NATIONAL ASSOCIATION OF REALTORS®

The Voice For Real Estate®

500 New Jersey Avenue, N.W.
Washington, DC 20001-2020
202.383.1194 Fax 202.383.7580
www.realtors.org/governmentaffairs

Thomas M. Stevens, CRB, CRS, GRI
President

Dale A. Stinton, CAE, CPA, CMA, RCE
EVP/CEO

GOVERNMENT AFFAIRS
Jerry Giovaniello, Senior Vice President
Walter J. Witek, Jr., Vice President

HEARING BEFORE THE

HOUSE GOVERNMENT REFORM

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, FINANCE AND ACCOUNTABILITY

ON

OFFICE OF THE COMPTROLLER OF THE CURRENCY'S DECISIONS TO ALLOW NATIONAL BANKS TO ENGAGE IN REAL ESTATE DEVELOPMENT, OWNERSHIP AND MERCHANT BANKING

WRITTEN TESTIMONY OF THE

NATIONAL ASSOCIATION OF REALTORS®, SEPTEMBER 27, 2006

Chairman Platts, Representative Towns, and Members of the Subcommittee, my name is Tom Stevens, and I am the former President of Coldwell Banker Stevens (now known as Coldwell Banker Residential Brokerage Mid-Atlantic) – a full-service realty firm specializing in residential sales and brokerage. Since 2004, I have served as senior vice president for NRT Inc., the largest residential real estate brokerage company in the nation.

As the 2006 President of the National Association of REALTORS®, I am here to testify on behalf of our more than 1.3 million REALTOR® members who are involved in residential and commercial real estate as brokers, sales people, property managers, appraisers, counselors and others engaged in all aspects of the real estate industry. Members belong to one or more of some 1,400 local associations/boards and 54 state and territory associations of REALTORS®. Additionally, they can join one of our many institutes, societies and councils to enhance their expertise and network with other professionals globally. Working for America's property owners, NAR provides a forum for professional development, research and the exchange of information among its members, and with the public and government for the purpose of preserving the free enterprise system and the right to own real property. I appreciate the opportunity to share our views on the Office of the Comptroller of the Currency's (OCC) real estate decisions.

NAR Opposes OCC Real Estate Development Rulings

In December 2005, the OCC announced it was authorizing national banks to engage in real estate development, ownership and merchant banking through three separate interpretive rulings. The first decision allows PNC Bank to develop a project involving retail space, offices, a hotel, and 32 condos (for immediate sale to make the rest of the project feasible). The second decision approves Bank of America's request to develop a luxury hotel in which less than half of the rooms will be use for its own business purposes. And the third decision authorizes Union Bank of California to own 70 percent of the equity interest in windmills and the associated real estate, under the pretext that the ownership interest was taken in connection with financing the project.

NAR is extremely concerned that the OCC's December 2005 decisions (issued via interpretive letters) authorizing national banks to invest in real estate projects involving the development of office buildings, hotels, residential condominiums and windmill farms inappropriately expand the powers of national banks to engage in real estate development and merchant banking.[1] Since these OCC interpretive letters became public, NAR and other industry participants have urged Congress to conduct oversight hearings on the Comptroller's decisions as well as examine whether or not the OCC has become too beholden to the banks they regulate – the same banks that fund the agency's operating budget – without any real accountability to the Treasury or to the U.S. Congress. NAR is concerned that the OCC is expanding congressionally established bank powers – in essence, creating law – without public notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.

The OCC has repeatedly claimed that the three rulings have nothing to do with real estate brokerage by national banks. We accept that notion, at least for today, and have never stated that the OCC's December letters permit national banks to engage in real estate brokerage. What we have stated and what we still firmly believe is that the OCC's actions set in motion a process that will result in the regulator authorizing national banks to engage in real estate brokerage, which is currently prohibited. Such activities will markedly increase the risk exposure of national banks and threaten the safety and soundness of the banking system. Moreover, permitting national banks to engage in real estate brokerage and management undermines the longstanding, Congressionally-mandated separation between banking and commerce. These same concerns, by the way, apply to state banks with "wild card" authority to engage in any activities permitted for national banks.

