

OPINION NO. 2013-031**Syllabus:**

2013-031

A board of trustees of a school district free public library that has accepted a bequest of money, subject only to a restriction that the money be held as an endowment, is required by R.C. 1715.52(E)(3) to invest the money in the types of investments set forth in R.C. 135.01-.21.

To: Juergen A. Waldick, Allen County Prosecuting Attorney, Lima, Ohio

By: Michael DeWine, Ohio Attorney General, September 30, 2013

You have requested an opinion concerning the investment of a restricted bequest of money received by a board of trustees of a school district free public library (board of library trustees). According to your letter, the restricted bequest

“was to the trustees of the library for the purpose of establishing a permanent endowment fund with the income to be used to augment the programs of the library.” You ask whether a board of library trustees that has accepted a bequest of money, subject only to a restriction that the money be held as an endowment, is required to invest the money in the types of investments set forth in R.C. 135.01-.21 or whether the board may invest the money in accordance with the provisions of R.C. 1715.51-.59.

School district free public libraries may be established under R.C. 3375.14 by boards of education to provide library services to pupils of the school district. A school district free public library is managed and controlled by a seven-member board of library trustees, which is a body politic and corporate. R.C. 3375.15; R.C. 3375.33. As a creature of statute, a board of library trustees possesses only those powers and duties vested in it, either expressly or impliedly, by the General Assembly. 2010 Op. Att’y Gen. No. 2010-012, at 2-78. Further, “[w]ith regard to financial matters, the power of a board of library trustees to act must be clearly and distinctly granted, and any doubt regarding the authority to invest public moneys will be resolved against the grant of authority.” *Id.* Included among a board of library trustees’ express powers is the power to, “[b]y the adoption of a resolution, accept any bequest, gift, or endowment upon the conditions connected with the bequest, gift, or endowment.” R.C. 3375.40(K).

Investment Authority Under R.C. Chapter 135 and R.C. Chapter 1715

Your question concerns the investment authority of a board of library trustees under R.C. 135.01-.21 and R.C. 1715.51-.59. Let us, therefore, consider these statutory provisions in turn.

R.C. Chapter 135, the Uniform Depository Act, governs the investment of public moneys. Pursuant to R.C. 135.01-.21, a subdivision is granted limited authority to invest or deposit its public moneys. 2010 Op. Att’y Gen. No. 2010-012, at 2-82. For purposes of R.C. 135.01-.21, the public moneys of a subdivision are classified as active deposits, inactive deposits, and interim deposits. R.C. 135.01(A), (E), (F). Active deposits are public moneys necessary to meet current expenses. R.C. 135.01(A). Active deposits must be deposited by a subdivision in either a commercial account that is payable on demand, a negotiable order of withdrawal account, or a money market deposit account. R.C. 135.01(A)(1)-(3). Inactive deposits are public moneys other than active deposits or interim deposits. R.C. 135.01(E). They must be deposited or invested in time certificates of deposit or savings or deposit accounts. R.C. 135.07; *see also* R.C. 135.13. Finally, interim deposits are public moneys that are not needed to meet current expenses and that remain after inactive deposits are awarded pursuant to R.C. 135.07. R.C. 135.01(F). Subject to certain restrictions, a subdivision’s interim deposits may be deposited or invested in the classifications of obligations set forth in R.C. 135.14 and R.C.

135.144.¹ These classifications include, among others, obligations and securities issued by the federal government, obligations of the State of Ohio, and the Ohio subdivision's fund. R.C. 135.14(B)(1)-(7), (E); *see also* R.C. 135.09; R.C. 135.144(A); 2012 Op. Att'y Gen. No. 2012-013, at 2-112 to 2-113. Hence, R.C. 135.01-.21 require a subdivision to invest or deposit its public moneys in certain statutorily enumerated categories of investments.

In addition to the investment authority under R.C. 135.01-.21, certain governmental organizations have investment authority under R.C. 1715.51-.59. R.C. 1715.51-.59 constitute Ohio's version of the Uniform Prudent Management of Institutional Funds Act. R.C. 1715.59. Under these statutory provisions, a governmental organization that is an "institution" may manage and invest an "institutional fund." An institutional fund is "a fund that is held by an institution exclusively for charitable purposes."² R.C. 1715.51(C).

