

OPINION NO. 826**Syllabus:**

1. A board of county commissioners as a county governing board is not required to enter into an investment program strictly in accordance with the provisions of the Uniform Depository Act and, specifically, in accordance with Section 135.12, Revised Code. Section 321.44, Revised Code, may be utilized when the board, in the exercise of its discretion, determines that an investment of funds in bonds or other interest bearing obligations of the United States should be made. The use of said Section 321.44, Revised Code, is not a deviation from the provisions of the Uniform Depository Act since it is a supplementary law.

2. A board of county commissioners is authorized to invest undivided tax funds in accordance with, or pursuant to, Section 321.44, Revised Code. This same right may also be exercised under Section 131.141, Revised Code. (Uniform Depository Act).

3. The duties and functions of a county treasurer pertaining to an investment program adopted or to be adopted by a board of county commissioners, whether pursuant to the Uniform Depository Act or under Section 321.44, Revised Code, do not include any right to determine what investments shall be made.

4. When a board of township trustees or a board of county commissioners has entered into an inactive depository account, and funds have been deposited in such inactive depository, such board under Section 135.20, Revised Code, may, at any time during the period of designation, determine that any part of all of such inactive deposits shall be withdrawn from the inactive depository and invested pursuant to Section 135.141, Revised Code. In the case of a board of county commissioners, investment may also be made in accordance with Section 321.44, Revised Code.

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To: Roger W. Tracy, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, January 24, 1964

Your request for my opinion reads:

"It has come to our attention that a variety of investment programs are being undertaken throughout the State of Ohio, by various subdivisions, especially counties and that there is a certain lack of

uniformity in the procedures followed in these investment programs. Specifically, the following questions have given rise to differing procedures:

"1. May a governing board enter into an investment program if the provisions of Section 135.01 to 135.23, Revised Code, have not been fully utilized, i.e., only in accordance with the provisions of Section 135.12, Revised Code? To what extent may governing boards deviate from the provisions of the Uniform Depository Act?

"2. It has been brought to our attention that some county governing boards are investing under the provisions of Section 321.44, Revised Code. Under authority of this Section may governing boards invest undivided tax funds? May governing boards invest undivided tax funds, as outlined in 1960 OAG #1202, where Section 135.141, Revised Code, was interpreted as an alternative?

"3. What are the duties and functions of a county treasurer pertaining to an investment program adopted or to be adopted by a county governing board, under the provisions of the Uniform Depository Act and under Revised Code Section 321.44?

"4. If a county or township has entered into an inactive depository contract, and funds have been duly deposited in such inactive depository, may the governing board of the subdivision at any time during the period of designation determine that any part or all of such inactive deposits shall be withdrawn from the inactive depository and invested pursuant to either Section 135.141 or 321.44, of the Revised Code?

"In view of the diversity of interpretations now followed by various subdivisions, your opinion on the above questions is respectfully requested."

The provisions of law principally involved are Sections 135.12 and 135.141, Revised Code, in Uniform Depository Act, and Section 321.44, Revised Code, which is in the code chapter

dealing generally with the duties of a county treasurer. Additionally involved is Opinion No. 1202, Opinions of the Attorney General for 1960, the syllabus of which reads:

"1. Section 321.44, Revised Code, is a special statute dealing with the authority of a board of county commissioners to invest inactive county funds in bonds or other obligations of the United States and, as such, constitutes an exception to the provisions of Sections 135.12 and 135.141, Revised Code, so far as such sections apply to the investment of inactive county funds in direct obligations of the United States by a board of county commissioners.

"2. Pursuant to Section 321.44, Revised Code, a board of county commissioners may invest inactive county funds in bonds or other obligations of the United States and such a board is not required to follow either the provisions of Section 135.12, Revised Code, nor the provisions of Section 135.41 (sic), Revised Code, in making such deposits. (Paragraph 3 of the syllabus of Opinion No. 1899, Opinions of the Attorney General for 1958, page 188, and that part of paragraph 4 of Opinion No. 860, Opinions of the Attorney General for 1959, issued on October 9, 1959, relating to investments in direct obligations of the United States, overruled.)"

The lengthy provisions of Section 135.12, Revised Code, will not be set forth. It is sufficient to note it provides that surplus funds may be invested in the securities mentioned in the section after the possibilities have been exhausted of obtaining depositories for such funds. However, as previously indicated, above Opinion No. 1202 expressly overruled a prior holding in respect of the duties of a board of county commissioners under said Section 135.12, Revised Code. This prior opinion, No. 1899, Opinions of the Attorney General for 1958, holds in the third branch of the syllabus:

"3. Until the board of county commissioners has exhausted the possibility of obtaining depositories for surplus funds in its hands, it is without authority to invest the same in securities, as provided in Section 135.12, Revised Code."

