

OPINION NO. 89-080

Syllabus:

1. The Miami Valley Regional Transit Authority may, pursuant to the terms of R.C. 306.35(B), R.C. 306.35(G), R.C. 306.35(J), and R.C. 306.44, enter into contracts for the purpose of purchasing diesel fuel, gasoline, and other petroleum products for use in buses and other motor vehicles that it owns or operates.
2. A contractual arrangement between the Miami Valley Regional Transit Authority and a fuel supplier for the purchase of diesel fuel, gasoline, and other petroleum products for use in buses and other motor vehicles that it owns or operates, the purchase price of which is to be based, in part, upon the prior purchase and sale of heating oil futures contracts by such supplier, is not an investment for purposes of R.C. 135.14.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, October 16, 1989

You have requested my opinion regarding the participation of the Miami Valley Regional Transit Authority (MVRTA) in the purchase and sale of certain

heating oil futures contracts by a petroleum supplier as a method by which MVRTA may obtain, at a substantial cost savings, adequate supplies of diesel fuel and gasoline for use in its buses and other motor vehicles. Your letter provides the following explanatory information in that regard:

- (1) MVRTA generally purchases fuel oil on a monthly basis at prices which "float" as determined by the spot market.
- (2) Because of fluctuations in that market, MVRTA occasionally contracts with a supplier to fix the price of fuel oil to be delivered up to several months in the future.
- (3) In such instances (of fixing prices for future delivery), MVRTA's supplier generally ensures the availability and price of such fuel oil at the scheduled time of delivery by purchasing "futures contracts" for a similar quantity of No. 2 heating oil (the price of which generally fluctuates in consonance with the price of fuel oil).
- (4) The Board of Trustees of MVRTA has approved, subject to confirmation of legality by the Attorney General of the State of Ohio, the concept of establishing a relationship with its supplier whereby the supplier would sell previously purchased No. 2 heating oil futures contracts at the direction of MVRTA, but only to the extent that such contracts relate to the quantity of fuel oil customarily used by MVRTA on a monthly basis (approximately 120,000 gallons or 3 futures contracts), at such times as MVRTA has reason to believe the price will be lower in the short term; since the fixed price contract with MVRTA would thereupon be cancelled, MVRTA could thereafter either "lock-in" at a yet lower fixed price, or simply pay the then current floating price. Any loss or profit on the original purchase and sale of the futures contract(s) would be passed through by the supplier to MVRTA in the ultimate purchase price of the fuel oil.
- (5) MVRTA has been advised by its legal counsel that to the extent the foregoing participation in the purchase and sale of futures contracts by its supplier may constitute an "investment", it would be prohibited under Ohio Revised Code Section 135.14.
- (6) MVRTA believes that the ability to fix the price of fuel oil to be purchased in a rising market in the future enhances its ability to predict pricing and budget expenses.
- (7) MVRTA believes that the ability to "buy-out" of the fixed prices for fuel oil to be purchased in a decreasing market in the future would provide it with flexibility which would be helpful in arranging the lowest price available, and would thereby enhance its financial condition.
- (8) MVRTA believes that the foregoing program, because of the guidelines set forth in paragraph (4) above, and the rationale set forth in paragraphs (6) and (7) above, can only benefit MVRTA, and should not be deemed to be an impermissible "investment" for purposes of Ohio Revised Code Section 135.14.

Accordingly, you wish to know whether MVRTA's participation in the foregoing arrangement constitutes an "investment" that is within the purview of R.C. 135.14. R.C. 135.14 enumerates the types of investments or deposits that may be made with interim moneys, as defined in R.C. 135.01(F), of certain political subdivisions and local governmental entities.

