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THE EVOLUTION OF THE ADMINISTRATIVE PROCESS UNDER THE "NEW" TEXAS SAVINGS AND LOAN ACT

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In January of 1964 the so called "new" Texas Savings and Loan Association Act, which is similar to the enactments governing other state administrative agencies, became effective. The generally accepted procedures and criteria applied in the judicial review of administrative rulings have been revolutionized with regard to the orders of the Savings and Loan Commission. It is therefore necessary to discuss the administrative process as it applies to applications for new savings and loan association charters and proposals for branch banks.¹ This administrative process can best be analyzed by a breakdown of three distinct areas: (1) the procedural requirements facing the Savings and Loan Commissioner in making his findings; (2) judicial review of the validity of these findings in terms of the substantial evidence rule; and (3) the admissibility of hearsay evidence in terms of its quantitative relationship to the sum total of the evidence necessary to sustain an administrative order.

SUBSTANTIAL EVIDENCE IN THE ADMINISTRATIVE PROCESS

The basis for determining the validity of an administrative order is whether or not it is supported by substantial evidence.² This evidence must be such that when considered as a whole, reasonable minds could reach the same conclusion that the agency reached in justifying its action.³ In the words of the Supreme Court of the United States, "substantial evidence" refers to such relevant evidence as might be accepted by a reasonable mind as being adequate to support a conclu-

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1. Venue for review of the Commissioner's orders is fixed in Travis County. TEX. REV. CIV. STAT. ANN. art. 852a, § 11.12(1)(b) (1964).

2. Colorado County Fed. Sav. & Loan Ass'n v. Lewis, 498 S.W.2d 723, 728 (Tex. Civ. App.—Austin 1973, no writ).

3. Trapp v. Shell Oil Co., 145 Tex. 323, 350, 198 S.W.2d 424, 441 (1946); Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 79, 161 S.W.2d 1022, 1030 (1942).

sion.⁴ In Texas, the application of the substantial evidence rule, in the judicial review of administrative orders, generally involves a trial de novo in the district court. This appeal, trial de novo, from an administrative order is treated as if it had been filed originally in the district court.⁵ Consequently, in deciding whether the order of the agency was reasonably supported by substantial evidence, the court looks to the evidence as developed in its own record, not to the record of the administrative hearing, and in effect substitutes its discretion and judgment for that of the agency.

Unlike those from other Texas administrative agencies, appeals from the rulings of the Savings and Loan Commission involving applications for a savings and loan charter no longer require a trial de novo. The Texas Supreme Court has held that the resolution of matters of pure public policy is an administrative function beyond the scope of the judiciary.⁶ Because the trial de novo requirement vested in the district court the power to redetermine an order of the Savings and Loan Commissioner on the basis of the preponderance of evidence, it was held to violate the separation of powers provision in the Texas Constitution.⁷ Since this ruling in *Gerst v. Nixon*,⁸ a district judge, in determining whether the Commissioner's order is supported by substantial evidence, may look only to the record of the original administrative hearing. In this manner the order of the Commissioner will now "stand or fall upon the evidence adduced and matters noticed at the Commissioner's hearing."⁹

Though the supreme court in the *Nixon* case struck down the de novo provisions of the "new" Savings and Loan Act, the remainder of the act was found to be consistent with the Texas Constitution.¹⁰ The effect of the 1964 enactment and this interpretation by the supreme court, nonetheless, imposed substantial procedural changes in the judicial review of the Commissioner's findings concerning applications for savings and loan charters.¹¹ Prior to *Nixon*, determination

4. *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938).

5. TEX. REV. CIV. STAT. ANN. art. 342-115(4) (1973).

6. *Chemical Bank & Trust Co. v. Falkner*, 369 S.W.2d 427, 432 (Tex. Sup. 1963).
See also *Davis v. City of Lubbock*, 160 Tex. 38, 57, 326 S.W.2d 699, 713 (1959).