Attention is next directed to Section 321.44, Revised Code, which provides in relevant part:

"The board of county commissioners in each county may, by resolution adopted and recorded, invest so much of the funds received by the county as are not required to meet current expenses, in bonds or other

interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, provided the maturity of the bonds is not later than three years after the date of the investment."

A brief recitation of the legislative history of the section is worthy of note. It came into existence in 1933 as supplemental Section 2715-2, General Code, and appeared in the chapter of the code then dealing with the duties of a county treasurer. See 115 Ohio Laws (Part II), page 64. Moreover, the Act providing therefor contained an emergency clause which states in part:

"* * * The reason for such necessity lies in the fact that large sums of money hitherto collected * * *, and the sums hereafter presently to be collected cannot be deposited in banks at an adequate interest rate and the several boards of county commissioners for the safety of said funds will in many cases be compelled to retain said funds in their possession and custody * * *"
(Emphasis added)

It is also worthy of note that this above section is substantially the same as passed approximately thirty years ago.

Notwithstanding that the same considerations giving rise to the enactment of the aforesaid supplemental Section 2715-2, General Code, have long ceased to exist it has nonetheless continued in force and effect. This is clearly evidenced by the last paragraph of Section 135.141, Revised Code, which also became effective as a supplemental section July 28, 1959. See 128 Ohio Laws, 580. As subsequently amended in a minor particular, not here of consequence, this section reads:

"Following the receipt of bids from eligible institutions as provided in section 135.08 of the Revised Code and notwithstanding the provisions of section 135.09 of the Revised Code, if the proper governing board in its discretion finds that any part of public moneys that could become inactive deposits should be invested otherwise, such board may order the treasurer to invest any part of such excess in bonds, notes, certificates of indebtedness, treasury bills, or other securities issued by and constituting direct obligations of the United States, but only such obligations as will mature or are redeemable at the option of the holder within two years from the date of purchase shall be eligible securities for such investments. Any order of the board directing the treasurer to invest public moneys shall specifically state the amount of public moneys to be

invested and shall specifically describe the securities to be acquired.

"Nothing in this section contained shall limit the powers of any county or municipal corporation to invest funds pursuant to sections 321.44, 731.56, 731.57, and 731.58 of the Revised Code."

Having previously called attention to Sections 135.141 and 321.44, Revised Code, each being a supplemental section, the purpose of such a section should be noted. It is stated in 50 Ohio Jurisprudence 2d, Statutes, Section 72:

"As distinguished from an amendment, a supplementary statute is one which supplies a deficiency, adds to or completes, or extends that which is already in existence, without changing or modifying the original, and its purpose is only to improve the existing statute by adding something thereto without changing the original text * * *"

With the observations heretofore made as background, your first question is now considered. You refer therein to a governing board, which could include other such boards. It is my understanding however, that this particular question is specifically with reference to a board of county commissioners.

I do not regard Section 321.44, Revised Code, as superseding Section 135.12, Revised Code. In this regard the following appears in the body of aforesaid Opinion No. 1202, at page 167:

"In short, your question asks whether the provisions of Section 135.12, Revised Code, as regarding the investing of excess public moneys by the county treasurer in direct obligations of the United States, are superseded by the provisions of Section 135.141, Revised Code, or by the provisions of Section 321.44, Revised Code, or by the provisions of both such sections."

The word "supersede" means to take the place of or to supplant. Nor am I in full accord with the proposition that Section 321.44, Revised Code, constitutes "an exception to the provisions of Sections 135.12 and 135.141, Revised Code" as stated in the first branch of the syllabus in aforesaid opinion. Instead I prefer to consider Section 321.44, Revised Code, as conferring in a board of county commissioners supplementary or additional rights not given in Section 135.12, Revised Code, since it may not be feasible or practicable for various reasons to enter into a contract to place in a depository "funds received by the county as are not required to meet current expenses." In other words, when in the exercise of the board's sound discretion such funds should be invested in bonds, the legal right to do so is not subject to challenge. Moreover, I do not believe when such right is exercised by a board of county commissioners

it must necessarily be regarded as a deviation from the provisions of the Uniform Depository Act. The end result is that the same basic conclusion has been arrived at as in aforesaid Opinion No. 1202, but under a different process of reasoning. However, this reasoning is consonant with the legal requirement that statutes should be harmonized and reconciled to give effect to each.

