



**Comptroller of the Currency
Administrator of National Banks**

Washington, DC 20219

December 15, 1998

**Conditional Approval #298
January 1999**

Scott A. Cammarn
Assistant General Counsel
NationsBank Corporation
Legal Department
NC1-007-20-01
NationsBank Corporate Center
Charlotte, NC 28255

Re: Application of NationsBank, N.A., Charlotte, North Carolina, to Establish an Operating
Subsidiary That Would Acquire a Noncontrolling Interest in a Limited Liability Company
Application Control No. 98-ML-08-0020

Dear Mr. Cammarn:

This is in response to the application filed by NationsBank, N.A., Charlotte, North Carolina (“Bank”), to establish an operating subsidiary that would acquire a 50 percent, noncontrolling interest in a limited liability company. The limited liability company would acquire, develop, and manage real property for use as bank premises. Based upon the representations and commitments made by the Bank in writing and in subsequent telephone discussions, we conditionally approve the Bank’s application to establish the operating subsidiary to engage in the proposed activities.

Background

The Bank wishes to establish a wholly-owned operating subsidiary, West Trade, LLC, a North Carolina limited liability company (“Subsidiary”). The Subsidiary will acquire a noncontrolling 50 percent interest in Charlotte Gateway Village, LLC, a North Carolina limited liability company (“LLC”). The remaining 50 percent interest in the LLC will be held by Cousins Properties Incorporated, a Georgia corporation and real estate developer (“Cousins”).

The LLC will acquire approximately four blocks of a five block real estate parcel currently held by the Bank, consisting of the 700 block, the 800 block, the 1100 block, and half each of the 900 and 1000 blocks of West Trade Street in Charlotte, North Carolina (collectively “West Trade

Property”).¹ The West Trade Property is located near the Bank’s main office location and other Bank or holding company corporate facilities.

The LLC’s acquisition and development costs are estimated at approximately \$200 million. Approximately 90 percent of the LLC’s funding is expected to consist of an interim construction loan from the Bank to the LLC. The remaining funding will consist of capital contributed, in equal amounts, by the Subsidiary and Cousins. Upon completion of the development, the interim construction loan by the Bank to the LLC will be repaid through the private placement of long-term notes issued by the LLC.

On the West Trade Property, the LLC will develop a complex of office buildings and parking facilities (collectively “Complex”). The Complex will include three mid-rise office buildings containing up to 900,000 square feet of office space (including a data processing and software development center), two employee parking garages for more than 2,000 vehicles each, and employee food service and related facilities.² Upon completion of the Complex, the Bank will lease the entire four block facility from the LLC for a 15-year term, with four five-year options to renew the master lease in whole or in part, and will occupy a substantial portion of the Complex.³

The Subsidiary and Cousins will jointly oversee the affairs of the LLC. Cousins will be designated as the Administrative Member, responsible for the day-to-day management and operations of the LLC. The proposed LLC Operating Agreement (“Operating Agreement”) will provide that: (1) the LLC will engage only in activities that are permissible for national banks; (2) the Subsidiary will have the power to veto any action that would result in the LLC engaging in activities not authorized for national banks; and (3) admission of new members to the LLC will be restricted to affiliated companies of the Bank or Cousins or transferees that have been approved by both the Subsidiary and Cousins.

¹ The Bank previously acquired and currently holds the five block parcel for its future expansion needs under the authority of 12 U.S.C. § 29(First) and Interpretive Ruling 7.1000(a)(2)(ii), 12 C.F.R. § 7.1000(a)(2)(ii) (future expansion real estate). The Bank will continue to hold the two half-block parcels not conveyed to the LLC.

² It is anticipated that a portion of the 700 block of West Trade Street, adjoining three sides of the parking garage, will be immediately sold by the LLC to a third party prior to the LLC’s significant development of the remaining property. The third party will then develop this portion of the 700 block into residential units. This portion of the 700 block will not be owned or managed by the LLC, the Bank, or its affiliates. To accommodate the parking needs of the residential tenants, a portion of the parking spaces located in the employees garage would be allocated to these tenants.

