

Opinion No. 26

Public Moneys—Investments—Time Deposits

- Held: 1. The amendment to Section 16-2618, RCM, 1947, by Chapter 50, Laws of 1957, does not change the status of the treasurer as the depositing agent who must act under the direction of the Board of County Commissioners or the city council in regard to the investment of public funds and the statutory bond required of a treasurer affords the same protection to the public as existed prior to the amendment.
2. Public moneys may be placed in time deposits by treasurers under the direction of the Board of County Commissioners or city councils.
3. A. Boards of County Commissioners may invest in time deposits any public moneys in the county treasury which they deem not necessary for immediate needs with these exceptions:
- (a) Money derived from the sale of county bonds used to finance construction, which funds may be invested in compliance with Section 16-2050, RCM, 1947.
 - (b) Money held on account for cities and towns.
 - (c) State tax moneys collected by the county treasurer.
 - (d) Sinking funds which may be invested as provided in Section 16-2044, RCM, 1947.
 - (e) All funds which are to be invested as provided in special statutes.
- B. City and town councils may place on time deposit any public moneys under their control which they deem not necessary for immediate needs of the city or town with the exceptions of:
- (a) Fire Department Relief Association Funds which may be invested as provided in Section 11-1914, RCM, 1947, and Police Reserve Funds which may be invested as provided in Section 11-1892, RCM, 1947.
 - (b) Sinking funds which may be invested as provided in Section 11-2327, RCM, 1947.
 - (c) All funds which are to be invested as provided in special statutes.
4. Banks may refuse to accept public funds on time deposits.

September 3, 1957

Mr. R. E. Towle
 Superintendent of Banks
 Capitol Building
 Helena, Montana

Dear Mr. Towle:

You have requested my opinion concerning the effect of the amendment of Section 16-2618, RCM, 1947, by Chapter 50, Laws of

1957, relating to the payment of interest on deposits of public funds by county, city and town treasurers. You asked in particular:

1. Does the amendment make the Board of County Commissioners and the city and town councils depositing agents so that there is a loss of the protection furnished by the official bonds of treasurers?

2. May public funds not necessary for immediate use be placed in interest-bearing time deposits with banks operating in the state of Montana?

3. What public funds may be designated as proper for time deposits?

4. May banks refuse to accept public funds on time deposits?

These questions will be considered in order. At the outset I think it appropriate to observe generally that it was indisputably the intent of the legislature in amending Section 16-2618 to enable our financially hard-pressed counties and cities or towns to utilize to the fullest extent whatever currently surplus money they might have on hand for the production of income. The law should not be so construed as to frustrate that intent. In *Special Road Dist. No. 8 vs. Millis*, 81 Mont. 86, 261 Pac. 885, our Supreme Court said:

“ . . . When a reasonable construction may be put upon statutes, it is the one to be adopted, to the exclusion of others, not reasonable.”

Chapter 50 of the Laws of 1957 amended the first paragraph of Section 16-2618, RCM, 1947, to read:

“(1) It shall be the duty of all county, city and town treasurers to deposit all public moneys in their possession and under their control in any solvent bank or banks located in the county, city or town of which such treasurer is an officer, subject to national supervision or state examination as the Board of County Commissioners in the case of a county, or of the council in the case of a city or town, may designate, and no other. The treasurer shall take from such bank such security as the Board of County Commissioners, in the case of a county, or the council, in the case of a city or town, may prescribe, approve and deem fully sufficient and necessary to insure the safety and prompt payment of all such deposits, together with the interest **on any time or savings deposits, provided that said Board of County Commissioners or city or town council is hereby authorized to deposit such public moneys not necessary for immediate use by such county, city or town with any bank authorized herein above in a time deposit as evidenced by certificates of deposit or deposits, which by agreement may not be withdrawn on less than thirty (30) days' notice by the said Board of County Commissioners, or city or town council; and provided that said board of county commissioners, or city or town council is hereby authorized to invest such public**

moneys not necessary for immediate use by such county, city or town, in direct obligations of the United States Government, payable within not to exceed one hundred eighty (180) days from the time of such investment." (The bold portion is that added by amendment.)

It will be noted that in the first sentence treasurers are directed to deposit all public moneys in their possession and under their control in proper banks. The first proviso of the second sentence authorizes boards of county commissioners and city or town councils to deposit in time deposits public moneys not necessary for immediate use. These two provisions if read literally appear contradictory, the one directing the treasurer to make all deposits, the other authorizing the board or council to make particular deposits.