Your second question involves "undivided tax funds." While I have been unable to find any definition of these words there is not much doubt that they have reference to taxes levied by and collected for a subdivision by the county treasurer.

I am aware that there are divergent points of view as to whether Section 321.44, Revised Code, can be utilized in regard to the investment of undivided tax funds. One view finds expression in Opinion No. 3819, Opinions of the Attorney General for 1941, at page 412:

"It would seem that, with respect to the moneys so received in the county treasury, the county treasurer occupies a fiduciary relationship. It is as though he were a trustee of such moneys of which the various taxing units are the beneficiaries. If then the county treasury occupies a fiduciary relationship with respect to such funds, it follows as a necessary incident that the treasury may not receive a profit or benefit from the earnings of such trust res, except to the extent that the county is also a beneficiary. * * *"

Then follows a reference in the above opinion to Section 2296-21, General Code, of the Uniform Depository Act which heretofore provided in part:

"All interest realized on money included within a public deposit and belonging to undivided tax funds shall, excepting as otherwise expressly provided by law, be apportioned by the auditor pro rata among the separate funds or taxing districts * * *"
(Emphasis added)

The present comparable law is Section 135.23, Revised Code, which contains this same exception. However, it appears that no particular attention was focused on the significance of this "exception" in arriving at the conclusion expressed in the 1941 Opinion.

The other view of the matter finds some support in the case of Cleveland v. Kangerle, County Aud., 127 Ohio St., 91, wherein the following appears at page 92 of the Opinion:

"No governmental subdivision of the state has any vested right, at least until distribution is made, in any taxes levied and in the process of collection. * * *"

I have also taken into consideration Opinion No. 1803, Opinions of the Attorney General for 1950, wherein the specific question in the opinion request is now set forth:

"The Board of County Commissioners of Franklin County, Ohio, has invested surplus funds in the hands of the County Treasurer in Government securities as authorized by General Code Section 2715-2. Said section provides that the interest shall be credited to the "proper county fund."

"Will you please advise this office what fund is meant by "proper county fund.""
(Emphasis added)

The syllabus of the opinion reads:

"Interest earned on surplus funds in the hands of the county treasurer invested in government securities as authorized by Section 2715-2, General Code, should be paid into the general fund of the county, unless there is statutory language to the contrary."

There is, of course, no indication as to whether there is included in the "surplus funds" referred to in the question undivided tax funds. I am informed, however, that many boards of county commissioners have been investing undivided tax funds on the authority--in part, at least--of the 1950 Opinion.

Further involved is previously quoted Section 321.141, Revised Code, which, apart from some confusing language therein, does authorize the treasurer, when ordered to do so to invest public moneys in United States bonds.

Additional arguments could be advanced for and against the two views. However, the principal and persuasive factor in reaching the conclusion that I have is the proposition that the General Assembly has expressly seen fit to keep in force and effect the rather broad terms of Section 321.44, Revised Code, as enacted more than three decades ago.

In specific answer to your second question it is accordingly my opinion that a board of county commissioners has the legal right to invest undivided tax funds in accordance with the terms of Section 321.44, Revised Code.

Your third question concerns the duties of the county treasurer pertaining to an investment program. This matter need not be elaborated. I do not find any provision in the Uniform Depository Act that suggests he shall have any voice in what investments shall be made and when they should be made. His status as to the securities is essentially that of a custodian even though they are to be registered in his name. Reference to Section 135.12, Revised Code, discloses that it contains the following:

"If any securities, purchased under

the authority of this section, are issuable to a designated payee or to the order of a designated payee, the name of the treasurer and the title of his office shall be so designated. If any such securities are registrable either as to principal or interest, or both, then such securities shall be registered in the name of the treasurer as such.

"The treasurer is responsible for the safekeeping of all securities acquired by him under this section. Any of such securities may be deposited for safekeeping in the Federal Reserve Bank of Cleveland or with any trust company which has its principal place of business in and is qualified to do a trust business in this state. Interest realized on any investments authorized by this section shall be collected by the treasurer and credited by him to the general fund of the state or subdivision."

Moreover, Section 321.44, Revised Code, provides in part:

"The county treasurer shall pay for such bonds or other interest bearing obligations upon their delivery to him, when they are accompanied by a voucher signed by not less than two members of the board, to which voucher there is attached a certified copy of the resolution authorizing the purchase. All such bonds or obligations shall be deposited with the treasurer as custodian thereof, * * *"

When the law imposes duties on public officers which involve discretion there may be no delegation of the discretionary power. Accordingly a county treasurer is therefore without authority to determine how funds shall be invested under Section 321.44, Revised Code, or pursuant to the Uniform Depository Act.