7. *Gerst v. Nixon*, 411 S.W.2d 350, 353 (Tex. Sup. 1966).

8. 411 S.W.2d 350 (Tex. Sup. 1966).

9. *Id.* at 357.

10. *Id.* at 355.

11. It should be noted that the same basic standards governing applications for a savings and loan charter are also applicable to proposals for branch offices, though the criteria for granting approval for the latter are less exacting than the former. Lewis

of the validity of the Commissioner's order, based on the specific findings required by Section 2.08 of the Act, was open to the discretion of the district court. The Texas Savings and Loan Association Act states that all factual issues affecting the validity of the order

complained of shall be redetermined in such trial on the *preponderance of the competent evidence*, but no evidence shall be admissible which was not adduced at the hearing on the matter before the Commissioner or officially noticed in the record of such hearing.¹²

Though the wording in this section does leave room for doubt as to the reviewing court's discretion to admit "competent evidence," the opinion of the supreme court in *Nixon* points out that when considered in conjunction with other portions of the Act, the legislative intent of this section becomes reasonably clear.¹³ The requirement that the Commissioner keep a formal record of any hearing,¹⁴ and file a record of the proceedings held before him with the district court,¹⁵ indicates that it is the record of the administrative hearing which is to be considered by the reviewing court in determining whether or not the Commissioner's order is reasonably supported by substantial evidence.¹⁶

Because the statute permits the court conducting the judicial review to consider only that part of the Commissioner's record which constitutes *competent evidence*, there must be some standard for evaluating the evidence. The Texas courts have applied what is generally known as the residuum rule which *requires the reviewing court to set aside the finding of an administrative agency unless it is supported by evidence which would be admissible and of probative value in a common law jury trial, regardless of what the opposing evidence may be.*¹⁷ In making this evaluation the reviewing court is confronted with the question of whether all the evidence which is not legally competent under common law jury trial standards should be excluded from the administrative record. Unlike jurisdictions applying the residuum rule, the federal courts and the majority of the state courts consider such incompetent evidence if it meets certain other requirements. In these jurisdictions if the evidence appears to be sufficiently trustworthy to be

v. Gonzales County Sav. & Loan Ass'n, 474 S.W.2d 453, 456 (Tex. Sup. 1972); *Strain v. Lewis*, 461 S.W.2d 498, 501 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.).

12. TEX. REV. CIV. STAT. ANN. art. 852a, § 11.12(5)(b) (1964) (emphasis added).

13. *Gerst v. Nixon*, 411 S.W.2d 350, 357 (Tex. Sup. 1966).

14. TEX. REV. CIV. STAT. ANN. art. 852a, § 11.11(3) (1964).

15. TEX. REV. CIV. STAT. ANN. art. 852a, § 11.12(4) (1964).

16. *Gerst v. Nixon*, 411 S.W.2d 350, 357 (Tex. Sup. 1966).

17. K. DAVIS, ADMINISTRATIVE LAW § 14.10, at 274 (1958).

relied upon in the ordinary course of serious business affairs, it is admissible as legally competent, "provided there is other competent evidence looking in the same direction."¹⁸

Professor Davis, a noted authority on administrative law, points out that the state statutes are somewhat variable, but nearly all of them have tended to relax, in judicial review, the rules of evidence which apply in jury trials.¹⁹ He contends that there is a movement concerning evidence problems in both the judicial and the administrative processes toward: (1) replacing rules with discretion; (2) admitting all evidence that seems to the presiding officer relevant and useful; and (3) relying upon "the kind of evidence on which responsible persons are accustomed to rely in serious affairs."²⁰ The commissioners of the Uniform State Laws have also proposed some standards for the admission of legally competent evidence in the Model Administrative Procedure Act. Section 10 of that act empowers agencies to admit and give probative effect to evidence "if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."²¹ Perhaps effect should be given to the rules of privilege recognized by law, but "incompetent, irrelevant, immaterial, and unduly repetitious evidence" may be excluded.²² Where the findings are not supported by competent, material and substantial evidence, the reviewing court may reverse these findings in light of the entire record submitted.²³