An institution's authority to invest moneys in an institutional fund is established by R.C. 1715.52(E)(3), which states, "[e]xcept as otherwise provided by law, an institution may invest in any kind of property or type of investment consistent with this section." R.C. 1715.51-.59 adopt the prudence standard for investment decision making. *See* Uniform Prudent Management of Institutional Funds Act § 3, cmt., 7A, Part III, U.L.A. 21 (Supp. 2012). Under this standard, "each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances." R.C. 1715.52(B).

We have previously concluded that a school district free public library is a subdivision for purposes of R.C. 135.01-.21 and that its board of library trustees is an institution for purposes of R.C. 1715.51-.59. 2010 Op. Att'y Gen. No. 2010-012, at 2-83 to 2-86. The term "[s]ubdivision," as defined by R.C. 135.01(L), includes any "district or local authority electing or appointing a treasurer, except a county."³ As explained in 2010 Op. Att'y Gen. No. 2010-012, at 2-83, a school district free public library serves an area that is coextensive with the school district that created it and is managed and controlled by a board of library trustees. *See* R.C. 3375.14-.15. A school district free public library also appoints a fiscal officer to serve as treasurer of the library's funds. R.C. 3375.32; R.C. 3375.36; *see also* 2010 Op. Att'y

¹ R.C. 135.141 and R.C. 135.142 authorize municipal corporations and boards of education, respectively, to invest their interim moneys in other types of investments. These statutes do not, however, apply to a school district free public library.

² For purposes of R.C. 1715.51-.59, the term "[i]nstitutional fund" does not include "(1) [p]rogram related assets; (2) [a] fund held for an institution by a trustee that is not an institution; [or] (3) [a] fund in which a beneficiary that is not an institution has an interest other than an interest that may arise upon a violation of or the failure of the purposes of the fund." R.C. 1715.51(C).

³ For certain purposes, the term "subdivision," as used in R.C. 135.14 and R.C. 135.181, also includes any county. *See* R.C. 135.01; R.C. 135.14(G); R.C. 135.181(A)(3).

Gen. No. 2010-012, at 2-83. Accordingly, a school district free public library must comply with R.C. 135.01-.21 when investing the library's public moneys. 2010 Op. Att'y Gen. No. 2010-012, at 2-83 to 2-84; *see also* 1942 Op. Att'y Gen. No. 5247, p. 657, at 661.

We also concluded in 2010 Op. Att'y Gen. No. 2010-012 that a board of trustees of a school district free public library is an institution for purposes of R.C. 1715.51-.59. R.C. 1715.51(B)(2) defines an "[i]nstitution" to include "[a] governmental organization to the extent that it holds funds exclusively for a charitable purpose." In 2010 Op. Att'y Gen. No. 2010-012, at 2-84, the Attorney General explained that a board of library trustees is a governmental organization because it is "a group of persons organized as a body politic and corporate" and "constitutes the governing authority of a free public library." *See* R.C. 3375.15; R.C. 3375.33. A board of library trustees also expends its moneys solely for a charitable purpose because R.C. 3375.40(B) requires the board to "expend[] its moneys exclusively for the advancement of education and the promotion of a paramount governmental purpose—the establishment and operation of a free public library." 2010 Op. Att'y Gen. No. 2010-012, at 2-85. Therefore, a board of library trustees is an institution that may manage and invest an institutional fund in accordance with R.C. 1715.51-.59. 2010 Op. Att'y Gen. No. 2010-012, at 2-85 to 2-86. Hence, 2010 Op. Att'y Gen. No. 2010-012 determined that a school district free public library is a subdivision for purposes of R.C. 135.01-.21 and that its board of library trustees is an institution for purposes of R.C. 1715.51-.59.

Investment of an Unrestricted Gift or Bequest of Money under R.C. 135.01-.21 and R.C. 1715.51-.59: 2010 Op. Att'y Gen. No. 2010-012

As you note in your request letter, 2010 Op. Att'y Gen. No. 2010-012 addressed a question similar to the one you have presented. The 2010 opinion considered whether a board of library trustees that accepts an *unrestricted* gift or bequest of money is required to comply with R.C. 135.01-.21 when investing the money or whether the board may place the money in an institutional fund and invest it in accordance with R.C. 1715.51-.59.

