National Banks in the Commercial Real Estate Market: Alarm over the OCC's Recent Expansion of National Bank's Powers May Be Premature

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National Banks in the Commercial Real Estate Market: Alarm over the OCC’s Recent Expansion of National Banks’ Powers May Be Premature

I. INTRODUCTION

The Office of the Comptroller of the Currency (OCC) recently permitted national banks to own a hotel,1 a mixed-use development that includes a hotel and condominiums,2 and an equity interest in a limited-liability corporation (LLC) that will operate a windmill farm, which includes an indirect interest in the real estate under the windmills.3 The National Association of Realtors (NAR)4 believes that with these rulings, the OCC has “set in motion a process that will inevitably lead to national banks becoming actively involved in real estate development and brokerage activities.”5 Additionally, Representatives Paul Kanjorski and Barney Frank, incoming chairman of the House Financial Services Committee in the new Congress,6 raise issues not addressed in the debate between the OCC and the NAR.7 In

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5. Letter from Thomas M. Stevens, President of NAR, to John C. Dugan, Comptroller of the Currency, at 1-2 (Jan. 27, 2006), available at http://www.realtor.org/banks_and_commerce.nsf/docfiles/L-06Jan-dugan.pdf/$FILE/L-06Jan-dugan.pdf [hereinafter NAR Letter 1 to OCC] (“OCC actions represent a marked departure from what is permitted by the National Bank Act, the OCC’s regulations and previous OCC rulings regarding the types of real estate activities in which national banks may engage.”).
7. See Press Release, House Financial Services Committee (Democrats), Kanjorski and Frank Seek Clarification on OCC Interpretive Letters (Jun. 27, 2006),
response, the OCC contends that these rulings are within its statutory authority and long-standing precedents such that they "absolutely do not open the door for national banks to engage in broad-based real estate development activities" and "have absolutely nothing to do with real estate brokerage by national banks."8 In support of the OCC's position, a former Comptroller of the Currency concedes more than the agency's current administration by asserting that though these rulings are based on precedent, they are nonetheless an "evolution" that "may push things a little bit on the edges."9

This Note examines the recent OCC rulings and finds that the questions raised by this incremental increase in national banks' power may, but do not necessarily, reflect the OCC's willingness to continue to expand national banks' entry into commerce.10 As background for the debate between the OCC and the NAR, Section II of this Note provides the details of each of the three national bank proposals authorized by the OCC rulings as well as the statutory authority on which they are based.11 Sections III and IV then discuss and evaluate the major issues related to the approval of the luxury hotel, the mixed-use development, and the equity interest in an LLC that will operate a windmill farm.12

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10. See infra notes 13-233 and accompanying text.

11. See infra notes 13-46 and accompanying text.

12. See infra notes 47-213 and accompanying text.
II. BACKGROUND

A. Recent OCC Interpretive Letters

Over the past two years, PNC Bank (PNC) proposed to build and own a hotel and condominiums, Bank of America proposed to build and own a luxury hotel, and Union Bank of California (Union Bank) proposed to own 70% of a windmill farm. In December 2005, the OCC approved each of these proposals in Interpretive Letters 1044 (PNC Mixed-Use Development Letter), 1045 (Bank of America Hotel Letter), and 1048 (Union Bank Wind Farm Investment Letter), respectively. The OCC later released OCC Interpretive Letter No. 1048a to clarify the “restrictions and limitations” associated with the transaction approved in the Union Bank Wind Farm Investment Letter.

1. PNC Mixed-Use Development Letter

The OCC authorized PNC to expand its headquarters complex in downtown Pittsburgh by adding a third office building. PNC explained that it needed a third building, with a proposed completion date of 2009, because its other two buildings were at capacity and its leases for a substantial amount of nearby office space would expire in 2013.

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14. Mixed-Use Letter, supra note 2, at 1; Hotel Letter, supra note 1, at 1; Wind Farm Letter, supra note 3, at 1. The names of the banks were redacted when the OCC published these Interpretive Letters but subsequent news reports have indicated the identity of the banks. See Barbara A. Rehm, OCC Moved the Line on Realty in UBOC Letter, AM. BANKER, Jan. 11, 2006, at 1 (naming Union Bank of California (Union Bank)); Michael Schroeder, Banks Might Widen Real-Estate Role, WALL ST. J., Jan. 9, 2006, at A3 (naming PNC Financial Services Group and Bank of America).
15. OCC Interpretive Letter No. 1048a, at 1 (Feb. 27, 2006) [hereinafter Wind Farm Letter Clarification].
17. Mixed-Use Letter, supra note 2, at 1-2 (noting that 100% of its first headquarter building and 92% of its second headquarter building are occupied).
The mixed-use development of this building will include ground-level retail stores and a restaurant, 158 hotel rooms on five floors, thirty-two residential condominium units on four floors, and twelve floors of office space. PNC anticipates occupying 25% of the office space and 10% of the hotel rooms on an annual basis. PNC will not retain an interest in the condominiums but intends to sell the units through an independent broker to help finance the project.

2. Bank of America Hotel Letter

The OCC authorized Bank of America to develop a Ritz-Carlton Hotel in its headquarters in downtown Charlotte, N.C. Bank of America will construct the hotel on a lot next to the headquarters building that it currently uses as a parking lot. Bank of America claims that the hotel is necessary to reduce its annual lodging expenses for its visitors. The hotel will have approximately 150 rooms, and Bank of America anticipates occupying 37.5% of the rooms on an annual basis.

PNC further provides that mixed-use development is required for the proposed building because it is necessary to finance the project in the downtown market and it will help rejuvenate the downtown area since the development will take place on lots that currently have run-down buildings. Id. at 3.

18. Id. at 2.

19. Id. The bank represents that it will not operate the hotel but will contract with a national hotel management company to run the “day-to-day” operations. Id.

20. Id. at 2-3.


22. Hotel Letter, supra note 1, at 1. Bank of America will remain the sole owner of all real estate and improvements associated with the development but will hire an independent contractor to build the hotel and will contract with a national hotel management company to run the operations. Id.

23. Id. at 1-2 (providing as justification that Bank of America required 72,000 business nights for its visitors in Charlotte in 2004).

24. Id. at 2. Bank of America chose to develop the hotel with 150 rooms because that is the smallest number of rooms that a national hotel management company will operate and because it expects its visitors at times will occupy significantly more than 50% of all rooms. Id.