VALIDITY OF THE FINDINGS

Because of the proliferation of both federal and state administrative agencies, the courts are inundated with trials and appeals from orders of these agencies. Whether the orders involve oil and gas reservoirs, trucking, banking, securities or the myriad of other fields regulated by government, they are the result of the extensive powers which Congress and the various legislatures have delegated to these agencies. These powers, being of a plenary nature, generally place the courts

18. Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 Sw. L.J. 239, 254 (1969) (emphasis added).

19. K. DAVIS, *ADMINISTRATIVE LAW* § 14.06, at 276 (1958).

20. *Id.* § 14.06, at 249.

21. F. COOPER, *STATE ADMINISTRATIVE LAW* § 10 (app.), at 814 (1965).

22. Since the proceedings before the Savings and Loan Commissioner have been described from time immemorial as being "informal," literally mountains of evidence, subject to every imaginable type of legal attack, have entered the records made before the Commissioner blessed only with the laconic remark, "We'll admit it for whatever it's worth." In looking over this "mountain," hearsay evidence forms the bulwark.

23. F. COOPER, *STATE ADMINISTRATIVE LAW* § 15 (app.), at 820-21 (1965).

in the position of mere arbiters, to decide whether or not the aggrieved party has been afforded due process of law. Since the orders involved in making these decisions are usually considered to be legislative,²⁴ the reviewing courts have followed a "hands-off" policy, provided that the orders are reasonable and are supported by substantial evidence. The decisions of the various boards and agencies deal with highly technical and complicated facts, which in the legislature's opinion can be best understood and evaluated by the "expert," who is, ironically, the very agency deciding the question involved.²⁵ To guarantee that the cases before the administrative agencies (acting in their quasi-judicial capacity) will be decided according to the evidence and the law, rather than from other arbitrary or extra-legal considerations, legislatures have required these quasi-judicial boards to make findings of fact in support of their decisions.²⁶ Where provisions for review are made, the findings of fact also serve to apprise the parties and the reviewing court of the factual basis of the agency's determination.²⁷ In this manner, it should become evident to all concerned whether the final order was based on legally competent evidence or on extra-legal considerations.

In evaluating the sufficiency of specific findings made by administrative agencies, the state courts reflect a remarkable uniformity in designating the general tests to be applied. In the application of these tests, the courts:

- (1) require that the findings include the basic facts; (2) require that the findings be sufficiently complete to make it clear that the agency considered all the relevant statutory factors; (3) refuse to accept findings that are cast too much in conclusionary terms; (4) remand findings that are too indefinite to permit the court to fulfill its appellate functions; (5) refuse to accept as 'findings' statements that are merely summaries of the evidence.²⁸

Texas, however, has no administrative procedure act. The tests applied to judicial review by this state's courts are, consequently, ex-

24. There is still some confusion in Texas as to whether the administrative agency is acting in a legislative or judicial capacity. See *Scott v. Texas State Bd. of Medical Examiners*, 384 S.W.2d 686 (Tex. Sup. 1964).

25. In an opinion commenting on the findings of the Interstate Commerce Commission, Mr. Justice Cardozo succinctly observed that, because of their lack of simplicity and clearness, it was left to the court to spell out, argue, and choose between the conflicting inferences. *United States v. Chicago, M., St. P.E.P. Ry.*, 294 U.S. 499, 510-11 (1935).

26. TEX. REV. CIV. STAT. ANN. art. 852a, § 11.11(4) (1964).

27. *Saginaw Broadcasting Co. v. FCC*, 96 F.2d 554, 559 (D.C. Cir.), cert. denied, 305 U.S. 613 (1938).

