1970

Clearfield State Bank v. W. S. Brimhall, Commissioner of Financial Institutions of the State of Utah; and Bank of Northern Utah : Respondents Brief

In The Supreme Court of the State of Utah

CLEARFIELD STATE BANK,
a Corporation,
Plaintiff-Appellant,

vs.

Case No.
11900

W. S. BRIMHALL, Commissioner of Financial Institutions of the State of Utah; and

BANK OF NORTHERN UTAH, an Unincorporated association
Defendants-Respondents.

RESPONDENT'S BRIEF

Appeal from a Judgment of the District Court of Salt Lake County, Utah
Honorable Bryant H. Croft, Judge

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STATEMENT OF NATURE OF CASE

This action is brought for a review of the decision and proceedings of the defendant Commissioner of Financial Institutions in authorizing the Bank of Northern Utah to establish a bank in Clearfield, Utah, pursuant to the order of said Commissioner, dated March 12, 1969.

DISPOSITION IN LOWER COURT

The lower court awarded judgment in favor of defendants and against plaintiff, of no cause of action.

RELIEF SOUGHT ON APPEAL

The defendant-respondents seek affirmation of the lower court decision and the action of the Commissioner of Financial Institutions in authorizing the Bank of Northern Utah to establish a bank in Clearfield, Utah.

STATEMENT OF FACTS

The application of defendant, Bank of Northern Utah, to establish a unit bank in Clearfield, Utah, was filed September 17, 1968 (R 50) and appellant, Clearfield State Bank, immediately filed protest. A hearing on the application was had November 26, 1968.

At said hearing substantial evidence was presented showing a need for another bank in Clearfield. It was established that Clearfield, a city of in excess of 10,000 people, was served by only one bank, the appellant herein, and that the trading area which would be served by the appellant, Clearfield State Bank, and the respondent, Bank of Northern Utah, would include a population of in excess of 15,000 people. (Tr 129, 132)

Further, it was pointed out that Davis County is the fastest growing county in the State of Utah (Tr 118) and that the median income of families in Davis County and particularly in Clearfield City was among the highest in the State (Ex 1, pps 67,68,69) facts which were born out by the substantial growth experienced by the appellant, Clearfield State Bank, and other banks in the area over the past ten years. (Ex 1, p 50)

The need for another bank in Clearfield was further pointed up by the fact that only three counties in the State have more population per banking facility than does the Davis County and the Clearfield area. (Tr 132, Ex 1, p 45)

The Mayor of Clearfield City and the President of the Clearfield Chamber of Commerce each testified that, based on the information and knowledge acquired by them while acting in their official capacities, another bank was necessary in the Clearfield area. (Tr 22-23, 39-44)

Substantial evidence was presented as to the character and fitness of the incorporators (personal information sheets, Tr 57-60, 146, 253) and as to the projected profitability of the proposed bank (Tr 57-73) so as to insure the protection of the citizens in the Clearfield area.

Based on the information presented at the hearing, a small portion of which is set out above, the Commissioner of Financial Institutions approved the application of the Bank of

Northern Utah by Order dated March 12, 1969 (R 6-10). Subsequently plaintiff-appellant prosecuted its review of that order to the District Court. The District Court after hearing oral argument and reviewing the complete record entered its memorandum decision affirming the action of the Commissioner of Financial Institutions. (R 24-34) From which decision the appellant, Clearfield State Bank has prosecuted review to this Court.

For the purposes of this brief, the transcript of the administrative hearing is referred to by the abbreviation, "Tr.", and the exhibits, as marked in the hearing.

ARGUMENTS

POINT I

THE PROPOSED BANKING FACILITY DOES NOT CONSTITUTE A BRANCH BANK SO AS TO VIOLATE UTAH LAW.

In recent years the question of what constitutes branch banking has been much litigated in the courts of this country. Under the decisions of those courts treating the question, it is clear that the proposed bank here in question would not be considered a branch bank.

