

VOLUME NO. 38

OPINION NO. 78

COUNTY GOVERNMENT - Industrial development revenue bonds, sale of;
INTEREST - Limitation as to industrial development revenue bonds, scope and application;
MUNICIPAL GOVERNMENT - Industrial development revenue bonds, sale of;
REVENUE BONDS - Industrial Development Project Act, sale of bonds at a discount;
MONTANA CODE ANNOTATED - Sections 17-5-102, 90-5-102, 90-5-103.

- HELD: 1. The sale of industrial revenue bonds issued pursuant to Title 90, chapter 5, part 1, MCA, at a price less than the face value of the bonds does not violate section 17-5-102, MCA, if the yield of the bonds exceeds nine percent.
2. A payment made directly to the purchaser of industrial development revenue bonds by the user-beneficiary of the bond proceeds from the user-beneficiary's own funds need not be considered in applying the interest limitation of section 17-5-102, MCA.

17 April 1980

Jeffrey M. Sherlock, Esq.
Helena City Attorney
Helena, Montana 59601

Dear Mr. Sherlock:

You have requested my opinion on the following questions:

1. Whether the sale of industrial development revenue bonds issued pursuant to Title 90, chapter 5, part 1, MCA, at a price less than the face value of the bonds violates section 17-5-102, MCA, if the yield of the bonds exceeds nine percent.
2. Whether a payment made directly to the purchaser of industrial development revenue bonds by the user-beneficiary of the bond proceeds from the user-beneficiary's own funds must be considered in applying the interest limitation of section 17-5-102, MCA.

You have indicated that the city of Helena is considering the issuance and sale of industrial development revenue bonds for the purpose of making a loan to a local hospital. The bonds would be issued pursuant to the Industrial Development Projects Act of 1965, sections 17-5-101 through 113, MCA. Authority for the issuance of such bonds is found in section 90-5-102(1)(c), MCA, which provides:

(1) In addition to any other powers which it may now have, each municipality and each county may:

(c) enter into agreements, upon terms the governing body considers advisable and not in conflict with the provisions of this part, to loan the proceeds of its revenue bonds to others for the purpose of defraying the cost of acquiring or improving any project.

Your questions concern matters relating to the sale of the bonds. The Act itself sets no limitation as to the interest industrial development revenue bonds may bear when they are sold. Section 90-5-103(2), MCA, provides that the bonds "may...bear interest at such rate or rates...as shall be deemed for the best interest of the municipality or county and provided for in the proceedings of the governing body whereunder the bonds shall be authorized to be issued." Section 17-5-102, MCA, however, limits the interest industrial development revenue bonds may bear to a rate which "shall not exceed 9%." The rate of interest a bond bears is a factor in determining the bond's yield, which is the return the purchaser receives on his investment. Under present economic conditions bonds which produce a yield of nine percent or less may not be generally marketable. You have questioned the effect of section 17-5-102, MCA, on two measures which have been proposed to enhance the marketability of bonds issued under the Act by increasing their yield.

The first measure involves the sale of industrial development revenue bonds bearing a nominal interest rate of nine percent at a price less than their par or face value. If the city's bonds were discounted in this manner, taking the discount into account the yield of the bonds would exceed nine percent. In my opinion the sale of industrial development revenue bonds at such discount comports with the Legislature's intent and does not violate section 17-5-102, MCA.

There are no Montana decisions on point. The Supreme Court has discussed the effect of section 17-5-102, MCA, on the maximum rate of interest on a city's special improvement district bonds. See State ex rel. Townsend v. D. A. Davidson, Inc., 166 Mont. 104, 531 P.2d 370 (1975). That court has also discussed various aspects of the Industrial Development Projects Act. See Fickes v. Missoula County, 155 Mont. 258, 470 P.2d 287 (1970). However, the court has not been asked to harmonize or reconcile section 17-5-102, MCA, and the provisions of the Act.

The threshold question is whether section 17-5-102, MCA, limits merely the nominal rate of interest industrial development revenue bonds may bear, or the bonds' yield to the purchaser. Pertinent authority from other jurisdictions is divided.

The better view, in my opinion, is represented by the holdings in Rowland v. Deck, 195 P. 868 (Kan. 1921), and Golden Gate Bridge and Highway District v. Filmer, 21 P.2d 112 (Cal. 1933). In Rowland, the sale of certain bonds at a discount resulted in a yield of six percent. A statute provided that the bonds could not bear more than five percent interest. The court construed that statute as referring only to the nominal rate of interest on the bonds, not the price at which they could be sold. The court noted, "The established doctrine that bonds may be sold at a discount unless such course is forbidden recognizes the obvious distinction between the rate of interest provided in the bond itself and what the municipality using it actually pays for the use of the money it borrows by means thereof." Rowland v. Deck, *supra*, 195 P. at 870. The court acknowledged that its view restricted the scope of the statute limiting the maximum rate of interest on the bonds; it found that statute did not have the purpose of limiting the actual compensation the municipality would pay for the use of the proceeds. Id., 195 P. at 870-71. Further, the court rejected the argument that the statutory interest ceiling

related to the productive value of the bonds. Id., 195 P. at 872. Compare Hattrem-Nelson & Co. v. Salmon River Grand R.H., 285 P. 231 (Ore. 1930).

