.

DISPOSITION IN LOWER COURT

The trial court granted plaintiff's motion for summary judgment and entered a declaratory judgment and decree that the denial by the Commissioner of the application of Walker Bank for the establishment of the branch at South Ogden "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." The decree further ordered and directed the Commissioner to grant plaintiff's application for the branch bank in South Ogden.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the declaratory judgment and decree of the District Court.

STATEMENT OF FACTS

Respondent accepts the statement of facts of appellants with the following clarifications and additions:

Appellants have correctly quoted or paraphrased portions of the findings of fact, conclusions and order of the Commissioner and of certain portions of the transcript of testimony at the hearing before the Commissioner.

The court is asked to consider in particular the findings of fact, conclusions and order as a whole and in the context in which the same were written. While we have no objection to the court considering the transcript of testimony at the hearing before the Commissioner, we suggest that consideration of such transcript is not necessary for the determination of this case.

We also wish to point out that following the conclusion of the hearing the Commissioner asked for an opinion of the then Attorney General, Phil L. Hansen. The Attorney General's first response was contained in his opinion No. 68-045 dated July 26, 1968, a copy of which is set forth in the appendix to this brief. In that opinion the Attorney General framed the question as follows:

May a branch bank be lawfully prohibited 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 City, 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, in which it is physically to be located, but rather to serve Ogden?

He concluded that the Commissioner *could* deny the branch on the grounds that the public convenience and advantage "will be subverted rather than subserved." The Attorney General in effect left the ultimate decision of granting or denying the branch up to the Commissioner, based on his determination of public convenience and advantage. The Commissioner was unwilling to de-

termine that the public convenience and advantage would be "subverted" but instead determined, directly to the contrary, that the public convenience and advantage would be subserved and promoted by the establishment of a Walker Bank branch in South Ogden (Conclusions, par. 4, R. 7). However, the Commissioner did ask for further advice which led to the Attorney General issuing the opinion of August 15, 1968, No. 68-055 which is set out in the appendix to Appellants' brief. In this opinion, Mr. Hansen ruled that the Commissioner must deny the application as a matter of law even though he had concluded that the public convenience and advantage would be promoted by the establishment of the proposed branch bank. The Commissioner based his ultimate decision denying the application solely on the advice given by the Attorney General (Conclusion 5, R. 7).

ARGUMENT

POINT I

THE DECISION OF THE COMMISSIONER WAS NOT IN ACCORDANCE WITH LAW.

We propose to answer here both Point I and Point II of Appellants' Brief.

The sole question involved in the court below and, we contend, the sole question involved here is the legal sufficiency of the Attorney General's second opinion to the Bank Commissioner dated August 15, 1968. We alleged in paragraph 7 of our complaint that the Commissioner denied Respondent's branch application "solely on the ruling of law set forth in the opinion of the Attor-

ney General'' (R. 3). This allegation was admitted by the Commissioner (R. 14) which, of course, in good conscience he had to admit by the very terms of his written conclusions in the case (Conclusion, Paragraph 5, R. 7). We contended below and contend here that the Attorney General's opinion and the Commissioner's decision were erroneous as a matter of law and the court below so determined.

An examination of the branch banking statutes upon which this case depends and which are fully quoted in Appellants' brief indicates that there are three prerequisites to the establishment of a branch by any bank. First, the bank must have sufficient capital and surplus and no one here questions the sufficiency of the capital and surplus of Respondent for this purpose. Second, the proposed branch must be located within the corporate limits of a city or town in which city or town no other bank is located. There is, likewise, no question but that the proposed location of the Walker Bank branch is within South Ogden, Utah, and while there are three branch banks operating in that city, there are no unit banks in the city. In *Walker Bank & Trust Company v. Taylor*, 15 U.2d 234, 390 Pac.2d 592, this court determined that the branch banking laws do not prohibit the establishment of a branch bank in a city in which only branches of other banks are located.

