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Attorney General

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| OPINION | : | No. 08-602 |
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| of | : | December 30, 2009 |
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| EDMUND G. BROWN JR. | : | |
| Attorney General | : | |
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THE HONORABLE ROBERT SHULMAN, COUNTY COUNSEL, COUNTY OF NEVADA, has requested an opinion on the following question:

When a county treasurer serves as treasurer of a fire protection district or other special district that has not appointed its own treasurer, is the county treasurer's approval required before that district may invest its surplus funds outside of the county treasury?

CONCLUSION

When a county treasurer serves as treasurer of a fire protection district that has not appointed its own treasurer, that district may invest its surplus funds outside of the county treasury without the county treasurer's approval. In the case of other special districts, the need for county treasurer approval of such investments depends on whether the governing statutes for those districts specifically require approval either by the county treasurer acting *ex officio* or by the district treasurer when one has been appointed by the district board.

ANALYSIS

Independent fire protection districts are established for the purpose of providing fire protection services in a defined geographical area, and they operate under the provisions of the Fire Protection District Law of 1987 (Fire Protection District Law).¹ Such districts are not subdivisions of the city or county in which they are located, but are separate public agencies that exercise essential government functions pursuant to state law.² Each fire protection district is governed by a board of directors,³ whose responsibilities include adopting an annual budget for the district.⁴ The board may borrow money, accept revenue from various sources, and make appropriations as needed.⁵ The board is also authorized to raise revenues through fees and special tax levies,⁶ and to issue bonds (with voter approval).⁷

¹ Health & Safety Code §§ 13800-13970. All further references to the Health and Safety Code are by section number only.

² *Id*; see also *Consol. Fire Protec. Dist. v. Howard Jarvis Taxpayers' Assn.*, 63 Cal. App. 4th 211, 214 (1998); 88 Ops.Cal.Atty.Gen. 99, 99-100 (2005); 87 Ops.Cal.Atty.Gen. 1, 2 (2004).

³ § 13840. District boards are selected either by election or by appointment. §§ 13835, 13848. In some circumstances, a city council or a county board of supervisors may appoint itself to act as the district board. See §§ 13835-13839, 13844.

⁴ §§ 13890-13895.

⁵ §§ 13897-13900.

⁶ §§ 13910-13919.

⁷ §§ 13925-13938.

A fire protection district board also has power to appoint a treasurer for the district, and to establish the treasurer's duties and compensation.⁸ Certain general functions and responsibilities of a district treasurer are also set forth in the Fire Protection District Law.⁹ If a district board has not appointed its own treasurer, the county treasurer acts as the treasurer of the district.¹⁰

In the situation before us, a fire protection district board has *not* appointed a district treasurer, and the county treasurer acts as the district's treasurer. We are asked to consider the extent to which the district's board may invest surplus district funds¹¹ without first obtaining the county treasurer's review and approval. Our inquiry does not concern the powers of a county treasurer when acting in the capacity of county treasurer, such as general responsibility for county-level oversight of district funds and

⁸ § 13854(b) (“The district board may adopt a resolution appointing a district treasurer other than the county treasurer and defining the duties and compensation of the office. The district treasurer, or any other person authorized by the district board, shall draw checks or warrants to pay any demands which have been audited and approved in the manner prescribed by the district board.”).

⁹ See §§ 13903, 13904, 13932, 13933, 13935 (concerning payment of warrants and claims for damages, issuance of general obligation bonds, and deposit of bond proceeds).

¹⁰ § 13854(a) (“Except as provided in subdivision (b), the county treasurer of the principal county shall act as the district treasurer and shall receive no compensation for the receipt and disbursement of money of the district.”).

¹¹ Govt. Code § 53635.8 provides that, subject to a number of specific conditions, “a local agency, at its discretion, may invest a portion of its surplus funds in certificates of deposit at a commercial bank, savings bank, savings and loan association, or credit union that uses a private sector entity that assists in the placement of certificates of deposit.”

The term “surplus funds” is not specifically defined in Govt. Code §§ 53635.8 or its associated provisions. For purposes of this opinion we assign the term its ordinary meaning and assume that “surplus funds” refers to district money in excess of the amount required for current district expenses. Cf. Govt. Code § 53684 (concerning local agency's “excess funds which are not required for immediate use”); § 13900 (permitting district boards to reallocate unused balances in “appropriations for contingencies,” “designations and reserves no longer required [for their intended purposes],” and amounts in excess of anticipated amounts or not specifically set forth in the budget); § 13902 (permitting boards to transfer “any unencumbered surplus reserve remaining at the end of a fiscal year”).

transactions.¹² Rather, the question before us concerns only the particular authority that becomes vested in the treasurer when that officer acts in the capacity of treasurer of the fire protection district. In other words, we are asked whether the treasurer’s authority to perform district functions includes the responsibility for screening and approving—or disapproving—the district’s investment of its surplus funds outside the county treasury.