25. Id.
3. Union Bank Wind Farm Investment Letter

The OCC authorized Union Bank to acquire a 70% equity stake in an LLC that will operate a wind energy farm.\textsuperscript{26} The LLC will acquire the windmills and an interest in the underlying real estate.\textsuperscript{27} Revenue for the project will come from the sale of electricity generated by the windmills and from renewable energy production tax credits under § 45 of the Internal Revenue Code.\textsuperscript{28} Union Bank’s equity stake is necessary to take advantage of these tax credits.\textsuperscript{29} Union Bank will not participate in the management and operation of the company or the sale of energy.\textsuperscript{30}

Union Bank’s financing of the LLC in the form of an equity interest is contingent upon a full credit review of the transaction in accordance with the bank’s standard loan underwriting criteria.\textsuperscript{31} “The bank [will] not share in any appreciation in value of its interest in the wind energy company or any of the company’s real property or personal property assets.”\textsuperscript{32}

The LLC will repay the bank’s funding in regular installments over a period of ten years.\textsuperscript{33} At the end of this period, Union Bank will sell its interest at book value.\textsuperscript{34} If the company does not perform as expected, the bank has the option to sell its interest and can force a vote to liquidate the company.\textsuperscript{35}

\textsuperscript{26} Wind Farm Letter, \textit{supra} note 3, at 1.
\textsuperscript{27} \textit{Id.} at 2. The LLC will also be responsible for the management and operation of the company. \textit{Id.}
\textsuperscript{29} Wind Farm Letter, \textit{supra} note 3, at 2.
\textsuperscript{30} Wind Farm Letter Clarification, \textit{supra} note 14, at 1.
\textsuperscript{31} Wind Farm Letter, \textit{supra} note 3, at 2.
\textsuperscript{32} Wind Farm Letter Clarification, \textit{supra} note 14, at 1.
\textsuperscript{33} Wind Farm Letter, \textit{supra} note 3, at 2. The ten-year holding period is necessary to take advantage of revenues generated by the tax credits. \textit{Id.}
\textsuperscript{34} Wind Farm Letter Clarification, \textit{supra} note 14, at 2.
\textsuperscript{35} \textit{Id.} at 1-2.
B. Statutory Authority for OCC Approval

1. National Banks Can Maintain an Interest in Real Estate

In approving the proposals in the PNC Mixed-Use Development Letter and the Bank of America Hotel Letter, the OCC relied primarily on 12 U.S.C. § 29 of the National Bank Act (NBA). The OCC found the banks’ proposals permissible under the first provision of § 29, which reads: “[a] national banking association may purchase, hold, and convey real estate ... as shall be necessary for its accommodation in the transaction of its business ... .” With respect to the Union Bank Wind Farm Investment Letter, the OCC determined that the transaction is not prohibited under § 29, since holding interests in real estate is “an integral part of an authorized banking activity.”

2. National Banks Can Invest in Banking Premises

In both the PNC and the Bank of America proposals, the OCC interpreted 12 U.S.C. § 371d to establish that the banks are authorized to invest in their respective premises. Section 371d provides the following:

No national bank ... shall invest in bank premises, or in the stock, bonds, debentures, or other such obligations of any corporation holding the premises of such bank, or make loans to or upon the security of any such corporation—

36. Hotel Letter, supra note 1, at 1; Mixed-Use Letter, supra note 2, at 1.
38. Id.
40. Wind Farm Letter, supra note 3, at 6-7. The OCC cites Corporate Decision No. 99-07 and Corporate Decision No. 98-17 as authority for this proposition. Id. at 6.
41. Hotel Letter, supra note 1, at 2 n.1; Mixed-Use Letter, supra note 2, at 2 n.1.
(1) unless the bank receives the prior approval of the Comptroller of the Currency (with respect to a national bank) . . . ;
(2) unless the aggregate of all such investments and loans, together with the amount of any indebtedness incurred by any such corporation that is an affiliate of the bank, is less than or equal to the amount of the capital stock of such bank . . . .

The OCC approved both PNC and Bank of America’s proposed real estate development projects, finding that each qualified under the second exception of the statute as investments in their proposed bank premises.

3. National Banks Have Incidental Powers Necessary to Carry on the Business of Banking

In approving the proposal in the Union Bank Wind Farm Investment Letter, the OCC stated that 12 U.S.C. § 24(Seventh) “provides national banks with broad authority to make loans or other extensions of credit.” Section 24(Seventh) states that “a national banking association . . . shall have power . . . [t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking . . . .” In the letter, however, the OCC failed to state the specific “business of banking” for which § 24(Seventh)’s incidental powers are necessary.

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43. See Mixed-Use Letter, supra note 2, at 2 n.1 (providing that aggregate investment in PNC’s premises was approximately $1.2 billion, and its capital and surplus was approximately $6.3 billion); Hotel Letter, supra note 1, at 2 n.1 (stating that aggregate investment in Bank of America’s premises was approximately $6.7B, and that its capital and surplus was approximately $102B). Further, since each can qualify their respective investments under the second exception, there is no requirement that they receive prior approval of the Comptroller of the Currency under the first exception. Id.
44. Wind Farm Letter, supra note 3, at 2.
46. See Wind Farm Letter, supra note 3.
III. ANALYSIS OF THE OCC APPROVAL OF PNC MIXED-USE DEVELOPMENT AND BANK OF AMERICA HOTEL LETTERS

A. Federal Regulations Regarding “Real Estate” and “Bank Premises” Apply to PNC’s and Bank of America’s Proposals Because the Regulations Contain Nonexclusive Lists

1. Meaning of “Real Estate” Under 12 C.F.R. § 7.1000

Created by the OCC to regulate national banks’ power to maintain an interest in real estate under 12 U.S.C. § 29, 12 C.F.R. § 7.1000 provides that:

[A] national bank may invest in real estate that is necessary for the transaction of its business . . . .

[T]his real estate includes:
(i) Premises that are owned and occupied (or to be occupied, if under construction) by the bank, its branches, or its consolidated subsidiaries;
(ii) Real estate acquired and intended, in good faith, for use in future expansion;

. . .

(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 [f]ederal tax purposes . . . . 47

The OCC uses 12 C.F.R. § 7.1000 as authority for the Bank of America Hotel Letter by interpreting this regulation to mean that the “[r]eal estate necessary for the accommodation of a bank’s business includes real estate other than that upon which bank office buildings are located.” 48 This interpretation is based on the

OCC’s contention that the list of enumerated examples in the regulation is nonexclusive and further, that including in the nonexclusive list “temporary lodging” for the use of “bank officers, employees, or customers” suggests that Bank of America’s hotel for its employees should fall within the same meaning of “real estate.” The OCC did not make specific findings related to whether suitable temporary lodging was otherwise available or whether the property qualifies as a deductible business expense for federal tax purposes. Nonetheless, the OCC contends that such limitations do not preclude the Bank of America hotel from being considered real estate within the meaning of this regulation since the list is nonexclusive.

The NAR, however, disagrees with the OCC. It claims that the list is exclusive and that Bank of America has failed to address the two limitations under 12 C.F.R. § 7.1000(a)(2)(v), the regulatory provision that is most applicable to the bank’s proposal. When this rule was proposed in 1995, it stated that the type of real estate in which it would be acceptable for national banks to hold an interest “include[d], but [was] not limited to” the enumerated list. When adopted as a final rule in 1996, the phrase


50. See Hotel Letter, supra note 1, at 2 n.2.

51. See OCC Response to NAR Letter 1, supra note 8; Letter from Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel OCC, to Thomas M. Stevens, President of NAR (March 2, 2006) [hereinafter OCC Response to NAR Letter 2] (citing “proposed section 7.1000 provides an updated, nonexclusive list of real estate the OCC considers as bank premises for purposes of 12 U.S.C. [§] 29” from 60 Fed. Reg. 11,924) (on file with N.C. Banking Inst.).