The only other requirement is that the applicant show "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 there can be no proper contention that the Commissioner was not so satisfied in view of his Conclusion No. 4 and his admission of paragraph 6 of our complaint that “the public convenience and advantage would be subserved and promoted by the establishment of such branch at the location proposed.” (R. 7, 2, 14)

The Attorney General initially recognized these as the three requirements for the establishment of a branch bank for in his opinion of July 26, 1968 he advised the Commissioner that he would have grounds for determining that the granting of the Walker Bank application would not subserve and promote the public convenience and advantage. In doing so, he assumed and stated that the “specific statutory prohibition [as to location] does not foreclose the anticipated branch bank” and further, that the applicant must “show that the public convenience and advantage will be subserved by the new facility.” The applicant here met that burden and the Commissioner specifically found that it had met the burden. The Commissioner was unwilling to conclude that because the branch facility would be located near the South Ogden City boundary or that because applicant showed that it would draw customers from areas outside of South Ogden that thereby the public convenience and advantage would not be subserved and promoted. When the Commissioner refused to take the “hint,” Mr. Hansen forced his hand by holding in his second opinion of August 15, 1968 that he must deny the Walker Bank application as a matter of law. In doing so he read into the branch banking statutes a requirement that simply

does not exist, a requirement that would limit the service area of a branch bank to the city limits of the city in which the branch facility is located.

At this point we call the court's attention to the New Jersey case *In re Application of Howard Savings Institution*, 159 A.2d 113 (N.J. 1960). In this case the Supreme Court of New Jersey upheld the determination of the New Jersey Commissioner of Banking and Insurance approving the application of a savings bank to establish a branch in the incorporated area of North Caldwell. The opinion describes the geographical and economic situation of the area indicating a typical situation of urban sprawl affecting seven city areas. (This is analogous to the situation here where North Ogden, Ogden, South Ogden, Riverdale, Roy and other North Davis County communities tend to run together and constitute a single metropolitan area.) A large increase in population had occurred. The cities were essentially residential communities and the retail center for the area was the major city of Caldwell with only a few retail businesses in the other cities. There were no banks or branches located in North Caldwell but there were banks in Caldwell. The Caldwell City boundary was about 400 feet west of the branch site in North Caldwell. Immediately across the street from the branch site was the city of Essex Fells, which had no banks or branches, and about 700 feet east of the branch site was the city limits of Verona in which city was located another bank.

The New Jersey statute permitted branch banks to be established in a municipality in the same county in which the applicant bank had its principal office "in

which no banking institution has its principal office or a branch office.” The Commissioner of Banking was required to determine “that the interests of the public will be served to advantage by the establishment of such branch office.” The Commissioner was also required to determine that the conditions in the “locality in which the proposed branch office is to be established” indicate that the branch could operate successfully (Utah has no such requirement).

It was contended that in determining whether the branch office could be successfully operated, the Commissioner and the applicant were limited to evidence of business to be derived from the particular municipality in which the branch was to be located. The court held that instead the proper criteria was the area to be served by the branch even though this extended beyond municipal boundaries. The branch must be established within the boundaries of a municipality but the Commissioner **must** consider the economic effect of the proposed branch to determine whether the criteria of public interest and successful operation are met. The court stated that plainly the criteria of public interest was to be considered on a service area basis.

It is indeed most appropriate that the vital questions of public interest and probable success be viewed without regard to mere artificial lines. Banking, like any business and most human activity these days, is not and should not be confined by political boundaries. Cf. *Duffcon Concrete Products v. Borough of Cresskill*, 1 N.Y. 509, 513, 64 A.2d 347, 9 A.L.R.2d 678 (1949). Realism is the sounder basis of any substantive test. In banking that is best indicated by conditions in and

of the whole area which the proposed institution or branch would normally expect to draw upon and serve. Again we cannot quarrel with the basis prescribed by the Legislature, either alone or in conjunction with the initial municipal requisite. (159 A.2d at 123)

Mr. Hansen concluded in his second opinion and Appellants argue in their brief that the branch banking statutes are designed to protect banks from competition of out of city banks. This argument is based solely on the admitted fact that branches cannot be established in unincorporated areas of counties (other than Salt Lake County) or in incorporated areas (other than Salt Lake City) in which any unit bank is located whereas unit banks can be located in such areas. The conclusion is a complete non sequitur. Banking is a regulated industry, but it is regulated for the public interest, not for the interest of existing banks. Excessive competition is an element to be considered in determining whether the establishment of a new branch would be in the public interest, but this determination is made from the point of view of the public rather than the banks which are affected by the competition. The question is whether the new facility is needed by the public and, if established, whether the competition would jeopardize the safety of existing institutions to the detriment of the public. These considerations are present for a new unit bank as well as for a new branch bank. The Commissioner here found and concluded that existing banks in the Ogden metropolitan area (and this includes all of the protestant banks) are financially stable and secure institutions, that increased competition from the proposed

Walker Bank branch would not unreasonably interfere with the operation of these existing banks and branches and that such competition "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."

