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NO.
STATE OF NEBRASKA
OFFICIAL
DEC 20 1996
DEPT. OF JUSTICE

DATE: December 18, 1996

SUBJECT: Interlocal Cooperation Act; Authority of Local Government Subdivisions to Establish Joint Entities

REQUESTED BY: John Breslow
Auditor of Public Accounts

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

This is in response to your request for a formal opinion of the Attorney General regarding the formation of the Nebraska Public Agency Investment Trust ("Investment Trust") and the role of the Auditor of Public Accounts with respect to this entity.

In brief summary, the Investment Trust is organized and established by certain local governmental officials who are the initial participants and settlors of the Trust. The governing body of the Investment Trust is a Board of Trustees consisting of seven employees and/or officials of participating political subdivisions pursuant to Article IX of the Interlocal Agreement and Declaration of Trust. The organizational trustees were appointed by the public officials who are the initial participants and trust settlors.

The Investment Trust is intended to be a joint legal and administrative entity formed in accordance with the provisions of the Interlocal Cooperation Act, Neb. Rev. Stat. §§ 13-801 to 13-827 (1991 and Cum. Supp. 1996), for use by counties and other local government subdivisions to facilitate the common investment of "surplus funds" of participating political subdivisions. For

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purposes of the Investment Trust, a political subdivision is referred to as a "public agency" defined to include, "a City, County, School District, Community College, Natural Resource District, Public Utility, Mental Health Region, or other political subdivisions." NEBRASKA PUBLIC AGENCY INVESTMENT TRUST, Interlocal Agreement and Declaration of Trust, p. 7; Information Statement, p. 3.

THE INTERLOCAL AGREEMENT ACT

The **first** question you ask is whether the Investment Trust is a "legally formed entity." It is our opinion that the Investment Trust is a separate legal and administrative entity whose formation is authorized by the Interlocal Cooperation Act ("the Act"). The intent of the Act is to authorize "public agencies" to enter into cooperative agreements for the joint exercise of their powers to efficiently provide services and facilities.[1] Any agreement entered into for this purpose may establish a separate legal entity and the agreement is required to specify the organization, composition, and nature of any legal or administrative entity created. ***See*** Neb. Rev. Stat. § 13-804 (Cum. Supp. 1996).

Generally described, a trust is a fiduciary relationship with respect to property, subjecting the person by whom the title to property is held to equitable duties to deal with the property for the benefit of another. Fratcher, SCOTT ON TRUSTS § 2.3 (4 ed. 1987). This definition of a trust has been accepted in Nebraska. ***O'Connor v. Burns Potter & Co.***, 151 Neb. 9, 36 N.W.2d 507 (1949) (quoting Restatement of Trusts § 2); ***Parker v. Bourke***, 131 Neb. 617, 269 N.W. 102 (1936). Further, trusts are recognized as separate legal and administrative entities under the law. ***See*** Nebraska Trustees' Powers Act, Neb. Rev. Stat. §§ 30-2819 to 30-2826 (1996). For these reasons, we believe that a trust is a legal entity that may be formed pursuant to interlocal agreement under the provisions of the Act. We also point out that Act is to be liberally construed to effect its purposes. Neb. Rev. Stat. § 13-827 (1991).

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[1] The term "public agency" is defined for purposes of the Act in Neb. Rev. Stat. § 13-803(2) (Cum. Supp. 1966) to mean any county, city, village, school district, or agency of the state government or of the United States, any drainage district, sanitary and improvement district, or other municipal corporation or political subdivision of this state, and any political subdivision of another state.

We also point out that a joint entity created by agreement under the Act is imbued with characteristics of governmental subdivisions. By statute, the joint entity constitutes a "separate public body corporate and politic of this state, exercising public powers and acting on behalf of the public agencies which are parties to such agreement. . . ." Neb. Rev. Stat. § 13-804(6) (Cum. Supp. 1996). Thus, the Investment Trust, a joint entity created by agreement under the Act, is appropriately viewed as a distinct legal and administrative entity with the nature and attributes of a governmental subdivision.