The question of whether a board of library trustees must comply with R.C. 135.01-.21 or whether the board may invest in accordance with R.C. 1715.51-.59 is significant because R.C. 1715.51-.59 provide an institution with greater discretion in investing an institutional fund than R.C. 135.01-.21 grant a subdivision in investing public moneys. 2010 Op. Att'y Gen. No. 2010-012, at 2-86 to 2-87. This is because while R.C. 135.01-.21 specify limited categories of investments in which a subdivision may place its public moneys, R.C. 1715.51-.59 do not list specific categories of authorized investments that an institution may make. Rather, R.C. 1715.52(E)(3) authorizes institutions to invest in any kind of property or type of investment so long as it is consistent with the requirements of R.C. 1715.52. Further, R.C. 1715.52(B) directs each person responsible for managing and investing an institutional fund to manage and invest the fund in good faith and with the care of an ordinarily prudent person.

Therefore, under R.C. 1715.51-.59, an institution generally may invest in a

broader range of investments than is permitted by R.C. 135.01-.21. For example, a subdivision is not authorized by R.C. 135.01-.21 to invest its public moneys in stocks and bonds of private, for-profit corporations. 2010 Op. Att’y Gen. No. 2010-012, at 2-86. In contrast, R.C. 1715.51-.59 do not contain such a limitation. 2010 Op. Att’y Gen. No. 2010-012, at 2-86. Under R.C. 1715.51-.59, “an institution is not specifically prohibited from investing money that is held in an institutional fund in any type of securities.” 2010 Op. Att’y Gen. No. 2010-012, at 2-86. Accordingly, it may appear that R.C. 1715.51-.59 permit an institution that is also a subdivision for purposes of R.C. 135.01-.21 to make investments that are not authorized by R.C. 135.01-.21.

However, the 2010 opinion explained that the investment authority conferred by R.C. 1715.51-.59 upon an institution that is also a subdivision for purposes of R.C. 135.01-.21 is not without limits. In this regard, the opinion explained:

One significant limitation [on the investment authority of an institution that is also a subdivision] is plainly set forth in R.C. 1715.52(E)(3).

R.C. 1715.52(E)(3) states that “[e]xcept as otherwise provided by law, an institution may invest in any kind of property or type of investment consistent with this section.” (Emphasis added.) The use of the clause “[e]xcept as otherwise provided by law” to modify the investment power granted under R.C. 1715.52(E)(3) indicates that another law may limit the investment power granted under R.C. 1715.52(E)(3). See Uniform Prudent Management of Institutional Funds Act § 3, cmt., 7A, Part[] III, U.L.A. 20 (2009 Supp.) (“[s]ubsection (e)(3) [of section 3 of the Uniform Prudent Management of Institutional Funds Act] also provides that other law may limit the authority under this subsection”). Accordingly, pursuant to the plain language of R.C. 1715.52(E)(3), the investment authority conferred upon an institution by R.C. 1715.51-.59 is subject to the limitations and restrictions imposed by other provisions of law.

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As explained earlier, R.C. 135.01-.21 limit the investment authority of a subdivision. Accordingly, if an institution is also a subdivision for purposes of R.C. 135.01-.21, then, pursuant to R.C. 1715.52(E), the subdivision is limited by R.C. 135.01-.21 as to the types of investments it may make under R.C. 1715.51-.59.

2010 Op. Att’y Gen. No. 2010-012, at 2-87.

After explaining the interaction between R.C. 135.01-.21 and R.C. 1715.51-.59, the 2010 opinion proceeded to address the investment authority of a school district free public library under these statutory provisions:

We have previously determined that a school district free public

library is a subdivision for purposes of R.C. 135.01-.21 and that its board of trustees is an institution for purposes of R.C. 1715.51-.59. Thus, pursuant to R.C. 1715.52(E), the investment power of a board of library trustees under R.C. 1715.51-.59 is subject to the limitations and requirements imposed by R.C. 135.01-.21. This means that R.C. 135.01-.21's limitations and requirements apply when the board holds money in an institutional fund, as defined by [R.C. 1715.51(C)], for investment in accordance with the provisions of R.C. 1715.51-.59.