28. F. COOPER, STATE ADMINISTRATIVE LAW § 1, at 474 (1965).

tracted from pertinent statutory and case law.²⁹ Because the development of the savings and loan law in Texas is still in an evolutionary phase, questions serious enough to be determined on appeal have arisen only in the last few years.³⁰ The principal reason for this late development is the unusual manner in which administrative orders are reviewed. The absurd criterion employed by the state courts in evaluating the adequacy of the administrative findings is not *whether the agency actually hears and considers sufficient evidence* to reasonably support its action, but whether *at the time* the questioned order was entered, *there then existed* sufficient facts to justify the agency's order.³¹

Under Section 2.08 of the Savings and Loan Association Act, certain factual findings are required. The Commissioner is prohibited from approving a charter application unless he has affirmatively found that:

- (a) there is a public need for the proposed association; (b) the volume of business in the community in which the proposed association will conduct its business is such as to indicate that the association may be profitably operated; and (3) [sic] the operation of the proposed association will not unduly harm any existing association.³²

The task confronting the reviewing court, then, is the determination of whether these requisite circumstances were in existence at the time the questioned order was entered. If in fact they were, an order of the Commissioner approving a charter application should be deemed to be supported by sufficient findings.

Even in Texas, then, it is elementary that the purpose of the rule requiring the making of findings cannot be fulfilled unless the findings are couched in terms of basic facts; mere conclusory assertions are not sufficient.³³ The Austin Court of Civil Appeals, in *Gonzales County*

29. This procedure is a pity. See Reavley, *Substantial Evidence and Insufficient Review*, 23 Sw. L.J. 230, 250 (1969). In this article Justice Reavley points out that Texas has some 70 administrative agencies performing important legislative, executive and judicial functions. *Id.* at 239.

30. Even so, there are cases where the courts of this state have invalidated a number of decisions of the Railroad Commission issuing certificates of public convenience and necessity to motor carriers for failure to set forth "full and complete findings of fact" supporting the ultimate conclusions, as required by Article 911b, Section 5a(d) of Vernon's Annotated Texas Statutes (1964). See *Miller v. R.R. Comm'n*, 363 S.W.2d 244 (Tex. Sup. 1962); *Thompson v. R.R. Comm'n*, 150 Tex. 307, 240 S.W.2d 759 (1951); *Thompson v. Hovey Petroleum Co.*, 149 Tex. 554, 236 S.W.2d 491 (1951).

31. *Cook Drilling Co. v. Gulf Oil Corp.*, 139 Tex. 80, 82, 161 S.W.2d 1035, 1036 (1942).

32. *Gerst v. Nixon*, 411 S.W.2d 350, 358 (Tex. Sup. 1966).

33. F. COOPER, *STATE ADMINISTRATIVE LAW* § 4, at 477-78 (1965).

Savings & Loan Association v. Lewis,³⁴ held that such findings of the Commissioner did not meet the requirements of the statute.³⁵ The order must contain findings of basic facts as opposed to "mere factual, or mixed factual and legal, conclusions" if it is to accomplish the purpose of the legislature.³⁶ Further, the court pointed out that even though there may have been sufficient evidence to sustain any of the conclusions made by the savings and loan commissioner in approving an application to establish a branch office, the Commissioner was not relieved of his statutory duty to make and set out findings in support of his conclusions.³⁷ In conjunction with meeting these requirements, the Commissioner must also comply with the rules and regulations for savings and loan associations.³⁸ Where the Commissioner, in making his findings, *does set them forth in statutory language*, Section 11.11(4) of the Savings and Loan Act further requires that they "be accompanied by a concise and explicit statement of the underlying facts supporting the findings."³⁹ Conversely, where the findings are set forth in compliance with the Commissioner's own rules but not in a manner which embodies the language of the Savings and Loan Act, they need not be accompanied by a concise and explicit statement of the underlying facts.⁴⁰ The supreme court, affirming *Gonzales County*, reasoned that these latter findings are "largely of a factual nature capable of precise, objective measurement,"⁴¹ and "include and carry with them the supporting underlying facts"⁴² which either do or do not exist. It should be noted that several of the Commissioner's rules and regulations are themselves expressed in statutory language. Therefore, when such rules are a part of the findings, they necessarily become subject to the concise and explicit statement requirement of section 11.11(4).