A reading of pertinent statutes will reveal that the duties of municipal treasurer (Sec. 11-807, RCM, 1947, particularly paragraphs 1, 3, 7, 10, and 11) and county treasurer (Sec. 16-2601, RCM, 1947, particularly paragraphs 1 and 5) are ministerial duties, performed subject to the approval of the controlling executive body. The board of county commissioners (Sec. 16-1001, RCM, 1947) and the city or town council (Sec. 11-901, RCM, 1947) are the policy making bodies of their respective political subdivisions. These distinctions are the result not only of statutory requirements but of judicial decision and long-established custom and usage. (See 20 CJS 849, Counties—81; 20 CJS 946, Counties—136; 62 CJS 313, Mun. Corp.—153; 62 CJS 1329, Mun. Corp.—697; *Rosebud County v. Smith et al.*, 92 Mont. 75, 9 Pac. (2d) 1071).

The authority and duty of treasurers in depositing public funds are defined in Section 16-2618, RCM, 1947, and the amendment of this statute by Chapter 50, Laws of 1957, relating to the investment of moneys did not alter the extensive and comprehensive directions as to the management and control of public funds. Under this code section it is the treasurer who acts as a depositing agent and he is the responsible official who must account for the funds in his custody. It is true that the amendment found in Chapter 50, Laws of 1957, gives to the Board of County Commissioners or the city or town council the power to invest funds either in United States obligations or in time deposits but it is the treasurer who has the responsibility and the duty to carry out the directions; he is the actual custodian of the funds. Subsection 5 of Section 16-2618, RCM, 1947, gives to the State Examiner the power to require compliance with the requirements of Subsection 4 that public funds be distributed ratably among all of the qualifying banks in the county. Also, this statute gives to the treasurer the power to withdraw funds and fixes the requirement that the treasurer's bond be that of a surety company. In my opinion the amendment to Section 16-2618, RCM, 1947, did not change the status of the treasurer as the depositing agent who must act under the direction of the Board of County Commissioners or the city council in regard to the investment of public funds.

It is also my opinion that Chapter 50, Laws of 1957, did not limit the responsibilities of the treasurer for the safe keeping of public funds and that the statutory bond required of a treasurer affords the same protection to the public as existed prior to the amendment.

In your second question you asked if public funds may be deposited in time deposits in banks authorized to receive public funds. The amendment to Section 16-2618, RCM, 1947, by Chapter 50, Laws of 1957, provides that "said board of county commissioners or city or town council is hereby authorized to deposit such public moneys not necessary for immediate use by such county, city or town with any bank authorized herein above in a time deposit . . .". As previously pointed out, the board of county commissioners or the council acts in an advisory capacity and it is the treasurer who in fact is the depositing agent and who has the power to withdraw the funds. However, Subsection 5 of Section 16-2618, RCM, 1947, provides in part: ". . . All such deposits shall be subject to withdrawal by the treasurer in such amounts as may be necessary from time to time . . ." This provision, which was not amended, is superficially in conflict with the concept of "a time deposit". As such a deposit is left with the bank for a fixed period of time a treasurer would not be able to withdraw such a deposit at any time as the above quoted portion of Subsection 5 permits. A rule of construction that is helpful in answering this apparent conflict was expressed by our Supreme Court in the case of *State ex rel. Federal Land Bank vs. Hays*, 86 Mont. 58, 65, 282 Pac. 32, where it was stated:

" . . . It will be presumed that the legislature, in adopting the amendment, intended to make some change in the existing law, and therefore the courts will endeavor to give some effect to the amendment."

There can be no doubt that the legislature intended to permit time deposits by the amendment, and the legislative intent must be observed. We must assume that the boards of county commissioners and city councils will work in harmony with their treasurers and that in advising the treasurers to make time deposits the best interest of the county or municipal corporations will be considered and that the time deposits will be so made that the money will be available when needed for the public purpose.

It is therefore my opinion that public moneys may be placed in time deposits by the treasurers under the directions of the boards of county commissioners or city councils.

Your third question is concerned with the definition of "public funds" as used in Chapter 50, Laws of 1957.

Our Supreme Court in the case of *State vs. McGraw*, 74 Mont. 152, 240 Pac. 812, considered the status of school moneys on deposit with the county treasurer and the relationship of the two governmental entities in the handling of the funds. Section 75-3722, RCM,

1947, makes it the duty of the county treasurer "to receive and hold all school moneys." This statute was considered in the McGraw case and the court said:

"There can be no question, then, but what school district funds and other funds of like character coming into the hands of the county treasurer in his official capacity, are 'public moneys' within the meaning of the section referred to."

* * * *

"All of the money, therefore, coming into the hands of the county treasurer in his official capacity and thus required to be deposited as directed by the county, becomes county funds, and is by the county loaned to the depository bank at a profit to the county."