2010 Op. Att'y Gen. No. 2010-012, at 2-87 to 2-88. Accordingly, the opinion advised that a board of trustees of a school district free public library that accepts an unrestricted bequest of money and holds that money in an institutional fund is required to invest the money in the types of investments set forth in R.C. 135.01-.21. 2010 Op. Att'y Gen. No. 2010-012 (syllabus, paragraph 3).

Investment of a Restricted Bequest of Money

You wish to know whether the analysis and conclusion of the 2010 opinion apply when a board of library trustees accepts a bequest of money, subject only to a restriction that the money be held as an endowment. That is, you wish to know whether the board of library trustees is required to comply with R.C. 135.01-.21 when investing such a restricted bequest of money or whether the board may exercise the broader investment authority of R.C. 1715.51-.59.

An endowment is generally understood to be a gift or bequest of money that is restricted by the donor's condition that the principal be kept primarily or wholly intact, while income generated from that principal is expended for a specific purpose set forth by the donor in the gift instrument. *See* Black's Law Dictionary 608 (9th ed. 2009) (defining "[e]ndowment" as, *inter alia*, "[a] gift of money or property to an institution (such as a university) for a specific purpose, esp. one in which the principal is kept intact indefinitely and only the interest income from that principal is used"); *see also* R.C. 1715.51(D) (defining "[e]ndowment fund," in part, as "an institutional fund or any part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis"); Uniform Prudent Management of Institutional Funds Act § 4, cmt., 7A, Part III, U.L.A. 29 (Supp. 2012) (explaining that "[a]n endowment fund is restricted because of the donor's intent that . . . the fund not be spent in the current year, and that the fund continue to maintain its value for a long time . . . [L]egally an endowment fund should not be considered unrestricted"). Under the circumstances you have presented, the board of library trustees is required by the terms of the restricted bequest to hold the bequest money as an endowment, preserving the principal and using income generated from that principal to support the library's programs.⁴ A member of your staff has indicated that the donor has not placed any other restrictions on the investment

⁴ R.C. 1715.53 provides specific guidance regarding the accumulation and expenditure of money in an endowment fund that is held by an "institution" as defined in R.C. 1715.51(B). While it "does not require that a specific amount be set aside as 'principal,' [it] assumes that [the institution] will act to preserve 'principal' ([i.e.,]

of this bequest.⁵ Thus, the bequest's only restriction relates to its accumulation and expenditure, rather than to its investment. We are of the opinion that this restriction does not alter the board of library trustees' investment authority as set forth in 2010 Op. Att'y Gen. No. 2010-012 and that the board is required by R.C. 1715.52(E)(3) to invest in accordance with R.C. 135.01-21.

First, the fact that the bequest money must be held as an endowment does not change the application of R.C. 1715.51-.59. As previously explained, a board of trustees of a school district free public library is an institution, as defined by R.C. 1715.51(B)(2), because it is a governmental organization, and it holds funds exclusively for a charitable purpose—the establishment and operation of a school district free public library. 2010 Op. Att'y Gen. No. 2010-012, at 2-84 to 2-86. Therefore, a board of library trustees may manage and invest an institutional fund in accordance with R.C. 1715.51-.59. 2010 Op. Att'y Gen. No. 2010-012, at 2-85 to 2-86.

Additionally, the restricted bequest must be held by the board of library trustees as an institutional fund. An institutional fund is “a fund that is held by an institution exclusively for charitable purposes.” R.C. 1715.51(C). Here, the restricted bequest requires the board of library trustees to hold the money for a charitable purpose, “to augment the programs of the library.” See 2010 Op. Att'y Gen. No. 2010-012, at 2-85 (describing the establishment and operation of a school district free public library as a charitable purpose for purposes of R.C. 1715.51-.59); see also R.C. 1715.51(A). That the bequest is restricted and must be held as an endowment does not preclude it from being held as an institutional fund. “The term institutional fund includes any fund held by an institution for charitable purposes, whether the fund is expendable currently or subject to restrictions.” Uniform Prudent Management of Institutional Funds Act § 2, cmt., 7A, Part III, U.L.A. 17 (Supp. 2012). Thus, the restricted bequest is held by the board of library trustees as an institutional fund.⁶ See R.C. 1715.51(C); Uniform Prudent Management of Institutional Funds Act § 2, cmt., 7A, Part III, U.L.A. 16 (Supp. 2012) (“[a]n endowment fund is an institutional fund or a part of an institutional fund that is not wholly expendable by the institution on a current basis” (emphasis added)). Ac-

to maintain the purchasing power of the amounts contributed to the fund) while spending ‘income’ ([i.e.,] making a distribution each year that represents a reasonable spending rate, given investment performance and general economic conditions).” Uniform Prudent Management of Institutional Funds Act § 4, cmt., 7A, Part III, U.L.A. 28 (Supp. 2012).