This inquiry involves examination of two related questions: First, when a county treasurer serves *ex officio* as district treasurer, does the treasurer exercise any different authority than would an appointed district treasurer? And second, to what extent must a district board obtain approval from an appointed district treasurer before it may invest surplus funds outside of the county treasury?

The County Treasurer’s Authority as Treasurer of the District

In our view, the question whether a county treasurer who acts *ex officio* as treasurer for a fire protection district holds greater power than would an appointed district treasurer must be answered in the negative. In fact, depending on how broadly a district board may have defined its *appointed* district treasurer’s duties,¹³ and how much of its own authority the board may have delegated to that appointee,¹⁴ an appointed district treasurer might conceivably exercise significantly greater authority than would a county treasurer acting *ex officio*.¹⁵ In any event, we conclude that a county treasurer who serves

¹² See, e.g., Govt. Code § 27136 (county treasury oversight committee).

¹³ See § 13854(b).

¹⁴ Govt. Code § 53607 authorizes a local agency to delegate its investment authority to that agency’s treasurer:

The authority of the legislative body to invest or to reinvest funds of a local agency, or to sell or exchange securities so purchased, may be delegated for a one-year period by the legislative body to the treasurer of the local agency, who shall thereafter assume full responsibility for those transactions until the delegation of authority is revoked or expires, and shall make a monthly report of those transactions to the legislative body. Subject to review, the legislative body may renew the delegation of authority pursuant to this section each year.

¹⁵ We believe that a district board’s authority to define the duties of a district treasurer under § 13854(b) extends only to *appointed* district treasurers, for whom the board also may define compensation of the office. In contrast, a county treasurer acting *ex officio*, whose role in that capacity is described simply as “the receipt and disbursement of money of the district,” shall, by statute, “receive no compensation” for

as district treasurer by operation of law would have no greater authority in that capacity than would an appointed district treasurer, and we believe this to be the case specifically with respect to the district’s investment of its surplus funds.¹⁶

This conclusion is consistent with our reasoning in a 2005 opinion in which we concluded that a district’s revenue-shifting obligations with respect to the Educational Revenue Augmentation Fund¹⁷ would be no different whether the district were governed by a separate elected board of directors or, instead, by a county board of supervisors that had appointed itself to sit as the district board.¹⁸ As we explained there, a “dual capacity legislative body”—that is, a board that serves both as the county’s governing board and as a fire protection district’s governing board—performs in only one capacity at a time. When a county board of supervisors acts as a district’s board, it has no different powers than would a board that had been elected or appointed specially to serve as the governing board of a district. The supervisors’ countywide powers are separate, and immaterial when the board is not sitting in its countywide capacity. Thus the board of supervisors “acts pursuant to the powers, duties, and prerogatives of a district board, with the same limitations and consequences that a district board would experience.”¹⁹

This reasoning applies equally in the case of a “dual capacity” officer, such as a county treasurer, who may be required by law to perform the duties of one or more other offices. As courts have observed, “Where a public officer is declared by law by virtue of his office—*ex officio*—to be also the incumbent of another public office, the two offices

that service to the district. § 13854(a).

¹⁶ We note that all taxes and assessments collected by a fire protection district must “be paid into the county treasury for the use of the district,” § 13899, and that subsequent district withdrawals of such funds require the county treasurer’s approval. Govt. Code § 27136. However, we find no similar requirement of deposit in the county treasury with respect to other revenues. *Cf.* § 13898 (district may accept “any revenue, money, grants, goods, or services from any federal, state, regional, or local agency or from any person for any lawful purpose of the district”), § 13935 (district’s bond proceeds “shall be deposited with the district treasurer in a special bond service fund”).

¹⁷ Rev. & Tax. Code § 97.2(c).

¹⁸ 88 Ops.Cal.Atty.Gen. 99 (2005).

¹⁹ 88 Ops.Cal.Atty.Gen. at 104 (citing *P. States Enter., Inc. v. City of Coachella*, 13 Cal. App. 4th 1414, 1424 (1993) and *Co. of Los Angeles. v. Continental Corp.*, 113 Cal. App. 2d 207, 220 (1952)).

are as distinct as though occupied by different persons.”²⁰ Courts have found an exception to this rule when a single officer is required to discharge the duties of another office at all times and there is no provision for appointment or election of a second officer. In such a situation, each set of duties is understood to be merely a different aspect of a single “blended” office.²¹ But the general rule remains valid when, as here, the two offices are distinct in the sense that the duties of each may be discharged by a separate elected or appointed official.²²

We thus conclude that a county treasurer, when acting as a district’s treasurer, has only those duties and powers prescribed for district treasurers under general law.²³ That brings us to the question whether appointed district treasurers have authority to approve or disapprove a district’s investment of surplus funds outside the county treasury.