52. See OCC Response to NAR Letter 1, supra note 8, at 4.


54. Id.

55. See Consolidation and Simplification of Current Regulations Regarding
"but is not limited to" was deleted from the proposal.\textsuperscript{56} The NAR contends that removal of a phrase that expressly makes the list nonexclusive evidences a clear intent to make the list exclusive.\textsuperscript{57} The OCC counters that the phrase "but not limited to" was removed because the term "includes" sufficiently conveys the intended meaning of a nonexclusive list.\textsuperscript{58}

The preamble from the proposed regulation supports the OCC's construction, stating that "[p]roposed § 7.1000 provides an updated, nonexclusive list of real estate the OCC considers as bank premises for purposes of 12 U.S.C. [§] 29."\textsuperscript{59} While the preamble from the final regulation fails to expressly describe the list as "nonexclusive," it does provide that "[t]he final rule . . . simplifies and clarifies § 7.1000's description of the types of real estate that may be held pursuant to the authority granted by 12 U.S.C. [§] 29," suggesting that the list remains nonexclusive.\textsuperscript{60} Moreover, when the designation of whether a list is exclusive or nonexclusive is significant enough for the OCC to express its intent in the \textit{Federal Register}, which was the case in the preamble to the proposed regulation,\textsuperscript{61} it follows that the OCC would also express its intent to change such a designation in the final regulation as published in the \textit{Federal Register}.\textsuperscript{62} Because no such change in designation was

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\textsuperscript{57} NAR Letter 2 to OCC, \textit{supra} note 53, at 6.

\textsuperscript{58} OCC Response to NAR Letter 2, \textit{supra} note 51, at 4 (citing "proposed section 7.1000 provides an updated, nonexclusive list of real estate the OCC considers as bank premises for purposes of 12 U.S.C. [§] 29" from 60 Fed. Reg. 11,924).

\textsuperscript{59} See Consolidation and Simplification of Current Regulations Regarding Permissible Ownership of Real Property by National Banks, 60 Fed. Reg. at 11,925 (emphasis added).

\textsuperscript{60} See Consolidation and Simplification of Current Regulations Regarding Permissible Ownership of Real Property by National Banks, 61 Fed. Reg. at 4850 (emphasis added).

\textsuperscript{61} See Consolidation and Simplification of Current Regulations Regarding Permissible Ownership of Real Property by National Banks, 60 Fed. Reg. at 11,925.

made, the OCC is most likely correct in construing the list of "real estate" under 12 C.F.R. § 7.1000 as a nonexclusive list. 63


The OCC developed 12 C.F.R. § 5.37 to regulate national banks' power to invest in banking premises under 12 U.S.C. § 371d.64 This regulation states that the definition of bank premises "includes the following: ... [p]remises that are owned and occupied (or to be occupied, if under construction) by the bank, its branches, or its consolidated subsidiaries ..." or "[r]eal estate acquired and intended, in good faith, for use in future expansion ...."65

Similar to its arguments regarding "real estate," the NAR contends that since the phrase "includes the following" is used in the definition of "bank premises" in 12 C.F.R. § 5.37,66 this list is also exclusive, and, as such, the OCC's use of "bank premises" in referring to Bank of America's hotel and PNC's hotel and condominiums is incorrect.67 The previous "real estate" analysis providing that the OCC most likely intended the phrase "includes the following" to be nonexclusive,68 coupled with the lack of conclusive legislative intent to the contrary,69 however, suggests that the OCC is probably also correct in construing the list of "bank premises" under 12 C.F.R. § 5.37 as a nonexclusive list.70

63. See supra notes 53-61 and accompanying text.
64. See 12 C.F.R. § 5.37 (2000).
65. Id.
66. Id.
67. NAR Letter 2 to OCC, supra note 53, at 6 (referring to 61 Fed. Reg. 60,342 (Nov. 27, 1996)).
68. See supra notes 53-63 and accompanying text.
70. See supra notes 53-61 and accompanying text.
3. Remaining Ambiguity from the OCC's Interpretation that Hotel Ownership is "Necessary for [a National Bank's] Accommodation"

Even if the "real estate" list under 12 C.F.R. § 7.1000 is nonexclusive, owning a hotel must still be considered "necessary for [the] accommodation" of PNC's and Bank of America's respective banking businesses. Representative Kanjorski and Frank, making the distinction between owning the hotel building and owning the hotel, state that the OCC has failed to "explain why 'owning' a hotel (as opposed to simply leasing the space to a third-party[-]owned hotel company) is 'necessary for [a national bank's] accommodation in the transaction of its business.'" In hopes of gaining further clarification from the OCC on this issue, Kanjorski and Frank ask the OCC whether the banks will be responsible for upfitting the space by purchasing furniture, painting the walls, and building the pool and whether the banks will "reap the profit – or pay the loss – if the hotel is sold or proves unsuccessful." The OCC has not yet responded to these questions. Any future response the OCC provides to these questions will help to indicate the extent to which the agency intends to allow national banks to enter commerce.

Moreover, while the OCC has permitted PNC and Bank of America to each own a hotel in the city where its respective headquarters is located, the extent to which the OCC will allow national banks such as PNC and Bank of America to own hotels in other cities remains unclear. In a recent interview, Julie Williams, lead lawyer of the OCC, was asked whether the OCC would also permit Bank of America to own hotels in other major

73. Id.
75. See House Press Release, supra note 7.
76. Rehm, supra note 9, at 3.
places of business such as New York, San Francisco, and Boston. 77 Ms. Williams responded, "[n]ot necessarily, no."78

B. PNC and Bank of America Have the Authority to Lease and Sell Excess Bank Premises

1. Brown v. Schleier as Authority to Lease Excess Bank Premises
Under the NBA

The OCC’s primary authority for the ability of national banks to maximize the utility of their banking premises by leasing real estate is the Eight Circuit’s decision in Brown v. Schleier, which was affirmed by the U.S. Supreme Court. 79 The OCC cites the following excerpt from Brown in the PNC Mixed-Use Development and Bank of America Hotel Letters:

When an occasion arises for an investment in real property for either of the purposes specified in the statute, the [NBA] permits banking associations to act as any prudent person would act in making an investment in real estate, and to exercise the same measure of judgment and discretion. The act ought not to be construed in such a way as to compel a national bank, when it acquires real property for a legitimate purpose, to deal with it otherwise than a prudent landowner would ordinarily deal with such property. 80

The agency also cites several cases and OCC decisions that cite to Brown as a major source of authority. 81 Under this authority, the OCC has granted PNC the ability to lease its office