Furthermore, if avoiding bank competition is a legislative policy, it is enunciated most strongly in the statutes pertaining to the establishment of unit banks. A unit bank can be established only if the Commissioner determines, among other things, that:

"the location or field of operation of the proposed business . . . [is not] in such proximity to an established . . . [financial institution] that such established business might be unreasonably interfered with. . . ." (Section 7-1-26(1), Utah Code Annotated 1953).

Note that under this section consideration must be given to the effect on all existing financial institutions, both existing unit banks and existing branch banks, consideration must be given to proximity, in the sense of distance at least, without regard to boundaries of cities or towns, and finally consideration must be given to not only the location of the new unit bank, but also to its field of operation or service area. None of these requirements are in the branch banking statute except for branches in Salt Lake County where a branch may not be established "in such close proximity to an established bank or branch as to unreasonably interfere with the business thereof." (7-3-6) The omission of these specific require-

ments makes it much more logical to find a legislative policy indifferent to competitive effects on existing banks in connection with branch bank applications outside of Salt Lake County.

The better answer to the whole question is stated by the New Jersey Supreme Court in the *Howard Savings* case as follows :

Evident from the statutes is a fundamental distinction between the basic physical requisites for a new bank or savings and loan association and for a branch office. The former can be established in a political subdivision where another similar institution already exists; a branch cannot be, although it may be permitted in the next municipality and thereby compete. *We see no reason why the Legislature cannot so differentiate if it chooses to do so or why it may not use the economically artificial municipal boundary as the preliminary measuring rod.* There is the advantage of initial certainty. Moreover, a new bank is an expensive undertaking and is generally proposed or organized by local people in response to some local need for additional banking facilities, fairly broadly felt and with sufficient depth to warrant the capital risk. The statutory scheme quite properly gives preference here to local interests organizing the new facility as against an out-of-town institution seeking to seize the opportunity to establish a branch and thereby compete in close quarters with a bank already in existence. By the same token, where there is legitimate room in an area for further banking facilities, it is entirely reasonable to say that establishment of a competing outside branch should not be permitted right next door, so to speak, to the established institution, *but that competition may be*

allowed, if in the public interest, from a location across the municipal boundary. Also, some municipalities in need of banking facilities may not have sufficient local capital or potential to justify creation of a new institution but their need and convenience may be adequately met by the maintenance of a less expensive branch. Stokes, *supra*, 74 Banking Law Journal at p. 927. It is well known that branch banking is a controversial subject, substantially not permitted in New Jersey outside the municipality of the principal office until 1948, and it seems apparent that the Legislature, in prescribing the physical scheme it has adopted a compromise between competing interests in the banking field, which was entirely within its power to do. (159 A.2d at 122; emphasis added)

This we contend is the same type of policy adopted by our legislature — a resolution or compromise between competing banking philosophies done on the basis of geographical prohibitions and in reliance on the ability of the Commissioner to determine the public convenience and advantage.

The Attorney General and Appellants both argue at great length that Walker Bank is by a subterfuge trying to establish a branch where it cannot legally establish a branch. We take it that neither Appellants nor the former Attorney General mean by the word “subterfuge” that Walker Bank is attempting by some trick or device to conceal the true facts of this case or obtain an under the table advantage. Respondent has at all times been frank and open in its presentation of its application. We have always pointed out that we believed that the proposed branch would serve an area not only of South Ogden

but of other parts of the Ogden metropolitan area including Ogden City itself, other parts of Weber County and parts of North Davis County. Respondent is not attempting to avoid anything but rather to comply with the branch banking statutes and present our application on a realistic basis. We again call the court's attention to the statement in the *Howard Savings* case quoted above (supra, p. 8) that banking is not and should not be confined by political boundaries. Under our law the branch must be established within the boundaries of a municipality in which a unit bank is not located, but there is nothing in our statutes that limits the service area of the proposed branch to the municipality in which it was located. The Commissioner cannot realistically assess the public convenience and advantage element of the statute unless he is presented with evidence of what the service area of the proposed branch is likely to be. Here Walker Bank showed that the proposed branch would serve South Ogden and would also serve Ogden and other areas in Weber County and North Davis County in the Ogden metropolitan area. Taking this into account, the Commissioner found that the public convenience and advantage would be subserved and promoted. Nothing further was required.

