

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 13

CITIES AND TOWNS - Authority to borrow money by methods other than bonds without election;
COUNTIES - Authority to incur liability and borrow money without election;
COUNTIES - Installment purchase contracts not considered borrowing money;
ELECTIONS - Incurring indebtedness and borrowing money by cities and counties;
MUNICIPAL CORPORATIONS - Authority to borrow money by methods other than bonds without election;
MONTANA CODE ANNOTATED - Sections 1-2-101, 7-5-2306, 7-5-4306, 7-7-2101, 7-7-2401, 7-7-2402, 7-7-4101, 7-7-4201, 7-7-4421(1);
MONTANA CONSTITUTION - Article VIII, section 10, article XI, section 4;
MONTANA CONSTITUTION OF 1889 - Article XIII, section 5;
OPINIONS OF THE ATTORNEY GENERAL - 35 Op. Att'y Gen. No. 52 (1973), 37 Op. Att'y Gen. No. 152 (1978), 38 Op. Att'y Gen. No. 14 (1979).

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- HELD: 1. Section 7-7-2101, MCA, authorizes a county to incur a liability or indebtedness in an amount up to \$500,000 without an election. Section 7-7-2402, MCA, authorizes a county to borrow money in an amount only up to \$10,000 without an election.
2. An installment purchase contract is not a "borrowing of money" within the meaning of section 7-7-2402, MCA.
3. A municipality is not required to hold an election to borrow money by a method other than issuing bonds. It is, however, limited by section 7-7-4201, MCA, to the 28 percent debt ceiling.

13 April 1987

David Ewer
Montana Economic
Development Board
Department of Commerce
Lee Metcalf Building
1520 East Sixth Avenue
Helena MT 59620-0401

Dear Mr. Ewer:

You have requested an opinion on the following questions:

1. Does section 7-7-2101, MCA, authorize a county to issue a note or some other obligation in an amount up to \$500,000 without first submitting the issue to the electorate of the county?
2. Does an installment purchase contract constitute a "borrowing of money" within the meaning of section 7-7-2402, MCA?
3. Does section 7-7-4101, MCA, authorize a municipality to issue a note without respect to amount and without a vote of the electorate?

Section 7-7-2101, MCA, provides, in pertinent part:

Limitation on amount of county indebtedness.

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....

(2) No county may incur indebtedness or liability for any single purpose to an amount exceeding \$500,000 without the approval of a majority of the electors thereof voting at an election to be provided by law, except as provided in 7-21-3413 and 7-21-3414.

Although this section appears to allow a county to incur any obligation up to \$500,000 without an election, it cannot be read in isolation.

Section 7-7-2402, MCA, provides:

Election required to borrow money -- exceptions. (1) Except as provided in subsection (3), the board of county commissioners must not borrow money for any of the purposes mentioned in this title or for any single purpose to an amount exceeding \$10,000 without:

(a) first having submitted the question of a loan to a vote of the electors of the county; and

(b) the approval of a majority of the electors of the county.

(2) If a majority of the votes cast are in favor of the loan, then the board may make the loan, issuing bonds or otherwise as may seem best for the interests of the county.

(3) It shall not be necessary to submit to the electors the question of borrowing money:

(a) to refund outstanding bonds; or

(b) for the purpose of enabling any county to liquidate its indebtedness to another county incident to the creation of a new county or the change of any county boundary lines.

This section clearly requires an election when a county borrow money in an amount exceeding \$10,000 for any single purpose.

35 Op. Att'y Gen. No. 52 at 126 (1973) held that the amount of money a county may borrow for a single purpose without an election is governed exclusively by section 7-7-2102, MCA. The apparent reasoning was that the 1972

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Constitution, article VIII, section 10 headnotes required the Legislature to set limits for county indebtedness. Section 7-7-2101, MCA, was amended the next year, placing a \$40,000 limitation on counties' authority to incur debt or liability without an election, while section 7-7-2402, MCA, was left alone.

I disagree with the ruling of that opinion. The 1889 Constitution contained the following provision in Article XIII, section 5:

No county shall be allowed to become indebted in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate, exceeding five (5) per centum 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 county shall be void. No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars (\$10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law.

