

Robin James Stowe  
Corporation Counsel  
Assistant Administrative  
Coordinator

# Langlade County

Office of the  
Corporation Counsel

Courthouse  
800 Clermont Street  
Room 102  
Antigo, WI 54409

715-627-6297  
fax 715-627-6542  
rstowe@co.langlade.wi.us

Deanna L. Kieper  
Legal Secretary

October 15, 2012

Mr. J. B. Van Hollen  
Wisconsin Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

RE: Request for Opinion

Dear Attorney General Van Hollen:

I have been directed by the Langlade County Finance Committee (3-2 vote) to request your opinion, pursuant to Wis. Stat. § 59.42(1)(c), on the following question:

**Does a county have the authority to exchange surplus funds for United States gold coins?**

I have previously advised the Finance Committee in the form of an oral opinion that the county does not have the authority to exchange surplus funds for U.S. gold or silver coins, or other forms of bullion. My opinion is based upon an interpretation of the proposed "exchange" as a financial transaction and specifically as an "investment" of county funds governed by Wis. Stat. § 66.0603(1m). My opinion is also based upon an examination of a county's authority as it pertains to engaging in the proposed financial transaction as well as an analysis of applicable statutes, and previous Opinions of the Wisconsin Attorney General.

I. The "exchange" of county funds for U.S. gold coins is an "investment".

United States gold coins are considered legal tender at their numismatic or denominational value, the same as paper currency such as Federal Reserve Notes. However, U.S. gold coins cannot be purchased at their legal tender or numismatic value. For example, at the time of submitting this request, the American Eagle U.S. gold coin containing one troy ounce (22 karats) of gold with a numismatic value of \$50 can be purchased from the U.S. Mint for \$2,035.00. According to the U.S. Mint: "Pricing for these numismatic precious metal coins is based on the United States Mint's precious metal pricing policy and changes periodically with the fluctuating price of gold". Based upon my research, it appears that gold coins or bullion can only be purchased at the price set by the market for such precious metals with valuations based upon the weight and purity (karat) of the metal. Since the price of gold is subject to market fluctuations, the "exchange" of surplus funds for gold coins may

represent a net increase or decrease in the value of the initial exchange of surplus funds depending upon the fluctuating market price of gold. Therefore, I view the "exchange" proposed by the Finance Committee as a financial transaction and more specifically as an investment governed by Wis. Stat. § 66.0603(1m) (Attachment B).

My interpretation of the proposed "exchange" is also supported by the plain meaning of the term "investment" as applied to the purposes enumerated for the exchange. The term "investment" is not defined within Wis. Stats. § 59.61 and § 66.0603, and therefore I have applied the plain meaning of the term. "Investment" or the act of investing is defined by The American Heritage Dictionary (Third Edition) as: "to commit money in order to gain a financial return; to spend or devote for future advantage or benefit". Although members of the Finance Committee identified several reasons to support the proposed exchange, the primary rationale for the exchange seemed to be a concern that given the current economic conditions, county funds deposited or invested in the form of U.S. currency will not maintain its value when adjusted for inflation, whereas converting a portion of county surplus funds to U.S. gold coins would likely result in these exchanged funds maintaining (or even increasing) their value against inflation. Additionally, committee members expressed concerns about the effect of the ever-increasing U.S. government debt on the value of county surplus funds held in the form of a "fiat" currency with no intrinsic value, whereas U.S. gold coins have an intrinsic value as a precious metal. It is my belief that the "exchange" proposed by the committee would commit county funds in order to gain a financial return and/or to devote a portion of the county funds for a future advantage or benefit, and therefore I view this "exchange" as an "investment" governed by Wis. Stats. § 59.61 and § 66.0603.

II. The county may only deposit or invest county funds as authorized by statute.

A county is a creature of the legislature and as such, it has only those powers that the legislature by statute provided. Wis. Const, art. IV, § 22. Wisconsin courts consistently have interpreted counties' powers as arising solely from the statutes.

The Wisconsin Attorney General has previously outlined the applicable standard of review involving questions of a county's authority (OAG 2-07, 2007 Wis. AG LEXIS 3 (June 8, 2007)), as follows:

"Wisconsin Stat. § 59.03(1) provides in part that "[e]very county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county." In Jackson County v. State, 2006 WI 96, PP 19-20, 293 Wis. 2d 497, 717 N.W.2d 713, the court described the home rule authority of counties:

The county correctly asserts that Wis. Stat. § 59.03 is a broad grant of power to counties. . . . When exercising home rule power, a county must be cognizant of the limitation imposed if the matter has

been addressed in a statute that uniformly affects every county as such legislation shows the matter is of statewide concern. Mommsen v. Schueller, 228 Wis. 2d 627, 635, 599 N.W.2d 21 (Ct. App. 1999). Wisconsin courts have previously recognized that while some subjects are exclusively a statewide concern, others may be entirely a local concern and some subjects are not exclusively within the purview of either the state or of a county. Id at 636. For those subjects where both the state and a county may act, the county's actions must "complement rather than conflict with the state legislation." State ex rel. Ziervogel v. Washington County Bd. of Adjustment, 2004 WI 23, P 37, 269 Wis. 2d 549, 676 N.W.2d 401.