77. Id.
78. Id.
79. Hotel Letter, supra note 1, at 3; Mixed-Use Letter, supra 2, at 3-4.
81. OCC Response to NAR Letter 2, supra note 51, at 3.
space" and both PNC and Bank of America the ability to rent their hotel rooms.\footnote{Mixed-Use Letter, \textit{supra} note 2, at 3-4.}

The NAR argues that the OCC's use of \textit{Brown} with respect to both proposals "does nothing to advance [the OCC's] position."\footnote{Hotel Letter, \textit{supra} note 1, at 3; Mixed-Use Letter, \textit{supra} note 2, at 3-4.} The NAR contends that while \textit{Brown} supports a bank's authority to purchase and lease "property needed for business," it cannot be used by the OCC as authority since it does not provide a specific percent-occupancy requirement.\footnote{NAR Letter 2 to OCC, \textit{supra} note 53, at 4.}

The issue addressed in \textit{Brown} is whether a national bank exceeds its authority under the NBA by entering into a lease of office space to a non-bank tenant.\footnote{\textit{Id.}} The Eighth Circuit held that banks have the power to lease and purchase property as long as they act in good faith.\footnote{\textit{Brown v. Schleier}, 118 F. 981, 983 (8th Cir. 1902), affd, 194 U.S. 18 (1904).} This "good faith" requirement recognized in \textit{Brown} was originally introduced by the Supreme Court in \textit{Union National Bank v. Matthews} as a fundamental limitation under the NBA.\footnote{\textit{Id.}} This limitation was intended "to keep the capital of the banks flowing in the daily channels of commerce[,] to deter them from embarking in hazardous real estate speculations[,] and to prevent the accumulation of large masses of such property in their hands . . . ."\footnote{Union Nat'l Bank v. Matthews, 98 U.S. 621, 626 (1879).}

In decisions that cite \textit{Brown}, percent of bank occupancy is but one factor used to measure good faith.\footnote{\textit{Id.}} Contrary to the NAR's argument, the court in \textit{Brown} was not required to address the issue of percent occupancy because it had already determined that the bank exceeded its authority under its charter; the bank had spent three times the amount permitted by charter covenant in developing a building.\footnote{\textit{See, e.g.}, Wingert v. First Nat'l Bank, 175 F. 739, 741 (4th Cir. 1909) (suggesting that good faith is not purchasing real estate for the purpose of entering into a business venture), \textit{appeal dismissed}, 223 U.S. 670, 672 (1912).} Consequently, the NAR has failed to
refute the OCC's use of Brown as authority for the approval of the Bank of America and PNC proposals.  

2. 1985 OCC Ruling as Authority to Sell Excess Bank Premises Under the NBA

As discussed above, national banks' authority to lease under the NBA was established by Brown. In contrast to this long-standing precedent on which the PNC approval and several other OCC rulings rely, the precedent cited by the OCC as a national banks' authority to sell under the NBA is an OCC ruling from 1985. This ruling permits national banks to sell excess commercial condominium space and directly cites the NBA as its authority for allowing the sale.

The NAR attempts to dismiss this ruling as authority for the approval of the PNC proposal by arguing that the office condominiums in this proposal cannot be equated to the residential condominiums being developed by PNC. The residential character of PNC's condominiums, however, does not undermine the authority of this ruling since other OCC rulings have authorized leasing excess residential condominium space.

The main significance in allowing PNC to sell residential condominiums is that the sale is an integral part of financing the overall mixed-use development project. Whether the OCC's approval of this proposal suggests that the OCC may be willing to permit the sale of any part of a mixed-use development as long as it is necessary to finance the project, however, remains to be seen.

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92. See supra notes 84-91 and accompanying text.
93. See, e.g., Wingert v. First Nat'l Bank, 175 F. at 741.
95. Id.
96. NAR Letter 1 to OCC, supra note 5, at 6.
97. OCC Interpretive Letter, at 1 (Jan. 21, 1993); OCC Interpretive Letter, at 1 (July 8, 1993).
98. Mixed-Use Letter, supra note 2, at 3.
99. See Mixed-Use Letter, supra note 2, at 4 (citing OCC Interpretive Letter (Aug. 14, 1985) as authority for national banks to sell condominiums, but without discussing the extent to which such sales are considered necessary as part of financing the overall development).
C. The Percent of Bank Premises to be Occupied by PNC is Within Past Case Law Precedent but Not Within Past OCC Precedent

Prior case law has permitted banks to occupy as little as 16.7% of the real property,\textsuperscript{100} while prior OCC rulings have allowed occupancy as low as 22%.\textsuperscript{101} The OCC is justified in relying on this cited authority,\textsuperscript{102} but its approval of the PNC proposal is not entirely within past precedent.\textsuperscript{103}

1. Approval of PNC Proposal Not Entirely Within Past Precedent

The Bank of America proposal clearly meets all of the minimum thresholds from the cited cases and OCC rulings;\textsuperscript{104} Bank of America expects to occupy 37.5% of all hotel rooms on an annual basis and does not indicate any reason for delay in occupying these rooms once development is completed.\textsuperscript{105} The NAR rightly does not contest this proposal on percent-occupancy grounds.\textsuperscript{106}

In contrast, the PNC proposal does not satisfy all of these thresholds as the OCC contends.\textsuperscript{107} The OCC's statement that PNC will occupy 25% of its proposed complex is incorrect.\textsuperscript{108} PNC represents that it will occupy 25% of twelve floors of office space, 10% of the five floors of hotel space, and 0% of the four floors of residential condominiums.\textsuperscript{109} The OCC argues that the

\textsuperscript{100} See Wingert v. First Nat'l Bank, 175 F. 739, 740 (4th Cir. 1909) (permitting a bank to occupy one of six floors of an office building), appeal dismissed, 223 U.S. 670, 672 (1912); see also, Wirtz v. First Nat'l Bank & Trust Co., 365 F.2d 641, 642 (10th Cir. 1966) (allowing a bank to occupy 20.7% of an office complex).
\textsuperscript{101} OCC Interpretive Letter No. 1034, at 2 (Apr. 1, 2005); see also OCC Conditional Approval No. 298, at 6 (Dec. 15, 1998) (permitting bank to occupy “at least” 25% of office complex).
\textsuperscript{102} See infra notes 127-34, 140-41 and accompanying text.
\textsuperscript{103} See infra notes 107-16 and accompanying text.
\textsuperscript{104} See supra notes 100-103 and accompanying text.
\textsuperscript{105} Hotel Letter, supra note 1, at 2.
\textsuperscript{106} See NAR Letter 1 to OCC, supra note 5, at 4-5; NAR Letter 2 to OCC, supra note 53, at 2-7.
\textsuperscript{107} See infra notes 108-16 and accompanying text.
\textsuperscript{108} See infra notes 109-16 and accompanying text.
\textsuperscript{109} Mixed-Use Letter, supra note 2, at 2.
condominiums should not be considered when determining overall percent occupancy because once they are sold they will no longer be part of the bank premises. The OCC fails to provide OCC rulings in support of this argument and the fact remains that the condominiums, at least initially, are part of the bank premises. Thus, using PNC's estimates, the overall percent occupancy for its complex is 16.7%. Although consistent with the threshold permitted by case law, this value is below the minimum thresholds reflected in the OCC rulings that are used in support of the PNC proposal. Assuming arguendo that the OCC establishes precedent in support of the condominiums not being taken into consideration, the resulting overall percent occupancy of 20.6% still falls short of the minimum thresholds in the cited OCC rulings.