We agree with Appellants that courts have been quick to strike down evasions of branch banking laws. If Walker Bank was here trying to move its main office at Second South and Main Street in Salt Lake City or another branch of Walker Bank to South Ogden, Utah, we are sure this court would look very closely at the situation and likely follow the decisions of *Marion National*

Bank v. Camp (Dist. Ct., N.D. Ind. 1968) ; *Bank of Dearborn v. Saxon*, 244 Fed. Supp 394, 377 Fed.2d 496 and *In re Princeton Bank & Trust Company* (N.J.) 208 A.2d 820. The court might similarly be concerned if Walker Bank had not applied for a branch in South Ogden, but instead set up a night depository and an armored car pickup and delivery service to serve South Ogden and other parts of the Ogden metropolitan area similar to the bank involved in *Dickinson v. First National Bank in Plant City*, 400 Fed.2d 548. We know we would be in trouble if after opening the South Ogden Branch we relocated it in Ogden City, which was the effect of the decision in *American Bank & Trust Company v. Saxon*, 373 Fed.2d 283. No such "subterfuge" is involved here. Our object is and has been to serve the public and our own best interests by locating a branch bank within the city limits of South Ogden to serve South Ogden and other parts of the Ogden metropolitan area (and, for that matter, anyone else wherever located who chooses to do business with us at the South Ogden branch).

Appellants, of course, cannot contend that the branch banking laws prohibit a branch from accepting business from any other place than the municipality in which the branch facility is located. If this is so, the practical result would be to make illegal all or at least most of the existing branches of all banks in the state, including the South Ogden branches of the Appellant banks. All of these banks have admitted that they accept business at these branches from outside of South Ogden (see Requests for Admissions (R. 22-27) and the various answers to such requests (R. 50-56) — Commercial Security Bank

having failed to answer, the requested admissions are deemed admitted; also see Protestants Exhibit B showing that the South Ogden branch of Bank of Utah had a substantial number of customers from areas outside of South Ogden including some customers who lived in Ogden City across the street from the Harrison Boulevard and Washington Terrace Branches of Commercial Security Bank, Tr. 269-270.

The offices of all banks can and must be permitted to accept business from wherever that business comes even if it comes from a municipality or geographical area in which the office itself cannot be located. To construe the statutes otherwise would create an impossible situation. One foresees a bank officer (or worse, a bank examiner) meeting each customer at the door with a request to identify the area in which the customer lives or does business and barring the door if the customer is from a "prohibited" area. Such an interpretation is obviously not a part of the Utah statutes nor would any Legislature attempt to impose such a requirement.

If Appellants and the former Attorney General mean that a bank cannot locate a branch in a municipality where one of its objectives in locating the branch is to serve people living or doing business outside of the municipality, then the branch banking laws rest on an unstable foundation indeed. It is no exaggeration to say that testimony from a branch applicant would be false if the testimony was that the applicant bank would only do business or expect to get business from the municipality in which the branch was located. Testimony would

be similarly suspect if the applicant claimed that the sole or primary purpose in establishing the branch was to serve the citizens of South Ogden or some other city or town. Any bank in establishing its first office or any branch office hopes to serve people who live or work near the office as well as those from other areas who choose to do business at that office. The banking business simply does not operate on the basis of where a customer lives, works or has a place of business in relation to the location of the banking facility. A customer living many miles away may find it convenient for his purposes to do business at a particular location. If a branch applicant was required to prove that business would not be accepted outside of the municipality in which the branch was located, no further branches could be established in the State of Utah because no bank could truthfully give such testimony.

If the Legislature had intended to limit branch banking on a service area basis, it would have said so. The concept of a service area is a familiar one to the Legislature for in connection with unit bank applications the Commissioner is required to determine that the "field of operation" of the proposed unit bank will not unreasonably interfere with existing financial institutions. 7-1-26(1). Having failed to specify this in the branch banking statutes, there is no basis for implying such a requirement.