Expanding the explicit statement requirement discussed in *Gonzales County*, the Supreme Court of Texas reversed the decision of the court of civil appeals in *Bay City Federal Savings & Loan Association v. Lewis*,⁴³ which had approved the Commissioner's order granting a

34. 461 S.W.2d 215 (Tex. Civ. App.—Austin 1970), *aff'd*, 474 S.W.2d 453 (Tex. Sup. 1971).

35. *Id.* at 217.

36. *Id.* at 218.

37. *Id.* at 219.

38. *Id.* at 219.

39. TEX. REV. CIV. STAT. ANN. art. 852a, § 11.11(4) (1964).

40. *Lewis v. Gonzales County Sav. & Loan Ass'n*, 474 S.W.2d 453, 457 (Tex. Sup. 1971).

41. *Id.* at 457.

42. *Id.* at 457.

43. 474 S.W.2d 459 (Tex. Sup. 1971).

charter to operate a savings and loan association. The supreme court characterized the blanket findings of the Commissioner as unsupported by any underlying statement of facts, and stated that the requirements of section 11.11(4) are still mandatory whether or not (1) the findings were contested on the merits; (2) lack of substantial evidence was urged; or (3) the petitioners alleged that they were harmed by the Commissioner's failure to comply with the law.⁴⁴ Discounting the lower court's conclusion that no benefit would be served by remanding the case to the Commissioner to set out the underlying facts to support a finding which was not contested,⁴⁵ the supreme court noted that the appellants and the lower court were not the only ones concerned with the Commissioner's orders and his failure to follow the procedure required by law. The *public* has an interest in the administrative decisions of state agencies, and it also has a general interest in the laws of the state being followed as they are written.⁴⁶

Another source of controversy arising from Section 11.11(4) of the Savings and Loan Act involves the distinction between the underlying facts (characterized as the "basic" facts) and the findings (or "ultimate" facts). That *basic* facts are the underlying facts which must be set forth as support for the *ultimate* facts is, apparently, a generally acceptable statement of the law. But, as Professor Cooper points out in his treatise on administrative law, it is often difficult to distinguish the ultimate from the basic facts.⁴⁷ In *Citizens of Texas Savings & Loan Association v. Lewis*,⁴⁸ the appellant assigned error to the action of the trial court in not holding the Commissioner's order invalid because of his failure to set out a concise and explicit statement of the underlying facts in support of his findings.⁴⁹ The appellant also contended that the issues had been decided on vague and conclusionary

44. *Id.* at 461.

45. *Id.* at 462.

46. *Id.* at 462.

47. F. COOPER, STATE ADMINISTRATIVE LAW § 2, at 475 (1965). In Texas

[t]he basic findings of the Commissioner relating to savings availability include at least the following: the number of people in the community to be served; the growth in population in the community in the past and the outlook for future growth in population; the percentage of households in the community with annual income of \$10,000.00 or more; the assets and general operating condition of existing savings and loan associations; and the basis of the economy and the outlook for future economic growth and development.

Citizens of Texas Sav. & Loan Ass'n v. Lewis, 483 S.W.2d 359, 363 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).

48. 483 S.W.2d 359.