In addition to percent occupancy not being supported by OCC precedents, the PNC proposal provides for an occupancy timeframe that is not supported by case law or OCC precedents. The initial occupancy rates from the cited case law and OCC rulings are at least the same as the minimum thresholds represented by these decisions. In contrast, PNC will have to wait four years from the completion of the development before it can begin to transfer employees from nearby office space with expiring leases. Until then, PNC only anticipates to occupy a "small" percent of the office space.

110. See OCC Response to NAR Letter 1, supra note 8, at 5-6.
111. See id.; OCC Response to NAR Letter 2, supra note 51.
112. See supra note 109 and accompanying text (occupying 3.5 out of twenty-one total floors yields 16.7% occupancy).
114. See supra note 101 and accompanying text.
115. See supra note 109 and accompanying text (occupying 3.5 out of seventeen floors yields 20.6% occupancy).
116. See supra note 101 and accompanying text.
117. Compare infra note 118 and accompanying text (providing lowest initial occupancy of 16.7%), with infra notes 119-20 and accompanying text (providing initial occupancy of less than 16.7%).
118. See supra notes 100-101 and accompanying text.
119. Mixed-Use Letter, supra note 2, at 1-2 (providing 2009 as expected completion date and 2013 as the year when leases would begin expiring in surrounding office space).
120. Id. at 2.
2. The NAR Attempts to Discount the Authority Cited by the OCC

In *Wingert v. First National Bank*, the court established the lowest occupancy threshold of all cited authorities—16.7%. The NAR attempts to distinguish this decision from both proposals by claiming that *Wingert* requires long-term ownership of the property in question. The trade group contends that neither Bank of America nor PNC has met this condition. The NAR bases this argument on the court’s framing of the issue in *Wingert* as

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 and at the same time provide offices which can be rented to tenants.

The OCC responded by contending that the discussion of “longstanding” ownership in *Wingert* was irrelevant to the court’s holding with respect to 12 U.S.C. § 29. In support, the agency refers to the court’s discussion of the second complaint in the case, which involves a violation of § 29 but fails to mention “longstanding” ownership.

The *Wingert* court cites *Brown* as authority for a banks’ ability to improve land purchased or leased in accordance with the

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121. See supra notes 100-101 and accompanying text.
122. See infra notes 123-34 and accompanying text.
123. See NAR Letter 1 to OCC, supra note 5, at 4-5 (providing that *Wingert* is distinguishable from the Bank of America proposal); NAR Letter 2 to OCC, supra note 53, at 3-4 (providing that *Wingert* is distinguishable from the PNC proposal).
125. OCC Response to NAR Letter 1, supra note 8, at 2-3.
126. Id. at 3. Even if “longstanding” ownership were a requirement, the OCC contends Bank of America and PNC would satisfy this requirement. OCC Response to NAR Letter 2, supra note 51, at 2 (noting that PNC has held its property since 1982 and 1998 and Bank of America has held its property since 1994).
NBA. Thus, the court should also be aware of the good-faith requirement discussed in Brown. In framing the issue of the case, the court is presumably providing that the good-faith requirement has been met such that the issue “is . . . simply a question whether or not the bank . . . can alter and enlarge the improvement on [its land] so as to furnish better accommodation for the business of the bank and the same time provide offices which can be rented to tenants.” It characterizes the bank as “the rightful owner” of the land “for many years” to emphasize that the bank’s acts are not speculative. The court further provides that if the bank were “about to purchase real estate with the purpose of erecting . . . [a] building as a business enterprise,” such an act would be speculative, and consequently not in good faith.

The court’s treatment of good faith in Wingert suggests that the period of time that a bank holds the land to be developed can indicate whether a bank’s intentions are speculative. Contrary to the NAR’s argument, however, it does not create a requirement that the property must be “long held” before it can be developed. Thus, Wingert’s 16.7% threshold supports the OCC’s approval of the PNC and Bank of America proposals, and the NAR has failed to make a successful distinction.

In addition to attempting to distinguish the recent OCC’s rulings from Wingert, the NAR also attempts to dismiss the OCC ruling with the lowest occupancy threshold. The NAR argues that this OCC ruling cannot be relied on as “longstanding OCC precedent” since it was issued April 1, 2005. The OCC argues that this ruling has value as OCC precedent because it is based on

128. See Brown v. Schleier, 118 F. 981, 984 (8th Cir. 1902), aff’d, 194 U.S. 18 (1904).
130. Id.
131. Id.
132. See supra notes 130-31 and accompanying text.
133. See supra notes 127-31 and accompanying text.
134. See supra notes 121, 123-24, 127-33 and accompanying text.
135. See NAR Letter 1 to OCC, supra note 5, at 6.
136. Id.
and consistent with the long-standing precedent of Brown, Wingert, and Wirtz.\footnote{137}

Assuming arguendo that the OCC ruling has value as precedent even though it is not long-standing, the value that the precedent provides is probably not what the OCC intended.\footnote{138} The OCC's selection of this ruling and another OCC ruling as authority for banks' occupancy thresholds, coupled with its approval of the PNC proposal, suggests a recent downward trend in such thresholds.\footnote{139} The rulings cited by the OCC are dated December 15, 1998, and April 1, 2005, and have thresholds of 25% and 22% respectively.\footnote{140} In addition to supporting that the OCC is acting outside of OCC precedents that established a lower limit of 22% occupancy, the PNC Mixed-Use Development Letter, issued nearly eight months after the most recent OCC precedent, suggests a continued willingness by the OCC to lower the occupancy threshold.\footnote{141} This apparent trend provides valuable insight into the OCC's potential courses of action in the future.\footnote{142}

