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NO.
STATE OF NEBRASKA
OFFICIAL
AUG 25 1999
DEPT. OF JUSTICE

DATE: August 23, 1999

SUBJECT: Whether Filing Fees Due Counties Under Portions Of The Uniform Commercial Code Should Be Remitted To County Clerks And Registers Of Deeds Or To County Treasurers.

REQUESTED BY: David Heineman
Nebraska State Treasurer

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

1998 Neb. Laws LB 1321 and 1999 Neb. Laws LB 550, passed by the Nebraska Legislature in 1998 and 1999 respectively, made extensive changes in various aspects of Nebraska's version of the Uniform Commercial Code. Under portions of those bills, certain types of filing fees previously collected by county clerks and registers of deeds in Nebraska are now collected by the Nebraska Secretary of State, and the Secretary is responsible for remitting each county's share of those filing fees to that county. An example of the provisions in the bills which require the Secretary of State to remit filing fees to counties is Section 23 of LB 550, which provides, in pertinent part:

> Beginning July 1, 1999, the uniform fee, payable to the Secretary of State, for presenting for filing and indexing and for filing and indexing each notice of lien or certificate or notice affecting the lien pursuant to the Uniform Federal Lien Registration Act shall be six dollars. . . . The uniform fee for each county more than one designated pursuant to subsection (1) of section 52-1001 shall be three dollars. The Secretary of State shall deposit each fee

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> received pursuant to this section in the Uniform Commercial Code Cash Fund. Of the fees received and deposited pursuant to this section, the Secretary of State shall remit three dollars to the register of deeds of a county for each designation of such county in a filing pursuant to subsection (1) of section 52-1001.

1999 Neb. Laws LB 550, § 23. You state that you are working with the Secretary of State to remit the funds generated under those provisions of LB 1321 and LB 550 back to county government, and that you are concerned about which county office should receive the funds at issue. Accordingly, you have posed two questions to us regarding which county officer should receive the county portion of the filing fees from the Secretary of State.

APPLICABLE NEBRASKA STATUTES

Apart from the portions of LB 1321 and LB 550 discussed above, several additional Nebraska Statutes have application to the questions which you have presented to us. First of all, with respect to the duties of county clerks and registers of deeds, Neb. Rev. Stat. § 33-130 (1998) provides:

> Each county clerk or register of deeds shall, not later than the fifteenth day of the month following the calendar month in which fees are received, pay over to the county treasurer all fees received and take the receipt of the county treasurer therefor. Except as provided by section 25-2712, all fees received by the county treasurer pursuant to this section shall be credited to the general fund of the county.

In addition, Neb. Rev. Stat. § 23-1601 (1997), which deals with the duties of county treasurers, provides, in pertinent part:

> It is the duty of the county treasurer to receive all money belonging to the county, from whatsoever source derived and by any method of payment provided by section 77-1702, and all other money which is by law directed to be paid to him or her.

Finally, Neb. Rev. Stat. § 77-2312 (1996) and the statutes immediately subsequent to it set out detailed instructions for the deposit and investment of county monies, including requirements for the depository institutions which are eligible to hold county funds. Section 77-2312 provides, as is pertinent:

> The county treasurer of each and every county in the State of Nebraska shall deposit, and at all times keep on deposit for safekeeping in the state or

> national banks or capital stock financial institutions doing business in the county of approved and responsible standing, the amount of money in his or her hands collected and held by him or her as county treasurer.

With those various statutes in mind, we will now turn to your two questions. We will consider your second question first.

> **Question No. 2. "... should the State Treasurer remit county funds collected by the Secretary of State to the County Treasurer's bank account or the Register of Deeds' (sic) bank account. (sic)"**

Under the various statutes cited above, it is apparent, as we noted in our Op. Att'y Gen. No. 98028 (June 22, 1998), that the county treasurer is the primary county official with authority to take custody of county funds, to deposit county funds in banks and other financial institutions, and to make investments of county funds for the county. On the other hand, § 33-130 clearly authorizes county clerks and registers of deeds to hold the fees collected by them for a period of time so as to pay over those fees to the county treasurer not later than the fifteenth day of the month following the calendar month in which such fees are received. As a result, when those statutes are read together, they appear to contemplate that county clerks and registers of deeds will collect the fees due and owing to them for performance of their duties over a period of time, and then remit those fees to the county treasurer on at least a monthly basis.[1] The county treasurer must then take those funds and deposit or invest them in accordance with the applicable statutes.