District Treasurer’s Role in Investment of Surplus Funds

We find no provision either in the Fire Protection District Law or elsewhere in the statutes that gives a district’s treasurer oversight responsibility for investment of surplus district funds, or that requires his or her approval as a condition of the district’s making such investments. To the contrary, it appears that investment decisions are the province of the district board itself, and that a district treasurer would be involved in those decisions only in the event that the board required such involvement, either by establishing it as one of the defined duties of the treasurer’s office or by making a separate delegation of its own authority.

We believe that Government Code section 53607, which authorizes a local agency to delegate its investment authority to the agency’s treasurer, supports our conclusion in this regard. Section 53607 states that, “*The authority of the legislative body to invest or to reinvest funds of a local agency . . . may be delegated for a one-year period by the*

²⁰ *Union Bk. & Tr. Co. v. Los Angeles Co.*, 2 Cal. App. 2d 600, 608-609 (1934); *see also City of Santa Clara v. County of Santa Clara*, 1 Cal. App. 3d 493, 495-497 (1969). *Cf. Los Angeles County v. Superior Court*, 17 Cal. 2d 707, 714-716 (1941); *Price v. Superior Court*, 186 Cal. App. 3d 156, 162-166 (1986).

²¹ *Price v. Super. Ct.*, 186 Cal. App. 3d at 162 (county clerk as *ex officio* clerk of superior court).

²² *Id.*

²³ *See, e.g.*, § 13854(b) (treasurer required to “draw checks or warrants to pay any demands which have been audited and approved in the manner prescribed by the district board”); *see also* §§ 13903, 13904, 13932, 13933, 13935.

legislative body to the treasurer of the local agency . . .”²⁴ The opening clause of this provision clearly indicates that investment authority rests in the hands of the local agency’s legislative body, absent a specific delegation of it.

The rule that investment authority over district funds resides in the district’s governing board is reflected in several related sections of the Government Code as well, including sections 53600.3 (“all governing bodies of local agencies . . . are fiduciaries subject to the prudent investor standard”); 53602 (“[t]he legislative body shall invest only in notes”); 53603 (“[t]he legislative body may make the investment by direct purchase”); 53604 (“[t]he legislative body may sell, or exchange”); 53605 (“[f]rom time to time, the legislative body shall sell the securities so that the proceeds may be applied ”); 53606 (“When canceled, [purchased bonds] are no longer outstanding, unless [sic] in its discretion, the legislative body holds them uncanceled”); and 53608 (legislative body of local agency may deposit for safekeeping the bonds, notes, etc., reflecting local agency’s investments).

Further, we note that the Legislature’s assignment of investment power to the district board, while giving the board discretion to delegate that power to its treasurer, mirrors the Legislature’s treatment of investment powers at the county level. Under Government Code section 27001, it is with the county’s legislative body—its board of supervisors—that “the authority to invest or reinvest the funds of the county” resides. A board of supervisors is also expressly permitted to delegate its authority (“by ordinance”) to the county treasurer.²⁵

Accordingly, we conclude that, when a county treasurer serves as treasurer of a fire protection district that has not appointed its own treasurer, the district may invest its surplus funds outside of the county treasury without the county treasurer’s approval.

²⁴ Emphasis added.

²⁵ Indeed, section 27001.1 twice makes specific reference to Government Code section 53607. Government Code § 27000.1 provides:

Subject to Section 53607, the board of supervisors may, by ordinance, delegate to the county treasurer the authority to invest or reinvest the funds of the county and the funds of other depositors in the county treasury, pursuant to Chapter 4 (commencing with Section 53600) of Part 1 of Division 2 of Title 5. The county treasurer shall thereafter assume full responsibility for those transactions until the board of supervisors either revokes its delegation of authority, by ordinance, or decides not to renew the annual delegation, as provided in Section 53607. Nothing in this section shall limit the county treasurer’s authority pursuant to Section 53635 or 53684.

Our conclusion does not necessarily extend to other special districts, however, because each type of district operates under a different statutory framework. In the case of community service districts, for example, the Legislature has provided a significantly more detailed statutory definition of duties and powers for both the county treasurer, when acting *ex officio* as district treasurer,²⁶ and for an appointed district treasurer.²⁷ We will not undertake an analysis of all the statutes for every type of special district here. For purposes of this opinion, it is sufficient to note that the need for county treasurer approval of a given special district's investment of its surplus funds depends on whether the statutes governing that particular kind of district require such approval—either by the county treasurer specifically or by a district treasurer when one has been appointed by the district board.

²⁶ Govt. Code § 61052.

²⁷ Govt. Code § 61053.