Golden Gate Bridge and Highway District v. Filmer, supra, is the case that is perhaps most frequently cited for the proposition that a statute fixing a maximum rate of interest on bonds refers to the description and form of the bonds rather than their yield. There, the court ruled that the term "interest" used in a statute limiting the interest rate to five percent on certain bonds was meant to carry its usual, everyday meaning. The court held accordingly that "interest" did not mean "effective interest," and found the statute was not violated where the yield of the bonds in question exceeded five percent due to the sale of the bonds at a discount. As in Rowland v. Deck, supra, the court in this case emphasized that the applicable state law did not forbid the sale of the bonds at a discount. Quoting from Kiernan v. Portland, 122 P. 764 (Ore. 1912), the court concluded that in the absence of such a proscription it was reasonable to infer "that it was the intent of the lawmaking power to grant...the entire discretion to sell at the best advantage possible under the circumstances." Golden Gate Bridge and Highway District v. Filmer, supra, 21 P.2d at 115.

In the absence of a provision barring the sale of industrial development revenue bonds at a discount, I see no reason why a Montana court would not follow the line of authority represented by the above decisions. In fact, the Act does speak to the sale of bonds at a discount. Rather than forbidding such sales, which would preclude the proposed sale in question, the Act expressly allows the sale of industrial development revenue bonds at a discount. This was accomplished through an amendment to section 90-5-103(3), MCA, enacted by the 1979 Legislature, 1979 Montana Laws, chapter 656, section 3. As amended, section 90-5-103(3), MCA, provides:

Any bonds issued under the authority of this part may be sold at public or private sale in such manner, at such time or times, and at such price above or below par as may be agreed upon by the lessor of the project or the borrower of the funds. (Amendatory material emphasized.)

It is presumed that the Legislature would not pass useless legislation. State ex rel. Irvin v. Anderson, 164 Mont.

513, 523, 525 P.2d 564 (1974). In determining the Legislature's purpose in amending section 90-5-103(3), MCA, as it did, I note also that statutes for industrial promotion "confer upon municipalities a much greater degree of discretion than has been granted to them in the past...in other areas of municipal activities," and that such statutes "are to be given a liberal interpretation in order to accomplish their broad social purposes." Green v. City of Mt. Pleasant, 131 N.W.2d 5, 27 (Iowa 1964).

By amending section 90-5-103(3), MCA, as it did, the Legislature plainly meant to give a municipality or county the power to sell industrial development revenue bonds at a premium (above par) or at a discount (below par). The only condition placed on a municipality or county's power to sell its bonds at a discount is that the user-beneficiary must agree to such sale. Applying the principle that in construing a statute the function is to declare what is stated therein, and not to insert what has been omitted, Dunphy v. Anaconda Co., 151 Mont. 76, 80, 438 P.2d 660 (1968), I conclude the Legislature did not intend to impose any other condition on the power to sell industrial development revenue bonds at a discount.

As the foregoing discussion shows, sections 17-5-102 and 90-5-103(3), MCA, can be harmonized to give effect to each. The former refers to the compensation that is paid by the issuer of industrial development revenue bonds, expressed in terms of a rate of interest that is fixed at the time the bonds are issued and offered for sale. The latter refers to the price at which the bonds are sold, which may result in a yield to the purchaser that is greater or lower than the fixed nominal interest rate. In my opinion, the city may sell its industrial development revenue bonds at a discount even if the yield of the bonds exceeds nine percent.

Your second question concerns a proposal whereby the user-beneficiary of the bond proceeds would pay the bonds' purchaser a certain amount from its own funds to induce the purchaser to buy the bonds. The bonds themselves would bear a rate of interest within the nine percent limitation of section 17-5-102, MCA, and would be sold at a price that, taking any discount or premium into account, would result in a yield to maturity of nine percent or less. You have asked whether such a payment would constitute "interest" under section 17-5-102, MCA.

I have concluded above that as used in section 17-5-102, MCA, the term "interest" refers to the fixed rate of interest industrial development revenue bonds bear. It follows that amounts paid directly to the purchaser by the user-beneficiary of the bond proceeds need not be considered as interest in applying the nine percent limitation of section 17-5-102, MCA. Even assuming that section 17-5-102, MCA, limits the yield of such bonds, it does not follow that section 17-5-102, MCA, would be violated by a payment of the kind you describe.

I reach this conclusion for two reasons. First, the Act contemplates that the interest on industrial development revenue bonds is the amount paid by the county or municipality, out of the project's revenues, for the use of the bond proceeds. See §§ 90-5-103(1), 90-5-106, MCA. The hospital, not the city, would be making the proposed payment. In addition, I find nothing in the Act indicative of a legislative intent to restrict such a payment. The city would receive no benefit, nor would its position be impaired in any way.

THEREFORE, IT IS MY OPINION:

1. The sale of industrial revenue bonds issued pursuant to Title 90, chapter 5, part 1, MCA, at a price less than the face value of the bonds does not violate section 17-5-102, MCA, if the yield of the bonds exceeds nine percent.
2. A payment made directly to the purchaser of industrial development revenue bonds by the user-beneficiary of the bond proceeds from the user-beneficiary's own funds need not be considered in applying the interest limitation of section 17-5-102, MCA.

Very truly yours,

MIKE GREELY
Attorney General