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January 29, 2015

Justin Hill
Greene County Treasurer
940 Boonville, Room 112
Springfield, MO 65802

RE: **Investing in Out of State Brokered Certificate of Deposits**

Dear Justin:

It is my understanding the County Commission has requested an opinion as to whether or not Greene County is authorized by Missouri law to continue investing in brokered certificates of deposit with United States financial institutions which are located outside the State of Missouri. I have reviewed the relevant provisions of the Missouri Constitution, state statutes and appellate court decisions to address this issue.

For purposes of this opinion I will assume that historically, the Greene County Treasurer's office has invested Greene County funds that are not needed for current expenses by utilizing a Missouri broker to purchase certificates of deposit issued by banking institutions which are located outside the State of Missouri. These CD's are FDIC insured.

By way of background, the County Treasurer's power to invest funds not needed for current operations is in addition to the investment authority otherwise granted a county by law. Sections 110.010 to 110.060, RSMo. relate to depositories of public funds generally. Sections 110.130 to 110.270, RSMo. are the express delegation of power to a county treasurer for the investment of county funds.

Missouri statutes provide for county funds to be deposited by the treasurer in a depository bank pursuant to Section 110.030, RSMo. The County Commission is to receive proposals from banking corporations or associations at the seat of the county which desire to be selected as depositories of the funds of the county. Section 110.130.1. Specifically, Section 110.140 limits banking corporations who wish to bid on becoming the county's banking depository to "any banking corporation or association in the county". There is no statutory provision for the county to use a banking corporation outside the State of Missouri as a depository bank for the county's funds. Section 110.180 provides that if for any reason the banking corporations in any county fail or refuse to submit proposals to act as county depositories as provided in Section 110.140, the county commission may deposit the funds of the county in any one or more of the banking corporations, or associations in the county or adjoining counties. Again, there is no statutory provision which authorizes a county commission to

deposit any county funds in a banking depository located outside of the State of Missouri.

Under Chapter 110, a county has no lawful right to deposit county funds except in a county depository. *Ralls County v. Commissioner of Finance*, 66 S.W.2d 115, 116 (Mo. 1933)(interpreting the predecessor statute 85.12185 et. seq. RSMo. 1929); *Huntsville Trust Co. v. Noel*, 12 S.W.2d 751, 754 (Mo. 1928). Only banking corporations and associations may serve as county depositories. Section 110.130, RSMo. A deposit of a county's funds in any other than a properly chosen and qualified depository is unlawful and such funds are wrongfully obtained. *Huntsville Trust Co.*, 12 S.W.2d at 754. A bank receiving county funds from a county treasurer without being a legal county depository, becomes a *trustee ex maleficio*. *Marion County*, 80 S.W.2d at 865; *In re Cameron Trust Co.*, 51 S.W.2d at 1027. A *trustee ex maleficio* is described as "a trustee from wrongdoing; the trustee of a trust arising by operation of law from a wrongful acquisition." *Lucas v. Central Missouri Trust Co.*, 166 S.W.2d 1053, 1056 (Mo. 1942).

With the foregoing in mind, we turn to Section 110.270 which governs the investment of county funds "not needed for current operations." This section, which was enacted in 1993 provides:

110.270. Any county may place money of the county which it has determined is not needed for current operations in obligations described in section 15, article IV, Constitution of Missouri, outright or by repurchase agreement. Such obligations and agreements shall be purchased through institutions in the county whose deposits may be insured by an agency of the United States government, hereafter referred to as federally insured institutions, provided the county determines such purchases to be in the best interest of the county as determined by the county treasurer. When such federally insured institutions are unwilling or unable to provide such obligations and agreements, the county may purchase them from federally insured institutions in any adjacent county in Missouri. The investment authority granted by this section shall be in addition to the investment authority otherwise granted a county by law.¹(emphasis added).

Pursuant to this Section, counties are limited to purchasing those investment "obligations" authorized by the Missouri Constitution²and to purchase them only from institutions whose deposits are insured by an agency of the United States.

County's "have no inherent powers but are confined to those expressly delegated by the sovereign and to those powers necessarily implied in the authority to carry out the delegated powers." *Premium Standard Farms, Inc. v. Lincoln Township of Putnam County*, 946 S.W.2d 234, 238 (Mo. Banc. 1997). I have concerns that the County lacks the statutory authority to invest funds not needed for current operations in C.D.'s issued by a bank located outside the State of Missouri because Section 110.270 specifically states the types of obligations and agreements listed in Section 15, Article IV of the Missouri Constitution (referenced in footnote 2) "shall be purchased through institutions in the county whose deposits may be insured by an agency of the United States Government or if none, then from federally insured institutions in any adjacent county in Missouri." (emphasis added). Section 110.270 is clear that a county treasurer is limited to purchasing certificates of deposit from "federally insured institutions" in either "the county" or an "adjacent county in Missouri". There is no statutory authority I can located authorizing your office to invest county funds not needed for current operations pursuant to Section 110.270 in C.D.'s issued by a bank located outside the State of Missouri. Without such an

¹ Although the last sentence of Section 110.270 authorizes investments "otherwise granted a county by law," there is to date no other law to which this section applies.