The fact remains, then, that the location requirements of the branch banking statutes are simply that the branch office itself must be located within a certain area as defined by the statute. A striking application

of this is the case of *First National Bank of Canton v. Canton Exchange Bank*, (Miss. 1963) 156 So.2d 580. In that case the statute permitted a branch office to be established in a county in which the bank establishing the office is domiciled, but prohibited establishment of the branch office in certain towns or cities which had one or more banks or branch banks in operation. The town of Ridgeland in Madison County, Mississippi, is within the county in which both the First National Bank of Canton, a national bank, and the Canton Exchange Bank, a state bank, were located. Both banks applied for branch offices in the town of Ridgeland, the state bank to the State Comptroller and the national bank to the Comptroller of the Currency. Both applications were approved within a short time of one another, but the national bank opened up its office in the town first. The state bank opened up its office some two weeks later, but when it determined that it was within the town limits, it moved the office across the town boundary line to a location outside of the town, but only 200 yards away from the national bank office. Against the contention of the national bank that this was a maneuver to circumvent the requirements of the branch banking law, the court held that the state bank could lawfully establish its branch office. Of course, the court did not find that the move was motivated by the objective of evading and circumventing legislative policy but this does not distinguish the case as a precedent. The court, instead, applied the statute according to its terms holding that it "is plain and unambiguous and obviously must be construed to mean what it says." Judge Hanson in this case ruled consistently with the *Canton* case and for the

reasons cited by the Mississippi court we suggest that this court must affirm his ruling. This court held in *Walker Bank & Trust Co. v. Taylor, supra*, that what is not permitted by the branch banking statutes is prohibited but it must follow that what is permitted is not prohibited.

Finally, Appellants have in their brief at pages 15 and 16 and under their Point II contended that there is a fourth statutory criteria in our branch banking laws which, as we understand the contention, is a broad general discretion vested in the Commissioner to deny a branch application even if the applicant has the necessary capital and surplus, will locate the branch in an area open to branching and has established that the public convenience and advantage would be subserved and promoted by the establishment of the branch. Such discretion, if granted by the Legislature, would undoubtedly be unconstitutional. We still have a government of laws and not of men. Uncontrolled discretion in any person, however praiseworthy his motives, however searching his inquiry, however informed and devoted he may be, is not tolerated under our system of laws. There is very clearly a right to the approval of an application where, as here, the three statutory requirements have been met.

This is not to say that the Commissioner does not have discretion. He clearly does in the determination of whether the public convenience and advantage would be subserved and promoted. Under this category he very properly can consider any number of factors such as the type of service proposed by the applicant (Commis-

sioner's Findings Paragraph 12, R.6), the financial condition and history of the applicant and the character and past performance of its management (Commissioner's Findings Paragraph 15, R.6). One can suppose numerous other factors which the Commissioner might consider. However, having considered these factors and exercised the proper discretion given to him to measure the public convenience and advantage, there is not a further area of discretion left. If such were the law, judicial review would be meaningless and, more importantly, the public interest could be "subverted" by an irresponsible Bank Commissioner.

POINT II

THERE ARE NO UNRESOLVED ISSUES OF FACT IN THIS CASE.

Appellants on pages 32 and 33 of their brief have correctly summarized the pertinent pleadings and the action of the District Court in striking the pleaded defense of the protestant banks that the Commissioner's finding of convenience and advantage was not supported by the evidence. The initial question, then, is whether the motion to strike was properly granted.

Respondent took its appeal from the Commissioner's denial of its application by filing an action in the District Court of Salt Lake County as required by Section 7-1-26(4), Utah Code Annotated 1953. The appeal was filed on September 25, 1968, which was within 30 days after the decision as required by such statute. Only the Commissioner was named as a defendant. It was not

until October 21, 1968 that the protestant banks made their Motion to Intervene which motion was granted by Order dated October 25, 1968. Both the filing of the Motion to Intervene and the granting of the Order permitting the intervention occurred after the expiration of the 30 day period within which appeals can be taken from a decision of the Commissioner. The Commissioner did not contend in his answer that there was insufficient evidence to support the conclusion of public convenience and advantage. This was raised only by the intervening banks. The Commissioner did not and has not sought to amend his answer to raise this issue and, accordingly, we contend he cannot properly raise it on appeal.

So far as the protestant banks are concerned, they have not appealed from the decision of the Commissioner within the time required by the statute. The present action was filed by Respondent 16 days after the decision of the Commissioner was rendered. The protestant banks not only had the same 30 days for appeal that Respondent had, but had 14 days after this action was filed within which to file their own appeal if they felt any part of the decision was wrong.

One must also consider the fact that the protestant banks are only intervenors in this proceeding. They must accept the action in the status in which it was at the time of the intervention and are in no position to broaden the issues to a determination of a point on which they may feel aggrieved. As persons with an interest in the outcome of the appeal and feeling that they might not be ade-

quately represented by the Attorney General, they are entitled to intervene under Rule 24, Utah Rules of Civil Procedure, but they must accept the action in the status in which it is at the time of the intervention. This is particularly true when they failed to file a timely appeal.

