

1971

**Bountiful State Bank, A Utah Corporation, Farmers State Bank, A Utah Corporation, South Davis Security Bank, A Utah Corporation, and Davis County Bank, A Utah Corporation v. W. S. Brimhall, Commissioner Of Financial Institutions of the State of Utah and Walker Bank and Trust Company, A Utah Corporation : Brief of Respondents**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

**BOUNTIFUL STATE BANK, a Utah corporation,  
FARMERS STATE BANK, a Utah corporation,  
SOUTH DAVIS BANK, a Utah corporation,  
CITY BANK, a Utah corporation,  
DAVIS COUNTY BANK, a Utah corporation,**

**Plaintiffs and Appellants**

vs.

**W. S. BRIMHALL, COMMISSIONER OF FINANCIAL INSTITUTIONS OF THE STATE OF UTAH, and WALKER BANK AND TRUST COMPANY, a Utah corporation,**

**Defendants and Respondents**

## BRIEF OF RESPONDENTS

Appeal from a Judgment of the  
Third Judicial District Court,  
Honorable Stewart M. ...

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H. W. ...  
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# IN THE SUPREME COURT OF THE STATE OF UTAH

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BOUNTIFUL STATE BANK, a Utah corporation, FARMERS STATE BANK, a Utah corporation, SOUTH DAVIS SECURITY BANK, a Utah corporation, and DAVIS COUNTY BANK, a Utah corporation,

Plaintiffs and Appellants,

vs.

W. S. BRIMHALL, COMMISSIONER OF FINANCIAL INSTITUTIONS OF THE STATE OF UTAH, and WALKER BANK AND TRUST COMPANY, a Utah corporation,

Defendants and Respondents.

Case No.  
11807

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## BRIEF OF RESPONDENTS

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### NATURE OF THE CASE

This is an action brought in the District Court of Salt Lake County by plaintiffs Bountiful State Bank, Farmers State Bank, South Davis Security Bank and Davis County Bank (herein sometimes referred to as the "Competing Banks") against W. S. Brimhall, Commissioner of Financial Institutions of the State of Utah (the "Commissioner") and Walker Bank & Trust Company ("Walker Bank") for review of a decision of the Commissioner granting the application of Walker Bank for permission to establish a branch bank in Centerville,

Davis County, Utah. The action was brought pursuant to Section 7-1-26, Utah Code Annotated 1953, as amended. The Competing Banks were protestants to the application of Walker Bank in the proceedings before the Commissioner.

## DISPOSITION IN LOWER COURT

The District Court granted the motion of Walker Bank for a Summary Judgment which determined that the Commissioner's Order granting the application of Walker Bank for the branch bank was supported by the evidence at the hearing before the Commissioner, that the Order was not arbitrary or capricious nor did the Commissioner abuse his discretion, that the Order of the Commissioner granting the application to Walker Bank "should be and is hereby sustained" and that the complaint of the Competing Banks should be dismissed with prejudice.

## RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the judgment of the District Court.

## STATEMENT OF FACTS

Respondents accept the statement of facts of Appellants with the following clarifications and additions:

The Commissioner specifically found that all of the Competing Banks are "financially stable and secure institutions and such stability would not be jeopardized

or the interests of the public impaired by the establishment and operation of the proposed branch.” Among other things, the Commissioner concluded that “increased competition from the proposed branch bank would not unreasonably interfere with the operation of the existing banks and branches [in the area] . . . 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 Commissioner further concluded in Conclusion No. 4 (R. 33) that “the public convenience and advantage would be subserved and promoted by the establishment of the proposed branch *at the location proposed. . . .*”

## ARGUMENT

### POINT I

#### THE DECISION OF THE COMMISSIONER DID NOT IGNORE THE IMPACT OF THE PROPOSED BRANCH UPON THE OPERATIONS OF BOUNTIFUL STATE BANK.