In 1895 the Legislature enacted two separate statutes--those presently codified as sections 7-7-2101 and 7-7-2402, MCA. Section 7-7-2101, MCA, as originally enacted provided in part: "No county may incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars without the approval of a majority of the electors thereof voting at an election to be provided by law." This section was enacted to give effect to the constitutional provision. Burlington Northern v. Flathead County, 162 Mont. 371, 512 P.2d 710, 712 (1973). Section 7-7-2402, MCA, as originally enacted provided in part: "The Board of County Commissioners must not borrow money for any of the purposes mentioned in this Title, or for any single purpose to an amount exceeding ten thousand dollars without the approval of a majority of the electors of the county, and without first having submitted the question of a loan to a vote of such electors."

In enacting both of the statutes the same year, and amending both from time to time, the Legislature clearly intended each statute to function individually and to coexist. In enacting laws the Legislature is presumed to not enact meaningless legislation. Crist v. Segna, ___ Mont. ___, 622 P.2d 1028 (1981). Nor does the

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Legislature perform useless acts. Kish v. Montana State Prison, 161 Mont. 297, 505 P.2d 891 (1973). The statutes must be construed harmoniously to make each operative. Schuman v. Bestrom, 42 St. Rptr. 54, 693 P.2d 536 (1985).

The Legislature therefore intended different objectives for the two statutes. Section 7-7-2101, MCA, limits the creation of liability or indebtedness; section 7-7-2402, MCA, limits the borrowing of money. The terms are not synonymous. A county can incur a liability or indebtedness without borrowing money. For example, action taken by the board of county commissioners in contracting to remodel an airport building creates an indebtedness or liability against the county. The county did not borrow money to pay the contract price because it had funds on hand for the initial expenditure, and intended to raise the remaining amounts through tax levy that year. Burlington Northern, Inc. v. Flathead County, *supra*. In that case, section 7-7-2101, MCA (§ 16-807, R.C.M. 1947), was the governing statute.

37 Op. Att'y Gen. No. 152 at 627 (1978) describes another example of incurring a liability or indebtedness without borrowing money. A county proposed to purchase machinery or equipment on an installment basis. Cash on hand was to be used for the initial expenditures with the remaining costs to be absorbed in the next fiscal budget. That opinion applied section 7-7-2101, MCA, holding that the debt limitation covers the entire amount of the installment contract price less the expenditures on hand.

Unlike section 7-7-2101, MCA, section 7-7-2402, MCA, is not an implementation of the constitutional requirement of debt limitations. This section is simply a legislative act to place a limit on the amount of money a county may borrow without an election. This section contemplates the borrowing of money through the issuance of bonds, notes, warrants, etc. Edwards v. County of Lewis and Clark, 53 Mont. 359, 165 P. 297 (1917).

In answer to your first question, then, section 7-7-2101, MCA, authorizes the county to incur a liability or indebtedness in an amount up to \$500,000 without an election; however, section 7-7-2402, MCA, authorizes the county to borrow money in an amount only up to \$10,000 without an election. 35 Op. Att'y Gen. No. 52 at 126 (1973) is therefore overruled insofar as it conflicts with the holding of this opinion.

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Your next question is whether an installment purchase contract entered into by the county is a "borrowing" and subject to section 7-7-2402, MCA, or whether it merely creates a debt and is thus subject to section 7-7-2101, MCA.

Installment purchase contracts for counties are authorized by section 7-5-2306, MCA. That statute requires amounts due on the contract to be budgeted for each fiscal year the payments are to be made, with the county making the commensurate appropriations. It is clear that a county's installment purchase contract is subject to the statutory limitations on creation of indebtedness. 37 Op. Att'y Gen. No. 152 at 627 (1978). Montana case law on this question, although scarce, leads to a conclusion that the contract is not a "borrowing" under section 7-7-2402, MCA. In Edwards v. Lewis and Clark County, supra, the Montana Supreme Court distinguished between incurring a debt or liability and borrowing money. The constitutional and statutory limitations for incurring indebtedness or liability are aimed at creation of new indebtedness or liability. The present section 7-7-2402, MCA, primarily concerns funding existing indebtedness. Thus, when the county contracts for goods or services, the indebtedness is created; when bonds or notes are then issued, money is borrowed to fund the indebtedness. The existing indebtedness has been transferred from the contract provider to the bond holder. The Court noted: "This is the sense in which the term 'borrowing money' is used throughout our Codes." Id. at 299. Of course, a county may create a new indebtedness upon the sale of bonds if the bonds have not been issued to fund an existing indebtedness.

The laws governing limitations on indebtedness and borrowing money have not changed substantively to affect the holding of Edwards. In this light an installment purchase contract is not "borrowing money" within the meaning of section 7-7-2402, MCA. An indebtedness is created by the contract, but no amount of money has been borrowed by the county to pay off the indebtedness. The indebtedness is paid off by the county through yearly appropriations in its budget.