Allowing banks to occupy a lower percent of the overall space and also to sell part of a mixed-use development to finance the overall project suggest that the OCC is creating greater incentives and opportunities for national banks to enter the commercial real estate market.\footnote{143} While these recent rulings

\begin{enumerate}
\item[137.] OCC Response to NAR Letter 1, supra note 8, at 5.
\item[138.] See infra notes 139-42 and accompanying text.
\item[139.] See Mixed-Use Letter, supra note 2, at 1, 4 n. 9 (approving the PNC proposal and citing OCC Interpretive Letter No. 1034 (Apr. 1, 2005) and OCC Conditional Approval No. 298 (Dec. 15, 1998) as authority for bank to lease 78% and 75% of space in bank premises, respectively).
\item[140.] See OCC Interpretive Letter No. 1034, supra note 101, at 2; OCC Conditional Approval No. 298, supra note 101, at 6.
\item[141.] See supra notes 101, 112, 140 and accompanying text.
\item[142.] See Mixed-Use Letter, supra note 2, at 1, 4 n. 9 (approving the PNC proposal and citing OCC Interpretive Letter No. 1034 (Apr. 1, 2005) and OCC Conditional Approval No. 298 (Dec. 15, 1998) as authority for bank to lease 78% and 75% of space in bank premises, respectively).
\item[143.] See Will Banks Become Land Developers?, CNNMONEY.COM, Jan. 9, 2006, http://money.cnn.com/2006/01/09/news/companies/banks_real_estate/index.htm (describing the OCC's approval of the PNC and Bank of America projects as "a move that could make it easier for banks to compete within the commercial real estate market[, since i]n the past, banks were only allowed to develop commercial real estate if the buildings were to be predominantly occupied by employees doing bank business."); see also Schroeder, supra note 14 ("Big national banks are potentially major players in the commercial real-estate market based on the powers
represent only a small step in this direction, continued expansion of banks' entry into commerce may have serious consequences.\textsuperscript{144} With "access to cheaper capital," banks would have the ability to dominate brokerage markets.\textsuperscript{145} Additionally, encouraging national banks to maintain an even higher percentage of loans in the "volatile commercial real-estate market" would impair overall bank capital when the economy slows.\textsuperscript{146}

IV. ANALYSIS OF UNION BANK WIND FARM INVESTMENT LETTER

A. Unclear Whether Union Bank Has Specific Authority to Make "Loans and Other Extensions of Credit" Under 12 U.S.C. § 24(Seventh)

For 12 U.S.C. § 24(Seventh)'s incidental power to be authorized, it must be "necessary to carry on the business of banking.").\textsuperscript{147} The statute provides a nonexclusive list of the types of banking activities for which incidental powers might be necessary.\textsuperscript{148} In the Union Bank Wind Farm Investment Letter, the OCC failed to state the specific "business of banking" for which the incidental powers in question were necessary.\textsuperscript{149} The agency focuses on § 24(Seventh) as authority for "loans or other extensions of credit," but its use of the phrase "part of, or incidental to, the business of banking" makes it unclear whether the OCC is treating Union Bank's investment as part of the business of banking or incidental to it.\textsuperscript{150} Assuming that the OCC is treating the investment as part of the business of banking, "loaning money on personal security" is the banking activity from this list that is most relevant to the Union Bank proposal.\textsuperscript{151}
In addition to § 24(Seventh), the OCC also appears to rely on 12 U.S.C. § 371(a). The OCC's use of the phrase "loans or [] extensions of credit," which is contained in § 371(a) but not in § 24(Seventh), suggests that the OCC may be relying on § 371(a) to authorize § 24(Seventh)'s incidental power. Establishing that national banks can secure loans with real property, § 371(a) reads as follows:

Any national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 18(o) of the Federal Deposit Insurance Act [12 U.S.C. § 1828(o)] and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.

Applying § 371(a) to the Union Bank proposal, "loaning money on personal security" under § 24(Seventh) would specifically refer to a national banks' power under § 371(a) to "make . . . loans or extensions of credit secured by liens on interests in real estate."

If the OCC is treating "loans or other extensions of credit" as part of the business of banking, Union Bank's investment must be characterized as a loan or sufficiently equivalent to a loan to rely on § 24(Seventh) and § 371(a). Additionally, Union Bank's security of its investment must be characterized as a lien on an interest in real estate or sufficiently equivalent to such in order to be permissible pursuant to § 371(a). In the Union Bank Wind Farm Investment Letter, the OCC discusses several measures that Union Bank uses to secure its investment, such as the ability to

152. See Wind Farm Letter, supra note 3, at 2-3.
153. Id. at 2.
157. See supra note 156. This issue is addressed in the following section. See infra notes 162-203 and accompanying text.
force a vote to liquidate the company;\textsuperscript{159} however, none of these measures can be considered the equivalent of a lien.\textsuperscript{160} Thus, any use of § 371(a) by the OCC in support of the Union Bank proposal is incorrect, and the specific authority to which 12 U.S.C. § 24(Seventh)’s incidental power is pursuant is lacking.\textsuperscript{161}

\textbf{B. Union Bank’s Equity Interest in a Wind Farm LLC is Not Equivalent to a Loan}

1. The LLC is Contractually Obligated to Repay Principal and its Obligation is Conditioned on Profits

The NAR cites OCC authority that loans or other extensions of credit in § 24(Seventh) must require the borrower to be contractually obligated to repay principal and that such an obligation cannot be conditioned on profits.\textsuperscript{162} The trade group contends that the OCC’s ruling in the Union Bank Wind Farm Investment Letter fails to meet these requirements, since the borrower is not obligated to repay principal and since the bank receives payments based on revenues from the project and tax credits.\textsuperscript{163}

The OCC contends that the terms of the financing approved in the Union Bank Wind Farm Investment Letter “provide[] assurances of repayment that are functionally equivalent to those in a production payment loan transaction.”\textsuperscript{164} A federally permitted production payment loan is secured by a collateral interest in an oil or gas reserve, which is intended to produce the revenue to repay the loan.\textsuperscript{165} Reframing the NAR’s argument,\textsuperscript{166} the OCC states that the “key point in production

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\textsuperscript{159} Wind Farm Letter, supra note 3, at 2.
\textsuperscript{160} See, e.g., Bloomberg.com, Financial Glossary, http://www.bloomberg.com/invest/glossary/bfglosl.htm (last visited Jan. 3, 2007) (defining a lien as “a security interest in one or more assets that lenders hold in exchange for secured debt financing”).
\textsuperscript{161} See supra notes 152-60 and accompanying text.
\textsuperscript{162} NAR Letter 1 to OCC, supra note 5, at 7.
\textsuperscript{163} Id.
\textsuperscript{164} OCC Response to NAR Letter 1, supra note 8, at 9.
\textsuperscript{165} Id. at 8.
\textsuperscript{166} See NAR Letter 1 to OCC, supra note 5, at 7.
payment lending is not whether the bank has imposed an express legal obligation to repay, but rather[,] whether the bank has obtained adequate contractual rights and performed adequate reviews to determine that its loan is likely to be repaid.”

The OCC further contends that Union Bank’s investment has met these conditions. The OCC claims that the agreement entitling Union Bank to 70% of the LLC’s revenue and tax credits, coupled with the assurances of standard representations and warranties, conditions that must be met before receipt of funding, and covenants providing access to financial information and restrictions on the LLC’s actions, provide adequate contractual rights. Additionally, the OCC argues that the full credit review required by the bank pursuant to its standard underwriting criteria constitutes an adequate review to determine the likelihood of repayment.

Regarding the NAR’s argument that the borrower’s repayment obligation cannot be conditioned on profits, the OCC clarifies that banks are allowed to receive profit as repayment as long as the repayment is a scheduled amount that is not subject to profit swings. The OCC states that Union Bank is allowed to take profit from the LLC as repayment since the obligation to repay “would not be conditioned upon the value of the profit, income, or earnings of the LLC.”

