

VOLUME NO. 37

OPINION NO. 31

CITIES AND TOWNS - Purchase of real property with existing buildings; procedure for and permissibility of incurring indebtedness; REVISED CODES OF MONTANA, 1947 - Sections 11-906, 11-930, 11-966, 11-977, 11-1104, 11-1202, 47A-7-204(7), 93-9902(3).

- HELD: 1. Under applicable Montana Statutes cities and towns are not required to submit a proposed purchase of real estate and existing buildings to voters for approval.
2. A city or town may purchase land and existing buildings to house its fire department using current appropriations and without incurring indebtedness or issuing bonds to finance such purchase.

31 May 1977

W. Gene Theroux, Esq.
Poplar City Attorney
P.O. Box 638
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Dear Mr. Theroux:

You have requested my opinion concerning the purchase of real property by the city of Poplar. The property, consisting of several lots with two buildings thereon, has been offered to the city for \$30,000. If purchased, the city intends to use it to house its fire department. Your question can be stated as follows:

Can a City purchase lots within the city limits, on which two buildings are located, for a price in the amount of \$30,000, for the purpose of housing its fire department, without calling for bids, requesting a vote of the electors, or issuing bonds for the purchase price?

Incident to their corporate powers as municipal corporations, municipalities have the power to purchase real property for public purposes. Section 11-104, R.C.M. 1947; Flom v. Unknown Conrad Heirs, 132 Mont. 574, 580, 319 P.2d 499 (1958); and see also 56 Am.Jur.2d, Municipal Corporations, § 532, pp. 589-590). In addition, municipalities may acquire real property through eminent domain proceedings. Section 11-977 R.C.M. 1947, and section 93-9902(3), R.C.M. 1947.

In reviewing the statutory powers of cities and towns, I am unable to find any provision requiring an appraisal prior to the purchase of real property. Although section 16-1007, R.C.M. 1947, requires counties to obtain appraisals for real property, there is no corresponding requirement applicable to cities and towns.

A bidding requirement is set forth in section 11-1202, R.C.M. 1947, which provides in relevant part:

All contracts for the purchase of any automobile, truck, or other vehicle or road machinery, or for any other machinery, apparatus, appliances, or equipment, or for any materials or supplies of any

kind, or for construction for which must be paid a sum exceeding four thousand dollars (\$4,000), must be let to the lowest responsible bidder after advertisement for bids; provided that no contract shall be let extending over a period of five (5) years or more without first submitting the question to a vote of the taxpaying electors of said city or town.

The word "construction" as used in section 11-1202, means to "build" or "put up." See Bryant v. Board of Examiners, 130 Mont. 512, 516-517, 305 P.2d 340 (1956); State v. Board of Examiners, 131 Mont. 188, 193, 309 P.2d 336 (1957). In context "construction" does not include purchase of existing buildings. The enumerated applications of section 11-1202 consist of fungible items which can be furnished on a competitive basis. The bidding requirement of section 11-1202 does not apply to the proposed purchase.

Similarly, I have been unable to discover any provision requiring voter approval of the purchase. The voter approval requirement of section 11-1202, R.C.M. 1947, supra, is inapplicable to real estate purchases. Therefore, discretion to purchase the property in question is vested solely in the city council. See Greener v. City of Great Falls, 157 Mont. 376, 388-389, 485 P.2d 932 (1971).

Where bonds may be issued to finance a proposed purchase, a bond election is required by section 11-2301, R.C.M. 1947. Authority to issue bonds derives from the power to incur indebtedness; where there is no explicit authority to incur indebtedness for the subject matter concerned, there is no authority to issue bonds. Dietrich v. City of Deer Lodge, 124 Mont. 8, 218 P.2d 932 (1950). Section 11-966, R.C.M. 1947, sets forth the specific purposes for which indebtedness may be incurred by a city, providing in relevant part:

The city or town council has power: (1) To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to wit: Erection of public buildings, construction of sewers, sewage treatment and disposal plants, bridges, dock wharves, breakwaters, piers, jetties, moles, waterworks, reservoirs and reservoir sites, lighting plants, supplying the city or town with water by contract, the purchase of fire apparatus, street and other equipment, the

construction or purchase of canals or ditches and water rights for supplying the city or town with water, building, purchasing, constructing and maintaining devices intended to protect the safety of the public from open ditches carrying irrigation or other water, to acquire, open and/or widen any street and to improve the same by constructing, reconstructing and repairing pavement, gutters, curbs and vehicle parking strips and to pay all or any portion of the cost thereof, and the funding of outstanding warrants and maturing bonds; provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not, at any time, exceed five per centum (5%) of the total value of the taxable property of the city or town, as ascertained by the last assessment for state and county taxes; * * * (Emphasis added.)