Your fourth and final question concerns both a board of county commissioners and a board of township trustees. In connection therewith I now direct attention to what is stated in the body of previously mentioned Opinion No. 1202, at page 168:

"Section 135.141, Revised Code, is however rather confusing in that the first sentence refers to an order to the treasurer to invest any part of 'such excess.' What these words mean is not clear since they have no antecedent in the section. While it is possible that 'such excess' refers to the excess over the aggregate amount of deposits made in public depositories as provided in the third paragraph of Section 135.12, supra, such an interpretation would have the effect of

invalidating Section 135.141, supra, as deposits in direct obligations of the United States would then have to follow the procedure of said Section 135.12.

"To answer the particular question at hand, however, I do not deem it necessary to resolve the question posed by the wording of Section 135.141, supra, as the provisions of Section 321.44, Revised Code, appear to govern the authority of a board of county commissioners to invest in direct obligations of the United States. * * *"

Considerable doubt is entertained that it is the intentment of the Uniform Depository Act for inactive deposits to be withdrawn at will at any time during the period of designation and the money then invested in bonds. However, in respect to transfer of funds, Section 135.20, Revised Code, provides in relevant part:

"Whenever the governing board is of the opinion that the actual amount of active deposits subject to the check of its treasurer is insufficient to meet the maximum anticipated demands on such active deposits for the succeeding two months, it shall direct the treasurer to transfer from the inactive deposits to the active deposits an amount sufficient to meet such demands subject to restrictions upon the withdrawal of inactive deposits. * * *"

(Emphasis added)

Note might also be taken of Section 135.19, Revised Code, as to withdrawal rights which provides inter alia:

"Each treasurer shall, when necessary to pay demands made on him as such treasurer, or when directed by the governing board, withdraw any part of any active public deposit by issuing his check therefor on the public depository. * * *"

It is my understanding that there are some instances where township trustees have inactive depository contracts and withdraw money on various occasions during the period of designation for investment in United States securities. I believe I must assume, however, that there is some basis for doing so and absent further information could not legally disapprove such action.

As will be observed, considerable latitude is conferred under Section 135.20, Revised Code, since appearing therein are the words "is of the opinion." This same general latitude is likewise inherent in Section 321.44, Revised Code. But in either instance the exercise of a sound discretion is patently contemplated.

I do not conceive it to be your legal duty to determine in each and every instance whether there is an

abuse of discretion in regard to the authority being exercised when a transfer of funds is made. There may be some cases in which, with full knowledge of all the circumstances and conditions, the matter could be resolved. However, I feel you are entitled to rely upon the general proposition that public officers or officials are presumed to be acting in good faith particularly when it is a situation involving "is of the opinion."

I further feel I cannot conclude that the practices you have above indicated are being followed by township governing boards are definitely and positively contrary to law, in the light of the somewhat ambiguous terms of Section 135.141, Revised Code. Since this section provides for the right to invest in bonds, apart from the lack of clear language as to the circumstance under which it may be done, I believe that a board of township trustees is authorized to utilize its terms to the extent that investment in the securities therein mentioned is desired to be made. It might further be suggested that the general intendment of this section seems to be to give to all governing boards authority to make investments comparable to that specifically given a board of county commissioners under Section 321.44, Revised Code.

In specific answer to your several questions it is therefore my opinion:

1. A board of county commissioners as a county governing board is not required to enter into an investment program strictly in accordance with the provisions of the Uniform Depository Act and, specifically, in accordance with Section 135.12, Revised Code. Section 321.44, Revised Code, may be utilized when the board, in the exercise of its discretion, determines that an investment of funds in bonds or other interest bearing obligations of the United States should be made. The use of said Section 321.44, Revised Code, is not a deviation from the provisions of the Uniform Depository Act since it is a supplementary law.

2. A board of county commissioners is authorized to invest undivided tax funds in accordance with, or pursuant to, Section 321.44, Revised Code. This same right may also be exercised under Section 131.141, Revised Code. (Uniform Depository Act).

3. The duties and functions of a county treasurer pertaining to an investment program adopted or to be adopted by a board of county commissioners, whether pursuant to the Uniform Depository Act or under Section 321.44, Revised Code, do not include any right to determine what investments shall be made.

4. When a board of township trustees or a board of county commissioners has entered into an inactive depository account, and funds have been deposited in such inactive depository, such board under Section 135.20, Revised Code, may, at any time during the period of designation, determine that any part of all of such inactive deposits shall be withdrawn from the inactive depository and invested pursuant to Section 135.141, Revised Code. In the case of a board of

county commissioners, investment may also be made in accordance with Section 321.44, Revised Code.