You next inquire whether the entity may legally do what it is proposing. We believe the Investment Trust can legally perform its intended purposes and functions for exercise of governmental subdivisions' authority to invest their funds. Of course, the Act is not intended to increase nor enhance the substantive powers and authority of governmental subdivisions. Rather, the Act authorizes governmental subdivisions to act jointly for exercise of any powers, privileges, or authority to the extent permitted by law. Neb. Rev. Stat. § 13-804(1) (Cum. Supp. 1996). Local governmental subdivisions have such powers and authority as conferred by law. Counties and county boards can only exercise such powers as are expressly granted by statute which are strictly construed. ***State ex rel. Agric. Extension Serv. v. Miller***, 182 Neb. 285, 154 N.W.2d 469 (1967); ***State ex rel. Johnson v. Gage County***, 154 Neb. 822, 49 N.W.2d 672 (1951). Similarly, municipal corporations are creatures of the law established for special purposes, and their corporate acts must be authorized by their character and they possess no power or faculties not conferred by the laws which created them. ***Hanson v. City of Omaha***, 157 Neb. 403, 59 N.W.2d 622 (1953); ***State ex rel. Krittenbrink v. Withnell***, 91 Neb. 101, 135 N.W.2d 376 (1912).

The Investment Trust is formed to enable the participating governmental subdivisions to jointly exercise powers and authority conferred upon them by law. The investment of public funds is a governmental function that the governmental subdivisions are authorized to perform. Neb. Rev. Stat. § 77-2341 (Cum. Supp. 1994) in material part states:

> (1) Whenever any county, city, village, or other governmental subdivision, other than a school district of the State of Nebraska has accumulated a surplus of any fund in excess of its current needs or has accumulated a sinking fund for the payment of its bonds and the money in such sinking fund exceeds the amount necessary to pay the principal and interest of any such bonds which become due during the current year, the governing body of such

> county, city, village, or other governmental subdivision may invest any such surplus in excess of current need or such excess in its sinking fund in certificates of deposit, in time deposits, and in any securities in which the state investment officer is authorized to invest pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act and as provided in the authorized investment guidelines of the Nebraska Investment Council in effect on the date the investment is made. The state investment officer shall upon request furnish a copy of current authorized investment guidelines of the Nebraska Investment Council. . . .

The investment standard for school districts is set forth in Neb. Rev. Stat. § 79-1308.01 (1994).

You indicate concern that the standard for some public agencies will be lowered and that the Investment Trust "will be able to invest in things they are not authorized to invest in by themselves." Generally, the investment standard that all governmental entities are required to adhere to is known and referred to as the "prudent man rule." The investment functions of the state investment officer are governed by this standard. Neb. Rev. Stat. § 72-1246.01 (1990) states:

> The state investment officer shall invest in investments of the nature which individuals of prudence, discretion, and intelligence acquire or retain in dealing with the property of another, and if the state investment officer has special skills or expertise, he or she is under a duty to use such skills.

The prudent man standard applicable to the state investment officer is further expressed in Neb. Rev. Stat. § 72-1247 (1990) which in part provides:

> . . . Any investment made by the state investment officer shall be made with the exercise of that degree of care and skill, under the circumstances then prevailing, which a person of prudence would exercise in the management of the property of another, not for speculation but for investment considering the probable safety of their capital as well as the probable income to be derived.

Section 77-2341 allows state political subdivisions to invest in securities which the Nebraska Investment Council's investment guidelines authorize. The guidelines authorize direct investment in U.S. Government obligations, U.S. Government obligations held

under repurchase agreements, and in investment trusts and/or companies investing in U.S. Government, government agency, and money market securities. ***See Nebraska Investment Council Authorized Investments***, amended June 5, 1991. The investment policy established by the Investment Council is set forth in the context of the prudent man rule. ***Nebraska Investment Council Policy for Political Subdivisions***, Dec. 14, 1995. This office has previously observed that the investment guidelines authorize political subdivisions of this state to invest in investment trusts and that it is generally permissible for counties to invest surplus funds in mutual funds composed solely of U.S. Government obligations. ***See*** Op. Att'y Gen. No. 95041 (May 15, 1995).