See also 56 Am. Jur. 2d Municipal Corporations § 580, which discusses in further detail the distinction between incurring indebtedness or liability and borrowing money.

In Greener v. City of Great Falls, 157 Mont. 376, 485 P.2d 932 (1971), the focus of the dispute was a city plan to construct a city shop complex, at a cost of

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\$600,000, and finance it pursuant to section 7-5-4306, MCA (§ 11-1202, R.C.M. 1947). That section, which is the city counterpart to section 7-5-2306, MCA, authorizes municipalities to use installment purchase contracts. The city had not intended to issue bonds to finance the project, but planned to appropriate moneys from its general and special funds. The issue was whether the city was legally required to issue bonds and hold an election therefor. The Court held that the city was not required to issue bonds, or hold an election therefor, and further stated, "[section 7-5-4306, MCA] expressly authorizes an alternate method of financing construction of municipal buildings to that of borrowing or a bond issue." *Id.* at 940. The Court interpreted an installment purchase contract as a method of financing that was not a "borrowing of money." Finally, the pertinent statutory language is consistent with the conclusion that the county's installment purchase contract is not a "borrowing." Section 7-7-2401, MCA, authorizes the county "to borrow money upon the credit of the county to meet current expenses if the county revenue is insufficient." (Emphasis added.) A county may, of course, incur indebtedness for several years into the future. Upon entering into an installment purchase contract, the county incurs an indebtedness for up to five years. § 7-5-2306, MCA. Thus it cannot be said to be "borrowing money for current expenses." If the county were to obtain money through bonds, warrants, or notes, for payment on the contract, it would then be borrowing money to pay current expense on the indebtedness.

I thus conclude that an installment purchase contract is not a "borrowing" under section 7-7-2402, MCA.

Your last question concerns the scope of authority of a municipality (rather than a county) to borrow money without an election and without respect to the amount borrowed.

Section 7-7-4101, MCA, authorizes a municipality to borrow money or issue bonds for a variety of purposes. The remainder of chapter 7 is concerned primarily with municipal bonds. Section 7-7-4201, MCA, appears to provide the only limitation on the municipality in borrowing money by a method other than selling bonds:

Limitation on amount of bonded indebtedness.

(1) Except as otherwise provided, no city or town may issue bonds or incur other indebtedness for any purpose in an amount which with all outstanding and unpaid indebtedness will exceed 28% of the taxable

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value of the property therein subject to taxation, to be ascertained by the last assessment for state and county taxes. [Emphasis added.]

The Legislature has imposed an election requirement whenever the municipality considers issuing general obligation bonds. § 7-7-4221(1), MCA. However, no such requirement exists for borrowing money by notes or other instrumentalities. The powers of general government and self-government municipalities are to be liberally construed. Mont. Const., art. XI, § 4; 38 Op. Att'y Gen. No. 14 at 50 (1979). Moreover, the rules of statutory construction prohibit the insertion of matter that the Legislature has omitted. § 1-2-101, MCA.

I therefore conclude that municipalities are not required to hold an election to borrow money by a method other than issuing bonds. The municipalities are, however, limited by section 7-7-4201, MCA, to the 28 percent debt ceiling.

My conclusion is supported by the history of Montana's municipal debt law. Under the 1889 Constitution, the debt ceiling of municipalities was 3 percent of the value of taxable property (increased to 5 percent in 1949). Until 1931 elections were required for the creation or increase of any municipal indebtedness. § 5278, R.C.M.: 1921. In 1931 that section was repealed and replaced with the present statutory scheme, which makes no mention of an election requirement for incurring indebtedness by means other than issuing bonds. 1931 Mont. Laws, ch. 160.

The Legislature is presumed to have intended a change, even if the purpose of that change is not readily apparent. State ex rel. Jones v. Giles, 168 Mont. 130, 541 P.2d 355, 357 (1975).

THEREFORE, IT IS MY OPINION:

1. Section 7-7-2101, MCA, authorizes a county to incur a liability or indebtedness in an amount up to \$500,000 without an election. Section 7-7-2402, MCA, authorizes a county to borrow money in an amount only up to \$10,000 without an election.
2. An installment purchase contract is not a "borrowing of money" within the meaning of section 7-7-2402, MCA.

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3. A municipality is not required to hold an election to borrow money by a method other than issuing bonds. It is, however, limited by section 7-7-4201, MCA, to the 28 percent debt ceiling.

Very truly yours,

MIKE GREELY
Attorney General