³ The Bank has represented that it will initially occupy at least 75 percent of the proposed complex, with Bank-dedicated service providers occupying approximately an additional 15 percent. As the Bank’s facilities needs change, its usage of the total space may vary. As a result, the Bank may sublet portions of the complex to third parties. At all times, however, the Bank will occupy a substantial portion of each office building in the Complex.

Analysis

I. Establishment of Operating Subsidiary and Investment in LLC

A national bank may establish an operating subsidiary to engage in activities that are part of, or incidental to, the business of banking and other activities permissible for national banks under other statutory authority. 12 C.F.R. § 5.34(d)(1).

A national bank's authority to own real estate is governed by 12 U.S.C. § 29. Section 29(First) provides that a national bank may purchase, hold, and convey such real estate "as shall be necessary for its accomodation in the transaction of its business." Real estate necessary for the accommodation of a bank's business includes parking facilities and other property for the use of bank officers, employees, or customers. 12 C.F.R. § 7.1000(a)(2)(iii) & (v). Because a national bank may acquire, develop, and hold property for bank premises and include parking garages and employee service facilities on the property, the Subsidiary may acquire and develop the West Trade Property as bank premises. Therefore the Bank may establish the Subsidiary pursuant to 12 C.F.R. § 5.34.

A second issue presented by your application concerns the authority of a national bank to hold--indirectly through an operating subsidiary--a noncontrolling interest in an LLC. A number of recent OCC Letters have analyzed the authority of national banks, either directly or through their subsidiaries, to own a noncontrolling interest in a limited liability company.⁴ These letters each concluded that the ownership of such an interest is permissible provided four standards are satisfied.⁵ They are:

- (1) The activities of the entity or enterprise must be limited to activities that are part of, or incidental to, the business of banking.
- (2) The bank must be able to prevent the enterprise from engaging in activities which are impermissible for national banks or be able to withdraw its investment.
- (3) The bank's loss exposure must be limited, as a legal and accounting matter, and the bank must not have open-ended liability for the obligations of the enterprise.

⁴ See e.g., Interpretive Letter No. 778 (Mar. 20, 1997), *reprinted in* [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-205; Interpretive Letter No. 732 (May 10, 1996), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-049; Interpretive Letter No. 705 (Oct. 25, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. ¶ 81-020.

⁵ See also 12 C.F.R. § 5.36(b). National banks are permitted to make various types of equity investments pursuant to § 12 U.S.C. 24(Seventh) and other statutes.

- (4) The investment must be convenient or useful to the bank in carrying out its business and not a mere passive investment unrelated to that bank's banking business.

Applying these four standards to the facts presented, I conclude, as discussed below, that the Bank's proposal satisfies these standards.

1. The activities of the enterprise in which the investment is made must be limited to activities that are part of, or incidental to, the business of banking.

The proposed activities of the LLC are legally permissible under 12 U.S.C. § 29(First) and 12 U.S.C. § 24(Seventh). As discussed above, a national bank may acquire, develop, and hold property for bank premises and include parking garages and employee service facilities on the property. Therefore, the LLC may acquire from the Bank and develop the West Trade Property.

2. The bank must be able to prevent the enterprise from engaging in activities that do not meet the foregoing standard, or be able to withdraw its investment

This is an obvious corollary to the first standard. It is not sufficient that the LLC's activities are permissible at the time of the Subsidiary's initial investment. They must also remain permissible for as long as the Subsidiary retains a membership interest in the LLC.

Several provisions in the proposed Operating Agreement are designed to satisfy the requirement that the Subsidiary will participate as an owner of the LLC only so long as the LLC's activities remain part of, or incidental to, the business of banking. The Operating Agreement explicitly provides that the LLC "shall engage solely in activities that are permissible for national banks ..." Operating Agreement, § 2.12. Furthermore, the Subsidiary will have the power to veto any action that would result in the LLC engaging in activities not authorized for national banks. *Id.* As a result, the Bank, through the Subsidiary, will be able on an on-going basis to prevent the LLC from engaging in new activities that are not part of, or incidental to, the business of banking. Thus, this standard is met.