NAR maintains the OCC actions represent a marked departure from what is permitted by the National Bank Act, the OCC's regulations and previous OCC decisions and underscore our concern that the rulings will inevitably lead to an irreparable breach in the wall separating banking and commerce. The Comptroller and other OCC officials have defended the decisions in response to congressional inquiries, in meetings and in correspondence with NAR and to the

[1] OCC Interpretive Letter No. 1044 (December 5, 2005) (Condominium Letter); OCC Interpretive Letter No. 1045 (December 5, 2005) (Hotel Letter); OCC Interpretive Letter No. 1048 (December 21, 2005) (Windmill Letter).

media. Yet despite the Comptroller's statements alleging a "fundamental misunderstanding"[2] of the effect of the decisions, numerous banking experts see the OCC's actions as a significant expansion of real estate powers of national banks.[3] Indeed, two former Comptrollers, Eugene Ludwig and John D. Hawke, have publicly acknowledged that the OCC letters move the bar.[4]

The OCC's power exertion is by no means limited to the December decisions. In January 2004, the OCC dismissed public comments and Congressional concerns and published a final regulation preempting state banking and real estate lending laws, including state licensing laws, for national banks and their operating subsidiaries.[5] NAR was a loud opponent of this rule because we can envision the OCC, in its continuing march to expand national bank powers, permitting national banks to develop residential and commercial real estate under the rubric of "bank premises," which was the basis for two of the December interpretive letters, and allowing banks to simply post a "For Sale" sign in order to sell such assets without the need of a licensed real estate professional.

It is important to note that the U.S. Supreme Court has agreed to consider an appeal from the Sixth Circuit that upheld the OCC's preemption rules with respect to operating subsidiaries. The case at issue, *Watters v. Wachovia Bank, N.A. and Wachovia Mortgage Company*, originates from a decision by Michigan's banking commissioner to prohibit Wachovia's operating subsidiary from engaging in mortgage lending because it was not properly registered pursuant to the laws of Michigan.[6] Wachovia maintained (and still maintains) that Michigan mortgage licensing registration statutes at issue are preempted by the National Banking Act and the OCC's regulations. Not surprisingly, the OCC has defended Wachovia at the District and Circuit court level. NAR is one of 24organizations and 51 state attorneys general that have filed *amicus curiae* briefs with the Supreme Court arguing that the OCC has misused its power and

[2] OCC News Release 2006-3 (January 11, 2006).
[3] Banks Might Widen Real-Estate Role," *Wall Street Journal* (January 9, 2006); "OCC Moved the Line on Realty in UBOC Letter," *American Banker* (January 11, 2006). "Tough Enforcement Belie Effort to Expand Bank Powers," *Financial Services Policy Bulletin*, Stanford Washington Research Group (January 25, 2006). "Will Banks Become Land Developers?" CNN Money (January 9, 2006) at http://money.cnn.com/2006/01/09/news/companies/banks_real_estate.
[4] "In Focus: Firm, But Not Specific, On Banks in Real Estate," *American Banker* (January 23, 2006).
[5] 12 C.F.R. §§ 7.4007(b)(2)(vi); 7.4008(d)(2)(i).
[6] S. Ct. Docket No. 05-1342

misinterpreted federal law by extending preemption privileges to operating subsidiaries. NAR's brief focused on the implication of the Sixth Circuit's decision on every activity in which the OCC has found – or, in the future, finds – that a national bank can engage. This could include real estate brokerage, for which national banks are actively seeking as a permissible activity for their financial subsidiaries.

Ultimately, we foresee the OCC stringing together such authority with decisions that permit national banks to participate in negotiating sale transactions on behalf of real estate investors and authorize national banks to engage in full service real estate brokerage free from any controls and protections established by state and local laws.[7] NAR strongly believes that such a result does not serve consumers and businesses well, breaches the separation of banking and commerce and is not in the public interest.

Background

The National Bank Act.