In your letter you questioned whether the phrase "public moneys not necessary for immediate use by such county" precludes the investment of school district funds on deposit with the county treasurer. In the McGraw case the court held that all funds coming into the hands of the county treasurer become county funds and that a debtor-creditor relationship is established between the depositing agencies (in the McGraw case a school district) and the county. The county, then, considering its debt to depositing agencies, may under the law as amended, make an estimate of the funds not immediately necessary to meet all anticipated claims, including those of depositing agency, and place such amount on time deposit. Under the McGraw case the county can use funds deposited by school districts, irrigation districts and other entities as public moneys within the meaning of the amendment.

There must be excluded from the provisions of Section 16-2618, RCM, 1947, as amended by Chapter 50, Laws of 1957, funds which are not under the control of the county commissioners or city councils and which by statute are subject to being invested by trustees such as the funds of the Fire Department Relief Association which are to be invested by the trustees of the association as provided in Section 11-1914, RCM, 1947, and the funds of the Police Reserve Fund in accord with Section 11-1892, RCM, 1947. Other special statutes such as Section 16-2044, RCM, 1947, and Section 11-2327, RCM, 1947, direct the manner in which county and city sinking funds shall be invested.

This office has previously held that moneys realized from the sale of bonds cannot be invested until such time as construction can be started. Such was the holding in Opinion No. 65, Volume 21, Report and Official Opinions of the Attorney General, and the conclusion in that opinion was reached on the basis of Section 3 of Article XIII of the Montana Constitution which provides:

"All moneys borrowed by or on behalf of the state or any county, city, town, municipality or other subdivisions of the state, shall be used only for the purpose specified in the law authorizing the loan."

My predecessor thereupon concluded that in the absence of statutory authority allowing the investment of county bond moneys the Constitutional provision prohibited such investments. Subsequent to that opinion Section 16-2050, RCM, 1947, was amended to provide:

“ . . . Public funds realized from the sale of bonds by a county for the purpose of constructing public buildings, or for other construction, may be invested in United States certificates of indebtedness. United States treasury notes or United States treasury bonds having a maturity date of one (1) year or less when emergency conditions, beyond the control of the county commissioners, exist which preclude the construction of the projects for which the bonds were issued at the time such investments are made.”

This statute does not violate Section 3 of Article XIII of the Constitution as the investment of bond money is authorized, under emergency conditions, until the funds may be utilized for construction purposes. There is no diversion of the funds from the purpose for which they were borrowed. This special statute, Section 16-2050, RCM, 1947, is controlling in the investment of the proceeds of the county bond issues as Section 16-2618, RCM, 1947, as amended is a general statute. In the case of *In re Stevenson's Estate*, 87 Mont., 486, 289 Pac. 566, our court said:

“ . . . Where one statute deals with a subject in general and comprehensive terms and another deals with a part of the same subject in a more minute and definite way, to the extent of any necessary repugnancy between them the special will prevail over the general statute.”

In your fourth question you asked if banks must accept time deposits. There can be no doubt that it is not obligatory for a bank to accept deposits of public moneys and this is recognized in Subsection 5 of Section 16-2618, RCM, 1947, as amended. However, the board of county commissioners or the city council may invest the funds in direct obligations of the United States government and there will be no loss of revenue.

To summarize my conclusion it is my opinion:

1. The amendment to Section 16-2618, RCM, 1947, by Chapter 50, Laws of 1957, does not change the status of the treasurer as the depositing agent who must act under the direction of the board of county commissioners or the city council in regard to the investment of public funds and the statutory bond required of a treasurer affords the same protection to the public as existed prior to the amendment.
2. Public moneys may be placed in time deposits by treasurers under the direction of the board of county commissioners or city councils.
3. A. Boards of County Commissioners may invest in time deposits any public moneys in the county treasury which they deem not necessary for immediate needs with these exceptions:

(a) Money derived from the sale of county bonds used to finance construction which funds may be invested in compliance to Section 16-2050, RCM, 1947.

(b) Money held on account for cities and towns.

(c) State tax moneys collected by the county treasurer.

(d) Sinking funds which may be invested as provided in Section 16-2044, RCM, 1947.

(e) All funds which are to be invested as provided in special statutes.

B. City and town councils may place on time deposit any public moneys under their control which they deem not necessary for immediate needs of the city or town with the exception of:

(a) Fire Department Relief Association Funds which may be invested as provided in Section 11-1914, RCM, 1947, and Police Reserve Funds which may be invested as provided in Section 11-1892, RCM, 1947.

(b) Sinking funds which may be invested as provided in Section 11-2327, RCM, 1947.

(c) All funds which are to be invested as provided in special statutes.

4. Banks may refuse to accept public funds on time deposits.

Very truly yours,
FORREST H. ANDERSON
Attorney General