The investment standard applicable to school districts for investment of their funds is the prudent man standard set forth in § 79-1308.01. Review of the statutory authorities set forth above reflect that all participating governmental subdivisions in the Investment Trust are governed by the same investment standard, that is, the prudent man standard or some variation thereof. Consequently, the investment standard applicable to government subdivisions is not lowered because of participation in the Investment Trust. In fact, the Investment Trust is authorized to invest only in securities that are permissible for each participant. NEBRASKA PUBLIC AGENCY INVESTMENT TRUST, Interlocal Agreement and Declaration of Trust, art. II, p. 10; Information Statement, p. 3.

The **third** question you ask is whether a public agency may legally invest money with the Investment Trust. We have concluded above that the Investment Trust is formed pursuant to the Interlocal Cooperation Act and, further, that the Trust can legally perform its intended purposes and functions for exercise of governmental subdivisions' authority for investment of their funds. Accordingly, it is our opinion that a "public agency" may legally participate and invest funds with the Investment Trust provided that the statutory formalities are complied with. Those being, appropriate action by ordinance, resolution, or otherwise pursuant to law of the governing bodies of the participating public agencies authorizing the agreement and participation in the Investment Trust.

ROLE OF THE AUDITOR OF PUBLIC ACCOUNTS

The **last** question you ask is, "what is the Auditor of Public Accounts role with regard to the new entity." The role and authority of the Auditor of Public Accounts is delineated in statutes setting forth the powers and duties of the Auditor. ***See*** Neb. Rev. Stat. §§ 84-304 and 84-304.01 (Cum. Supp. 1996). We

believe that the role of the Auditor of Public Accounts is to consider the Investment Trust and investment units of the Trust the same as any other investment or security held by a political subdivision during the course of an audit conducted by the Auditor. In this respect, we refer you to GOVERNMENT AUDITING STANDARDS issued by the Comptroller General of the United States commonly described and known as generally accepted government auditing standards ("GAGAS").[2]

An audit objective is to ascertain the accuracy of financial statements and records of the governmental subdivisions consistent with government auditing standards. During the course of an audit, determinations are made whether adequate controls and procedures are in place for safeguarding assets and with regard to compliance with laws and regulations. GAGAS §§ 2.4, 2.6. Consistent with these standards, we believe the Auditor of Public Accounts may appropriately determine whether adequate procedures are in place to provide a reasonable assurance regarding prevention or timely detection of an unauthorized use or disposition of the agency's assets that may have a material effect on the financial statements. During the course of an audit, various control procedures for investment of funds may be subject to review and verification.

A county treasurer may invest in certain direct and indirect obligations of the United States with the consent of the county board. Neb. Rev. Stat. § 77-2315 (1990). We have previously pointed out above that § 77-2341 authorizes **governing bodies** of governmental subdivisions to invest surplus funds. Thus, a particular official may not directly nor unilaterally direct the investment of the funds of a governmental subdivision, and it is necessary that the investment functions be authorized by the governing body of the governmental subdivisions. It is established by law that a county is a body corporate and politic, and its powers are executed by a county board. Neb. Rev. Stat. § 23-103 (1991). It is also established that powers of the board are strictly construed and that such powers are required to be exercised by the county board. ***Shanahan v. Johnson***, 170 Neb. 399, 102 N.W.2d 858 (1960); ***State ex rel. Johnson v. County of Gage***, 154

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[2] Neb. Rev. Stat. §§ 84-304 and 84-304.01 (Cum. Supp. 1996) provide that all audits and examinations conducted by the Auditor of Public Accounts shall be conducted in accordance with standards for audits of governmental organizations, programs, activities, and functions published by the Comptroller General of the United States and in conformity with generally accepted auditing and government audit standards.

Neb. 822, 49 N.W.2d 672 (1951); ***Morton v. Carlin***, 51 Neb. 202, 70 N.W. 966 (1887).

We believe that appropriate government audit procedures would include review of investment practices of a governmental subdivision to determine whether statutory procedures applicable to investment of funds were followed. In light of the fact that an official's acts necessarily must be authorized by the governing body, the Auditor of Public Accounts may proceed to ascertain whether investment or participation in the Investment Trust was authorized by the governing body through resolution, ordinance or other means. In summary, we conclude that the appropriate role of the Auditor of Public Accounts with respect to the Investment Trust is necessarily viewed in the context of the audit and examination authority of the Auditor.

Sincerely yours,

DON STENBERG
Attorney General

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Assistant Attorney General

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Approved by:

Attorney General