One of the earliest cases to consider the question was the case of *Daniel vs. Best* 224 Iowa 1348, 279 NW 374 (1938); 23 ALR 3d 683, there two new banks were proposed by the stockholders of an existing bank when they voted the appropriation of part of the surplus of the latter to the organization of the new banks. The court held that the new banks were not branch banks in spite of the fact that the two new banks were managed by a board of three trustees selected by the directors of the existing bank from their own members, which three trustees were the president, vice-president and cashier of the existing banks. The court reasoned that where the business of each bank was conducted independent of one another and of the existing banks, and where each bank kept separate records they did not constitute branch banks.

The Colorado Supreme Court in recent decisions has reached results similar to that of the Iowa Court. *Peoples Bank vs. Banking Board*, (Colo), 436 P2d 681 (1968);*Goldy vs. Crane* (Colo), 445 P2d 212 (1968); *Nemurow vs. Bloom*, (Colo), 445 P2d 214 (1968).

In the *Peoples Bank case*, supra, the Supreme Court of Colorado affirmed the granting of an application in which the existing Guaranty Bank and Trust Co., of Denver, through its executive officers, put together the materials contained in the application. The court noted that the stock ownership of the two banks would be the same and proportionately identical; that the board of directors and chief executive officers would be the same; that the employees of the new bank would be trained and furnished by Guaranty Trust and that all accounting for the new bank would be done by the later. In upholding the Commissioner's action, the court stated that in order to establish that a proposed bank is a branch bank, the protestant must show that in substance Guaranty Bank and Trust was doing business through the instrumentality of the newly proposed bank or vice versa, in the same way as if the institutions were one, and that such had not been shown.

The *Crane case*, supra, followed the rationale of the *Peoples Bank Case*, supra. In this case the Colorado Banking Commission denied the charter of three proposed industrial banks on the ground that they would constitute branch banks. The District Court reversed the decision and the Supreme Court affirmed such reversal. The facts of the case were, that except for the resident office manager, each bank would have common officers and directors, that all said officers and directors were also officers and directors of Continental Finance Corporation of America, a holding company; that such holding company owned all the stock of two existing Colorado banks and would hold all the stock in the three new banks; and that the manager of each new bank would have limited loan authority. The court in allowing the charter to issue, noted that each proposed bank was a separate corporation; organized as an independent corporation entirely; each bank having its own independent capital structure; and each with a separate and independent loan basis; factors which the court held, indicated an independent banking operation. The court concluded then by holding:

"That it is not enough to show common control through common stock ownership and participation, but it must be shown that the alleged bank is doing business with the alleged parent in the same way as if the institutions were one; and, it must be shown that, 'the unitary type of operation', which is the hallmark of branch banks is present".

Federal Courts which have considered the question in the context of adjudication under the National Banking Act (12 USC Section 26) which makes state branch banking laws applicable to national banks, have reached a similar result. *First National Bank of Billings vs. First Bank Stock Co.,* (CA 9th Cir 1962) 306 F2d 937; *Camden Trust Co. vs. Gidney* (CA DC Cir 1961), 301 F2d 251.

In the *First National Bank* case, supra, the Circuit Court held that it was not enough to show common ownership and control through stock ownership, and further that the fact that two banks had common directors and that one bank allowed the other to use its night deposit and vault facilities was not sufficient to show a branch bank. The Court pointed out that the two banks were separate corporations, each with its own capital, surplus and undivided profit, and its separate banking house.

As stated by the Court the critical question was whether one bank was doing business through the instrumentality of the other or vice versa, in the same way as if the institutions were one.

The second Federal case having bearing on the question is that of *Camden Trust Co. vs. Gidney*, supra. This was a suit by a New Jersey banking corporation to enjoin the Comptroller of Currency from issuing a certificate of authority to permit a national bank to establish a banking facility in Camden.

Under the facts of the case, nine directors of the Haddenfield National Bank filed an application for a new bank and appellants objected before the Comptroller. The court upheld the granting of the application even though directors and stockholders of Haddenfield National would also be directors and

and stockholders of the new bank. The Court pointed out that the capital structure of the two was completely independent, that the new bank's stockholders would be liable for their shares in the new bank independent of Haddenfield and that the new bank was located 2 miles from the office of Haddenfield.

The court placed great emphasis on the fact that deposits with the new bank would be its own liability and not Haddenfields and that its loan limits would be those applicable to an independent bank, based on its own capital structure and totally independent of loan limitations applicable to Haddenfield National.

