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FILE NO. S-575

COUNTIES:

**Illegality of county board
member having an interest
in a depository of county
funds.**

Honorable Philip G. Reinhard
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Rockford, Illinois 61101

Dear Mr. Reinhard:

I have your letter pertaining to the legality of
a county board member having an interest in a bank in which
county funds have been deposited.

In your letter you state, in part, as follows:

"The factual situation pertinent to Winnebago
County is that whenever requested by the County
Treasurer, pursuant to Ch. 36, Sec. 20, para-
graph 1, previous Winnebago County Boards have,
by Resolution named and authorized banks as
depositories for the funds of the County Trea-
surer and Ex-Officio County Collector. All of

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the 17 banks in Winnebago County have been named and authorized to be depositories for those funds by appropriate Resolutions of previous County Boards. The present County Board has not itself authorized any banks as depositories, since all of the banks in Winnebago County have been previously authorized prior to April 4, 1972. Should a Charter be issued for a new bank in Winnebago County, the practice of the Winnebago County Board would be, if requested by the County Treasurer, to approve that new bank as an additional depository for funds in the custody of the County Treasurer by Resolution without renaming all of the other banks as approved depositories. To my knowledge, no bank outside of Winnebago County has been refused authorization by the County Board, if so requested by the County Treasurer, and currently one bank outside of Winnebago County is authorized as a depository.

The Winnebago County Board does not, in any manner, suggest or direct the County Treasurer to deposit funds in a particular bank, or banks. The County Treasurer in his sole discretion can deposit county funds in any one or more of the authorized banks. Currently, County funds in varying amounts are now deposited in all of the 18 authorized banks, some of which have a County Board Member associated with the bank in one of the categories listed below. Specifically, we request your opinion as to whether any violation of Ch. 102, Sec. 3, Ill. Rev. Stat., 1971, occurs with respect to present County Board Members who have the following interest or association with banks in Winnebago County and where Winnebago County has County moneys on deposit:

1. An employee of a bank.
2. A director of a bank.

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3. A stockholder in a bank.
4. A spouse or member of the immediate family of a County Board Member owning stock in a bank.

If your answers to the above questions are that there is a violation of Ch. 102, Sec. 3, is this corrected and the County Treasurer discharged from responsibility, if he did not, pursuant to Ch. 36, Sec. 20, paragraph 1, request that the County Board designate depositories, but instead he, himself, deposited funds in those banks and required securities equal in market value to the amount of funds and moneys deposited and entered into an agreement with the bank to that effect pursuant to Ch. 36, Sec. 20, paragraph 2?"

Section 4 of AN ACT concerning county treasurers, in counties containing more than 150,000 inhabitants, and concerning public funds within their custody and control and the interest thereon, and to repeal all acts or part of acts in conflict therewith (Ill. Rev. Stat., 1971, ch. 36, par. 20) [hereinafter referred to as the County Funds Depository Act] reads as follows:

"In counties having a population of more than 150,000 the county board, when requested by the County Treasurer, shall designate a bank or banks or other depository in which the funds and other public moneys in the custody of the

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County Treasurer may be kept and when a bank has been designated as a depository it shall continue as such until 10 days have elapsed after a new depository is designated and has qualified by furnishing the statements of resources and liabilities as is required by this Section. When a new depository is designated, the county board shall notify the sureties of the County Treasurer of that fact, in writing, at least 5 days before the transfer of funds. The County Treasurer shall be discharged from responsibility for all funds and moneys which he deposits in a depository so designated while such funds and moneys are so deposited.