² Approved obligations are set out in Article IV, Section 15 of the Missouri Constitution and include: (1) "Obligations of the United States Government or any agency or instrumentality thereof;" (2) Repurchase agreements "secured by United States Treasury obligations or obligations of United States Government agencies or instrumentalities;" and (3) "bank's acceptances issued by domestic commercial banks possessing the highest rating issued by a nationally recognized rating agency."

express delegation of power to Greene County for the investment of County funds, any failure to follow the statutory requirements for transfer and investment of public funds in C.D.'s issued by an out of state bank will be void ab initio. See *Bride v. City of Slater*, 263 S.W.2d 22, 26 (Mo. 1953)(citing *Donovan v. Kansas City*, 175 S.W.2d 874, 881 (1943)).

In a case involving similar facts, the Missouri Supreme Court in 2006 construed the provisions of Section 110.270, RSMo. in *Christian County v. Edward D. Jones and Company*, 200 S.W.3d 524 (Mo. 2006) the Supreme Court held "Contracts public officials entered into without constitutional, statutory, or other authority are void." In the Christian County case, the county treasurer had invested approximately \$625,000.00 of county funds not needed for current operations in a brokerage account at Edward D. Jones which was not a depository bank in Christian County. Thereafter the Treasurer directed Edward D. Jones to transfer the money to his personal account and absconded with the funds. After suit was filed by Christian County against Edward D. Jones to recover the funds, the Missouri Supreme Court held that since the Treasurer did not follow the statutory requirements for transfer and investment of public funds pursuant to Section 110.270, because he had set up an account with Edward D. Jones which was not a depository bank, the act was void and Edward D. Jones had no obligation to repay the county for the funds the Treasurer had absconded with when it initially paid over the County funds to the Treasurer upon his request.

I do not believe it makes any difference if the County is utilizing the services of a broker located in Missouri when purchasing the C.D.'s of a federally insured bank located outside the State of Missouri. In delineating the procedures for the selection of depositories for county money in Sections 110.010 through 110.270, RSMo., all the statutory provisions refer to banking institutions, depository banking institutions, depository banks and trust companies, bank or trust companies wherein any deposits of private or public monies shall be made, banking corporations or associations, and banks. A broker is not a "bank" and unlike banks, a broker is not federally insured. This fact precludes a broker, even if based in Missouri, from being an authorized institution through which the County may invest funds not needed for current operations under Section 110.270.

Finally, it is my opinion, Section 30.950, RSMo. which sets forth the investment policy required of governing bodies of political subdivisions in this State does not apply to Greene County's investment of county funds not needed for current operations pursuant to Section 110.270 in the types of obligations described in Section 15, Article IV, Constitution of Missouri. Section 30.950 by its own terms only applies to a political subdivision of this state which is responsible for the management and investment of public funds and which has existing authority to invest such funds in a manner other than in depository accounts at financial institutions in this state. Since Greene County does not have the statutory authority to invest county funds in a manner other than in financial institutions in this state in accordance with Section 110.030 and 110.270, RSMo., Section 30.950 RSMo. does not apply to the question presented herein.

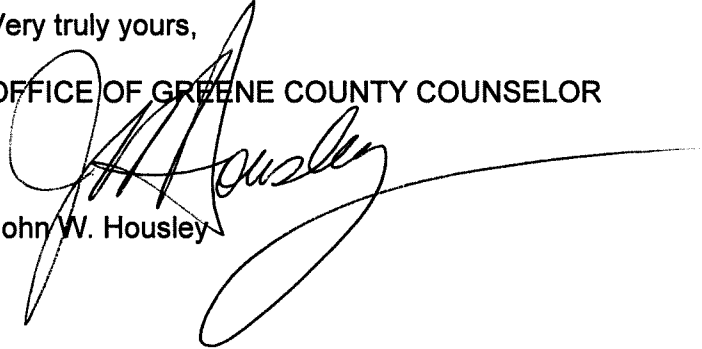
In conclusion, the statutory authority of a county treasurer to invest county funds not needed for current operations pursuant to Section 110.270, RSMo. in the types of obligations described in Section 15, Article IV, Constitution of Missouri, requires such obligations to be purchased through federally insured institutions that are physically located either in the county, or if none are willing and able, then from federally insured institutions in any other adjacent county in Missouri. The county treasurer has no express statutory authority to invest county funds not needed for current operations in brokered certificates of deposit issued by an FDIC insured banking institution located outside the State of Missouri, or for that matter, any Missouri federally insured institution which is not otherwise located in Greene County or an adjacent county in Missouri.

If you have any further questions, please do not hesitate to contact this office.

Very truly yours,

OFFICE OF GREENE COUNTY COUNSELOR

John W. Housley

A handwritten signature in black ink, appearing to read "John W. Housley", is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

JWH:cjm
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