Four factors assist us in determining how a county's action is to be analyzed:

- (1) whether the legislature has expressly withdrawn the power of municipalities to act;
- (2) whether the ordinance logically conflicts with the state legislation;
- (3) whether the ordinance defeats the purpose of the state legislation;
- or
- (4) whether the ordinance goes against the spirit of the state legislation. Mommsen, 228 Wis. 2d at 636-637 (citing Anchor Sav. & Loan Ass'n v. EOC, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984); U.S. Oil, Inc. v. City of Fond Du Lac, 199 Wis. 2d 333, 345, 544 N.W.2d 589 (Ct. App. 1996)). If any one of the four factors set out in Mommsen is met by a county's action, that action is without legal effect. Ziervogel, 269 Wis. 2d 549, P 38 (citation omitted)."

Pursuant to Wis. Stat. § 59.61 (Attachment A), the State legislature has granted authority to counties to engage in certain specified financial transactions. As a starting point, this statute requires that all monies collected or received on behalf of the county shall be paid into the county treasury (Wis. Stat. § 59.61(1)(c)). Upon receipt into the county treasury, then the county treasurer has essentially three types of financial transactions that are available (Wis. Stat. § 59.61(3)): 1) deposit funds into depositories designated by the County Board; 2) invest funds in investments authorized by statute; and 3) retain funds in an amount not to exceed \$3,000 for immediate use.

Although the State legislature has granted counties some discretionary authority with regards to the type of financial transaction to consider (i.e. whether to deposit or invest county funds), the statute clearly limits such financial transactions to those authorized by statute. Therefore, it is my opinion the county does not have the authority to engage in any financial transaction involving the deposit or investment of County funds not specifically authorized by statute, as the State has expressly limited that power. Moreover, any action taken by the county board to authorize a deposit or investment of county funds in a manner that is not expressly

authorized by statute would logically conflict with state legislation and also violate the purpose and spirit of such legislation (i.e., regulation of financial transactions of local governments is a matter of statewide concern, and such regulations apply uniformly to all counties).

Members of the Langlade County Finance Committee have expressed concern about the security of County funds placed in depositories and investments as authorized by law given recent federal court decisions involving the use of "segregated" client funds to pay institutional debts, or use of placing such funds at risk as collateral in other investment schemes that are not authorized by the individual depositor/investor.

III. The "exchange" of county funds for U.S. gold coins is not authorized by statute.

As stated previously (Section II above), county funds may be deposited in active deposits; meaning that these funds must be available for withdraw on demand (Wis. Stat. § 59.61(3)). Additionally, any county funds that are not immediately needed may be invested in investments as authorized by statute (Wis. Stats. § 59.61(3) and § 66.0603). To the extent that the funds paid into the county treasury are already in the form of U.S. gold or silver coins, then it is my opinion that such funds can be deposited or invested as authorized by statute. However, the question raised by the Finance Committee is whether county funds that have already been paid into the county treasury may be "exchanged" for U.S. gold coins. As previously stated (Section I above), it is my opinion that the proposed "exchange" would constitute an "investment" of county funds.

The Wisconsin Attorney General has previously opined on the scope of a county's investment authority (OAG 62-88, 1988 Wisc. AG LEXIS 65 (October 24, 1988)), finding that: "The manner in which, and the investments in which, public funds may be invested by local governmental entities is strictly regulated and specifically detailed in a number of statutes". In this Opinion, the Attorney General determined that a county could not invest in a mutual fund on the basis that the term "mutual fund" did not appear in any of the statutory sections pertaining to investments, and as a general rule, where the statutes authorize certain specified investments, those investments not enumerated are not permitted. Similarly, the investment in U.S. gold coins or bullion also does not appear in Wis. Stat. § 66.0603(1m), and therefore I conclude that such investment is not permitted.

IV. Protecting municipal deposits and investments.

If the County is limited to placing county funds in depositories and investments as specifically authorized by law, then Finance Committee members expressed concerns about the security of county funds given recent federal court decisions involving the use of "segregated" client funds to pay debts of the financial institution, and use of "segregated" client funds as collateral for unauthorized investments. (See, In re Sentinel Mgmt Group, 689 F.3d 855, 2012 U.S. App. LEXIS 16546 (7<sup>th</sup> Cir. Ill.

2012); *see also*, In re MF Global Holdings Ltd. Inv. Litig., 2012 U.S. Dist. LEXIS 58792 (J.P.M.L. Apr. 23, 2012). I'm not certain how municipal deposits or investments may be impacted by these decisions, but I advised the Finance Committee to consider adopting deposit and investment guidelines to better manage risks, including: collateralization, security diversification, financial institution limits, and maturity restrictions. To the extent that deposits are not adequately insured or investments are not guaranteed to increase in value, the Finance Committee is concerned that a "safe harbor" for County surplus funds does not currently exist. The Finance Committee views the "exchange" for U.S. gold coins as a safer harbor for County funds than the deposits and investments currently authorized by law. I advised the Finance Committee that the County is without authority to consider the proposed exchange until such time as the State grants additional deposit or investment authority to governing boards.

Sincerely,



Robin James Stowe  
Langlade County Corporation Counsel  
State Bar No. 1016640

Enclosures (Attachments A and B)