The National Bank Act imposes strict limits on the ability of national banks to own real estate.[8] Specifically, a national bank may purchase, hold and convey real estate under the following narrow circumstances "and for no others":

- Property necessary for accommodating its business.
- Property mortgaged to the bank as security for debts previously contracted.
- Property conveyed to the bank in satisfaction of debts previously contracted.
- Property purchased at sales under judgments, decrees or mortgages held by the bank or purchased to secure debts owed to the bank.

National banks are required to dispose of real estate acquired in satisfaction of debts owed to it by customers within five years.[9] National banks are also permitted to invest in bank premises in

[7] OCC Interpretive Letter No. 880 (December 16, 1999). (". . . a bank's involvement in the sale of [the real estate] could entail . . . participating in the structuring of the transaction (including negotiations with the buyer) . . . Competitors in the real estate advisory and management business offer such negotiation services. Your letter states that unless banks can offer the same range of services requested by clients, clients will search for an alternative provider of such services.")

[8] 12 U.S.C. § 29.

an amount up to the bank's capital.[10] The Supreme Court has long held that the purpose of these restrictions is to deter national banks from "embarking in hazardous real estate transactions," ensure the maintenance of liquidity and prohibit the accumulation of large amounts of property by national banks.[11]

OCC Regulations.

The OCC has adopted several regulations that address the power of national banks to purchase or hold interests in real estate. OCC regulations circumscribe the nature and circumstances under which national banks may extend credit secured by liens on real property.[12] Generally, a national bank may lend to a third party and take as security for the loan a lien on or interest in the real estate.[13] OCC regulations define a "loan or extension of credit" as "a bank's direct or indirect advance of funds to or on behalf of a borrower based on an obligation of the borrower to repay the funds or repayable from specific property pledged by or on behalf of the borrower."[14] NAR argues the OCC's letter permitting a national bank to invest in windmill farms does not comport with these regulations.

The OCC has also adopted regulations concerning national bank investment in real estate that is necessary for the transaction of its business.[15] Accordingly, a national bank may invest in the following types of real estate:

- Real estate that the bank occupies as bank premises.
- Real estate acquired and intended, in good faith, for use in future expansion.
- Parking facilities.
- Residential property for the use of bank officers and employees who are:

---

[9] *Id*. With OCC approval, the five year holding period may be extended for up to an additional five years if the bank has made a good faith attempt to dispose of the property or if disposal within the five year period would be detrimental to the bank.
[10] 12 U.S.C. § 371d. The limit is increased to 150 per cent of capital for banks that are "well-capitalized" and possess a high CAMEL (*i.e.*, supervisory) rating of 1 or 2.
[11] *Union National Bank v. Matthews*, 98 U.S. 621, 626 (1879).
[12] 12 C.F.R. Part 34.
[13] 12 C.F.R. § 34.3(a).
[14] 12 C.F.R. § 32.2(k).
[15] 12 C.F.R. § 7.1000.

    - o located in remote areas where suitable housing at a reasonable price is not readily available; or
    - o temporarily assigned to a foreign country, including foreign nationals temporarily assigned to the U.S.
- Property for use of bank officers, employees, or customers, or for the temporary lodging of such persons in areas *where suitable commercial lodging is not readily available*, provided that the purchase and operation of the property qualifies as a deductible business expense for Federal tax purposes.[16] (emphasis added)

OCC regulations also set out the procedures governing OCC review of applications from national banks to invest in bank premises.[17] The regulations define bank premises as:

- Premises that are owned and occupied (or to be occupied, if under construction) by the bank or its subsidiaries.
- Capitalized leases and leasehold improvements, vaults, and fixed machinery and equipment.
- Remodeling costs to existing premises.
- Real estate acquired and intended, in good faith, for use in future expansion.
- Parking facilities that are used by customers or employees of the bank, its branches, and its consolidated subsidiaries.[18]

OCC's December Rulings Go Beyond "Bank Premises"

The OCC has issued numerous interpretive letters and decisions regarding the authority of national banks to acquire real estate for use in the banking business. The OCC has consistently stated that "[t]he key point is that a bank must hold the property for banking premises and not for real estate speculation."[19] NAR adamantly maintains the OCC's December 2005 real estate rulings violate this principle.