⁵ If the donor had set forth other express restrictions in the gift instrument, the board of trustees of the school district free public library would, upon accepting the bequest, be required to comply with such restrictions so long as they were lawful. See 1942 Op. Att'y Gen. No. 5246, p. 657, at 660; see also R.C. 1715.52-.53.

⁶ Because we have determined that the restricted bequest is held as an institutional fund for purposes of R.C. 1715.51-.59, the provisions of R.C. Chapter 5813 (Institutional Trust Funds Act) do not apply to the investment of this restricted bequest of money. See R.C. 5813.06(B).

Accordingly, the board of library trustees is subject to the provisions of R.C. 1715.51-.59.

Nevertheless, as explained in 2010 Op. Att’y Gen. No. 2010-012, R.C. 1715.52(E)(3) requires a board of library trustees to comply with other applicable provisions of law when investing an institutional fund. You have asked whether R.C. 135.01-.21 limit or restrict the board of library trustees’ investment authority with regard to this restricted bequest of money. We are of the opinion that R.C. 135.01-.21 apply and therefore limit the board of library trustees’ investment authority.

As previously explained, a school district free public library is a subdivision, as defined by R.C. 135.01(L), because it serves an area that is coextensive with the school district, is managed by a board of library trustees, and appoints a fiscal officer to serve as treasurer of the library’s funds. 2010 Op. Att’y Gen. No. 2010-012, at 2-83 to 2-84. Accordingly, a school district free public library is required to comply with R.C. 135.01-.21 when depositing or investing its public moneys. 2010 Op. Att’y Gen. No. 2010-012, at 2-83 to 2-84.

Like the unrestricted bequest considered in the 2010 opinion, the restricted bequest of money is “public moneys” for purposes of R.C. 135.01-.21. R.C. 135.01(K) defines “[p]ublic moneys,” in part, as “all moneys in the treasury of . . . any subdivision of the state, or moneys coming lawfully into the possession or custody . . . of the treasurer of any subdivision.” Here, the board of library trustees has accepted and is in possession of the restricted bequest of money. The board of library trustees, therefore, has a duty to deposit the restricted bequest with the school district free public library’s treasurer or a properly designated public depository. *See* R.C. 9.38; 2010 Op. Att’y Gen. No. 2010-012, at 2-88 (“[m]oney donated directly to a board of library trustees is public money that must be deposited in the library’s public depository and invested as provided by statute”); *cf.* 2011 Op. Att’y Gen. No. 2011-033, at 2-261 (“moneys received by a board of county commissioners as a gift are public moneys that must be deposited in the county treasury”); 1985 Op. Att’y Gen. No. 85-085, at 2-342 (“[u]nless otherwise provided by statute, moneys donated to a political subdivision, including those donated funds held in trust by the political subdivision, must be paid into the treasury of the political subdivision”). Therefore, the restricted bequest is public moneys as defined by R.C. 135.01(K). Because the restricted bequest is public moneys of a subdivision, the provisions of R.C. 135.01-.21 apply.

Thus, even though the bequest is restricted and must be held as an endowment, we have determined that R.C. 135.01-.21 apply. Therefore, the restricted bequest must be invested in accordance with the provisions of R.C. 135.01-.21. While the board of library trustees has investment authority under R.C. 1715.51-.59, R.C. 1715.52(E)(3) requires the board to comply with other applicable provisions of law when investing an institutional fund. Accordingly, the board of library

trustees is required by R.C. 1715.52(E)(3) to invest the restricted bequest of money in the types of investments set forth in R.C. 135.01-.21.⁷