In Appellants’ POINT I, they take the very limited view that the Commissioner “ignored” the impact of the Walker Bank branch on the operations of the Centerville branch of Bountiful State Bank. In doing so, Appellants “ignore” the Findings and Conclusions of the Commissioner (R. 31-33) which clearly demonstrate that the Commissioner directly considered the effect of

the Walker Bank branch on the operations of the other banks in the area. He specifically concluded that the Walker Bank branch “would not unreasonably interfere with the operation of the existing banks and branches” located in south Davis County. This conclusion covers the effect of the Walker Bank branch on the operations of all of the Competing Banks, including Bountiful State Bank and including the Centerville branch of Bountiful State Bank. The Findings also clearly indicate that the effect on the Competing Banks was considered. For example, in Finding No. 11, the Commissioner determined that the Competing Banks have operated from their respective places of business “a sufficient period of time to have an established business at such locations,” that all such banks “are financially stable and secure and such stability would not be jeopardized or the interests of the public impaired by the establishment and operation” of the Walker Bank branch. The Commissioner also found that the Competing Banks have been able to compete successfully in the past with other financial institutions and, coupled with his conclusion that competition from the Walker Bank branch would not unreasonably interfere with the operation of any of the Competing Banks, it is clear that the Commissioner very seriously considered the “impact” of the Walker Bank branch upon the operations of all of the Competing Banks, including Bountiful State Bank.

It is true that at the hearing Mr. Jeppsen, the President of Bountiful State Bank, opined that competition from the Walker Bank branch would be “disastrous” to the Centerville branch of Bountiful State

Bank (R. 383). Of course, this was offered only as an opinion and an opinion that may not have been shared by the Commissioner. There was substantial evidence which would support a contrary opinion. We are sure that the Competing Banks would not contend that the Commissioner is compelled to believe all of the evidence submitted much less all of the opinions that are given. It is, of course, the Commissioner's job as an expert in the banking field to weigh facts and opinions and arrive at his own conclusions. But even Mr. Jeppsen was only discussing the effect on the Centerville branch of his bank. On cross-examination he testified that the safety of the depositors of the bank as a whole (which necessarily includes the depositors at the Centerville branch) would not be jeopardized (R. 389). He did not testify that the effect on the stockholders of the bank would be "disastrous", but only that the profits of the bank might be reduced. He did not even testify that the Bountiful State Bank would become unprofitable because of the Walker Bank branch, but only that profits would be diminished (R. 389). This, of course, is what may be the result of any competition. From a bank whose resources have grown from approximately \$4,000,000 in 1954 to \$11,600,000 in 1967 (Exhibit 1, Table IV-8, p. 57) whose loans and discounts increased 15% between 1960 and 1967 (Exhibit 1, Table IV-11, p. 63; R. 26-27, Admission 11) and which has successfully competed with a new unit bank in the area (R. 390, 393-394), a little additional competition from Walker Bank would be a healthy situation, at least from the point of view of the public.

Not all the Competing Banks foresaw the same “disaster” as Bountiful State Bank. Note the testimony of the President of Farmers State Bank (R. 298-331), particularly his comments concerning the growth of his bank in face of new competition in the past (R. 319-321), his predictions of growth in the local economy (R. 322-324) and his opinion that his bank would safely survive the Walker Bank competition (R. 327-329). See also the testimony of the President of South Davis Security Bank (R. 346-379) outlining the efforts of his bank in breaking into the south Davis area, competing successfully with the existing banks (R. 361-364, 368), that he presently is competing for business with Walker Bank and the competition wouldn’t change “a lot” if Walker’s opened a branch in Centerville (R. 372).

In substance, the Competing Banks’ complaint is that there would be more competition if the Walker Bank branch was established. This we can concede and, of course, competition is quite appropriate in banking as well as in most other business activity. However, the branch banking statutes are not designed to protect banks from competition or to turn banks into public utilities guaranteed a profit. Banking is a regulated industry, but it is regulated for the public interest, not for the interest of existing banks. The statutory criteria is the public convenience and advantage, not the convenience and advantage of existing banks. For a discussion of this important distinction see *In re Application of Howard Savings Institution of Newark*, 32 N.J. 209, 159

A.2d 113 at 123; *Dauphin Deposit Trust Co. v. Myers*, 401 Pa. 230, 164 A.2d 86 at 92 (1960); *Delaware County National Bank v. Campbell*, 378 Pa. 311, 106 A.2d 416 at 422; *Blairsville National Bank v. Myers* (Pa. 1963), 187 A.2d 655; *Philadelphia Saving Fund Society v. Myers*, 406 Pa. 328, 179 A.2d 209.