49. *Id.* at 361.

language and not upon the underlying facts.⁵⁰ The Commissioner's order consisted primarily of the economic history of Baytown (the proposed location of the savings facility), with reference to population and population growth, the basis of its economy, the prospect for industrial growth, the residential construction, the banks and savings institutions presently serving the town and the state of their economic health. From these economic indicators (basic facts), the Commissioner concluded that there was a public need for the new facility, that the volume of business in the community indicated a probably profitable operation, and that the operation of the proposed association would not "unduly harm" any existing association (*ultimate facts*). The appellant claimed that this conglomeration of economic facts was expressed in a somewhat disjointed narrative style, objectionable as hearsay, and that the Commissioner had failed in his attempt to bolster the ultimate findings with the required basic facts. The court thought otherwise, however, citing the Supreme Court of the United States in *Colorado Interstate Gas Co. v. FPC*:⁵¹

The findings of the Commission in this regard leave much to be desired since they are quite summary *But the path which it followed can be discerned.* And we do not believe its findings are so vague and obscure as to make the judicial review contemplated by the Act a perfunctory process.⁵²

The court in *Citizens of Texas* did, however, recognize that it is difficult, under the administrative practices developed by the various agencies and courts in this state, to neatly bundle evidence into separate categories labeled basic findings or ultimate findings.⁵³ It is therefore apparent that although the theoretical standard exists, its practical application is elusive. The problem in admitting evidence is further compounded by evidence objectionable as hearsay.

THE ROLE OF HEARSAY

Because the hearings dealing with applications for charters of savings and loan associations, which include branch offices, generally involve voluminous documents, expert testimony, extensive records of economic history, and other data, the reviewing tribunal, in determin-

50. *Id.* at 363. The court, however, noted that "[b]asic facts by their very nature are often in the form of 'generalizations' or 'conclusions.'" *Id.* at 363.

51. 324 U.S. 581 (1945).

52. *Id.* at 595 (emphasis added).

53. *Citizens of Texas Sav. & Loan Ass'n v. Lewis*, 483 S.W.2d 359, 363 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).

ing if the findings are supported by substantial evidence, is often confronted with the issue of whether the record of the Commissioner's hearing contains hearsay evidence. In Texas, hearsay evidence is generally considered to be of no probative value, or more emphatically, no evidence at all, even where admitted without objection.⁵⁴ Under certain exceptions to this rule, however, hearsay evidence can be designated as admissible. One exception frequently encountered by the Savings and Loan Commissioner permits the admission of "publications of market prices and statistical compilations which are generally recognized as reliable and regularly used in a trade or specialized activity by those persons so engaged."⁵⁵ When such a predicate is laid, these publications are admissible to show the truth of the matter published.

In a recent case before the Savings and Loan Commissioner, *Southmore Savings & Loan v. Lewis*,⁵⁶ suit was brought in the district court to reverse an order granting application for a charter for a proposed association. Judgment was entered declaring the order valid and overruling all objections made by Southmore Savings and Loan concerning the admission of certain evidence. On appeal, the court of civil appeals reviewed the hearsay evidence admitted into the record and reversed the judgment of the trial court which has sustained the order of the Commissioner as being supported by substantial evidence.

Some of the evidence admitted by the Commissioner consisted of the testimony of a businessman (*not* considered to be an expert) employed in the city of the proposed institution. He was allowed to testify from what he had read in newspapers and information he had heard about town. He was also permitted to introduce a printed report purportedly prepared by private planning consultants and adopted by the city council, as a plan of redevelopment for the area. After reading excerpts from the report, relating primarily to forecasts of population growth, the witness was allowed to testify that he concurred in the views expressed therein, based upon his experiences and observations in business and as a resident of twenty-two years.

54. *Gerst v. Gibraltar Sav. & Loan Ass'n*, 413 S.W.2d 718, 723 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e., per curiam). Even official writings admissible in evidence may be necessarily hearsay and cannot serve to show that the Commissioner's order was supported by substantial evidence. TEX. REV. CIV. STAT. ANN. art. 3731a § 1 (Supp. 1974); *Benson v. San Antonio Sav. Ass'n*, 374 S.W.2d 423, 429 (Tex. Sup. 1963).