No bank is qualified to receive such funds or moneys until it has furnished the county board with copies of the last two sworn statements of resources and liabilities which such bank is required to furnish to the Commissioner of Banks and Trust Companies or to the comptroller of currency. Each bank designated as a depository of funds or moneys shall, while acting as such depository, furnish the county board with a copy of all statements of resources and liabilities which it is required to furnish to the Commissioner of Banks and Trust Companies or to the comptroller of currency. If such funds or moneys are deposited in a bank, the amount of such deposits shall not exceed 75% of the capital stock and surplus of such bank, and the County Treasurer shall not be discharged from responsibility for any funds or moneys deposited in any bank in excess of such limitation, however, the County Treasurer of any County may require each bank selected as a depository to deposit with him securities equal in market value to the amount of the funds and moneys deposited, and such County Treasurer is authorized to enter into an agreement with any such depository bank relating to the deposit of such securities. The

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County Treasurer shall be discharged from responsibility for any funds or moneys for which securities are so deposited with him and the funds and moneys deposited in a bank for which securities are so deposited shall not be limited in amount."

The County Funds Depository Act when first enacted (Laws of 1915, p. 355) provided that the county treasurer shall advertise for bids from all regularly established national and state banks doing business within his county for interest on county money to be deposited in said banks. All bids shall be referred to the county treasurer, county clerk and the president or chairman of the county board of such county, who shall have the power by a majority vote, to reject any or all bids or to designate as many depositories as they deem necessary for the protection of all county monies and make awards accordingly. Each depository was required to give bond to secure the county deposits.

In People v. West Englewood Bank, 353 Ill. 451 (1933), the constitutionality of certain sections of the County Funds Depository Act was challenged. It was claimed that since the county treasurer was a constitutional officer his common law

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powers could not be revised by statute. It was further alleged that at common law the county treasurer was the sole custodian of county funds and that this power had been usurped by section 4 of the County Funds Depository Act. The Illinois Supreme Court held that the General Assembly was without power to take from the county treasurer the absolute custody of the county funds.

"It was the positive purpose of the General Assembly as expressed in the depository act, to compel the county treasurer to deposit daily the public funds in some of the banks of his county - not in banks selected by him but in banks selected by a majority of an official body composed of the county treasurer, the county clerk and the chairman of the county board of such county. It is possible that none of the banks designated would be of his selection. It will be seen that if the act is fully complied with, the county treasurer would be little more than a book-keeper with respect to the custody of public funds. * * *

The legislature is without power to compel a treasurer to put the public funds at profitable employment or to impose upon him any hazard whatever. When he assumes the duties of the office he accepts whatever risks and hazards there are incident to the receipt and safekeeping of the public funds, and the General Assembly is powerless to increase his hazard. He is a constitutional officer and the legislature cannot deprive him of his stewardship. Neither

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can it assume for itself the right to determine the depository for the public funds, whether such depository be a bank or otherwise. If such power can be exercised by the legislature it would have the right to take from him and repose in another the custody of the public funds. Such a course of conduct would be out of harmony with the spirit of the constitution. There can be no doubt that the legislature has the right to require a treasurer to keep proper accounts and to make frequent reports of his fiscal affairs. Such duties in no way conflict with his constitutional duties. It is therefore our opinion that the legislature is without power to strip a treasurer of his right of absolute custody of the public funds which come into his possession under the law. It follows that his deposits in the bank did not create a trust ex maleficio."

Subsequent to the Illinois Supreme Court ruling in People v. West Englewood Bank, section 4 of the County Funds Depository Act, was amended to account for the court's objections. (Laws of 1947, p. 763). Today, the county treasurer can, of course, deposit funds in any bank he chooses. However, the county treasurer cannot relieve himself from liability for the loss of any funds he places into a bank unless said bank is first designated as a depository pursuant to the provisions of section 4 of the County Funds Depository Act. (Ill. Rev. Stat., 1971, ch. 36, par. 20). It is, of course, obvious that relief

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from personal liability is a strong incentive for the county treasurer to deposit funds in a bank designated as a depository by the county board.

It should be noted that if the county treasurer deposits funds in a designated depository amounting to more than 75% of the capital stock and surplus of the depository, then, the county treasurer will remain liable for the amount of funds exceeding the 75% level. However, paragraph 2 of section 4 of the County Funds Depository Act (Ill. Rev. Stat., 1971, ch. 36, par. 20) further provides that if a designated depository deposits securities with the county treasurer, then, the amount of the county funds deposited with the depository may equal the amount of the securities even if said amount exceeds 75% of the capital stock and surplus of the depository without making the county treasurer personally responsible for the amount of funds in excess of 75% of the capital stock and surplus.