Your request thus presents two issues: whether the Miami Valley Regional Transit Authority is, as a general matter, empowered to make purchases of diesel fuel and other petroleum products; and, if so, whether the contractual arrangement pertaining to such a purchase, as described in your letter, constitutes an "investment" for purposes of R.C. 135.14. I shall consider first whether a regional transit authority (RTA) may enter into contracts for the purchase of diesel fuel, gasoline, and other petroleum products. The establishment, government, and operation of regional transit authorities are addressed by certain provisions that appear in R.C. Chapter 306 (county transit system; regional transit authority). See R.C. 306.30-.71. R.C. 306.31 states that an RTA may be created in the manner provided for in R.C. 306.32 for the purpose, *inter alia*, of "acquiring,

constructing, operating, maintaining, replacing, improving, and extending *transit facilities*." (Emphasis added.) The term, "transit facility," as used in R.C. 306.30-53, is defined, in part, as any "[s]treet railway, motor bus, tramline, subway, monorail, rapid transit, aeroplane, helicopter, ferry, or other ground or water transportation system having as its primary purpose the regularly scheduled mass movement of passengers between locations within the territorial boundaries of a regional transit authority." R.C. 306.30(A). An RTA that is so created "is a political subdivision of the state and a body corporate with all the powers of a corporation, comprised of the territory of one, or two or more counties, municipal corporations, townships, or any combination thereof." R.C. 306.31. See R.C. 306.32 (describing the specific procedures that are to be followed whenever any county, or any two or more counties, municipal corporations, townships, or any combination thereof resolve among themselves to create an RTA).¹ R.C. 306.34 further states that, "[a]ll the power and authority granted to a regional transit authority shall be vested in and exercised by its board of trustees which shall manage and conduct its affairs." R.C. 306.33 addresses the appointment of such board of trustees.

The general duties, powers, and responsibilities that are conferred upon and vested in an RTA are delineated in R.C. 306.35. As pertains herein, R.C. 306.35 provides that an RTA "[m]ay make contracts in the exercise of the rights, powers, and duties conferred upon it." R.C. 306.35(B); "[m]ay acquire, construct, improve, extend, repair, lease, operate, maintain, or manage transit facilities within or without its territorial boundaries, considered necessary to accomplish the purpose of its organization and make charges for the use of transit facilities," R.C. 306.35(G); and

[m]ay hold, encumber, control, *acquire by donation, purchase, or condemnation*, construct, own, lease as lessee or lessor, use, and sell real and *personal property, or any interest or right therein*, within or without its territorial boundaries, for the location or protection of transit facilities and improvements and access thereto, the relocation of buildings, structures, and improvements situated on lands acquired by the regional transit authority, or *for any other necessary purpose*, or for obtaining or storing materials to be used in constructing, maintaining, and improving transit facilities under its jurisdiction. (Emphasis added.)

R.C. 306.35(J). Finally, R.C. 306.44 further elaborates upon the power of an RTA to enter into contracts as follows:

The board of trustees of a regional transit authority may enter into such contracts or other arrangements with the United States government or any department thereof, with the state government of this or other states, with counties, municipalities, townships, or other governmental agencies created by or under the authority of the laws of the state or other states, with persons, *with public corporations and private corporations as may be necessary or convenient* for the making of surveys, investigations or reports thereon, and for the *exercise of the powers granted by sections 306.30 to 306.47, inclusive*. of the Revised Code. (Emphasis added.)

See also R.C. 306.43 (specifying, *inter alia*, when competitive bidding is required in the case of a contract for the purchase of supplies or material or for labor for any work that is made by the board of trustees of an RTA or any officer or employee designated by the board to make such a contract).

As a creature of statute, R.C. 306.31; R.C. 306.32, a regional transit authority may exercise only such power as is expressly conferred upon it by statute,

¹ The Miami Valley Regional Transit Authority was created and established pursuant to the foregoing statutory provisions. *Schwenk v. Miami Valley Regional Transit Authority*, 4 Ohio Op. 3d 145, 146-47 (C.P. Montgomery County 1975).