[16] 12 C.F.R. § 7.1000(a)(2)(i)-(v).
[17] 12 C.F.R. § 5.37.
[18] 12 C.F.R. § 5.37(c).
[19] OCC Interpretive Letter No. 758 at 4 (April 5, 1996).

The Hotel Interpretive Letter

In December 2005, the OCC concluded that a national bank was permitted to develop a [luxury] hotel to provide lodging for the bank's out of area visitors under the guise of "bank premises."[20] In the bank's request for permission to develop this real estate project, it stated that the purpose for building the hotel, which NAR subsequently learned is a Ritz-Carlton hotel, was to reduce its annual lodging expense for bank visitors and to "improve the overall quality of [the] experience" for bank visitors.

The hotel would have approximately 150 rooms, and the bank indicated that approximately 37.5 percent of the rooms (only 56 rooms in the hotel) would be used by persons related to the bank's business. The OCC suggests that this level of usage exceeds what has been "expressly permitted in the case law on bank premises."[21] The cases cited by the OCC reveals that the holdings did not involve the banks' level of usage of bank premises. In the first case, *Wingert v. First National Bank of Hagerstown*, a national bank's shareholder alleged that the bank's tearing down of its existing office building and the erection of a new six story office building at the same location exceeds the powers granted by law.[22] The court stated:

> It should be noticed that this is not the case of a national bank about to purchase real estate for the purpose of erecting thereon a six-story building as a business enterprise. In the present case the lot of ground has belonged to the bank since its organization . . . It is therefore simply a question whether or not the bank which is and has been for many years the rightful owner of a lot of ground improved by its bank building can alter and enlarge the improvement on it so as to furnish better accommodation for the business of the bank . . .[23]

The Hotel Letter involves the development of a hotel, which of course is far removed than the erection of an office building on property which was long owned by the bank and on which the

[20] OCC Interpretive Letter No. 1045 (December 5, 2005) (Hotel Letter).
[21] Hotel Letter at 3.
[22] *Wingert v. First National Bank of Hagerstown*, 175 F. 739 (4th Cir. 1909).
[23] *Wingert* at 741.

bank's building was which already located. Accordingly, NAR believes that *Wingert* does not support the OCC's conclusion.

The OCC cites a second case, *Wirtz v. First National Bank and Trust Company*, which they rely on as recognizing the authority of national banks to occupy space in bank premises and lease excess premises to tenants. As we concluded with *Wingert*, NAR maintains the OCC's use of *Wirtz* to justify the hotel decision is misplaced. The issue decided in *Wirtz* was whether the minimum wage requirements of the Fair Labor Standards Act covered employees of a national bank's subsidiary which operated and maintained a building complex owned by the national bank.[24] While the case stated that the bank occupied 20.7 percent of the total space, contrary to the OCC's statement, there is nothing in the ruling to suggest that it was "recognizing" the bank's authority to occupy the space and lease the remaining space. The court's holding that the act applied to the operating subsidiary's employees cannot in any manner be construed as the court recognizing the authority of a national bank to occupy a certain percentage of space as bank premises since that was not at issue.

The OCC's regulation regarding ownership of property provides that a national bank may invest in real estate if the property is used for temporary lodging in areas *where suitable commercial lodging is not readily available.*[25] The Hotel Letter is devoid of any indication that suitable commercial lodging is not readily available in the area. In fact, NAR's own scan of the area in the immediate vicinity of the bank location reveals a 434-room Marriott hotel directly adjacent to the bank, which also has 20,000 sq ft of meeting space.[26] Interestingly enough, Marriott International Inc. also owns the Ritz-Carlton franchise. The only justification the OCC gives in its interpretive letter is that the hotel will reduce the bank's lodging expense for bank visitors and "improve the overall quality of [the] experience" for bank visitors. This rationale hardly justifies the OCC ignoring its own regulation, specifically the agency's 1996 "temporary lodging" rule providing that national banks may invest in real estate that is *necessary* for the transaction of its business.[27]

---

[24] *Wirtz* at 643-644.
[25] 12 C.F.R. § 7.1000(a)(2)(v).
[26] Charlotte Marriott City Center, 100 West Trade Street, Charlotte, North Carolina.
[27] 61 *Fed. Reg.* 4849 (February 9, 1996).