Notwithstanding, the defense if permitted does not raise a question of fact. This is an appeal from an administrative proceeding on which a record was made. It has been the established policy of this court to consider such appeals only on the basis of the record and not permit a trial de novo in the sense of receiving or considering additional testimony or other evidence presented to the court. See, for example, *Withers v. Golding*, 100 U. 179, 111 P.2d 550; *Erkman v. Civil Service Commission*, 118 U. 228, 198 P.2d 238; *Building Service Employees, etc. v. Newhouse Realty Co.*, 97 U. 562, 95 P.2d 507; *Goodrich v. Public Service Commission*, 114 U. 296, 198 P.2d 975; *Hotel Utah v. Industrial Commission*, 116 U. 443, 211 P.2d 200; *Chapman v. Graham*, 2 U.2d 156, 270 P.2d 821. If this were done here, the examination of the court would be limited to a question of law — based on the record was the finding of the Commissioner of public convenience and advantage a proper one or, more precisely and in the terms of Section 7-1-26(4), was this finding and conclusion “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.”

While we believe, for reasons already stated, that the defense was properly stricken and that this finding and conclusion cannot be properly inquired into, if this court is inclined to engage in such inquiry, it has before it the

entire record before the Commissioner with which to make a final determination. In the interests of the best use of judicial time and effort and for a faster disposition of this case, we suggest that it would be inappropriate for this court to reverse the District Court simply on the basis of an erroneous granting of the motion to strike, but rather the court here should inquire into the sufficiency of the defense on its merits. We are confident that if the court wishes to make such an inquiry that the record amply supports the Commissioner's conclusion that the public convenience and advantage would be subserved and promoted by the establishment of the Walker Bank branch in South Ogden. Certainly there is nothing in the record that would indicate that in making such conclusion the Commissioner's action was arbitrary or capricious. Particularly is this true when the Commissioner was careful enough to inquire of the Attorney General on two occasions concerning this precise case and when he was unwilling, notwithstanding the Attorney General's prompting in his first opinion, to conclude that the public convenience and advantage would not be subserved.

POINT III

**THAT PART OF THE LOWER COURT'S ORDER
REQUIRING THE COMMISSIONER TO APPROVE
WALKER BANK'S APPLICATION FOR THE SOUTH
OGDEN BRANCH WAS LAWFUL AND NOT ERROR.**

The appeal from the Commissioner's decision was made because he committed an error of law in denying Walker Bank's application for the South Ogden branch.

Appellants in their brief at page 37 concede that the Commissioner denied the application as a matter of law because that is what the Attorney General told him to do. This appears to be a concession that but for such instruction from the Attorney General the Commissioner would have granted the application. Of course this is apparent from the fact that the Commissioner found all of the necessary three statutory conditions had been fully satisfied by Respondent. It would be a useless gesture for this court or any court to remand the case for the taking of further evidence or to assume that any question of fact remains.

Appellants argue, however, that the review statute does not grant authority to the court to order the application granted. No precedent or authority is cited for this proposition. It would appear to us that the terms of the statute empowering the reviewing court "to hold unlawful and set aside any act, decision or ruling of the . . . commissioner . . ." is ample authority to grant an application which was denied illegally. This is particularly true when the Commissioner has made an error as a matter of law. Arguably a reviewing court might be reluctant to substitute its judgment for that of the Commissioner where the question involved factual issues relating to the public convenience and advantage element of the branch banking laws. But where the Commissioner has made an error of law, the courts are authorized and required to correct such error and to grant the relief prayed as if such error had not occurred. If having found an error of law or an arbitrary or capricious act by the

Commissioner, the reviewing court must remand so that the Commissioner could exercise the "discretionary powers" claimed by Appellants, such discretion might well be exercised to ignore the ruling of the reviewing court. Such negation of judicial review cannot be tolerated.