or as may be inferred from those powers that are expressly granted. *See generally Burger Brewing Co. v. Thomas*, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975); *State ex rel. Shriver v. Board of County Commissioners*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). None of the provisions throughout R.C. 306.30--71 refer expressly to the purchase of diesel fuel and other petroleum products by an RTA. Such power is implicit, however, in the several statutory provisions I have set forth above. Pursuant thereto, an RTA may be formed for the purpose of operating and maintaining transit facilities, R.C. 306.31, and an RTA that is thus formed is further granted the express power to undertake the operation, maintenance, and management of such transit facilities, R.C. 306.35(G). The term, "transit facility," is defined in R.C. 306.30(A) as including a motor bus transportation system. Clearly, the operation of a regional motor bus transportation system requires an RTA to furnish both the buses and other motor vehicles that will be used to transport passengers along the routes that are established within the RTA's territorial boundaries, and the diesel fuel or other petroleum products necessary to power those buses. Authority to purchase or otherwise acquire supplies of diesel fuel and other petroleum products may be further inferred from the language of R.C. 306.35(J) stating that an RTA may acquire by purchase personal property, or any interest or right therein, for any necessary purpose. Finally, an RTA may enter into contracts and effect other arrangements incident to such a purchase or acquisition pursuant to the general power to contract that is bestowed upon an RTA by R.C. 306.35(B) and R.C. 306.44. Accordingly, it follows that the Miami Valley Regional Transit Authority may enter into contracts for the purpose of purchasing diesel fuel, gasoline, and other petroleum products for use in buses and other motor vehicles that are owned or operated by MVRTA.

I shall now consider whether participation by the Miami Valley Regional Transit Authority in the particular fuel supply arrangement described in your letter constitutes an "investment" for purposes of R.C. 135.14. R.C. Chapter 135 comprises the uniform depository act, the provisions of which address the deposit and investment of various public moneys of the state and such of its subdivisions as are defined therein. R.C. 135.14 specifically governs the investment of a subdivision's "interim moneys," stating, in pertinent part, as follows:

As used in this section, "treasurer" does not include the treasurer of state.

The treasurer or governing board may invest or deposit any part or all of the *interim moneys*, provided that such investments will mature or are redeemable within two years from the date of purchase, except as otherwise limited in this section. (Emphasis added.)

R.C. 135.14 further specifies the classifications of obligations that shall be eligible for an investment or deposit of interim moneys: bonds, notes, or other obligations of or guaranteed by the United States, or those for which the faith of the United States is pledged for the payment of principal and interest thereon, R.C. 135.14(A); bonds, notes, debentures, or other obligations or securities issued by any federal government agency, or the export-import bank of Washington, R.C. 135.14(B); interim deposits in eligible institutions applying for interim moneys as provided in R.C. 135.08 (application for interim deposits), R.C. 135.14(C); and, bonds and other obligations of the State of Ohio, R.C. 135.14(D).

R.C. 135.01 enumerates and defines a number of terms used in R.C. Chapter 135, which, in turn, elucidate the precise scope and application of R.C. 135.14 in this particular instance. R.C. 135.01 thus reads, in part, as follows:

Except as otherwise provided in sections 135.14 and 135.181 of the Revised Code, as used in sections 135.01 to 135.21 of the Revised Code:

(A) "*Active deposit*" means a public deposit necessary to meet current demands on the treasury, and that is deposited in any of the following:

(1) A commercial account that is payable or withdrawable, in whole or in part, on demand;

(2) A negotiable order of withdrawal account as authorized in the "Consumer Checking Account Equity Act of 1980," 94 Stat. 146, 12 U.S.C. 1832(a);

(3) A money market deposit account as authorized in the "Garn-St. Germain Depository Institutions Act of 1982," 96 Stat. 1501, 12 U.S.C. 3503.

....
 (D) *"Governing board"* means, in the case of the state, the state board of deposit; in the case of all school districts including county school districts except as otherwise provided in this section, the board of education, and when the case so requires, the board of commissioners of the sinking fund; in the case of a municipal corporation, the legislative authority, and when the case so requires, the board of trustees of the sinking fund; in the case of a township, the board of township trustees; in the case of a union or joint institution or enterprise of two or more subdivisions not having a treasurer, the board of directors or trustees thereof; and *in the case of any other subdivision electing or appointing a treasurer, the directors, trustees, or other similar officers of such subdivision.* The governing board of a subdivision electing or appointing a treasurer shall be the governing board of all other subdivisions for which such treasurer is authorized by law to act....

(E) *"Inactive deposit"* means a public deposit other than an interim deposit or an active deposit.

