

VOLUME NO. 35

Opinion No. 41

CONSTITUTIONAL LAW — Debt or liability, creation of; DEPARTMENT OF ADMINISTRATION — Powers, no authority to dispose of interests in state lands; STATE BOARD OF LAND COMMISSIONERS — Powers, authority to dispose of interests in state lands; STATE LANDS — Transfer of, who has authority. Article XIII, sections 2 and 6, Constitution of Montana, 1889; Article VIII, section 8, Article X, section 11, Constitution of Montana, 1972; sections 79-2202, 81-102, 81-103, 81-402, 81-416, 81-907, 81-918, 82-1918, and 82-3310, R.C.M. 1947; Senate Bill No. 54, Session Laws of 1973.

HELD: 1. The department of administration may not dispose of any interest in state lands without the approval of the state board of land commissioners.

2. No legal method or procedure exists for a lease-purchase plan for construction of a social and rehabilitation services building as authorized by section 82-1918, R.C.M. 1947, as the plan would create a debt or liability which has not been approved as required by Article XIII, section 2, Constitution of Montana, 1889, or Article VIII, section 8, Constitution of Montana, 1972.

December 7, 1973

Mr. E.V. "Sonny" Omholt
State Auditor
State Capitol
Helena, Montana 59601

Dear Mr. Omholt:

I am in receipt of your recent letter wherein you ask my opinion on the following questions:

1. Does the state department of administration have the power or authority to lease, sell, or otherwise deal with state lands in the capitol complex without the approval of the state board of land commissioners?
2. If the state board of land commissioners is the proper body to consider the leasing, sale, or disposition of state lands for the purpose of constructing the proposed social and rehabilitation services building, what are the proper or legal methods by which the same can be accomplished?

In answering your first question, it must be determined who has authority to dispose of interests in state lands. Article X, section 4, Constitution of Montana, 1972, creates a five-member board of land commissioners. Article X, section 11, Constitution of Montana, 1972, provides in part:

- (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.
- (2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

(4) All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area.

Pursuant to these provisions, all state lands are public lands which must be classified by the board of land commissioners and any interest in public lands may only be disposed of as provided by law. There are several specific statutory provisions relating to the disposition of interests in state lands.

Section 81-103, Revised Codes of Montana, 1947, provides in part:

The board [of land commissioners] shall exercise general authority, direction, and control over the care, management, and disposition of state lands, ...

Section 81-402, R.C.M. 1947, provides in pertinent part:

(1) Under the general direction and control of the board of land commissioners, the department shall lease all agricultural and grazing lands and all town and city lots open to leasing upon proper application.

...

(4) All leases of agricultural or grazing lands, or town or city lots, shall be upon condition that the board may, in its discretion, offer the land for sale at any regular public sale of state lands ...

Section 81-416, R.C.M. 1947, provides in part:

The general form of lease to state lands shall be prescribed by the board, and no changes in the form for these leases may be made without the approval of the board. ...

Section 81-907, R.C.M. 1947, provides in part:

The state board of land commissioners is hereby vested with the power and authority to decide when sales of state lands are to be held and what state lands are to be offered for sale, ... provided, however, that as a general rule no sale of state lands shall be held unless applications have been made for the purchase of lands within one (1) county by prospective purchasers representing at least twelve (12) families.

Section 81-918, R.C.M. 1947, provides:

All sales of state lands, and all sales of timber on state lands, shall be subject to the approval and confirmation by the state board of land commissioners, and no sale shall be deemed completed until after such approval and confirmation. The board shall have the power and it shall be its duty to disapprove any sale which in its opinion would be disadvantageous to the state.

The foregoing statutory provisions give to the board of land commissioners

the duty and authority to administer the sale or lease of all state lands within the purview of section 81-102, R.C.M. 1947, which provides:

The term state land or lands shall mean and include all lands that have heretofore been granted and that hereafter may be granted to the state by the United States for educational purposes or for any other purpose, either directly or through exchange for other lands; all lands that have become the property of the state through deed or devise from any person; and all lands that have become the property of the state through the operation of law, except, however, such of these lands as the state has sold and conveyed through the issuance of patent; and except also lands that are used as building sites, campus grounds, or for experimental purposes by any of the state institutions, and have become the property of such institutions.

