

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CORPORATION COUNSEL



Office of Government Operations
Legal Counsel Division

October 12, 2000

David J. Bardin
Chairperson
Advisory Neighborhood Commission 3F
PO Box 39290
Washington, D.C. 20016-9290

Re: Whether an ANC may put money into a certificate of deposit

Dear Mr. Bardin:

This responds to your letter of September 24, 2000, wherein you seek advice regarding the depositing of Advisory Neighborhood Commission (ANC) funds into a certificate of deposit (CD). You state that ANC 3F currently maintains a single checking account at a bank in the District, and that the checking account earns no interest. The ANC has accumulated a sum of money as a cushion against future contingencies and wants to deposit these funds in a certificate of deposit at a District bank. The certificate of deposit would pay twice the interest of a conventional savings account. The CD would be insured by the Federal Deposit Insurance Corporation. The amount deposited into the CD would be secure, however, if the ANC withdrew money from the CD prior to its maturity date there would be a penalty, which would amount to a forfeiture of interest on the amount withdrawn. You seek advice as to whether District law authorizes ANCs to make deposits into CDs. In advising as to the interpretation of this section, I approach the question as a court would, if asked to decide the issue.

CONCLUSION

While I believe there are arguments to be made in support of your interpretation of the statute as permitting an ANC to deposit money into certificates of deposit, and while it is impossible to predict with certainty how a court would read the statutory language, based on the analysis below I conclude that, on balance, a court would be more likely to interpret the statutory language to prohibit an ANC from putting money into a certificate of deposit. This conclusion is based on an interpretation of the phrase "savings account" in the context of the surrounding statutory language, which implies that the Council used banking terminology precisely and that it understood the nature of different types of accounts. This conclusion is also based on other provisions of District law, under which a certificate of deposit is considered to be an investment, not a savings account. Moreover, the existing case law is not dispositive and there is no clear evidence that the Council intended for the term "savings account" to include certificates of deposit. While your interest in putting money into a certificate of deposit is certainly logical and even commendable, I do not believe it is statutorily authorized. Therefore, an ANC should not

put money into a certificate of deposit, but should only put money into an account designated as a "checking account," "negotiable order of withdrawal account," or a "savings account."

If you believe that ANCs should be authorized to invest in CDs, amendatory legislation would be required. You should contact Councilmember David Catania, Chairman of the Local and Regional Affairs Committee, to discuss the need for such legislation.

ANALYSIS

Section 16(b) of the Advisory Neighborhood Commissions Act of 1975, effective September 20, 1977 (D.C. Law 2-16; D.C. Code § 1-264(b)), as amended, provides that:

Each Commission shall establish no more than one checking or negotiable order of withdrawal account. The Commission may deposit into any savings account created pursuant to this section funds not immediately needed for the operation of the Commission.

It may be argued that a plain reading of the statute prohibits the placement of funds into a CD because it only permits funds to be put into a "checking account," "negotiable order of withdrawal account," or a "savings account." In a prior opinion interpreting D.C. Code § 1-264(b), this Office stated:

The general maxim of statutory construction applicable here is known in the law by the Latin phrase "expressio unius est exclusio alterius," *i.e.*, the mention of one thing implies the exclusion of another. This means that when the Council of the District of Columbia enacts a statute that mandates that a thing be done in a given manner, absent clear evidence to the contrary...it is presumed that the Council intended that the thing shall not be done in any other manner.

See September 30, 1997 letter from Leo N. Gorman, Assistant Corporation Counsel, to Jill Diskan, Secretary-Treasurer, ANC 3E (Attached)(holding that an ANC must deposit funds in insured institutions).

Since ANCs are created by statute, they only possess those powers that are granted by statute. In this case, the statutory language that permits funds to be placed in three different types of accounts raises a presumption that *other* types of accounts are not permitted. This construction cannot be overcome without a strong indication of legislative intent or policy. *See Sutherland Stat. Const.* § 47.23 (5th Ed. 1992). However, this interpretation does not exclude a CD if a CD is a form of "savings account." To paraphrase your letter, you argue that a CD meets several of the criteria normally understood by a layman to constitute a "savings account," such as earning interest, security of the principal, and the ability to make withdrawals. I believe this argument merits consideration because it is likely that a court would find the phrase "any savings account"

If amendatory legislation is drafted, it should also contain authority for the ANC to receive and expend the interest earned on a CD. *See* D.C. Code §§ 31-2853.43(b) and 47-391.6(d) as examples of how to permit the ANCs to earn and expend interest.