While it is certainly proper for the Commissioner to consider the effect of new competition on existing banks and while it is beyond question that the Commissioner did so in this case, the Commissioner is not required by any statutory provision to consider this effect in the sense used by Appellants. Appellants cite 7-1-26(1), referring to “unreasonable interference” with an established financial institution. This provision does not apply to branch bank applications but only to applications for new bank charters and charters for other financial organizations supervised by the Commissioner, such as savings and loans, credit unions and small loan licensees (see 7-3-12; 7-13-3; 7-9-3; former § 7-10-3; also the reference in 7-1-26(1) to the character of “the incorporators or organizers” can only apply to new organizations not to existing banks applying for branches). Where branch bank applications were intended to be covered, as in subsection (4) of 7-1-26 relating to court review, the Legislature was specific in the reference to branch banks.

The criteria for establishment of branch banks is set forth in § 7-3-6, UCA 1953. There are three criteria applicable to all branch banks and that are applicable in this case: (1) adequate capitalization; (2) location

of the branch in a permissible area (within the corporate limits of a city or town where no unit bank is located, within Salt Lake City, or within unincorporated areas of Salt Lake County); and (3) proof to the satisfaction of the Commissioner that the public convenience and advantage will be subserved and promoted by the establishment of the branch bank. See *Walker Bank & Trust Company v. Brimhall*, U.2d , 461 P.2d 730 (Nov. 20, 1969). The next to the last paragraph of § 7-3-6 establishes a fourth criteria for some branches located in Salt Lake County, viz., that if the branch is located in unincorporated areas, it shall not be established "in such close proximity to an established bank or branch as to unreasonably interfere with the business thereof." But where the branch is located within the corporate limits of a city or town as is the case here and as must be the case for all branches outside of Salt Lake County, only the three criteria are applicable.

Thus, it cannot be said in any sense that as a matter of law the Commissioner must deny a branch application because the operation of that branch in competing for business with an existing bank might reduce the profits of the existing bank. This is the natural result of any competition and certainly was within the contemplation of the Legislature when it established the criteria for branch bank applications. Excessive competition, as in areas with too many banks, for example, can have an effect on the public by affecting the financial stability of an existing bank so seriously that members of the public might be damaged. This might result in a decline

in the ability of the bank to perform proper services or, in an extreme case, in the insolvency of the bank. These are proper concerns for the Legislature, for the Commissioner and for the public at large. These are the questions the Commissioner addressed himself to as evidenced by the Findings and Conclusions previously cited. To insulate existing banks from new competition or to apply a standard which prohibited new branches if existing banks might lose profits would clearly be improper and not authorized or required by our laws.

## POINT II

THE COMMISSIONER MADE ALL REQUIRED FINDINGS AND CONCLUSIONS REGARDING THE WALKER BANK BRANCH AND THERE IS NO JUSTIFICATION FOR SETTING ASIDE HIS DECISION.

The Competing Banks apparently seek in POINT II of their Brief to have this Court set aside its recent decision in the case of *Walker Bank & Trust Company v. Brimhall, supra*, which involved a proposed branch in South Ogden which would serve Ogden, other parts of Weber County and north Davis County. The basic argument of the Competing Banks appears to be that because Walker Bank indicated in this case that it would seek business for its Centerville branch from Centerville, Bountiful and other cities, towns and unincorporated areas in south Davis County, coupled with the fact that the proposed branch location is in a shopping center

near the boundary line between Centerville and Bountiful, in some way the criteria for establishing a branch bank have not been met. They repeat the argument which this court rejected in the *Brimhall* case that existing banks are insulated from competition except from new unit banks or, to put it another way, that branch banks cannot be established in locations which will compete for business with existing banks.

The holding of this Court in *Walker Bank & Trust Company v. Brimhall, supra*, was that the branch banking laws do not limit the service area of a branch. If the branch is to be established in a lawful location, it can do business with anyone and can compete for business with any existing bank. This Court did say that geography could be a factor in the question of public convenience and advantage and it is obvious from the Findings and Conclusions that were made that geography in this sense was taken into account by the Commissioner.