Section 11-966 contains authority to incur debts for the "erection of public buildings" but does not mention purchases of real property or existing buildings. In Bryant v. Board of Examiners, supra, the Montana Supreme Court strictly construed the phrase "for the purpose of erecting public buildings," as that term was used in a statute of the United States, stating:

At the outset we heed the command of R.C.M. 1947, section 19-102, to construe the words and phrases found in the statutes before us "according to the context and the approved usage of the language" we find there. For in these statutes no technical terms are used, which have acquired any peculiar meaning or definition apart from that ordinarily conveyed by what we read. Our task is limited accordingly to the construction of simple English in which there inheres neither uncertainty nor ambiguity; or so it seems to us.

* * *

The usual and ordinary meaning of the verb "to erect" as it is used in section 12 of the Enabling Act, is "To raise, as a building; to build; construct; as, to erect a house." See Webster's New International Dictionary (2d ed.): "erect."

* * *

(There follows an approving discussion of cases from other jurisdictions which strictly construe

the term "erect" as excluding the repair and remodeling of existing buildings.)

It follows that chapter 278 may not be sustained as a valid pledge of the income from the capital land grant, which is made up of the moneys received from the lands given the state to erect public buildings under sections 12 and 17 of the Enabling Act. These moneys may be used only to erect a building as those words are commonly understood; for the Enabling Act says just this and nothing more. They may not be used to rebuild or remodel and repair a structure already built and in use, which after reconstruction and renovation remains yet the same building as before. To reconstruct and renovate the existing capitol building, unless the work designed amounts to the construction of what is a new and different building when completed.

* * *

Nor do we find anything absurd in the so-called literal construction put here upon sections 12 and 17 of the Enabling Act, which leads to the conclusion that "erecting" does not include "reconstructing" and "renovating." It is not absurd to construe a statute to mean precisely what it says. Nor is it absurd for us to decline to work a judicial amendment of the Enabling Act by interpolating the words "reconstructing and renovating," or their synonyms, "remodeling and repairing." 130 Mont. at 515-522.

The Court held that the word "erect" did not include repair, remodeling or renovation of an existing building.

The holding in Bryant was expressly overruled the next year in State v. Board of Examiners, supra, which held that "the authority to erect a building for a designated purpose confers impliedly authority to keep it erected by repairing it." 131 Mont. at 193. However, the overruling opinion was expressly limited to the particular statutory provision and factual situation before the court. In dictum the court reaffirmed rules of strict construction of statutes authorizing municipalities to incur indebtedness for enumerated purposes:

There are cases which place a strict interpretation upon the word "erect" and which hold that it

does not contemplate the repair of a building already erected. They are listed in the majority opinion in the Bryant case.

Those cases had to do with authority on the part of public officers to issue bonds payable from tax levies and in such cases it is proper to strictly construe the statutes and to hold that they do not confer implied authority. 131 Mont. at 188.

I therefore conclude that cities are not authorized to incur indebtedness for the purchase of an existing building and its situs.

The implementation of new forms of local government under provisions of chapter 51 of Title 16 and of Title 47A, R.C.M. 1947, does not give cities and towns authority in addition to that granted in section 11-906 since the general statutory provisions concerning indebtedness are applicable and mandatory even under self-government powers, section 47A-7-204(7), R.C.M. 1947.

The word "erect" is also used in section 11-930, R.C.M. 1947, which empowers cities and towns "to erect engine, hose, and hook-and-ladder houses." I do not read that section to preclude the purchase of existing structures for use as fire-houses. As already pointed out, under section 11-104, R.C.M. 1947, cities and towns may purchase land and buildings. I construe section 11-930 only to give the city the additional power to construct fire-houses.

Finally, in preparing this opinion, I have not considered the effect of city ordinances which may relate to real estate purchases.

THEREFORE, IT IS MY OPINION:

1. Under applicable Montana Statutes, cities and towns are not required to submit a proposed purchase of real estate and existing buildings to voters for approval.
2. A city or town may purchase land and existing buildings to house its fire department using current appropriations and without incurring indebtedness or issuing bonds to finance such purchase.

Very truly yours,

MIKE GREELY
Attorney General