The cirtical factors which must be examined in determining the existence of a branch bank as indicated by the cases above was succinctly stated by the New Jersey Supreme Court in a recent decision. *Application of Kennelworth State Bank*, 49 NJ 330, 230 A2d 377, 1967, 23 ALR 3rd 683, 686.

The facts of that case were very similar to these now before the court, in that an established bank appealed the granting of a charter to another banking institution to locate in the community on the grounds that the new bank was in fact a branch of the other institution and thereby prohibited from locating in the community. The court affirmed the granting of the charter notwithstanding the fact that a majority of the outstanding stock of the new bank and the directorship would be in the hands of the stockholders and directors of the other bank. In so holding, the court distinguished a branch bank from other banking relationships in the following terms:

> "A branch bank is not a separate corporation or legal entity but is an office or agency operated by the legal entity which operates the main bank. It has no separate board of directors or capital structure, its deposits are pooled with those of the main bank and its loan limits are based on the main bank's capital structure."

In applying the law as hereinabove setforth to the facts of this case, it is clear that the proposed bank does not constitute a branch of the Bank of Utah.

The testimony at the hearing and the application itself clearly indicates that the proposed bank will be a separate legal entity organized under the corporate laws of the State of Utah.

As testified by Mr. Beutler the proposed bank will have a separate and distinct board of directors and although some of the members of said board are also directors of the Bank of Utah (Tr 155) this has no bearing on the question of whether the proposed bank constitutes a branch bank. *Peoples Bank vs. Banking Board,* supra; *Goldy vs. Crane,* supra; *First National Bank of Billings vs. First Bank Stock Co.;* (CA 9th Cir 1962) 306 F2d 937; *Camden Trust Co. vs. Gidney,* supra; *Application of Kennelworth State Bank,* supra.

That this is a common practice in banking circles around the nation and here in Utah is evidenced by the testimony of Mr. Beutler, wherein he testified that the practice of interlocking officers and directors is common in Utah (Tr. 111) and that one Emerson Sturdevant is an officer or director of at least six different banks in the State. (Tr. 109)

Mr. Beutler further testified that at least seven other banks in the State had officers or directors which were also officers or directors of at least one other bank. (Tr. 109-111)

The president of the proposed bank will be a person not affiliated with the Bank of Utah in any way. Also, said bank will have its own separate employees and location (Tr 94,147, 150). Of even more significance is the fact that the proposed bank will have its own separate loan base independent of any other bank. With its own deposit liability and loan limitations. (Tr 61, et seq)

The stock ownership in the proposed bank will not be entirely in the hands of any other bank; however, certain of the present applicants do hold approximately 51% of the outstanding stock of the Bank of Utah (Tr. 157). However, the fact of common stock ownership has no bearing on the question of whether the proposed bank constitutes a branch bank. *Peoples Bank vs. Banking Board,* supra; *First National Bank of Billings vs. First Bank Stock Co.,* supra.

That common stock ownership is a common practice in banking circles was evidenced by the testimony of Dr. Nelson, an officer of First Security Corporation, called as a witness for the plaintiff, Clearfield State Bank, who admitted that the First Security Corporation owned the controlling stock in both the First Security State Bank and First Security Bank (NA). (Tr 396).

Protestant in its brief makes great issue out of the similarity of the name of the proposed bank and that of the Bank of Utah. However, it conveniently ignores the same similarity between one of the protestants, First Security State Bank and First Security Bank (NA).

It should be noted that protestant cities to no competent authority for its assertions as to what constitutes branch banking, but rests its arguments on secondary authorities and cases dealing with matters completely outside the banking area. The only case which has any relevancy at all is the case of *Whitney National Bank in Jefferson Parish* vs. *Bank of New Orleans and Trust Co.* (CA DC Cir 1963) 323 F2d 290, reversed 379 US 411. Which was decided under a Louisana Law which prohibited the opening of new banks through holding companies and therefore, is inapplicable in this case.

As clearly indicated by the law and facts as recited above, the proposed Bank of Northern Utah possesses all the attributes of a unit bank. Such bank is an independent legal entity, with a separate capital structure and with its own separate and distinct loan base and deposit liability, operating at a separate and distinct location.

