OCC Inter. Ltr. 12 (O.C.C.), Fed. Banking L. Rep. P 85,087, 1977 WL 23307

Office of the Comptroller of the Currency (O.C.C.)
OCC Interpretive Letter

Banking Research Digest (c) BRG, Inc.
Interpretive Letter No. 12
December 7, 1977

BRD SECTION:

***1** 720A / File 24

TOPIC:

General Powers:
DPC Operations

LAWS:

12 U.S.C. Section 24(7)

BRG DIGEST:
OCC approves workout situation involving a manufacturing plant that the bank acquired at a foreclosure sale to protect debts previously contracted, as incidental to the bank's power to purchase real property to secure debts previously contracted, but those incidental powers do not include the power to enter into a joint venture for the purpose of operating the plant. (OCC Interpretive Letter No. 12.)

Dear Mr. * * *:
This is in reply to your memorandum of September 2, 1977, forwarding correspondence from * * * Vice President, * * * NB). Mr. * * * inquiry concerns * * *NB's ownership, through * * * Company, a wholly owned subsidiary, of an anhydrous ammonia production plant in * * * (the ammonia plant). * * * NB purchased the ammonia plant at a foreclosure sale in order to protect debts previously contracted. The purchase by * * * NB was subject to the superior security interests of three other entities. Since the date of the foreclosure sale, * * * NB has purchased the first and third mortgage positions directly, thus leaving only the second position superior to the bank's ownership interest. We are informed that the reason for structuring the transaction in this manner is the presence of significant legal questions regarding the amount of the second lienholder's secured interest.

* * * NB has apparently conducted negotiations with several third parties regarding the operation of the ammonia plant coupled with the purchase of the prior lienholder's interest. Alternatives discussed during these negotiations include (1) a joint venture with * * * NB being the minority interest, (2) a joint venture with * * * NB being the majority interest, and (3) a straight loan. Mr. * * * further indicates that each of these alternatives would result in the bank holding debt in excess of its legal lending limit. The current value of the real estate in question is approximately $3.5 million. Under the joint venture arrangements, * * * Company would execute a note payable to * * * NB in the amount of the bank's total investment in * * * This loan would be at prevailing interest rates to be paid within ten years from operating income of the plant.

Because the expenditure anticipated by * * * NB is in excess of that bank's legal lending limit, Mr. * * * requests specific approval of this work-out situation. In addition, approval of the joint ventures, as permissible alternatives, is requested.

Section 29 of Title 12, the United States Code, authorizes national banks to purchase real property in which, in order to secure previously contracted debts, they had already acquired some partial interest or title. Reynolds v. First National Bank of Crawfordville, Indiana, 112 U.S. 405 (1884), Atherton v. Anderson, 86 F.2d 518 (6th Cir. 1936). In order to successfully accomplish this purpose, a national bank is permitted to make necessary advances to run a business and thereby preserve its going value, when the business was acquired to secure or collect a previously contracted debt. Preservation of the value of the collateral, the courts reason, is incidental to carrying on the business of banking, under 12 U.S.C. § 24 (Seventh), even though engaging in mercantile business, absent the underlying banking transaction of foreclosure on the collateral, is beyond the implied powers of a national bank under the same section. This reasoning underlies the adoption by this Office of Interpretive Ruling 7.3025(g). However, it should be noted, that a national bank may acquire such property only within the limitations prescribed by 12 U.S.C. § 29 and applicable interpretive rulings governing the retention of real estate by national banks. Thus, a national bank may retain and operate such facilities only so long as is necessary to obtain a reasonable price from the sale of the complex in relation to the investment of the bank and in no event for a longer period than permitted by the provisions of 12 U.S.C. § 29 and Interpretive Rulings 7.3020 and 7.3025. Accordingly, the expenditure of funds by * * * NB relative to the operation of the ammonia plant do not constitute loans that are subject to the legal lending limit of the bank. Under this proceaure, the bank becomes the owner of the property, with the result that funds advanced by the bank either to pay off prior lienholders or in the operation of the real property is considered money spent by the bank on its own property.

***2** The sale of the ammonia plant by * * * NB or its subsidiary, where the bank takes back a mortgage from the purchaser to finance the transaction, would also be excluded from the bank's legal lending limit for similar reasons. The mortgage obligation of the purchaser, used to facilitate the sale of the ammonia plant, is viewed as part of the sale of an asset owned by the bank which is not encumbered by restrictions on the bank's ability to loan funds.

With regard to Mr. * * * inquiry concerning the ability of * * *NB to engage in a joint venture for the purpose of operating the ammonia plant, I note that the incidental powers provision of 12 U.S.C. § 24 (Seventh) does not authorize a national bank to become a participant in such a business format. In this regard, your attention is directed to Merchants' National Bank v. Wehrman, 202 U.S. 295 (1906), in which the Supreme Court held that the Merchants' National Bank had no authority to enter into a partnership. See also Hanson v. Birmingham, 92 F.Supp. 33 (N.D. Iowa 1950). These cases are determinative of Mr. * * * inquiry because of the close affinity of partnerships and joint ventures with regard to the unlimited liability of the participants for the debts of the entity incurred by the other principals. Accordingly, it is my opinion that * * * NB may not enter into the joint venture under circumstances such as those described in Mr. * * * letter.
Very truly yours,

Charles F. Byrd,
Assistant Director,
Legal Advisory Services Division

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