to be ambiguous. Ambiguous statutory language is interpreted by discovery of the legislative intent, which may be discerned by analyzing the legislative history, the common and legal meanings of the words used, and the surrounding language and circumstances. See Sutherland Stat. Const. § 48.01 (5th Ed. 1992). Given the ambiguity of the phrase "any savings account," such an analysis is necessary here. ²

a. Legislative History

The relevant statutory language was added to the Advisory Neighborhood Commissions Act of 1975 by the Advisory Neighborhood Commissions Act of 1990, effective March 6, 1991 (D.C. Law 8-203, D.C. Code § 1-264). The Report of the Committee on Government Operations of the District of Columbia Council regarding the Advisory Neighborhood Commissions Act of 1990, dated October 25, 1990, does not provide any interpretation, justification, or discussion regarding the amendment allowing a deposit into "any savings account."

b. Surrounding Language

The statutory language in the sentence preceding the phrase "savings account"-- the second sentence of section 16(b) -- is relevant. The preceding sentence states that ANCs shall establish no more than one "checking or negotiable order of withdrawal account." It would appear from the reference in this sentence to two different types of accounts, that the Council is using banking terminology very precisely, and not as a layman would. A "negotiable order of withdrawal" account is a checking account that earns interest, which is only available for use by certain types of organizations. See 12 U.S.C. § 1832; Black's Law Dictionary at 960 (5th Ed. 1979)(definition of "N.O.W." account). The Council's use of both phrases conveys its knowledge of the banking definitions of these terms, and an intent to list each type of account permitted, *i.e.*, the term "checking account" alone would not have included a negotiable order of withdrawal account. By this we can infer that the Council's use of the term "savings account" in the following sentence was also a deliberate and precise choice, and should be given its formal meaning under banking law. Customary definitions of "savings account" and "certificate of deposit" are as follows:

Webster's Ninth New Collegiate Dictionary (1985):

- "Savings account" - an account on which interest is usually paid and from which withdrawals can be made usually only by presentation of a passbook or by written authorization on a prescribed form. *Id* at 1045.
- "Certificate" [of deposit] - a document evidencing ownership or debt. *Id* at 223.

² In a subsequent telephone message to Annette Elseth, Assistant Corporation Counsel, Legal Counsel Division, you argued that the statute apparently permits multiple "savings accounts" and that this means CDs are permitted because the only reason to have multiple savings accounts is to have CDs that mature on different dates, allowing the ANC to manage its funds without the potential for the forfeiture of interest. However, it is not clear that multiple savings accounts, if permitted, could not serve a purpose unrelated to CDs. Therefore, further analysis of the phrase "any savings account" is needed.

Black's Law Dictionary (5th ed. 1979):

- "Savings account" - accounts maintained in commercial and savings banks for purpose of accumulating money, in contrast to a checking account. Savings accounts generally yield interest on the deposited funds, though the trend is to also pay interest on checking account balances. *Id* at 1205.
- "Certificate of deposit" - a written acknowledgement by a bank or banker of a deposit with promise to pay to depositor, to his order, or to some other person or to his order. Document evidencing existence of a time deposit. Documents showing deposits in building and loan association in form of passbooks or any other appropriate written recital. *Id* at 205.

Michie on Banks and Banking (1994):

- "Savings account" - a deposit where there is no contractual duty on the part of the customer to give at least seven days[] notice prior to withdrawal but which the bank may require. *Id* section 606.
- "Certificate of deposit" - a written acknowledgment by a bank of the receipt of a sum of money on deposit which it promises to pay to the depositor, to his order, or to some other person or to his order, whereby the relation of debtor and creditor between the bank and the depositor is created. A "certificate of deposit" is, in effect, a loan to a bank by the depositor for an agreed period of time at a stated rate of interest...A certificate of deposit ordinarily constitutes in effect a promissory note. *Id* section 313.

These definitions show that, although they may share some characteristics, a CD is fundamentally a note or loan to a bank, whereas a "savings account" is not. Adopting an interpretation of "savings account" that conforms to the surrounding language reveals that a certificate of deposit is not, as a financial or legal matter, ordinarily the same as a "savings account."

c. Case Law

The majority of the case law interpreting or defining the phrase "savings account" relates not to an interpretation of the use of the phrase in a statute, but to the use of the phrase in a will. These cases go both ways, supporting an interpretation of the phrase "savings account" as including or not including a certificate of deposit. The different interpretations are the result of an analysis of the factual circumstances and the intent of the decedent in each case. *See* Annotation, Wills: What Constitutes "Bank," "Checking," or "Savings" Account, within Meaning of Bequest, 31 ALR4th 688 (2000); Sammons v. Elder, 940 S.W.2d 276 (1997 TX)(certificate of deposit is a savings account under the subject will); The Ohio National Bank of Columbus v. Camp Fire

Girls, et al., 1979 Ohio App. LEXIS 11703 (1979 Ct. App. 10th App. Dist.)(certificate of deposit is not a bank account under the subject will). It has also been held that a "certificate of deposit" was not a "savings account" for purposes of a security agreement, Poirier v. Peoples State Bank, 418 N.W.2d 631 (1987 WI), and that a statute which specifically permitted an investment in a certificate of deposit also permitted a savings account as an investment. Bunkie Bank & Trust Company v. Avoyelles Parish Police Jury, 358 So.2d 319 (1978 LA). Consequently, unlike the established financial and legal usage, the terms "savings account" and "certificate of deposit" are not clearly distinguished in case law.

d. Other District Laws Containing References to "savings accounts" or "certificates of deposit"

Our review of other uses of the phrase "certificate of deposit" in District law reveals that a CD is not treated as an "account" or a "savings account," but rather is viewed as an investment vehicle, and is regulated as a negotiable instrument under the UCC.³ Courts normally will construe an ambiguous statute by reference to the language of other statutes that are not specifically related, but that apply to similar things. *See, e.g., Sutherland Stat. Const.*, § 53.03 (5th Ed. 1992).