55. *Lewis v. Southmore Sav. Ass'n*, 480 S.W.2d 180, 186 (Tex. Sup. 1972).

56. 467 S.W.2d 226 (Tex. Civ. App.—Austin 1971), *rev'd*, 480 S.W.2d 180 (Tex. Sup. 1972).

Another segment of the evidence admitted was that of a research economist considered to be an expert in the field. His testimony comprised statistical abstracts and surveys collected by the United States Department of Commerce from all forms of government agencies, as well as other governmental publications and studies, none of which was made available to the adverse party. He was also permitted to introduce random excerpts, chosen by himself, from documents and an unidentified article. Over timely objections the witness stated that he had verified the facts and that in his "capacity as an expert economist" he could "say that the information contained in those [exhibits] were reasonably accurate."⁵⁷

In disclaiming the admissibility of this evidence, the court of civil appeals observed that while these sources may be considered valid testimony upon which an economic expert could base an opinion (even though the sources constitute hearsay), the opinion testimony of the expert must be based on facts proved or assumed to be sufficient in order to form a basis for the opinion of the expert. The court further stated that the expert's opinion itself cannot furnish the substantial facts needed to support his own conclusions. If the evidence upon which the opinion purports to be based is largely hearsay, nebulous, or of other species deemed unreliable, it should be excluded.⁵⁸

In commenting on the general admissibility of hearsay in such proceedings, the court of civil appeals stated:

It is neither practical, nor is it the function of the courts, to lay down rules fixing an inflexible level of tolerance for the percentage of hearsay and other incompetent evidence allowable in a record of administrative proceedings. But when the hearsay reaches such proportion that in the opinion of the court the action of the administrative agency was substantially influenced by the hearsay or other incompetent evidence, the order of the agency ought to be set aside.⁵⁹

57. *Id.* at 229.

58. *Id.* at 230. The Commissioner's admission of a document referred to by Dr. Pedger as the "Dorran Reports" highlights the obvious hearsay nature of the evidence. The makers of these reports were not present at the hearing, nor was the report itself made available—only random excerpts selected by Dr. Pedger. This outline of the hearsay nature of the testimony involved in the proceeding is not all inclusive. It does, however, demonstrate the reason for the court's conclusion that hearsay or other incompetent evidence will not become relevant and substantial merely because it is offered through an expert witness when the facts are not known to the witness as proven to be true.

59. *Southmore Sav. Ass'n v. Lewis*, 467 S.W.2d 226, 239 (Tex. Civ. App.—Austin 1971), *rev'd*, 480 S.W.2d 180 (Tex. Sup. 1972).

The court concluded that the record before them was "bloated with hearsay," and that any attempt to distill the reasonable and credible facts and opinions not colored by it would become an "unnecessarily burdensome task attended by results of doubtful complete accuracy."⁶⁰

The Supreme Court of Texas, however, reversed this decision and the judgment of the trial court upholding the order of the Commissioner was affirmed. The court observed that in Texas the hearsay rule applies in administrative hearings just as it does in the trial courts, but considerable discretion is permitted in allowing evidence to be introduced under the *liberal* exceptions to the hearsay rule.⁶¹ Accordingly, the expert may not rely merely on *any* hearsay, and though his source may be acceptable to the members of his profession, "it should be confirmed insofar as that is practical." There should be a necessity for allowing the hearsay information to be used by the expert, *but* when the information is not proven there must be *some* justification for receiving his opinion.