Appellants further argue that because of the lapse of time, the Commissioner should have a further opportunity to examine into the merits of the application. This is an argument verging on the ridiculous for it suggests that once the laborious process of application, hearing, review in the District Court and review by this court has been concluded, there must be a further hearing or at least further proceedings beyond that. Walker Bank filed its application for this branch on March 21, 1968. The hearings on the application commenced April 29, 1968 and after two days of hearings, the matter was continued to May 13, 1968, the continuance being granted at the request of the protesting banks, not the request of Walker Bank. The two Attorney General's Opinions were requested by the Commissioner at the behest of the protesting banks and were not requested by Walker Bank. When the Commissioner finally entered his Order on September 9, 1968, an appeal was filed within two weeks after and was pushed forward as rapidly as possible as the record will disclose. To say now that this less than normal delay of litigation makes the factual basis of the decision unrealistic is a conclusion that is basically unsupported by the facts and certainly not justified for the particular case. After expediting the matter as we have, Appellants are in no position to claim that we must relit-

gate the case if Appellants are unable to convince this court that the Commissioner did not err as a matter of law.

CONCLUSION

For the foregoing reasons it is submitted that the determination of the District Court was proper and should be affirmed in all respects and Respondent should be awarded its costs.

Respectfully submitted,

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Attorneys for Plaintiff and
Respondent Walker Bank &
Trust Company

APPENDIX

OFFICE OF THE ATTORNEY GENERAL STATE OF UTAH

OPINION OF LAW

No. 68-045

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

Prepared by Attorney General Phil L. Hansen and staff.

QUESTION

May a branch bank be lawfully prohibited 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 City, 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, in which it is physically to be located, but rather to serve Ogden?

CONCLUSION

Yes.

OPINION

The primary legislative restriction on the establishment of branch banks in the State of Utah states:

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.¹

The Utah State Legislature has further specified that:

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.²

From the foregoing, it is apparent that the legislative delineation of those areas in which branch banks may and may not be established precludes the establishment of a branch bank in the City of Ogden, a city of the second class, with certain exceptions not applicable here.³

While it is clear that a branch bank may not be established in Ogden City with the factual basis presented, the question arises as to whether a branch bank may be formed, in the immediately adjacent City of South Ogden.

¹Utah Code Ann. § 7-3-6 (Supp. 1967).

²Utah Code Ann. § 7-3-6.3 (Supp. 1967).

³Banks may establish branches by a "take over" process, and the provision is specifically made inapplicable to cities of the first class.

Initially, it appears clear that Utah Code Ann. § 7-3-6 (Supp. 1967) does not directly prohibit additional branch banks in South Ogden, for the banking structure of that city does not include any so-called "unit" banks. However, the opposite assumption that a branch bank must be established does not necessarily follow.

In addition to the legislative restrictions which have been discussed, those seeking authority for the development of branch banking must satisfy other overriding prerequisites. The Utah State Legislature has provided that:

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.⁴

Thus, after it is determined that the specific statutory prohibition does not foreclose the anticipated branch bank, it is still incumbent upon the applicants to show that the public convenience and advantage will be subserved by the new facility.

It appears from the facts presented that the proposed facility is to be located within a few feet of the southern boundary of Ogden City. It further appears that an objective of the applicant is to draw, not from the banking market of South Ogden, but from the market of the Ogden metropolitan area generally. It is possible to conclude that the applicant is attempting to effect indirectly that which is otherwise specifically prohibited

⁴Utah Code Ann. § 7-3-6 (Supp. 1967).

by the Utah State Legislature and which may not, therefore, be done directly.

It is the opinion of this office that the Bank Commissioner may refuse to permit a branch bank in South Ogden. The fact that the anticipated banking venture does not fall within the specific statutory prohibition does not impose upon the commissioner an obligation to approve the venture. The commissioner must further be satisfied that the public convenience will be promoted.

In Utah, a restrictive policy with respect to branch banking has been enunciated.⁵ In the instant situation, it would not be unreasonable for the Bank Commissioner to conclude that the subject bank is attempting to invade indirectly an area from which it is specifically excluded by statute. If such a determination were made, it would be entirely appropriate for the commissioner to thwart the attempted subversion of the legislative policy against branch banking in second class cities where unit banks exist.⁶ He need not subscribe to the geographical sophistry practiced by the applicant, and he may deny the application on the simple ground that the public convenience and advantage will be subverted rather than subserved.

Dated this 26th day of July, 1968.

Respectfully submitted,
Phil L. Hansen,
Attorney General

PLH/rjs/ej

⁵*Walker Bank & Trust Company v. Taylor*, 15 Utah 2d 234, 390 P.2d 592 (1964).

⁶*Cf. American Bank & Trust Co. v. Saxon*, 373 F.2d 283 (4th Cir. 1967).