Examples of these other uses in District law are:

- Section 141 of the District of Columbia Retirement Reform Act, approved November 17, 1979 (93 Stat. 866; D.C. Code § 1-721) permits the assets of certain retirement funds to be "invested" in interest-bearing certificates of deposit. This provision became effective in 1979.
- Article 16, section 69 of the Washington Metropolitan Area Transit Authority Compact, codified at D.C. Code § 1-2431, permits the Authority (WMATA) to "invest" in certificates of deposit. This provision was added to the compact in 1984.
- D.C. Code § 28:3-104 (UCC provision) defines a "certificate of deposit" as a "[negotiable] instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank." The term certificate of deposit was used in this section beginning in 1963, but was not defined until 1995.
- D.C. Code § 28:4-104 (UCC provision) defines an "account" as "any deposit...account with a bank, including a demand, time, savings, passbook, share draft, or like account, other than an account evidenced by a certificate of deposit." This definition was added to the law in 1995. However, D.C. Code § 28:9-105 (DCC provision), beginning in 1982, similarly defined a "deposit account" as "a demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union or like organization, other than an account evidenced by a certificate of deposit.,⁴

³ See also 15 U.S.C. § 78c(a)(IO)(defining the term "security" to include a certificate of deposit).

⁴ This definition would be amended by the "Uniform Commercial Code Secured Transactions Revision Act of 2000," D.C. Act 13-434, which is currently pending Congressional review. The new definition excludes the

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- Section 35 of chapter III of the Life Insurance Act, approved June 19, 1934 (48 Stat. 1152; D.C. Code § 35-634) permits domestic life insurance companies to "invest" in bank certificates of deposit. This provision was added in 1948.
- D.C. Code § 47-351.3 permits the Mayor/CFO to "invest" District funds in federally insured negotiable certificates of deposit. This provision became effective in 1998.

If a "certificate of deposit" is an investment, then the ANCs are not authorized to deposit money into one because ANCs have no statutory authority to make investments. In addition, if a CD is a negotiable instrument, subject to regulation under the DCC, it is clearly not the equivalent of a "savings account." Thus, other District laws support a conclusion that the reference to "savings account" in D.C. Code § 1-264(b) does not include a certificate of deposit.

- e. Practical Differences and Similarities Between a "savings accounts" and a "certificates of deposit"

Differences:

SAVINGS ACCOUNT	CERTIFICATE OF DEPOSIT
ability to make unlimited deposits	no additional deposits
no penalty for withdrawal	penalty for early withdrawal
deposit status	note of bank status
no requirements to make withdrawals	maturity date
no minimum deposit amount required	requires specific deposit amount
withdrawal of funds does not sever relationship with bank without closure of account	withdrawal of funds severs relationship with bank

Similarities:

- both insured
- both permit withdrawals
- both earn interest
- both provide security of principal

This review of the differences and similarities between a "savings account" and a "certificate of deposit" demonstrate the different nature of the two vehicles. An ANC has full control over a "savings account," determining both the amount and timing of deposits and withdrawals, and maintaining an on-going relationship with the bank. The same cannot be said for a "certificate of deposit," which fundamentally is a note of the bank, under which the bank: (1) sets the terms regarding the amount of the first deposit; (2) allows no further deposits; and (3) provides the

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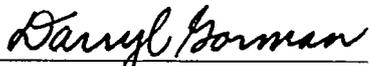
language specifically directed to certificates of deposit, and instead excludes all negotiable instruments -- including certificates of deposit -- under the definition of D.C. Code § 28:3-104.

terms for withdrawals by setting a maturity date (when full interest is due) and permitting the depositor to make other withdrawals subject to penalties.

If you have any further questions with regard to this matter, please contact Annette Elseth, Assistant Corporation Counsel, Legal Counsel Division, at 724-5537, or me at 724-5493.

Sincerely,

ROBERT R. RIGSBY
Corporation Counsel



By: DARRYL G. GORMAN
Senior Deputy Corporation Counsel
for Government Operations
Legal Counsel Division

DGG/ahc
(AL-00-477)

Attachment

cc: Phil Kogan
Treasurer
ANC3F

Deborah Nichols
D.C. Auditor