3. The bank's loss exposure must be limited, as a legal and accounting matter, and the bank must not have open-ended liability for the obligations of the enterprise.
 - a. Loss exposure from a legal standpoint

A primary concern of the OCC is that national banks not be subjected to undue risk. Where an investing bank will not control the operations of the entity in which the bank holds an interest, it is important that a national bank's investment not expose it to unlimited liability. First, the Bank's interest in the LLC will be owned through the Subsidiary. The Bank, therefore, will be insulated from any potential liability for the acts of the LLC through the "corporate veil" of the Subsidiary. *See* 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations 25 (perm. ed.

rev. vol. 1990). Additionally, as a legal matter, investors in a North Carolina limited liability company will not incur liability with respect to the liabilities or obligations of the limited liability company solely by reason of being a member or manager of the limited liability company. N.C. Gen. Stat. § 57C-3-30 (1997). Thus, the Bank's loss exposure for the liabilities of the LLC will be limited.

b. Loss exposure from an accounting standpoint

In assessing a bank's loss exposure as an accounting matter, the OCC has previously noted that the appropriate accounting treatment for a bank's 20-50 percent ownership share of investment in a limited liability company is to report it as an unconsolidated entity under the equity method of accounting. Under this method, unless the bank has guaranteed any of the liabilities of the entity or has other financial obligations to the entity, losses are generally limited to the amount of the investment, including loans and other advances shown on the investor's books. *See generally* Accounting Principles Board, Op. 18 § 19 (1971) (equity method of accounting for investments).

As proposed, the Bank will have a noncontrolling 50 percent ownership interest in the LLC through the Subsidiary. The Bank believes, and its accountants have advised, that the appropriate accounting treatment for the Bank's investment is the equity method.⁶ Thus the Bank's loss from an accounting perspective would be limited to the amount invested in the LLC, and the Bank will not have any open-ended liability for the obligations of the LLC.

4. The investment must be convenient or useful to the bank in carrying out its business and not a mere passive investment unrelated to that bank's banking business.

A national bank's investment in an enterprise or entity that is not an operating subsidiary of the bank must also satisfy the requirement that the investment have a beneficial connection to that bank's business, *i.e.*, it must be convenient or useful to the investing bank's business activities and not constitute a mere passive investment unrelated to the bank's banking business. Twelve U.S.C. § 24(Seventh) gives national banks incidental powers that are "necessary" to carry on the business of banking. "Necessary" has been judicially construed to mean "convenient or useful." *See Arnold Tours, Inc. v. Camp*, 472 F.2d 427, 432 (1st Cir. 1972). Therefore, the investment must benefit or facilitate that business and cannot be a mere passive or speculative investment.⁷

⁶ OCC's Chief Accountant has concluded that the Bank's investment in the LLC should be recorded as "Investments in unconsolidated subsidiaries and associated companies" on the Bank's Consolidated Reports of Condition and Income ("Call Reports"). Such classification is consistent with the Call Report Instructions. *See* Instructions to Schedule RC- M, item 8.b.

⁷ *See, e.g.*, Interpretive Letter No. 697 (Nov. 15, 1995), *reprinted in* [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-012; Interpretive Letter No. 543 (Feb. 13, 1991), *reprinted in* [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,255; Interpretive Letter No. 421 (Mar. 14, 1988), *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,645; Interpretive Letter No. 380 (Dec. 29, 1986), *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,604 n.8.

This requirement is met in this case. The Bank acquired and currently holds the West Trade Property as real estate intended for future bank premises. The sole purpose of the LLC is to develop and manage the Complex to be used by the Bank as bank premises. The Bank is expected to remain, at all times, a substantial tenant within the Complex. Furthermore, the fact that the Bank will be a 50 percent owner of the LLC with MPC is evidence of its intention to remain actively involved in this business. Far from making a mere passive investment, the establishment of the LLC is directly related to this Bank's business and will be convenient and useful to it in carrying out its banking business. Therefore, the fourth standard is satisfied.