POINT II

THE COMMISSIONER OF FINANCIAL INSTITUTIONS WAS NOT GUILTY OF PREJUDICIAL ERROR IN REFUSING TO DISCLOSE OR IN FAILING TO ALLOW DISCOVERY OF INFORMATION WHICH WAS IMMATERIAL AND IRRELEVANT.

It is well recognized by the courts of this country and the State of Utah, that alleged errors in proceedings before administrative bodies which do the complaining party no inury will not justify disturbing the determination of such body. *Utah Gas Service Co.* vs. *Mountain Fuel Supply Co.*, (Utah) 422 P2d 530 (1967) 18 ALR 2d 552 Section 10; *U.S.* vs. *Pierce Auto Freight Lines*, 66 S Ct 687, 327 US 515; 73 CJS, *Public Administrative Bodies and Procedures* 210.

In the matter before the court, plaintiff alleges that the Commissioner committed reversable error in not allowing them to see the financial statements of the applicants and in refusing to disclose a list of stockholders of the Bank of Utah and the Bank of Ben Lomond.

Assuming without admitting that the plaintiff had a right to such documents, the question remains, was the withholding of such documents prejudicial to the plaintiffs so as to constitute an arbitrary and capricious exercise of discretion on the part of the Commissioner.

Section 7-1-26 UCA 1953 as amended, sets forth the circumstances in which the Commissioner may refuse to approve an application for a unit bank in essentially the following terms:

1. When the plan of operation does not comply with the laws of Utah, or with accepted and prevailing practices; or,

2. When the incorporators or organizers shall not be of such a character, responsibility and general fitness as to warrant a belief that the business will be honestly conducted in accordance with law and for the best interests of the members, customers and depositors of the institution; or,

3. When the location or field of operation of the proposed business shall be in such close proximity to an established business subject to the banking laws of the State, that such established business might be unreasonably interfered with and the support of the new business would be such as to make improbable its success; or,

4. When other good and sufficient reasons exist for such refusal.

Under the provisions of the above Statute the only determination required to be made as to the applicants individually, in approving the application, is whether the incorporators or organizers are of such character, responsibility and general fitness as to warrant the belief that the business will be conducted in accordance with law and for the best interest of the members, customers and depositors of the institution. There is no requirement that any finding as to the financial status of the organizers be made.

That this was the intent of the legislature is evidenced by the fact that Section 7-3-10 UCA 1953 as amended, specifically provides that the proposed bank before commencing business must have a certain amount of subscribed stock and a certain expense fund. The critical points being that such financial requirements are to be met before commencing business and not at the time of application, and that the Statute limits the question of financial responsibility specifically to the bank as an entity and not to the independent financial ability of its organizers and incorporators.

As to the question of the general fitness of the applicants the record is more than adequate to support that finding. This is evidenced by the background information sheets on the application submitted to the Commissioner and by the qualifications of the applicants which were brought out during the course of the hearing. (Tr 57-60, 146, 253)

This fact was recognized by Judge Bryant H. Croft of the District Court who after studying the complete record affirmed the Commissioner's action and in so doing stated:

> "(T)hat in this case no effort is made, and indeed none could be made, to content that the intended incorporators of the Bank of Northern Utah are of such a character, responsibility and general fitness as to warrant the belief that the business would not be honestly conducted in accordance with law and the best interest of the

members, customers and depositors of the institution. Indeed, the one complaint made about the incorporators is that most of them are established, experienced bankers in the Davis-Weber County areas ....." (R 29)

From the above it is evident that under the clear meaning of the Statute no finding need be made on the particular financial status of the applicants. Even assuming without admitting that it was error to withhold the financial statements; such statements were irrelevant and immaterial in the determination of this question in that substantial evidence found in the record supports the finding that the applicants are of such a character, responsibility and general fitness as to warrant the belief that said bank will be conducted honestly in accordance with law and in the best interest of the members, customers, and depositors of said bank.

The second allegation made by the appellants is that they were prejudiced by the Commissioner's failure to disclose to them a list of stockholders of the Bank of Utah and the Bank of Ben Lomond, an argument which is frivolous for at least two reasons.