A deposit of funds in a bank creates a contractual relation between the bank and the depositor. Sanders v.

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Merchants State Bank of Centralia, 349 Ill. 547, 563; 1959 Atty. Gen. Op., p. 7; 9 C.J.S., Banks and Banking, sec. 267b, p. 545; 10 Am. Jur. 2d, Banks, sec. 337, p. 299.

Section 3 of AN ACT to prevent fraudulent and corrupt practices in the making or accepting of official appointments and contracts by public officers (Ill. Rev. Stat., 1971, ch. 102, par. 3 [hereinafter referred to as the Corrupt Practices Act]), reads, in part, as follows:

"No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. * * * Any contract made and procured in violation hereof is void."

A county board member is an elected officer. (Ill. Const., art. VII, sec. 3). It is noted that no officer, whether elected or appointed, may be directly or indirectly interested in any contract or work in the making or letting of which the officer may be called upon to act or vote.

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At this point, our attention should be focused on the words "may be" which appear at line 3 of section 3 of the Corrupt Practices Act. These words indicate that it was the intent of the legislature to proscribe the possibility of an officer acting or voting upon a contract in which the officer is directly or indirectly interested. The officer does not have to actually vote or act upon the contract to void the contract. If it were possible for him to vote or act upon the contract, then, the contract is voided. This was made clear in Peabody v. Sanitary District, 330 Ill. 250.

In Peabody, it appeared that the Sanitary District let a contract to a corporation in which the treasurer of the Sanitary District owned one-third of the capital stock. The treasurer, under the law, had no vote in the letting of the contract. However, under the rules of the Sanitary District, he was the financial adviser of the board of trustees of the district and the court held that he could have been called upon by the trustees to advise them relevant to the financial ability of the corporation to perform the contract. Although he was

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not present at the meeting when the contract was let, nor called upon for any advice, the court held that he was in a position where he could have been called upon by the trustees for financial advice and, therefore, the contract was void.

It should be emphasized that the fact that the treasurer of the Sanitary District could not vote upon the contract, but only advise upon financial matters, was still deemed sufficient possibility of conflict of interest to void the contract. At page 258 the court stated:

" * * * While his [Sanitary District Treasurer] testimony is to the effect that he had nothing to do with making or letting the contract to the ballast company, this is quite beside the point. If his duties were such that he could or might have been called upon to take any action in the matter of making a contract, that fact disqualified him from having any interest in the contract, either directly or indirectly, and such a contract was void."

Again, at page 261, the court states:

" * * * The thing prohibited is an interest of a public officer, either directly or indirectly, in any contract in the making of which some action may be required of such officer. * * *"

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A county treasurer may deposit funds in any bank of his choosing; however, if he deposits funds in a bank that has been designated as a depository by the county board, the county treasurer can eliminate or, at least, substantially reduce his chances of being held liable for the loss of any county funds so deposited. To reiterate, this is a compelling incentive for the county treasurer to place funds only in banks designated by the county board as depositories.

In those cases where the county treasurer requests that the board designate a depository and the board does so name a depository, this county board action is an important condition precedent to the formulating of a contract of deposit between the county and the depository. I am of the opinion that when the county board designates a depository it is acting upon a contract of deposit and as such the provisions of section 3 of the Corrupt Practices Act (Ill. Rev. Stat., 1971, ch. 102, par. 3) apply to this county board action.

Now we must determine what "direct or indirect interests" are prohibited by section 3 of the Corrupt Practices Act. It is generally held that the rule forbidding a public

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officer from being interested in public contracts applies to contracts of a corporation in which he is an officer, director or stockholder. 63 Am. Jur. 2d, Public Officers and Employees, sec. 316 (1972).

It should be noted that my predecessor, William G. Clark, on April 6, 1965, issued an opinion (File No. UP-1355) wherein he held that it would be a violation of section 3 of the Corrupt Practices Act (Ill. Rev. Stat., 1971, ch. 102, par. 3) to designate a bank as a depository which employs a member of the county board.