Thus, it appears that the only state lands contemplated by the above statute over which the board of land commissioners does not have authority and control are the following:

1. Lands conveyed by the state through the issuance of patent.
2. Lands used as building sites, campus grounds, or for experimental purposes by any state institution and that are the property of that institution.

It must then be determined if the department of administration has authority to dispose of any interest in state lands. A review of Montana law reveals no such authority. The only pertinent statute appears to be section 82-3310, R.C.M. 1947, which provides:

The state controller [Department of Administration pursuant to 82A-202, R.C.M. 1947] is custodian of all state property in the state capitol area.

In ascertaining the intention of the legislature in denominating the department of administration custodian of state property in the capitol area, it is necessary to examine the meaning of "custodian". It is presumed that terms are intended to be used in their ordinary sense, unless it is evident from their context that a different meaning was intended. **Morrison v. Farmers' & Traders' State Bank, et al.**, 70 Mont. 146, 151, 225 P. 123 (1924). **Webster's New International Dictionary, Second Edition Unabridged**, (1941), defines custodian as: "One who has care or custody, as of some public building; a keeper." As the keeper of state property the department of administration has not been granted the authority to dispose of any interest in state lands by sale or lease. It does not appear that the legislature has granted authority to the department of administration to dispose of any interest in state lands, nor is the department of administration included within the exceptions of section 81-102, *supra*.

Therefore, in reference to your first question, based upon the above-cited constitutional and statutory authority, the department of administration does not have the authority to dispose of any interest in state lands without the approval of the state board of land commissioners.

You have also asked for my opinion as to the proper method and procedure by which state lands may be leased or conveyed to a developer for construction of the proposed social and rehabilitation services building if the board of land commissioners is the proper body to consider the leasing, sale, or other disposition of state lands.

By way of background, the 1973 session of the Montana legislature amended section 82-1918, R.C.M. 1947, and authorized the state purchasing agent, under the department of administration, to enter into the lease-purchase of buildings by the state under certain conditions. Pursuant to this authority, the department of administration has solicited bid proposals for the lease-purchase by the state of a building to be constructed on state land to house the department of social and rehabilitation services. Most, if not all, of the proposals received contemplate some transfer of interest in state lands as part of the lease-purchase contract. In addition, one of the conditions imposed by section 82-1918, *supra*, is that any lease-purchase plan must have legislative approval.

However, in order to answer your second question, section 12, Senate Bill 54, Laws of 1973, which apparently gave the required legislative approval for the social and rehabilitation services building, must be examined together with the subject of state indebtedness and the constitutional provisions applicable thereto. Since questions may arise relative to whether the 1889 or the 1972 state constitution is controlling, your question will be considered under the relevant provisions of both constitutions.

The constitutional provisions in question are Article XIII, section 2, Constitution of Montana, 1889, which provided:

The legislative assembly shall not in any manner create any debt except by law which shall be irrevocable until the indebtedness therein provided for shall have been fully paid or discharged; such law shall specify the purpose to which the funds so raised shall be applied and provide for the levy of a tax sufficient to pay the interest on, and extinguish the principal of such debt within the time limited by such law for the payment thereof; but no debt or liability shall be created which shall singly, or in the aggregate with any existing debt or liability, exceed the sum of one hundred thousand dollars (\$100,000) except in case of war, to repel invasion or suppress insurrection, unless the law authorizing the same shall have been submitted to the people at a general election and shall have received a majority of the votes cast for and against it at such election.

and Article VIII, section 8, Constitution of Montana, 1972, which provides:

No state debt shall be created unless authorized by a two-thirds vote of the members of each house of the legislature or a majority of the electors voting thereon. No state debt shall be created to cover deficits incurred because appropriations exceeded anticipated revenue.