In Nebraska, when the Legislature enacts a law affecting an area which is already subject to other statutes, it is presumed that the Legislature does so with full knowledge of the preexisting legislation and any decisions of the Nebraska Supreme Court construing and applying that legislation. ***White v. State***, 248 Neb. 977, 540 N.W.2d 354 (1995). Therefore, we must assume that the Legislature was aware of the statutes cited above when it enacted LB 1321 and LB 550. In that context, those bills provide that the Secretary of State shall remit the county filing fees at issue to the register of deeds of the appropriate county rather than to the county treasurer. For that reason, we believe that you should remit the county filing fees collected by the Secretary of State under the bills

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[1] While § 33-130 requires county clerks and registers of deeds to pay over fees collected to the county treasurer on at least a monthly basis, there is obviously nothing which would prevent them from doing so more frequently.

to the county clerks or registers of deeds of the appropriate counties.[2] Had the Legislature intended that those fees should be remitted to the county treasurers, it could have so stated in the statute. After county clerks or registers of deeds receive filing fees under the bills, they will then be required to pay over those funds to the county treasurer in accordance with the provisions of § 33-130.

We understand that you wish to electronically transfer the funds at issue to the counties involved, and we believe you may do so in those instances where county clerks or registers of deeds have bank accounts which are amenable to that form of transfer.[3] If such is not the case, then you may still make the transfer of filing fees to the county clerk or register of deeds by issuing and mailing a state warrant. You may also wish to consult with the county clerk or register of deeds in each case, and determine if that officer wishes you to remit the filing fees directly to the county treasurer in his or her county.

We also understand from the materials which you provided to us with your opinion request that there are potential inefficiencies and other problems with anything but an electronic transfer of those filing fees directly to the county treasurer of the appropriate county. In that regard, we would simply point out that much of the language of the statutes cited above dates from the late 1800's, and is based upon banking systems and other practices of that time. Therefore, it may be appropriate for you or the county officials involved to propose remedial legislation which might make this fund transfer more efficient and more satisfactory for the counties involved.

Question No. 1. " . . . is the County Treasurer the sole depository of all county funds?"

From the materials which you provided to us with your opinion request, we understand that the issue with respect to your first question is whether county clerks and registers of deeds may maintain county funds separate and apart from the county treasurer, and in particular, whether county clerks and registers of deeds may maintain their own bank accounts apart from the county treasurer. For the reasons discussed

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[2] Under Neb. Rev. Stat. § 23-1502 (1997), the county clerk in some counties acts as an ex officio register of deeds.

[3] In your opinion request letter you state that "most County Clerks and Registers of Deeds collect a variety of county funds, deposit those funds in a bank account established by the County Clerk or Register of Deeds and remit them to the County Treasurer at the end of the month."

below, we must respectfully decline to provide you with a response in regard to that question.

Under Neb. Rev. Stat. § 84-205 (4) (Cum. Supp. 1998), the Attorney General is authorized to give his or her opinion in writing, without fee, upon questions of law submitted to him or her by state officers, including the State Treasurer. This general obligation of the Attorney General to issue such opinions has been interpreted by the Nebraska Supreme Court to mean that state officers are entitled to advice upon questions of law which arise "in the discharge of their duties." ***Fullmer v. State***, 94 Neb. 217, 142 N.W. 908 (1913). Consequently, it has been our normal practice to decline to issue opinions to state officers on questions of law which do not arise in the discharge of their duties.

As discussed at length above, we believe that you are required to remit the filing fees at issue in your opinion request to the county clerks or registers of deeds of the appropriate counties whether you do so by an electronic transfer to their bank account, or by simply mailing them a state warrant which they can then handle in a manner consistent with their statutory obligations. Apart from that, it appears to us that issues involving the authority of county clerks and registers of deeds to maintain county funds apart from county treasurers in their own bank accounts are uniquely county issues, which have few applications to your duties as State Treasurer. Moreover, if we were to provide you with an opinion on those issues, it also appears to us that there is little means for us to require county officials to comply with any views expressed in our opinion. For those reasons, we must respectfully decline to respond to your initial question.

Sincerely yours,

DON STENBERG
Attorney General

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Assistant Attorney General

Approved by:

Attorney General
05-100-10.15