With respect to testimony which summarizes the contents of voluminous documents, the court stated that the witness may introduce testimony of his extractions, but the full records must be made available to the opposing party for inspection and cross-examination.⁶² It concluded that the record before the Commissioner reflected competent *direct evidence* of public need supporting his findings. Consequently, it was within the Commissioner's discretion to admit and consider the expert testimony according to its weight and credibility.⁶³ In passing on the non-expert testimony, the court found that it was competent legal evidence because it was based on the witness's extensive financial experience in the community, his knowledge and involvement in the planning of city activities, and his awareness of the city's growth.⁶⁴

In considering the opposing conclusions of the Texas Supreme Court and the court of civil appeals, the question arises as to what rule is to be followed in this state with respect to hearsay evidence before the Savings and Loan Commissioner.⁶⁵ At the outset, it can be safely said that hearsay of the rankest order is not necessarily fatal to the Commissioner's determination. It is also probably safe to assume that

60. *Id.* at 232.

61. *Lewis v. Southmore Sav. Ass'n*, 480 S.W.2d 180, 186 (Tex. Sup. 1972).

62. *Id.* at 187.

63. *Id.* at 188.

64. *Id.* at 186.

65. Whether the law in this respect differs from agency to agency I offer no opinion.

hearsay can be disregarded and the record upheld if there is direct competent evidence upon which the Commissioner can base his findings. The court of civil appeals in *Southmore*, however, found the record "bloated" with hearsay of "such proportion that in the opinion of the court the action of the administrative agency was substantially influenced by the hearsay or other incompetent evidence."⁶⁶ In overruling this contention, the finding of the supreme court leaves the unrelenting suspicion that, while paying lip service to the residuum rule, the law in Texas is actually much closer to that of the federal and the majority state rule, which grants the discretion to admit evidence trustworthy enough to be relied upon in the ordinary course of serious business affairs. Is there a possibility that the supreme court has somewhat inadvertently adopted the same test for the admissibility of hearsay evidence as it has for finding substantial evidence?

CONCLUSION

I have described the interdependence of the evidence submitted and the substantial evidence rule in the proceedings discussed. Adding to these the findings of the Commissioner, whether basic or ultimate, the evidence and the findings are subsumed into the substantial evidence rule—the ultimate test of the Commissioner's order. The syllogism to be drawn has two aspects—the pedantic and the practical application for the practitioner. In the former, the basic discussion is of evidence, its nuances and procedural aspects. The latter presents the "ground rules" faced by the practitioner.

From my vantage point on the Third Court of Civil Appeals, having written many of the opinions and having participated in nearly all of the savings and loan appeals for the past dozen years, it becomes apparent that the odds are greatly weighted against overturning the Commissioner's order. The appellate courts will make every effort to find the necessary evidence, to find the requisite "findings," scanty though they may be, and uphold the order. Undoubtedly, this attitude on the part of the courts stems from the legislative character of the order and, in all probability, is as it should be. Consequently, there is a lack of rigidity in the courts' "four corners" approach to the problem.

Reviewing the question of findings supported by varying degrees of hearsay evidence, it may be that the apparent—*though unad-*

66. *Southmore Sav. Ass'n v. Lewis*, 467 S.W.2d 226, 239 (Tex. Civ. App.—Austin 1971), *rev'd*, 480 S.W.2d 180 (Tex. Sup. 1972).

mitted—rule in Texas of relying upon the kind of evidence on which reasonable persons are accustomed to rely in serious affairs is the proper rule and completely compatible with the general scheme. The establishment of a savings and loan facility is basically a business venture and little more. Though it be tinged with a public interest, it is not accorded the same level of sanctity as one's life or personal freedom in a criminal trial or of property in a civil matter. There is, then, no reason the Commissioner and the courts should be compelled to a stricter standard of evidence than a prudent businessman would consider necessary.

It is apparent that the criteria are two-fold:

(1) The order of the Commissioner will, in all probability, be held to be supported by substantial evidence if the applicant can show by the record that the establishment of the desired facility is a good business venture using the standards generally acceptable to the savings and loan field; and

(2) With respect to the required findings, the order of the Commissioner will, in all probability, be upheld if the Commissioner, in the order, states his *reasons* for the findings.

Failing these, the order should fall.