(F) *"Interim deposit"* means a deposit of interim moneys. *"Interim moneys"* means public moneys in the treasury of the state or any subdivision after the award of inactive deposits has been made in accordance with section 135.07 of the Revised Code, which moneys are in excess of the aggregate amount of the inactive deposits as estimated by the governing board prior to the period of designation and which the treasurer or governing board finds should not be deposited as active or inactive deposits for the reason that such moneys will not be needed for immediate use but will be needed before the end of the period of designation.

....
 (I) *"Public deposit"* means public moneys deposited in a public depository pursuant to sections 135.01 to 135.21 of the Revised Code.

....
 (K) *"Public moneys"* means all moneys in the treasury of the state or any subdivision of the state, or moneys coming lawfully into the possession or custody of the treasurer of state or of the treasurer of any subdivision. "Public moneys of the state" includes all such moneys coming lawfully into the possession of the treasurer of state; and "public moneys of a subdivision" includes all such moneys coming lawfully into the possession of the treasurer of the subdivision.

(L) *"Subdivision"* means any municipal corporation, except one which has adopted a charter under Article XVIII, Ohio Constitution, and the charter or ordinances of the chartered municipal corporation set forth special provisions respecting the deposit or investment of its public moneys, or any school district, including a county school district, township, municipal or school district sinking fund, *special taxing or assessment district, or other district or local authority electing or appointing a treasurer, except a county...*

(M) *"Treasurer"* means, in the case of the state, the treasurer of state and in the case of any subdivision, the treasurer, or officer exercising the functions of a treasurer, of such subdivision. (Emphasis added.)

Thus, R.C. 135.14 authorizes the treasurer or governing board of a subdivision to invest interim moneys of the subdivision in the categories of obligations or instruments listed in R.C. 135.14(A)-(D).

R.C. 135.01(L) includes within its definition of "[s]ubdivision" any "special taxing or assessment district, or other district or local authority electing or appointing a treasurer." Each RTA is empowered by R.C. 306.35(H) to levy and collect taxes in the manner specified in R.C. 306.40 (an RTA "may submit to the voters within its territorial boundaries the question of...the necessity of a tax outside the limitation imposed by Section 2 of Article XII, Ohio Constitution, to pay the interest on and to retire" general obligation bonds issued by the RTA) and R.C.

306.49 (upon voter approval, an RTA "may levy upon the property within its territorial boundaries a tax, for all purposes other than bond debt charges, not in excess of five mills annually on the total value of all property as listed and assessed for taxation for any period not exceeding ten years," R.C. 306.49(A)). R.C. 306.33 also provides, in part, that the board of trustees of an RTA "shall appoint and fix the compensation of a secretary-treasurer, who shall be the fiscal officer and shall not be a member of the board and who shall serve at the pleasure of the board." Thus, for purposes of R.C. 135.01(L), an RTA qualifies as both a special taxing district and a local authority that appoints a treasurer.

An RTA is, therefore, a "[s]ubdivision," as defined in R.C. 135.01(L), and, as such, is subject to the directives set forth throughout R.C. Chapter 135 regarding the deposit and investment of public funds in its treasury. Among such directives is that found in R.C. 135.14, which specifically addresses a subdivision's deposit or investment of "interim moneys," a term that is further defined in R.C. 135.01(F). R.C. 135.14 specifically limits the deposit or investment of such interim moneys to the four categories of instruments or obligations enumerated in subdivisions (A) through (D) thereof.

With regard to the foregoing, you have asked whether participation by the Miami Valley Regional Transit Authority in the fuel purchasing arrangement described in your letter constitutes an investment for purposes of R.C. 135.14. If such an arrangement is an investment, one must then determine whether it is an investment that comes within one or more of the categories listed in R.C. 135.14(A)-(D), such that "interim moneys" of MVRTA may be used in connection with that arrangement.