Senate Bill 54, Laws of 1973, section 12, authorized the department of administration, as part of the long-range building program, to enter into a lease-purchase agreement to provide a new office building for the department of social and rehabilitation services provided that the total cost of the project did not exceed \$1,500,000.

Thus, the question that arises is whether or not the \$1,500,000 authorized in section 12, *supra*, is a debt within the meaning of Article XIII, section 2, Constitution of Montana, 1889, and Article VIII, section 8, Constitution of Montana, 1972.

The words "debt or liability" as used in Article XIII, section 2, Constitution of Montana, 1889, have been defined by the Supreme Court of Montana in **State ex rel. Diedrichs v. Board of Trustees of Missoula Co. High School**, 91 Mont. 300, 7 P. 2d 543 (1932). The court stated at page 305:

"In construing our constitutional provision applicable, we have under consideration the meaning of the words "debt or liability," and in our view the prohibition intended by these words is the creation of a debt or obligation of the state in excess of cash on hand and revenue provided for," ...

and further at page 307:

It seems plain that the constitutional limitation does not apply to the expenditure of cash on hand provided for a specific purpose; but rather to the creation of an obligation to be met and paid in the future by the taxpayers.

The words "indebted" and "indebtedness" were also used in Article XIII, section 6, Constitution of Montana, 1889, which provided:

No city, town, township, school district or high school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum (5%) of the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township, school district or high school district shall be void; and each school district and each high school district shall have separate and independent bonding capacities within the limitation of this section; provided, however, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when

such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt.

In 1963 the city of Missoula contemplated conveying city land to a private party for the purpose of having a city-approved building erected which the city would rent for three years, with an option to purchase for the sum of one dollar. The Montana Supreme Court held that the lease payments were an "indebtedness" within the meaning of Article XIII, section 6, Constitution of Montana, 1889. The court stated at page 213:

... [T]he question arises as to whether the lease payments contemplated by the resolution are forms of indebtedness within the purview of Art. XIII, Sec. 6. We think they are.

... A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs, the liability is absolute,—the debt exists,— ... **State ex rel. Simmons v. City of Missoula**, 144 Mont. 210, 395 P.2d 249 (1964).

Thus, the only difference between Article XIII, section 2, and Article XIII, section 6, as they relate to the meaning of the term "indebtedness", is that the former is a limitation upon the state legislature, while the latter is a limitation upon cities, towns and school districts. The meaning of "indebtedness" is analogous in both of the above provisions, as well as in Article VIII, section 8, Constitution of Montana, 1972. The convention notes of the Constitutional Convention indicate that Article VIII, section 8, was intended to replace Article XIII, section 2, of the 1889 constitution.

In addition, section 79-2202, R.C.M. 1947, concerning the funding of the long-range building program, previously provided:

(1) When authorized by the legislative assembly, and within the limits of such authorization and the further limitations in this section, the board may issue and sell bonds of the state of Montana in such manner as it shall deem necessary and proper to provide funds to finance the long-range building program. All bonds issued hereunder shall contain a statement that they are not and shall never become a debt or liability of the state of Montana within the meaning of any constitutional or statutory limitation or provision, and that no ad valorem tax may be levied upon property within the state of Montana to

pay principal thereof or interest thereon, but that the bonds and interest are payable solely from the proceeds of special taxes pledged and appropriated to the sinking fund account as provided in this chapter, and shall contain the pledge of the state of Montana to continue to levy and collect said special taxes and to apply the proceeds thereof to the retirement of said bonds and the payment of interest thereon.

However, the 1973 legislative assembly amended 79-2202, *supra*, to read as follows:

(1) When authorized by a vote of two-thirds (2/3) of the members of each house of the legislature, or of a majority of the electors voting thereon if so provided by law, and within the limits of such authorization and the further limitations in this section, the board may issue and sell bonds of the state of Montana in such manner as it shall deem necessary and proper to provide funds to finance the long-range building program. Bonds may be issued hereunder to provide funds for the payment or redemption of the outstanding War Veterans' Compensation Bonds and World War I Veterans' Compensation Bonds issued pursuant to Initiative No. 54, and the amendment thereof, chapter 270, Laws of 1963, and long-range building program bonds issued under this section. The full faith and credit and taxing powers of the state of Montana shall be pledged for the payment of all bonds issued pursuant to this chapter after January 1, 1973, with all interest thereon and premiums payable upon the redemption thereof.