II. Section 29

The remaining issue presented by your application concerns the Bank's potential subleasing of excess bank premises space to third-party tenants. As discussed above, 12 U.S.C. § 29(First) provides that a national bank may purchase, hold, and convey such real estate "as shall be necessary for its accomodation in the transaction of its business." Section 29's limitations are designed "to keep the capital of the banks flowing in the daily channel 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"⁸ However, section 29 does not prohibit a national bank from owning or leasing premises larger than its current needs dictate.⁹

Consistent with section 29, the bank's activities must be conducted in good faith, that is, for banking purposes and not in an effort to violate section 29. Once a national bank owns property for its own use, both the courts and the OCC have recognized that the bank may maximize the utility of its banking premises by leasing excess space in its premises.¹⁰

In this case, the Bank previously acquired the West Trade Property as bank premises for use in future expansion. The property, in downtown Charlotte, is located near the Bank's main office location and other Bank or holding company corporate facilities. The Bank and Bank-dedicated service providers will initially occupy at least 90 percent of the Complex and, at all times, will occupy a substantial portion of each office building in the Complex.

The Bank has represented that over time, while its facilities requirements at the Complex may change, it will occupy at least 25 percent of each of the three office buildings in the Complex. This level of occupancy is sufficient for the office buildings still to be considered bank premises.

⁸ *Union Nat'l Bank v. Matthews*, 98 U.S. 621, 626 (1878).

⁹ *See Brown v. Schleier*, 118 F. 981, 984 (8th Cir. 1902), *aff'd*, 194 U.S. 18 (1904) (noting that the National Bank Act does not preclude a national bank, acting in good faith, from maximizing the utility of its banking premises by leasing excess bank premises).

¹⁰ *See, e.g., Brown*; Interpretive Letter No. 758 (Apr. 5, 1996), *reprinted in* [1996-1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-122 (authorizing national bank holding parkland as bank premises to lease a portion of the parkland to third-party).

Indeed it exceeds what has been expressly permitted in the case law on bank premises. *See, e.g., Wingert v. First Nat'l Bank*, 175 F. 739 (4th Cir. 1909), *appeal dismissed*, 223 U.S. 670, 672 (1912) (upholding bank's authority to tear down bank building and construct new six story office building in which bank will occupy only first floor); *Wirtz v. First Nat'l Bank & Trust Co.*, 365 F.2d 641, 644 (10th Cir. 1966) (recognizing bank's authority to occupy 20.7 percent of office complex and lease remaining space as excess premises). Therefore, under these circumstances, the Bank may sublease its excess bank premises space to maximize the utility of its premises.

Conclusion

Based upon the information and representations you have provided, and for the reasons discussed above, we have approved, subject to conditions, the Bank's application to establish a subsidiary that will acquire and hold a noncontrolling 50 percent interest in the LLC. This approval is conditioned upon the Bank's compliance through the Subsidiary with the following conditions:

- (1) The LLC will engage only in activities that are part of, or incidental to, the business of banking;
- (2) The Bank, through the Subsidiary, will have veto power over any activities and major decisions of the LLC that are inconsistent with condition number one, and will withdraw from the LLC in the event it engages in an activity that is inconsistent with condition number one;
- (3) The Bank, through the Subsidiary, will account for the investments in the LLC under the equity method of accounting; and,
- (4) The LLC will be subject to OCC supervision, regulation, and examination.

Please be advised that the conditions of this approval are deemed to be "conditions imposed in writing by the agency in connection with the granting of any application or other request" within the meaning of 12 U.S.C. § 1818.

This approval is granted based on a thorough review of all information available, including the representations and commitments made in the application and by the Bank's representatives.

If you have any questions, please contact Richard Erb, Licensing Manager, at (202) 874-5060.

Sincerely,

/s/

Julie L. Williams
Chief Counsel