In the first instance, it must be recognized that in fact the plaintiffs were given information as to what interest the proposed incorporators held in both the Bank of Utah and the Bank of Ben Lomond. In that regard, it was testified that the incorporators did not own the controlling interest in the Bank of Ben Lomond, but that they did in the Bank of Utah. (Tr 156, 157, 159, 160) Further, plaintiffs had the opportunity to question the individual incorporators as to their interest and were in fact, invited to do so. (Tr 158) However, they declined said invitation. (Tr 159) At no point in the record did the plaintiff question the incorporators as to their individual holdings in other banks although presented with the opportunity to do so. (Tr 57-112, 154, 146-152, 253-270)

Secondly, under the law as it exists in this country and the State of Utah, the question of stock ownership in other banking institutions has no bearing on the determination of whether to approve an application for a unit bank.

The courts have uniformily held that stock ownership is irrelevant as a test to determine the existence of a branch bank. *Peoples Bank* vs. *Banking Board,* supra; *Goldy* vs. *Crane,* supra; *Application of Kennelworth State Bank,* supra; *First National Bank of Billings* vs. *First Bank Stock Co.*, supra; *Camden Trust Co.* vs. *Gidney,* supra.

Further, under Utah Law, the requirements for the establishment of a unit bank are established by Section 7-1-26 UCA 1953, as amended, which is essentially setforth in Point I. Under this provision the question of stock ownership in another bank has no bearing on the statutory requirements which must be met to establish a unit bank. Nor, is there any law in the State of Utah which makes illegal bank holding companies as such.

Therefore, for the court, at this point, to make stock ownership in other banks a criterion for the approving of applications for unit banks would amount to legislation on its part.

As stated by the New Jersey Supreme Court in this regard:

> ".....(T)he legislature could have, but did not prohibit an individual from being a stockholder or a director in more than one bank. Nor did it adopt any inactment aimed specifically at chain banking resulting from such common stock holdings and directorships. In view of the well recognized distinction between chain and branch banking, the legislature restrictions aimed specifically at branch banking should not be extended by the judiciary to banks which are independently structured and operated though affiliated. If the legislature wishes such extension it may adopt suitable enactments ....."
>
> *Application of Kennelworth State Bank,* supra.

From the foregoing it is obvious that in fact the plaintiff was supplied with information as to the stock ownership of the applicants in the Bank of Utah and the Bank of Ben Lomond. However, even assuming such information had not been supplied to the plaintiffs it would not constitute prejudicial error in that such information was irrelevant and immaterial to the question then before the Commissioner.

POINT III

THE REQUIRED CAPITAL AND SURPLUS OF THE PROPOSED BANK NEED NOT BE PAID IN UNTIL SUCH TIME AS THE CERTIFICATE OF INCORPORATION IS ISSUED.

Section 7-3-10 UCA 1953, as amended, sets forth the minimum subscribed capital which a bank must have in order to commence business.

The point at which a proposed bank must establish that it has such required capital is established by Section 7-3-11 UCA, 1953, as amended, which provides as follows:

> "The Secretary of State shall not issue a certificate of incorporation to any bank authorizing it to do business in this State until it shall appear to him by the affidavit of at least three of the incorporators that the proposed corporation has the requisite amount of capital stock subscribed and also the required surplus and that at least fifty per cent of the capital stock and surplus of the corporation has been paid in cash."

Therefore, it is clear that the statutory requirements as to the capital and surplus must be met at the time the certificate of incorporation is to be issued and not when the application for its approval is filed with the Commissioner.

POINT IV

THE FINDINGS OF THE COMMISSIONER OF FINANCIAL INSTITUTIONS IN THIS MATTER ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND HIS EXERCISE OF DISCRETION IN REGARDS THERETO WAS NOT ARBITRARY OR CAPRICIOUS.

Section 7-1-26 UCA 1953, as amended, provides that the reviewing court may reverse the decision of the Banking Commissioner only in instances where it finds that such decisions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Therefore, in order for the court to upset the ruling of the Commission in this matter, it must find that such decision is not supported by substantial evidence taken from the record as a whole, or that it is arbitrary or capricious. *Zions First National Bank (NA)* vs. *Taylor* 15 U2d 239, 390 P2d 854 (1964). *McNight* vs. *State Land Board* 14 U2d 238, 381 P2d 726 (1963).