In People ex rel. Pearsall v. Sperry, 314 Ill. 205, the Illinois Supreme Court held that a city paving contract was void where a number of the members of the city council were employees of the paving contractor at the time the contract was entered into. The court, at page 209, states:

" * * * If we attach any significance to the words used by the statute, 'directly or indirectly interested in the contract,' we think the conclusion cannot be escaped that the officers of the city who are also employees of the contractor must be considered as indirectly interested in the contract, without regard to the fact that they derived no direct benefits from the contract itself. * * *"

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In City of Lincoln v. First National Bank of Lincoln, 146 Neb. 221, 19 N.W. 2d 156, it was held that a deposit of city funds in a designated bank constituted a "contract" within the statute providing that no city officer should be interested in a contract to which the city was a party and that such interest in such a contract would void the city's obligation thereon. It was held that a city's deposit in a bank, while a city councilman was a stockholder, director or officer of the bank, was illegal.

I am of the opinion that a county board member would be indirectly interested in a contract between the county and a depository so as to void the legality of the contract if said county board member's spouse owned stock in the depository. The recent case of Bock v. Long, 3 Ill. App. 3d, 691, is pertinent. There, the court construed section 2(14) of Article VI of AN ACT relating to alcoholic liquors (Ill. Rev. Stat., 1971, ch. 43, par. 120(14)), which stated as follows:

"No license of any kind issued by the State Commission or any local commission shall be issued to:

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* * * * *

(14) Any law enforcing public official, any mayor, alderman, or member of the city council or commission, any president of the village board of trustees, any member of a village board of trustees, or any president or member of a county board; and no such official shall be interested in any way, either directly or indirectly, in the manufacture, sale or distribution of alcoholic liquor;

* * * * * " (Emphasis added)

In the Bock case the court held that the spouse of an official holding a dram shop license was a sufficient interest as to fall within the proscription of section 2(14) of article VI of AN ACT relating to alcoholic liquors. At page 693 the court justifies its holding as follows:

" * * * To hold otherwise would be to close our eyes to the natural and probable sharing of assets and liabilities which constitutes a characteristic of the family unit as it is known in our society. * * *"

Again, at page 694, the court states:

" * * * The prohibitions of that section would be rendered virtually meaningless if the courts failed to recognize as evidence of the prohibited interest a marriage relationship between

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a dramshop licensee and a person described
in that section. * * *

Therefore, I am of the opinion that a contract for the deposit of county funds between the county and a depository is void if a spouse of a county board member is a stockholder in the bank. The same applies to minor children of a county board member who is a stockholder in the bank. Of course, stockholding even by emancipated children would be proscribed if the real party in interest were the board member. Brennan & Christopher v. Purington Paving Brick Co., 171 Ill. App. 276.

To summarize, section 3 of the Corrupt Practices Act voids only a contract in which a public officer may be called upon to act or vote if the public officer is interested directly or indirectly in the contract. The depositing of county funds in a bank is a contract. A county board member is an elected public officer. County funds cannot be deposited in a bank, relieving the county treasurer of liability for any loss thereof, unless the county board designates the bank as a depository; thus, it is possible for a county board member to act upon a contract of deposit. Therefore, a county board member cannot be directly or indirectly interested in any depository at the

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time the county board designates the depository as acceptable for the receipt of county funds. Specifically, a county board member cannot be an officer, director, employee or stockholder of a depository. Also, a spouse of a county board member cannot hold stock in a depository at the time the county board designates the bank as a depository.

You have indicated that the Winnebago County Board has designated 18 banks as depositories of county funds. Pursuant to this authorization, the county treasurer has formulated contracts of deposit with all 18 banks. You must ascertain whether or not at the time the Winnebago County Board designated these various banks as depositories of county funds a member of the county board held an interest in the particular bank or banks being designated as a depository. If any county board member, at the time, was interested in a bank, then the contract of deposit made pursuant to county board designation is void.

The principles of this opinion will, of course, serve as a guideline to future county board designation of depositories.

Very truly yours,

A T T O R N E Y G E N E R A L