NAR believes that, in order for the OCC to be consistent with their own 1996 "temporary lodging" regulation they should have conditioned approval on the bank's demonstration that commercial lodging is not readily available in the area. Our position is bolstered by a review of the language of the "temporary lodging" regulation and of the regulatory history of the rulemaking in this matter. The rule proposed by the OCC in 1995 provided that a national bank may invest in real estate that is *necessary* for the transaction of its business.[28] Among the types of real estate which the OCC proposed as necessary for the transaction of a national bank's business was commercial lodging *where suitable lodging is not readily available*. The proposal read as follows:

> (a) **Bank Premises**- (1) General. Under 12 U.S.C. 29, a national bank may invest in real estate that is necessary for the transaction of its business.
> (2) Type of real estate. This real estate includes, but is not limited to:
>
> * * *
>
> (iv) Property for the use of bank officers, employees, or customers or for the temporary lodging of such persons in areas where suitable commercial lodging is not readily available, provided that the purchase and operation of the property qualifies as a deductible business expense for Federal tax purposes.[29]

When the proposed rule was adopted by the OCC in 1996, the provision was altered to read as follows:

> (a) **Investment in real estate necessary for the transaction of business**-
> (1) General. Under 12 U.S.C. 29(First), a national bank may invest in real estate that is necessary for the transaction of its business.

[28] 60 *Fed. Reg.* 11924, 11934 (March 3, 1995).
[29] Proposed § 7.100(a)(1)(2)(iv). 60 *Fed. Reg.* at 11934.

> (2) Type of real estate. For purposes of 12 U.S.C. 29(First), this real estate includes:
>
> * * *
>
> (v) Property for the use of bank officers, employees, or customers, or for the temporary lodging of such persons in areas where suitable commercial lodging is not readily available, provided that the purchase and operation of the property qualifies as a deductible business expense for Federal tax purposes.[30]

The final rule contains two significant changes from the proposal. The OCC added the caption "Investment in real estate necessary for the transaction of business" in the title to §7.1000 in addition to retaining it in the body of the rule to underscore the importance and significance that a national bank may invest in real property only if it is *necessary* for the transaction of its business. NAR believes the regulation clearly means that it is necessary to provide temporary lodging *when suitable commercial lodging is not readily available*. It would be illogical to conclude that it is also *necessary* to provide such facilities when suitable commercial lodging is readily available. If that were the case, there would have been little reason to adopt the regulation with any restriction at all. Nothing in the Hotel Letter reflects consideration by the OCC of whether suitable commercial lodging is readily available such that the projects are necessary for the transaction of the bank's business. NAR argues that if the OCC desires to permit national banks to invest in hotels, it must, in accordance with the Administrative Procedure Act (APA), solicit public comment on a proposed change to its existing rule rather than expand national bank real estate investment powers by administrative fiat. And until such time when the OCC follows the APA to amend its 1996 "temporary lodging" regulation, we believe the hotel decision remains inconsistent with, and contrary to, the OCC's lawfully promulgated rules.

The Condominium Interpretive Letter

In December 2005, the OCC also determined that a national bank was permitted to develop a mixed-use building that would provide 12 floors of office space for the bank's use, ground floor

[30] 61 *Fed. Reg.* 4849, 4862 (February 9, 1996).

retail and restaurant space, five floors of hotel space (158 rooms) and four floors of condominiums (32 units).[31] The bank's request for approval to develop the real estate project indicated that, *over time*, it expects to occupy *approximately* 25 percent of available office space and 10 percent of the hotel rooms. With regard to the estimated office space that the bank speculated it will eventually occupy, NAR is troubled by the fact that the OCC never questioned or conditioned the approval on meeting a deadline for achieving a certain occupancy goal. In fact, it seems illogical and inappropriate for the OCC to suggest that this transaction is consistent with prior OCC precedents when the bank itself admits that it will occupy only a "small" percentage of the space and will within some unspecified time occupy only 25 percent of the office space. NAR argues that the only way the OCC can conclude that such an open-ended estimation is consistent with prior OCC precedents is by ignoring the law and its own precedents.