In holding that an administrative agency has acted arbitrary or capricious the courts seem to require unreasoning action by the agency in disregard of facts and circumstances. However, when there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration even though it may be believed that an erroneous conclusion has been reached. *State ex rel Cosmopolis* vs, *Bruno*, 61 Wash 2d 461, 379 P2d 691; *Petition of the City of Bellevue* 62 Wash 2d 458, 383 P2d 286. Further, the court may not substitute its judgment in discretionary matters for that of the administrative agency. *Zions First National Bank (NA)* vs. *Taylor*, supra.

The inquiry as to whether substantial evidence appears from the record to substantiate the administrative agencies factual findings, is limited to the question of whether there exists, in the record such relevant evidence that a reasonable mind might accept such as adequate to support a conclusion. *American Foundry and Machine Co.* vs. *Utah Labor Relations Board*,(Utah) 141 P2d 390 (1943); *Howard* vs. *Lindmier*, (Wyo), 214 P2d 737.

At the outset it should be noted that administrative agencies are not bound by the technical rules of evidence applicable to a court of law and in fact may and should admit hearsay evidence if it is relevant and of such a character, and or quality as that on which responsible persons are accustomed to rely in conduct of serious affairs. *Richard Mast* vs. *State Board of Optometry;* (Cal), 193 P2d 148 (1956). That this is the law in Utah is evidenced by the decision of this court in the case of *Lakeshore Motor Coach Lines, Inc.* vs. *Welling*, 9 U2d 114, 339 P2d 1011 (1959) wherein the court indicated that fact findings

based to some extent on hearsay evidence were not invalid if such findings were also supported by a residuum of competent evidence.

In the matter here before the court, each finding made by the Commissioner is supported by competent evidence in the record.

Mr. Charles Cuneo, the Superintendent of the DelMonte Distribution Center at the Freeport Center, and President of the Clearfield Chamber of Commerce (Tr 22) testified that in his opinion another bank was needed in Clearfield (Tr 32). Said opinion being based on knowledge acquired by Mr. Cuneo through his activities as President of the Clearfield Chamber of Commerce and Superintendent of the DelMonte Distribution Center; and from official records submitted to him in his official capacity as President of the Chamber of Commerce (Tr 24).

The argument that Mr. Cuneo's testimony is rank hearsay and not entitled to any probative value is succinctly put to rest in the *Lakeshore case,* supra., wherein this court in ruling that the opinion of an applicant as to the need for carrier service was sufficient to support a finding stated:

> "(T)hat a moments reflection makes plain that a very high proportion of the knowledge of mankind is acquired through sharing of experiences of others and from sources which, in one sense, might be considered as hearsay. We do not and could not, experience everything first hand, but we do obtain much credible evidence and knowledge from many sources other than experiencing the primary facts themselves." (9 U2d 114, 339 P2d 1011)

Added testimony of the need for another bank in Clearfield was given by the Mayor of Clearfield City who testified as to the growth of the community as evidenced by new business (Tr 41), increased activity at Hill Air Force Base (Tr 40), and increased population over the past years. (Tr 43)

The need and feasibility of another bank in Clearfield City was further substantiated by the study prepared by Dr. Milton Matthews, an expert in the field of Marketing, (EX 1) and

one experienced in projecting the need and probable success of business based on population and other srastical data.

Dr. Matthews qualification and experience in this field is unquestionable and in fact, he has, in the past, prepared similar studies of the Clearfield and Davis County areas for one of the protestants here. He has also acted as consultant to many other banks and financial institutions (Tr 115, 117; Ex 1 personal qualifications).