I shall consider first whether the foregoing fuel purchase transaction is, as a general matter, an "investment" for purposes of R.C. 135.14. R.C. 135.14 specifically states that the treasurer or governing board may invest interim moneys in the types of investments described in 135.14(A)-(D). Neither R.C. 135.14 nor any other provision in R.C. Chapter 135 defines the terms, "invest" or "investment," as they are used in R.C. 135.14. Thus, in accordance with the rule of construction that appears in R.C. 1.42, those terms are to be "read in context and construed according to the rules of grammar and common usage." See *State v Dorso*, 4 Ohio St. 3d 60, 62, 446 N.E.2d 449, 451 (1983) ("any term left undefined by statute is to be accorded its common, everyday meaning"); *Eastman v. State*, 131 Ohio St. 1, 1 N.E.2d 140 (1936) (syllabus, paragraph five) (same). *Webster's New World Dictionary* 741 (2nd college ed. 1978) states, in pertinent part, that "invest" means "to put (money) into business, real estate, stocks, bonds, etc. for the purpose of obtaining an income or profit," and that "investment" means "anything in which money is or may be invested." Similarly, *Black's Law Dictionary* 741 (5th ed. 1979) defines the term, "[i]nvestment," in the following manner:

An expenditure to acquire property or other assets in order to produce revenue; the asset so acquired. The placing of capital or laying out of money in a way intended to secure income or profit from its employment. To purchase securities of a more or less permanent nature, or to place money or property in business ventures or real estate, or otherwise lay it out, so that it may produce a revenue or income. (Citation omitted.)

See, e.g., *In Re Bowen*, 141 Ohio St. 602, 608, 49 N.E.2d 753, 755 (1943) ("[a]n 'investment' as that word is commonly used and understood is the placing of capital or laying out of money in a way intended to secure income or profit from its employment"); *State v. Gibbs*, 18 Ohio Dec. 694, 696, 7 Ohio N.P. (n.s.) 371, 372-73 (C.P. Huron County 1908) ("[a]n investment is the laying out of money with the view of obtaining an income or profit from the thing bought whether it be an interest in a business, a farm, stocks or bonds; to place money so that it will be safe and yield a profit; to put money out at interest, either by way of loan or of income producing property") (citations omitted).

Given the foregoing definitions, I am of the opinion that participation by the Miami Valley Regional Transit Authority in the fuel purchasing arrangement described in your letter cannot reasonably be considered an investment for purposes

of R.C. 135.14. The authorities cited above agree that an "investment," in the common and ordinary sense, is understood as referring to the use or expenditure of money, or other capital resource, in connection with a particular enterprise, activity, or undertaking for the specific purpose of realizing therefrom income, revenue, or other financial gain or profit. It is clear, however, that the fuel purchasing arrangement in question cannot be so characterized. According to the information contained both in your letter and in contract documents subsequently provided to me by personnel of MVRTA, that transaction has but a single purpose — to facilitate the purchase of diesel fuel, gasoline, and other petroleum products by MVRTA at a better price than might be possible if MVRTA were to purchase such products on a month-to-month basis only. Such transaction, therefore, is clearly intended to reduce the overall fuel costs incurred by MVRTA in connection with its operation of a regional transportation system, and not to produce additional revenue or profit for MVRTA in the sense commonly conveyed by the term, "investment." Moreover, the fact that one component of that fuel purchasing arrangement, namely, the purchase and sale of futures contracts by MVRTA's fuel supplier, is, in other business contexts, undertaken for investment purposes does not thereby convert this particular transaction, and MVRTA's participation therein, into an investment for purposes of R.C. 135.14.

Thus, I am of the opinion that participation by the Miami Valley Regional Transit Authority in the fuel purchasing arrangement you have described does not constitute an investment for purposes of R.C. 135.14. Accordingly, I find it unnecessary to address the further question of whether such arrangement comes within one or more of the categories listed in R.C. 135.14(A)-(D), such that interim moneys of MVRTA may be expended in connection therewith.

It is, therefore, my opinion, and you are advised that:

1. The Miami Valley Regional Transit Authority may, pursuant to the terms of R.C. 306.35(B), R.C. 306.35(G), R.C. 306.35(J), and R.C. 306.44, enter into contracts for the purpose of purchasing diesel fuel, gasoline, and other petroleum products for use in buses and other motor vehicles that it owns or operates.
2. A contractual arrangement between the Miami Valley Regional Transit Authority and a fuel supplier for the purchase of diesel fuel, gasoline, and other petroleum products for use in buses and other motor vehicles that it owns or operates, the purchase price of which is to be based, in part, upon the prior purchase and sale of heating oil futures contracts by such supplier, is not an investment for purposes of R.C. 135.14.