If the test the OCC applied were based on the percentage of use or occupancy in determining a national bank's good faith use for banking purposes, we do not understand how it could conclude that an occupancy percentage that is characterized as "small," and an open-ended assertion that the bank will occupy a specified percentage of the premises at some unspecified date constitutes "good faith" use of the premises. Under such circumstances, it appears that the OCC will accept *any* percentage of occupancy as an indication of a national bank's good faith. Accordingly, we must conclude that the OCC does not seriously consider a bank's occupancy percentage when considering bank premises requests.

An activity identified in the Condominium Letter that is of particular concern to NAR is the bank's proposal that in order to make the office space development deal more "economically feasible" it needed to sell the 32 residential condominiums, which are in no way related to the business of a national bank. While we appreciate the bank's statement that their bank-owned residential condominiums would be sold through an unaffiliated real estate broker, it has no force of law because the OCC did not qualify in the interpretive letter that the bank *must use a broker, or that the use of a broker is required as a matter of law* by the National Bank Act or OCC regulations. Instead, the OCC simply acknowledged the bank's intent, which any other national bank could argue, does not establish policy requiring national banks to use unaffiliated

[31] OCC Interpretive Letter No. 1044 (December 5, 2005) (Condominium Letter).

companies to sell their assets. Regardless, NAR strongly believes that there is no basis in law or regulation that permits a national bank to develop and own residential condominiums for sale to the public.

Another concern to NAR about the Condominium Letter is the "economically feasible" catch-all asserted by the bank and seemingly unquestioned by the OCC. To NAR, this sounds as if any national bank can *justify virtually any type of real estate development project* on the basis that the bank's equity investment is necessary to yield the desired economic result. It seems strange to us that the OCC would permit a national bank to breach limitations imposed by the National Bank Act simply to achieve a target return on its investment. NAR firmly believes that by relying upon the rubric that the development of residential condominiums promotes the economic viability of the project, the OCC has opened the door to permitting national banks to engage in *any type of commercial or residential real estate development* so long as the bank can contend that such activities promote the economic success of the project.

The Windmill Interpretive Letter

In a letter to counsel for Union Bank of California, N.A., the OCC considered the bank's request to make an equity investment in approximately 70 percent of a limited liability company (LLC) that would operate a wind energy project.[32] The LLC would purchase wind turbines and interests in real estate needed to generate electricity. The OCC indicated that the transaction was structured as an equity investment rather than a loan in order to take advantage of federal renewable electricity production tax credits. The bank would be repaid in installments consisting of income provided from revenues produced by the project and by the tax credits. The OCC concluded that the equity investment was permissible because it was the functional equivalent of bank financing.

To justify the equity investment, the OCC relied upon a 1999 decision in which it permitted a national bank to establish an operating subsidiary to invest in an entity that would rehabilitate historic structures in order to take advantage of federal rehabilitation tax credits.[33] The OCC

[32] OCC Interpretive Letter No. 1048 (December 21, 2005).
[33] OCC Corporate Decision 99-07 (March 26, 1999).

indicated that, in substance, the transaction was the provision of construction financing which would be repaid from operating income and through tax credits. What the OCC failed to mention is that in the 1999 corporate decision the bank provided construction financing and used the tax credits to reduce the origination fee and interest rate charged on the loan. Moreover, upon completion of the project, the construction loans would be converted to permanent loans. In contrast, the windmill decision does not involve a loan by the bank. The bank would make only the equity investment. The transaction described in the Windmill Letter is substantially different than the facts presented in the 1999 corporate decision and thus, NAR believes it does not support the OCC's conclusion in the Windmill Letter. The OCC also cites a 1998 corporate decision as support for its conclusion, but a review of that ruling reveals that the bank in that transaction also had provided financing in the form of extending actual loans to the borrowers.[34] Moreover, the corporate decision indicates that under the terms of the agreement between the parties, the borrower was obligated to repay the bank the amount advanced plus interest.[35] No such obligation is present in the Windmill Letter.