Based on the evidence presented at the hearing it was established that Davis County and the Clearfield area is one of the fastest growing areas in the State. (Tr 118, 407, 408)

Evidence established the approximate population of Davis County in excess of 95,000, with approximately 50,000 people residing in the Clearfield and the North Davis County area (Tr 128 Ex 1, p 16). The City of Clearfield itself having a population of in excess of 10,000 people. (Tr 129)

Dr. Matthews further testified to the fact that the trading area of the proposed Bank of Northern Utah and the appellant, Clearfield State Bank would not be limited to Clearfield City itself, but would also include the surrounding communities of Syracuse, West Point, Sunset and Clinton. (Tr 129) This fact was substantiated by the testimony of Mr. Steed, an officer of the plaintiff, when he testified that a good portion of the trade of appellant, Clearfield State Bank, came from outside Clearfield City. (Tr 331)

The trading area which is served by the appellant, Clearfield State Bank and which would be served by the defendant, Bank of Northern Utah has a population of approximately 15,000 people (Tr 129). A fact which makes the average population per banking facility in this area double what it is for Davis County as a whole and almost two and half times greater than the average for the entire state. (Tr. 132)

Further justification for the granting of the application here in question is evidenced by the fact that the median family income in Davis County and the Clearfield area is among the highest in the State (Ex 1, pps 67, 68, 69) and as would be expected the number of families having incomes less than $3,000.00, among the lowest (Tr 140).

The growth and prosperity of the area was further pointed up by the above average valuation of the owner occupied housing in the area (Ex 1, p 40) and the substantial growth with the banks in the North Davis area, including the plaintiff, have experienced over the past ten years. (Ex 1, p 50)

Dr. Matthews testified that based on his study, it was his opinion that another bank was needed in Clearfield and that in fact he had first recognized this need ten years before while doing a previous study of the area. (Tr 164)

In regards to the projected profitability of the proposed Bank of Northern Utah, defendant, called as its witness Mr. William W. Beutler, an individual of extensive experience in the banking field, who had testified before the Commissioner on previous occasions (Tr 61). Mr. Beutler testified that the proposed bank could operate profitably in Clearfield City (Tr 61 et seq.), basing said projection on what he, as an experienced banker would estimate the cost to be in running such a bank and on the expected volume of business as projected from the growth trends setforth in Dr. Matthews' study. (Tr 65, Ex 1, p 50)

It is evident from the record that in terms of population and the general characteristics of the Clearfield area in regards to employment, income and growth potential that another bank is needed in Clearfield City.

The plaintiff, Clearfield State Bank relied heavily on two points in support of their argument of the lack of any need for another bank in Clearfield. The first being the high percentage of persons under 18 years of age in Davis County and second, the low per capita sales tax collected in the area. (Tr 384, Tr 377)

As to the former, plaintiff would have us believe that the fact that there are more persons under 18 years of age in Davis County indicates less of a need for a banking facility. On closer observation it becomes clear that such a statistic is only more evidence of what Dr. Matthews established; namely, that said area is growing, that young families are moving in, and with them bring more demand for the money and services which a bank is equipped to supply. As to the question of low per capita sales tax collection in the area, this factor is nothing more than

an indication that facilities are lacking in the area, and that where facilities are not available people will go elsewhere to find them. A fact which was recognized by Dr. Nelson, called as a witness by the plaintiff. (Tr 404) In this regard he further testified that in fact the banks in Davis County did not have sufficient loan capacity to meet the needs of the residents and that they were being forced to go to Ogden and Salt Lake to meet these needs. (Tr 419)

Under the above analysis, it is clear that there is in the record substnatial evidence to support the finding of the Commissioner of Financial Institutions in this matter and the fact that he chose to give more weight to evidence presented by the applicant than to that presented by the plaintiff is a matter within his discretion and does not constitute a basis for this court to disturb his decision.

POINT V

THE PROPOSED LOCATION OF THE DEFENDANT APPLICANT IS NOT IN SUCH CLOSE PROXIMITY TO THE CLEARFIELD STATE BANK AS TO MAKE IMPROBABLE THE SUCCESS OF EITHER.

Section 76-1-26, UCA 1953, as amended, provides in part that the Commissioner of Financial Institutions may deny an application when the location or field of operation of the proposed business shall be in such close proximity to an established business subject to this title that such established business might be unreasonably interfered with and the support of the new business would be such as to make improbable its success.