The contractual rights obtained and risk review performed by Union Bank suggest that it has secured its investment by relying on many of the same assurances that banks normally use in securing loans. Additionally, Union Bank’s requirement of a

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167. OCC Response to NAR Letter 1, supra note 8, at 9 (citing “borrower’s obligation to repay principal . . . may not be conditioned upon the value of the profit, income, or earnings of the business enterprise” from 12 C.F.R. § 7.1006).
168. Id.
169. Id. at 8-9.
170. Id. at 9.
171. NAR Letter 1 to OCC, supra note 5, at 7.
172. OCC Response to NAR Letter 1, supra note 8, at 9.
173. Id.
174. See Q&A Session with John Dugan, Comptroller of the Currency, CAROLINA BANKER, Winter 2006, at 15 (“The bank underwrote the transaction in the same way that it would underwrite a comparable extension of credit to the LLC.”).
payment schedule to ensure regular returns suggests that its returns will be structured similar to those of a loan. Nevertheless, as discussed in the following section, the OCC’s characterization of Union Bank’s investment as a loan equivalent falls short in regards to the bank’s ability to guarantee recovery in the event of bankruptcy or dissolution.

2. Even Considering Substance over Form, Union Bank Has Not Structured its Equity Interest to Guarantee a Recovery Priority Similar to that of a Loan

The OCC argues that because the bank’s interest, although equity, is “patterned after a typical debt transaction,” it can be considered a loan that falls within banks’ “broad authority” under § 24(Seventh). The OCC rulings relied upon to justify Union Bank’s equity investment all involve transactions where the substance of the transaction was given more importance than the form. In each of these decisions, the OCC found the transaction was substantively equivalent to “an extension of credit that is permissible for national banks.” The substantive aspect of each transaction was deemed to “prevail over the form in which it had been cast.” The form of each transaction required the bank to hold an interest in real estate to take advantage of tax credits. Since Union Bank’s transaction involves the same substance and form as these transactions, the OCC contends that the bank’s

175. Wind Farm Letter, supra note 3, at 2.
176. See Q&A Session with John Dugan, Comptroller of the Currency, supra note 174, at 15 (“While the bank’s financing took the form of an interest in the LLC in order to utilize tax credits, it was structured to be substantially identical to a loan transaction.”).
177. See infra notes 175-203 and accompanying text.
179. Wind Farm Letter, supra note 3, at 3.
181. Wind Farm Letter, supra note 3, at 3.
182. Id.
183. Id.
transaction “fits the definition of [a] loan or other extension of credit in § 24(Seventh).”

The NAR distinguishes the OCC rulings cited to justify Union Bank’s equity investment from the Union Bank Wind Farm Investment Letter because the prior approvals involved loans or leases, while the Union Bank Wind Farm Investment Letter only involved equity without any accompanying obligations. The OCC concedes that the prior approvals it relied upon included loans but emphasized that the relevance of these decisions was that they also involved “equity-type” interests. One transaction involved a 99% interest in an LLC, and the other involved working interests in gas leases. More importantly, these interests were an integral part of these transactions, since they were necessary to receive the tax credits as a major part of the financing of the respective projects. Similarly, Union Bank’s transaction requires an equity-type interest to receive tax credits as a major part of the project's financing.

In accordance with the OCC’s substance-over-form argument, the fact that the form of the Union Bank transaction fails to include a loan does not, on its face, mean that the transaction is outside the substantive precedent established by these OCC rulings. According to representatives Kanjorski and Frank, however, one key substantive difference that the OCC fails to sufficiently address is the bank’s priority in the event that the LLC is dissolved or enters into bankruptcy proceedings of the borrowers. Since the transactions in the previous OCC rulings involve loans, the creditors, including the banks, would be given

184. Id.
185. NAR Letter 1 to OCC, supra note 5, at 7 (referring to OCC Corporate Decision No. 99-07, which involved construction loans, and OCC Corporate Decision No. 98-17, which involved leases).
186. OCC Response to NAR Letter 1, supra note 8, at 7.
187. Id. (referring to OCC Corporate Decision No. 99-07, which involved a 99% interest in an LLC, and OCC Corporate Decision No. 98-17, which involved working interests in gas leases).
188. Id.
189. Wind Farm Letter, supra note 3, at 1.
190. See OCC Response to NAR Letter 1, supra note 8, at 7.
priority over the shareholders in bankruptcy proceedings.\textsuperscript{192} On the other hand, because Union Bank only has an equity interest in the transaction, it would have to stand behind creditors in a bankruptcy proceeding.\textsuperscript{193} Union Bank would thus have less entitlement to a recovery than if it had been a creditor.\textsuperscript{194} This difference in recovery between the Union Bank transaction and a typical loan is significant and jeopardizes the characterization of the transaction as a loan.\textsuperscript{195}

Union Bank’s ability to force a vote for the dissolution of the LLC, coupled with its controlling 70\% interest in the company, suggests that the bank, if necessary, would be able to force liquidation outside of bankruptcy to guarantee a higher priority than under bankruptcy.\textsuperscript{196} Even in such an event, however, Union Bank’s priority may still be lower than the priority guaranteed to the banks in the OCC rulings under bankruptcy law.\textsuperscript{197} For example, if the bank had negotiated a liquidation preference, its priority would still be higher than that of the other shareholders.\textsuperscript{198} The Union Bank Wind Farm Investment Letter makes no mention of the bank being granted such a preference.\textsuperscript{199} Further jeopardizing the characterization of the transaction as a loan, Union Bank’s priority in the event that the LLC is dissolved is lower than the priority guaranteed to the banks under bankruptcy proceedings in the cited OCC rulings.\textsuperscript{200}

\begin{footnotes}
\item[192] See John C. McCoid, II, \textit{Discharge: The Most Important Development in Bankruptcy History}, 70 Am. Bankr. L.J. 163, 187 (1996) (discussing the case law origin of the absolute priority rule, where the Supreme Court held that creditors had a valid claim if shareholders received proceeds before creditors).
\item[193] Id.
\item[194] Id.
\item[195] See supra notes 192-94 and accompanying text.
\item[196] OCC Response to NAR Letter 1, supra note 8, at 1-2.
\item[197] Compare Bloomberg.com, Financial Glossary, http://www.bloomberg.com/invest/ glossary/bfglosi.htm (last visited Jan. 3, 2007) (defining an involuntary liquidation preference as a “premium that must be paid to preferred or preference stockholders if the issuer of the stock is forced into involuntary liquidation”), with McCoid, supra note 183, at 187 (discussing that creditors have a valid claim if shareholders received proceeds before creditors).
\item[199] See Wind Farm Letter, supra note 3.
\item[200] See supra notes 196-99 and accompanying text.
\end{footnotes}
In approving a pure equity transaction, the OCC has approved a form of transaction outside of OCC precedent that has formerly always involved a loan. More importantly, since Union Bank has failed to structure the equity interest to guarantee a recovery priority similar to that of debt, the OCC has approved a substantive transaction that is also outside OCC precedent. Such findings suggest that Union Bank’s equity interest may not be sufficiently “patterned after a typical debt transaction” to be considered a loan under § 24(Seventh) and § 371(a).