Thus, it is evident that the legislature repealed the statutory limitation that long-range building program bonds are not a debt or liability within the meaning of the Montana constitutional provisions, and that an ad valorem tax may be levied to redeem all such bonds issued after January 1, 1973. Since the "full faith and credit and taxing powers" of the state are pledged for the payment of such bond obligations, without limitation to a special or excise tax, it seems that the legislature intended that all long-range building program bonds issued after January 1, 1973, be considered a debt or liability of the state of Montana.

The legislature did not provide for "cash on hand" to finance the social and rehabilitation services building under section 12, Senate Bill 54, but authorized the department of administration to incur future lease and/or purchase payments not in excess of \$1,500,000. Because of this, together with the decision of *State v. City of Missoula*, *supra*, holding such lease purchase payments to be an "indebtedness" incurred by the city, and the amendment of section 79-2202, *supra*, it is my opinion that the legislature has created a "debt" within the purview of both Article XIII, section 2, Constitution of Montana, 1889, and Article VIII, section 8, Constitution of Montana, 1972.

In my view, it is not necessary to decide which constitutional provision is applicable to section 12, Senate Bill 54, Laws of 1973, but only to discuss the

passage of section 12, Senate Bill 54, supra, in view of the following facts that have come to my attention. First, if the provisions of the Constitution of Montana, 1889, control the passage of this bill, then section 12, Senate Bill 54, was not submitted to a vote of the people at a general election as prescribed by Article XIII, section 2, for the creation of any "debt or liability" in excess of \$100,000. Second, if the provisions of the Constitution of Montana, 1972, apply to the passage of this bill, then section 12, Senate Bill 54, was not passed by a 2/3 majority of each house as required by Article VIII, section 8, Constitution of Montana, 1972. Section 12, Senate Bill 54, was a house amendment to the original senate bill which had already been passed by the senate with a total of 48 "yes" votes. However, the senate vote on the third reading of the bill with house amendments, which included section 12, was passed by only 32 votes as recorded in the Senate Journal, Special Session, Forty-third Legislative Assembly, at page 181. The Journal also shows 12 against, 6 excused, and none absent and not voting. Thus, it appears from my calculation that 2/3 of the 50-member senate is 33, and that the senate did not pass section 12, Senate Bill 54, on the final reading with the required 2/3 majority. The legislature is bound by the provisions of the consttution, and no act, even if passed by a sufficient majority, has the force and effect of law unless in compliance with all applicable constitutional requirements. **State ex rel. Peyton v. Cuningham**, 39 Mont. 197, 103 Pac. 497 (1909).

Therefore, in regard to your second question, it is apparent that no legal method or procedure for the conveyance of state land to a social and rehabilitation services building developer is available because section 12, Senate Bill 54, Laws of 1973, creates a state "debt," and is not in compliance with the provisions of either the 1889 or the 1972 constitutions regarding the creation of such debts. Since section 12, Senate Bill 54, did not comply with constitutional requirements, there is no valid approval of the lease-purchase agreement as authorized by section 82-1918, R.C.M. 1947.

THEREFORE, IT IS MY OPINION:

1. The department of administration has no authority to sell, lease, or otherwise dispose of any interest in state lands, without the approval of the state board of land commissioners.
2. No legal method or procedure exists for a lease-purchase plan for construction of a social and rehabilitation services building, as authorized by section 82-1918, R.C.M. 1947, as the plan would create a debt or liability which has not been approved as required by Article XIII, section 2, Constitution of Montana, 1889, or Article VIII, section 8, Constitution of Montana, 1972.

Very truly yours,

ROBERT L. WOODAHL
Attorney General