

MEMORANDUM OF LAW

DATE: June 15, 1992

TO: Conny M. Jamison, City Treasurer

FROM: City Attorney

SUBJECT: Funds Deposited With County Investment Pool

By means of your February 13, 1992 memorandum and subsequent conversations, you inquired about the legal implications of investing "excess funds" in the County of San Diego's investment pool. By "excess funds" we understand you to reference funds over which you have discretionary control and not those funds that are expressly restricted by the City Charter (e.g., Section 145 Retirement Fund). Therefore with reference to those "excess funds" over which you have discretionary control, we advise as follows:

1. Are City funds protected from County creditors in case of bankruptcy?

Yes. California Government Code section 53684(a), adopted in 1986, authorizes local agencies to deposit excess funds in the county treasury for investment by the county treasurer. Subsection (e) of that section states that any monies so deposited are not subject to impoundment or seizure by the county. California Government Code section 27100.1, enacted in 1991, was specifically drafted to clarify the status of funds held in trust by a county treasurer in the event of a county's bankruptcy. The legislative digest for that section explains that in order to avoid any characterization of the deposited funds as county property, the language of the statute is clear that the funds "shall not be deemed funds or assets of the county and the relationship of the depositing entity . . . and the county shall not be one of creditor-debtor." California Government Code section 27100.1. This answers both your question and Councilmember Behr's question regarding risk to City funds in the event of any possible financial difficulty of San Diego County.

2. Could the County prevent the City from withdrawing funds deposited therein for investment purposes?

No. California Government Code section 53684(e) states in relevant part that "any moneys deposited in the county

treasury for investment . . . are not subject to impoundment or seizure. . . ." The only statutory limitation on the City's access to its funds is provided in Section 53684(d) which requires thirty (30) days' written notice for withdrawal of funds.

3. Councilmember Behr's question: would the City funds be protected from a third party lawsuit against the County?

As noted above, California Government Code section 53684(e) prohibits the impoundment or seizure of deposited funds.

Further, Government Code section 27100.1 states that deposited funds are held in trust by the county and shall not be deemed funds or assets of the county. Therefore, such funds are not at risk in a third-party lawsuit against the county.

4. Does the California Constitution, Article XVI, section 6, grant the County the right to use funds so invested for other purposes?

The answer is unclear. Although California Government Code section 53684(e) holds that such funds are not subject to impoundment or seizure, a constitutional provision conflicting with that statute would prevail. Note that Article XVI, section 6 of the California Constitution states:

The treasurer of any city, county,  
or city and county shall have power  
and the duty to make such temporary  
transfers from the funds in custody  
as may be necessary to provide funds  
for meeting the obligations incurred  
for maintenance purposes by any city,  
county, city and county, district, or  
other political subdivision whose  
funds are in custody and are paid out  
solely through the treasurer's  
office. Emphasis added.

Unfortunately, a definitive answer to this question is not possible at this time. You have indicated that the County Treasurer's Office interprets the above-cited language to permit temporary transfers of invested funds. While there is no precise resolution of this view due to the lack of definition of "funds in custody," we believe the better view is that invested funds are not subject to temporary transfers.

This view is bolstered by both language and intent. Obviously funds that are invested can be said to be substantially different from other custodial funds. First, they are clothed in a trust concept per California Government Code section 27100.1 and therefore under neither the disposition nor ownership of the county. Secondly, the whole import of Article XVI, section 6

was to benefit political subdivisions by providing mutual access.

The principal provision of Article IV, section 31 now Article XVI, section 6 prohibits the State, the counties and cities from giving or lending their money or credit. The fund transfer provision was added by a 1926 amendment. Before the amendment, the constitutional provision would often prevent a county or city acting as custodian for the funds of various political subdivisions from transferring money from one political subdivision to another. During the "dry period" which occurs after the start of the fiscal year and before the receipt of property tax revenue for that year, local agencies with insufficient reserves would fall short of cash. Operating expenses would have to be conducted on credit, by means of notes, registered warrants or tax anticipation warrants. Some political subdivisions might have surplus idle cash, while others with accounts in the same public treasury would be forced to borrow and to pay interest on their borrowings. The purpose of the 1926 amendment was to ease the restrictions of Article IV, section 31, to save interest costs by authorizing cash transfers between political subdivisions having accounts in the same county or city treasury. Thus, at several places, Article IV, section 31, now speaks of temporary fund transfers "to any political subdivision."

20 Ops. Cal. Atty. Gen. 224, 226 (1952).

It hardly furthers the intent of such a section if it is construed as putting political subdivision assets at risk rather than as pooled resources. Therefore both via the imposed trust concept of Government Code section 27100.1 and the very purpose of the constitutional provision, we believe the better view to be

that invested funds of political subdivisions are not available for temporary transfers to satisfy the obligations of other entities.

Appreciating the uncertainty you face on this issue, this office contacted the California Attorney General's Office for the procedure of pursuing an opinion. We were informed that civil opinions were not issued to municipalities per California Government Code section 12519. To assist in resolving this issue, we will contact the County Counsel's Office for a confirmation of our advice. If such confirmation is not forthcoming and if the construction of Article XVI, section 6 is the critical factor in your investment strategy, we could file an action for declaratory relief to test the limitations of Article XVI, section 6. Declaratory relief would then provide a judicial determination on the use or nonuse of the invested funds.

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By

Ted Bromfield

Chief Deputy City Attorney

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Jack M. Sturak, Assistant Treasurer

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