Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

October 15, 2003

Interpretive Letter #976
December 2003
12 USC 24(7)
12 CFR 4

Re: Request for Opinion

Dear **[ ]**:

I am writing in response to your request, dated September 10, 2003, for a legal opinion addressing the contractual relationship between **[** ***Bank, City and State*** **]** ("Bank") and your clients, **[ ]**, a **[** ***State*** **]** corporation ("**[ ]**"), and **[ ]**'s principals ("Principals"). Your request comes as the parties attempt to resolve a dispute concerning the profits earned by **[ ]** and disbursed, pursuant to an agreement between the parties, to the Bank. We understand that for the last year, the Bank and **[ ]** have been pursuing voluntary mediation to resolve the dispute. Such mediation efforts are still on-going. At the same time, the parties have been preparing for binding arbitration, as required by the Agreement. We understand that the parties have agreed upon a three arbitrator panel to hear the dispute, likely sometime in January 2004.

We addressed the permissibility of the Bank's activities in Interpretive Letter No. 956 ("IL 956").[1] In IL 956, we concluded that the Bank's lending arrangement with **[ ]** constituted a permissible shared appreciation mortgage pursuant to 12 C.F.R. § 7.1006; that the lenders' covenants imposed by the Bank constituted permissible prudential measures designed to protect the Bank's interests; and that the nature and amount of the Bank's compensation to **[ ]** are consistent with OCC precedent.

Your letter requests that we now consider the information you have submitted and employ **[ ]**'s characterization of the facts underlying IL 956 to reconsider and to opine anew on the nature of the relationship between the Bank and **[ ]**. The information you have presented does not differ fundamentally in key respects from the information on which our previous opinion was based, thus we decline to reconsider our previous opinion. That opinion relied on facts represented to us by the Bank. In contractual disputes between a national bank and a third party, the OCC typically does not assume the role of fact finder. Instead, this role would best be taken on by a decision-making body – a mediator, an arbitration panel, or a court – with expertise in weighing different factual characterizations.

[1] *Reprinted in* [Current Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-481 (Jan. 31, 2003).

There are two additional matters that I should note. In an earlier telephone conversation with the OCC you raised the possibility of seeking depositions from various OCC employees. The OCC will not permit the deposition of any current OCC employees in this matter. As the facts are essentially undisputed, testimony from any OCC employee would be in the form of an expert opinion. The OCC does not provide expert opinions for private parties except in rare cases under circumstances not present here.

Second, as to former OCC employees, the OCC must grant permission to former OCC employees before they may disclose information obtained in the course of their OCC employment. Your letter cites three former OCC employees as experts. Given the geographic scope of their OCC service, there may be an issue as to whether these individuals furnished fact information resulting from their OCC employment. In this regard, all requests for OCC information from past and present OCC employees must comply with 12 C.F.R. Part 4.

Sincerely,

/s/ *Julie L. Williams*

Julie L. Williams
First Senior Deputy Comptroller
And Chief Counsel