The extent of the Commissioner's discretion in making such a determination was succinctly setforth by this court in the case of *Zions First National Bank* vs. *Taylor,* 15 U2d 239, 390 P2d 854. In that case the court in discussing the "close proximity" question in connection with branch banks noted that "close proximity" in and of itself was not determinative of the question and stated that:

> "It is the duty and prerogative of the Bank Commissioner to determine whether a branch bank application shall be granted or denied. He must decide if the establishment of a new branch would unreasonable interfere with the business of an existing bank or branch. The courts will not over rule his decision, if it is supported by any substantial evidence and is not arbitrary or capricious." 15 U2d 239, 240

It is clear from the record that the proposed bank will be located on the Smith Plaza in Clearfield (Ex 1, p 13). Mr. Smith, one of the incorporators and president of the company which owns the plaza testified to the fact that he had been approached to construct the bank there and that they were prepared to enter into a lease agreement upon the granting of the charter. (Tr 147)

That the plaintiff had no question as to where the new bank would be located is evidenced by the fact that after application was filed by the defendant, Bank of Northern Utah for approval, plaintiff purchased land just down the street from said proposed construction site, (Tr 345) and then introduced testimony that they intended to build a new banking house there at some future date (Tr 295-296)

The facts before the Commissioner were clear as to the location of the new bank. This location being approximately one-half mile from the offices of the plaintiff, Clearfield State Bank. (Tr 145)

The record indicates that plaintiff, Clearfield State Bank is the only bank located within Clearfield City, having been established in 1917 (Tr 277) and that between 1958 and 1968 its total assets increased from $4,878,489.00 to $9,210,266.00 (Ex 1, p 50); that First Security Bank of Utah has assets of over one-half of one billion dollars and has a branch office serving the Hill Field area; that State Savings and Loan Association, which does not conduct a full banking business has assets of over 93,000,000.00; that other protestant banks with locations more than 3 miles from the proposed site have likewise almost doubled their assets over a ten year period (Ex 1, p50); and that Clearfield City with a population of over 10,000 (Tr 129), excluding

military personnel on Hill Air Force Base (Tr 327,355) has one bank, while Layton with a population of 14,289 has three banks. (Ex 1, p 13)

Substantial evidence, some of which is set out above, supports the conclusion of the Banking Commissioner that the establishment of the defendant, Bank of Northern Utah, in Clearfield would not unreasonably interfere with the business of plaintiff, Clearfield State Bank, and that support for the new bank was not so lacking as to make improbable its success.

At this point it should be noted that because of the different nature of branch banking the law specifically requires that in order to establish a branch bank one must show that "public convenience" and "advantage" will be promoted by the establishment of the branch. (7-3-6 UCA 1953 as amended). However, the law requires no such showing when the question is one of establishing a unit bank. (7-1-26 UCA 1953 as amended).

Even assuming that such a showing must be made in the case of unit banks, the record is adequate to support such a finding. Mr. Steed, an officer of the plaintiff, Clearfield State Bank testified as to the poor and inconvenient location of their banking office (Tr 297) while at the same time the record shows that the office of defendant, Bank of Northern Utah will be constructed in a shopping center convenient to all those who wish to avail themselves of its services. (Ex 1, p 13, Tr. 147)

CONCLUSION

The Commissioner of Financial Institutions, as in the case of other administrative agencies, is given wide discretion in carrying out his administrative duties. His exercise of this discretion may not be disturbed by this court unless found to be arbitrary, capricious or not supported by any substantial evidence in the record. Nor, may this court substitute its judgment for that of the Commissioner in discretionary matters.

At the hearing, considerable evidence was introduced by both parties. The Commissioner allowing in and making available

to the parties all evidence which was material and relevant to the question there under consideration.

Under the law as cited in Point I above, and the evidence contained in the record, it is clear that the proposed Bank of Northern Utah constitutes a unit bank. It is a separate legal entity with a separate capital structure and with its own separate and distinct board of directors, loan base and deposit liability.

Substantial evidence in the record pointed up the need and feasibility of the establishment of another unit bank in Clearfield City. Relying on that evidence, the Commissioner approved the application of the defendant, Bank of Northern Utah to establish its offices within that City.

From the record it cannot be said that the decision of the Commissioner of Financial Institutions, in granting the application, was unsupported by any substantial evidence in the record or that his action was arbitrary or capricious. For this reason, this Court should affirm the decision of the district court upholding the Commissioner's action in granting the application of defendant, Bank of Northern Utah to establish a unit bank in Clearfield City.

Respectfully submitted,

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