While the Competing Banks assert that the Commissioner failed to make Findings on the geographical location of the proposed branch, this is a clear misreading of the Findings and Conclusions that were made. Finding of Fact No. 8 indicates the nature of the City of Centerville as it relates to the statutory criteria for locating branch banks. The precise location of the branch is referred to in Finding No. 10 and this location in reference to the location of existing banks is referred to in Finding No. 11. The service area of the proposed

branch is referred to in Finding No. 16. It would serve no useful purpose to the Competing Banks or to anyone else to have a specific Finding to the effect that Centerville and Bountiful adjoin one another, that each are residential communities as distinguished from industrial areas or, least of all, that the principal stockholder of Walker Bank is Western Bancorporation. The Commissioner did find that Walker Bank is the largest state bank in Utah (Finding No. 7) and that existing banks serve in the same area proposed to be served from the Walker Bank branch (Finding No. 11). Surely, details of the economics of the area, assessed valuation statistics, traffic patterns, physical features of the area, size and location of existing banks, and similar details need not be specified, although such matters were in evidence and before the Commissioner for his consideration, including all of the matters which the Competing Banks now contend at pages 15 and 19 of their Brief, are required Findings. We wonder what further Findings the Competing Banks would have the Commissioner make? If the Commissioner is obligated to be more specific than he has been in this case, it appears that you enter into the area of probing the mental processes of the Commissioner which was specifically condemned by this court in *Zions First National Bank v. Taylor*, 15 U.2d 239, 390 P.2d 854 (Syllabus 3 and 4).

One must also consider that all of these arguments now made were fully and forcefully made by the Competing Banks to the Commissioner (R. 489-513) and such

arguments were rejected because the application was granted. It is also significant that the Commissioner decided to permit the branch in this case even though at the time the Attorney General had ruled that the application for the South Ogden branch must be rejected and this Court had not ruled to the contrary (the Commissioner acted in this case on February 28, 1969, prior to the November 20 decision of this court). Thus, there is not the slightest doubt but that the Commissioner would have arrived at the same conclusion, even though he did not make a negative Finding that the geographic location did not militate against the public convenience and advantage. Apparently this was not true in *Salt Lake City v. Industrial Commission*, 103 Utah 581, 137 P.2d 364. Hence, such case is not applicable here.

The proper standard to be applied as established by the branch banking statutes and by the decision of this court in the *Brimhall* case is the public convenience and advantage. Findings and Conclusions were made by the Commissioner in this case that the public convenience and advantage would be subserved and promoted by the establishment of the Walker Bank branch in Centerville at the location proposed by the applicant. Tested by this standard, the only question remaining for this Court, is whether such determination was arbitrary and capricious. It is not the function of this Court to substitute its judgment for the judgment of the Commissioner or to require Findings and Conclusions to be redrafted to negative all arguments of the unsuccessful parties to the

administrative hearing. See *Walker Bank & Trust Company v. Brimhall*, *supra*; *Mountain States Telephone & Telegraph Company v. Public Service Commission*, 107 Utah 502, 155 P.2d 184; *Salt Lake Transfer v. Public Service Commission*, 11 U.2d 121, 355 P.2d 706; *Withers v. Golding*, 100 Utah 179, 111 P.2d 550; *Erkman v. Civil Service Commission*, 114 Utah 228, 198 P.2d 238; *Building Service Employees, Etc. v. Newhouse Realty Co.*, 97 Utah 562, 95 P.2d 507; *Hotel Utah v. Industrial Commission*, 116 Utah 443, 211 P.2d 200.

Where, as in this case, the Competing Banks received a fair hearing (and this is conceded by the Appellants on page 10 of their Brief) and where the Commissioner has made Findings and Conclusions on the required three statutory criteria set forth in *Walker Bank & Trust Company v. Brimhall*, *supra*, the reviewing court should affirm the decision unless it is plain that the Commissioner has acted arbitrarily. There can be no question that in the three very full days of hearings before the Commissioner, the Competing Banks were able to present what evidence they had and arguments they might make to defeat the application of Walker Bank. No item of evidence offered by the Competing Banks was refused. Time for argument was afforded. All of the evidence presented was thoroughly considered by the Commissioner as evidenced by his detailed Findings and Conclusions. In the absence of a clear showing of arbitrariness, the court should not in-

terfere but should affirm the decision of the Commissioner as was done by the court below.

### CONCLUSION

The decision of the District Court of Salt Lake County should be affirmed.

Respectfully submitted,

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