C. Implications of Union Bank Holding an Equity Interest in a Wind Farm as “an Integral Part of an Authorized Banking Activity”

The OCC rulings in support of the interpretation that an equity interest in a wind farm is “an integral part of an authorized banking activity” involve transactions where the bank’s acquisition of real estate was considered an integral part of the respective transactions. One OCC decision involved a bank’s investment in rehabilitating historic property to take advantage of tax credits. Two other OCC determinations concerned a bank’s acquisition of working interests in natural gas leases that received tax credits and were operated by the borrower.

Taking advantage of tax credits is deemed essential to financing since it allows the banks in each of these transactions to “reduce[] the costs of financing . . . while providing an appropriate yield to the [b]ank.” In the case of the wind farm investment, Union Bank was required to hold an interest in real estate for ten years to take advantage of tax credits. Consequently, the OCC

201. See supra note 185 and accompanying text.
202. See supra notes 185-200 and accompanying text.
203. See supra notes 178-200 and accompanying text.
204. See Wind Farm Letter, supra note 3, at 6.
205. See Corporate Decision No. 98-17, supra note 180, at 2-3; Corporate Decision No. 99-07, supra note 180, at 2-3.
206. See OCC Corporate Decision No. 99-07, supra note 180, at 1.
207. See OCC Corporate Decision No. 98-17, supra note 180, at 1.
208. OCC Corporate Decision No. 98-17, supra note 180, at 2.
contends that Union Bank's transaction is not prohibited under 12 U.S.C. § 29 since holding such interests is "an integral part of an authorized banking activity." Janet Seiberg, an analyst with the Stanford Washington Research Group, raised the major implication of this OCC approval, stating that "[t]his [OCC ruling] allows a bank to be involved in the electricity business . . . . If you can do this for wind, why can't you do it for anything else?"

Indeed, the OCC's approval in the Union Bank Wind Farm Investment Letter seems to reflect the potential for national banks to expand into new areas of commerce.

V. CONCLUSION

Regarding its statutory authority for the PNC and Bank of America proposals, the OCC is probably correct in construing the list of "real estate" under 12 C.F.R. § 7.1000 and "bank premises" under 12 C.F.R. § 5.37 as nonexclusive lists. Even if the PNC and Bank of America proposals fall within these regulations, however, they must still satisfy the requirements of the statutes on which these regulations are based. Representatives Kanjorski and Frank question whether owning the hotel, as opposed to the hotel building, can be considered "necessary for [the] accommodation" of each bank's business under 12 U.S.C. § 29. Further, the extent to which the OCC will permit national banks to own hotels in non-headquarter cities also remains unclear.

Concerning the precedent cited by the OCC in support of these same proposals, the OCC relies on long-standing decisions in support of a national banks' authority to lease excess bank

210. Id.
213. See supra notes 209-12 and accompanying text.
214. See supra notes 47-70 and accompanying text.
215. See supra notes 36-46 and accompanying text.
216. See supra notes 71-75 and accompanying text.
217. See supra notes 76-78 and accompanying text.
premises and occupy 16.7% of the bank premises.\textsuperscript{218} Other aspects of the OCC’s approval of the PNC and Bank of America proposals suggest that the OCC has stepped and may further step outside its own precedent.\textsuperscript{219} Allowing PNC to sell residential condominiums as an integral part of financing the mixed-use development suggests that the OCC may be willing to permit the sale of any part of a mixed-use development as long as it is necessary to finance the project.\textsuperscript{220} Additionally, the OCC has authorized a percent occupancy of 16.7% for the PNC proposal, which is not only outside of past precedent,\textsuperscript{221} but when viewed with other recent OCC rulings, suggests a willingness by the OCC to continue to lower this occupancy threshold.\textsuperscript{222} In allowing banks to occupy a lower percent of the overall space and to sell part of a mixed-use development to finance the overall project, the OCC is creating greater incentives and opportunities for national banks to enter the commercial development market with potentially serious consequences for the financial industry and economy as a whole.\textsuperscript{223}

Regarding its statutory authority for the Union Bank proposal, the OCC failed to state the specific “business of banking” for which § 24(Seventh)’s incidental powers are necessary.\textsuperscript{224} Regardless of whether the OCC has authorized this power pursuant to another statute, however, Union Bank has failed to structure its equity interest to guarantee a recovery priority similar to that of a loan.\textsuperscript{225} Thus, Union Bank’s equity interest may not be sufficiently “patterned after a typical debt transaction” to be considered a permissible loan for national banks under § 24(Seventh).\textsuperscript{226}

The OCC’s approval of the Union Bank proposal also raises significant questions regarding national banks’ ability to

\begin{footnotes}
\footnote{218. See supra notes 79, 100, 102 and accompanying text.}
\footnote{219. See supra notes 139-41, 201-02 and accompanying text.}
\footnote{220. See supra note 99 and accompanying text.}
\footnote{221. See supra notes 139-41 and accompanying text.}
\footnote{222. See supra notes 139-41, 201-02 and accompanying text.}
\footnote{223. See supra note 143-46 and accompanying text.}
\footnote{224. See supra notes 149-50 and accompanying text.}
\footnote{225. See supra notes 190-203 and accompanying text.}
\footnote{226. See supra notes 178-203 and accompanying text.}
\end{footnotes}
hold property and take an equity interest in a company.227 Permitting a national bank to hold a real estate interest for ten years because it is required to receive tax credits suggests that other banks may hold similar and possibly more extensive real estate interests as long as it is tied to a tax credit.228 Additionally, allowing a national bank to take an equity stake in an electricity business begs that question: what other industries is the OCC willing to allow banks to enter?229

The NAR’s belief that these rulings indicate the OCC has “set in motion a process that will inevitably lead to national banks becoming actively involved in real estate development and brokerage activities”230 may overstate the incremental step that these decisions currently represent.231 The OCC rulings do, however, raise and leave unanswered many questions regarding the future of national bank involvement in commerce.232 Continued analysis of OCC rulings will be necessary to determine whether the consequences that the NAR fears are in fact on the mark.233

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227. See supra notes 208-13 and accompanying text.
228. See supra notes 208-10 and accompanying text.
229. See supra notes 211-13 and accompanying text.
230. NAR Letter 1 to OCC, supra note 5, at 1-2.
231. See supra notes 139-41, 190-203 and accompanying text.
232. See supra notes 71-78, 99, 139-41, 149-50, 208-13 and accompanying text.
233. See e.g., Stacy Kaper, In Realty, Is OCC Again Stretching Status Quo, AM. BANKER, Oct. 27, 2006 (discussing the OCC’s recent approval of a bank’s leasing half of its property to an independent developer for forty years in return for building a bank branch and parking lot).