This conclusion is consistent with advice given by the Attorney General in 1942 Op. Att’y Gen. No. 5246, p. 657. In that opinion, the Attorney General advised that a board of library trustees is required to deposit all funds coming into its hands, whether from bequests or otherwise, in accordance with the Uniform Depository Act “unless the terms of a given bequest or gift expressly authorize or require the board to invest such funds in a stipulated manner.” 1942 Op. Att’y Gen. No. 5246, p. 657, at 663. Although the Attorney General observed that a bequest or gift of money to a school district free public library may, in some situations, be invested other than in accordance with the Uniform Depository Act, you have not presented a situation that authorizes investment other than in accordance with the Uniform Depository Act. Under the circumstances you have presented, the bequest’s only restriction is that it be held as an endowment. This restriction relates to the bequest’s accumulation and expenditure, rather than to its investment. Unlike the situation contemplated in the 1942 opinion, the donor has not expressly expanded the board of library trustees’ investment authority beyond the scope of investments set forth in the Uniform Depository Act. Likewise, the donor has not placed any express limitations on the investment of the restricted bequest that would prohibit the board of library trustees from investing the bequest in accordance with the Uniform Depository Act. Had the restricted bequest contained any such express authorizations or limitations regarding its investment, the board of library trustees would be obliged to comply with them “so as to carry out the express conditions or purposes attached thereto by the donor.” 1942 Op. Att’y Gen. No. 5247, p. 657, at 660.

Further, investing the restricted bequest in accordance with R.C. 135.01-.21 will not violate the donor’s intent that the restricted bequest of money be held as an endowment. In order to comply with the donor’s intent that the bequest money be held as an endowment, the board must follow standard principles governing the accumulation and expenditure of money in an endowment fund. *See* R.C. 1715.53. This means that the board of library trustees must work to preserve the bequest’s principal and “mak[e] a distribution each year that represents a reasonable spending rate, given investment performance and general economic conditions.” Uniform

⁷ We are aware that this conclusion does not agree with the court’s holding in *Bd. of Trs. of the Grafton-Midview Pub. Library v. Petro*, C.A. No. 98CA007230, 2000 Ohio App. LEXIS 9 (Lorain County Jan. 5, 2000). There, the court held that when a board of library trustees invests donated money pursuant to the provisions of R.C. 1715.51-.59, the board is not limited to investing the money in the types of investments authorized by R.C. 135.01-.21. However, as explained in 2010 Op. Att’y Gen. No. 2010-012, at 2-89 to 2-90, the statutory language considered in *Bd. of Trs. of the Grafton-Midview Pub. Library v. Petro* has been significantly amended since the court’s decision. Therefore, we are not constrained to follow the court’s interpretation of the investment authority granted to a board of trustees of a school district free public library by R.C. 1715.51-.59. *See* 2010 Op. Att’y Gen. No. 2010-012, at 2-88 to 2-90.

Prudent Management of Institutional Funds Act § 4, cmt., 7A, Part III, U.L.A. 28 (Supp. 2012); *see also* R.C. 1715.53. Investing the restricted bequest in accordance with R.C. 135.01-.21 will not prevent the board of library trustees from following these standard principles governing the accumulation and expenditure of money in an endowment fund.⁸ Thus, the restricted bequest may be invested in accordance with R.C. 135.01-.21 and still held as an endowment as required by the donor.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that a board of trustees of a school district free public library that has accepted a bequest of money, subject only to a restriction that the money be held as an endowment, is required by R.C. 1715.52(E)(3) to invest the money in the types of investments set forth in R.C. 135.01-.21.

⁸ The board of library trustees must, however, exercise care in classifying the bequest moneys as active, inactive, and interim deposits for purposes of R.C. 135.01-.21. Because active deposits are public moneys necessary to meet current expenses, *see* R.C. 135.01(A), any portion of the bequest that the board classifies as active deposits will be subject to immediate expenditure. In order to hold the restricted bequest as an endowment as required by the donor, the board must work to preserve the bequest's principal and expend only a reasonable amount of money from the endowment fund each year. Thus, each year the board may classify as active deposits only an amount that represents a reasonable spending rate given the endowment fund's overall performance. *See* R.C. 1715.53 (providing specific guidance to an institution on the accumulation and expenditure of money in an endowment fund); *see also* note 4, *supra*.