The OCC has long held that to be regarded as a financing, the borrower must be obligated to repay principal and repayment of principal must be contractually assured.[36]
This principle was reaffirmed in a ruling issued in 2000 in which the OCC stated that "[r]equiring the borrower to repay principal preserves the fundamental nature of the bank's activity, *i.e.*, that of a lender."[37] In addition, the borrower's obligation may not be conditioned on the profit, income or earnings of the business enterprise.[38] NAR contends the Windmill Letter undermines these longstanding principles.

First, the windmill decision does not require the LLC to repay the bank the amount of its investment. This, of course, is inconsistent with the OCC's position reflected in longstanding rulings that to be regarded as a financing, the borrower must be obligated to repay principal.

---

[34] Corporate Decision No. 98-17 (March 23, 1998) ("The Bank has extended credit of approximately $320,000 to a limited liability company that owns and operates oil and gas leases . . .")
[35] *Id.* at 3 ("The Bank has advanced funds to the Borrower and would receive repayment of principal plus interest.").
[36] OCC Interpretive Letter No. 244 (January 26, 1982). 1982 OCC Ltr. LEXIS 18.
[37] OCC Corporate Decision No. 2000-02 (February 25, 2000). The decision also provides that "[i]t is necessary that the borrower be obligated to repay principal in order to preserve the nature of the underlying transaction, *i.e.*, making a loan."
[38] 1982 decision. at *3.

Second, the OCC indicates that the bank will receive periodic payments from the revenues produced by the project and tax credits. NAR believes this conflicts with the OCC's position, also reflected in the 1982 ruling, that the borrower's obligation may not be conditioned on the profit, income or earnings of the business enterprise.[39] In contrast, the bank in the windmill matter will be paid solely from project revenues and tax credits. Again, NAR maintains this represents a marked departure from prior OCC rulings.

Furthermore, NAR believes the windmill ruling also conflicts with other OCC precedents. For example, in 1988, the OCC considered whether a national bank could invest in a limited partnership that was organized to invest in entities that would own, operate and renovate real estate. The OCC's interpretive letter stated that while 12 U.S.C. § 29 grants national banks some limited authority to purchase, hold and convey real estate for bank premises and in a debt-previously contracted context "[t]hat limited authority does not include generally owning, operating, and renovating real estate (note that the statute provides no *de minimis* exception)."[40] In that request, the OCC rejected the bank's attempt to characterize the limited partnership interest as nothing more than the "substantial equivalent" of a secured loan with an "equity kicker."[41] For similar reasons, we argue that the OCC's attempt in the windmill decision to treat the bank's investment in the LLC as the equivalent of bank financing fails.

Conclusion

In January, NAR approached the OCC to communicate concerns with the December 2005 decisions. NAR was very clear with our concerns, specifically, that the decisions lay out a roadmap for the continued expansion of national banks to develop and sell commercial and residential real estate. The OCC responded that the decisions contain limits which preclude the consequence we anticipate will be forthcoming. The OCC also indicated to NAR that it fully recognizes the limits associated with the three decisions and will apply them consistently to all national banks. Needless to say, NAR's concerns remain unsatisfied as the OCC has not amended the letters to establish any meaningful limitations on national bank real estate activities.

[39] *Id.*
[40] OCC Interpretive Letter No. 435 (June 30, 1988). 1988 OCC Ltr. LEXIS 97 at *3.
[41] *Id.* at *4.

In our view, the OCC has opened the door, and all but invited in, national banks to engage in widespread real estate development that breaches the fundamental separation of banking and commerce, as long as they can make an argument that the project constitutes bank premises in some minor way. Such expansion will dramatically increase the risk exposure of national banks and threaten the safety and soundness of the nation's banking system. Accordingly, we ask Congress to urge the Comptroller to reconsider these December 2005 rulings and direct the OCC to cease from taking any future actions that have the intended or unintended result of expanding bank powers to engage in real estate development. NAR also encourages Congress to be vigilant regarding future OCC decisions that violate congressional intent to keep banking and commerce separate.

Thank you for your attention to this matter that is of such great public importance. I will be happy to answer any questions you may have.