

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 20

COUNTIES - Authority to construct housing for low-income elderly citizens;  
COUNTY GOVERNMENT - Whether apartment complex for low-income elderly citizens constitutes a "public building";  
PUBLIC BUILDINGS - Whether an apartment complex for low-income elderly citizens constitutes a "public building";  
MONTANA CODE ANNOTATED - Title 7, chapter 15, part 21; sections 3-5-404, 7-3-401 to 7-3-442, 7-8-2102, 7-15-2101, 7-15-2102, 7-15-2105, 7-15-2107, 7-15-2111 to 7-15-2113, 7-15-4403, 7-15-4406, 7-15-4456, 7-16-2105, 7-16-2202, 7-16-2321, 7-32-2201, 7-34-2201, 7-34-2301;  
MONTANA CONSTITUTION - Article XI, sections 4(1)(b), 4(2);  
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 17 (1983), 40 Op. Att'y Gen. No. 51 (1984).

HELD: Counties with general government powers do not have the authority to construct or maintain an apartment complex for elderly, low-income citizens which does not otherwise constitute a boarding or nursing home under section 7-34-2301, MCA, and such a structure would not constitute a "public building" under section 7-8-2102, MCA. Such housing, however, may be provided by a county or municipal housing authority.

21 July 1987

Marvin Quinlan Jr.  
Rosebud County Attorney  
Rosebud County Courthouse  
Forsyth MT 59327

Dear Mr. Quinlan:

You have requested my opinion concerning several questions which I have consolidated into the following:

Does a county with general government powers have the authority to purchase and remodel a building under section 7-8-2102, MCA, for the

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purpose of providing housing to low-income elderly persons?

I conclude that a general powers county does not have the authority to engage in such activity but that, instead, a county or municipal housing authority should be created under Title 7, chapter 15, part 21, MCA, to provide the involved housing.

Rosebud County, which has a commission form of government under sections 7-3-401 to 442, MCA, is considering the purchase and remodeling of a motel to provide retirement housing to low-income elderly citizens. As presently contemplated, the project's cost will be borne directly by the county which would thereafter lease the apartments within the facility and be responsible for its maintenance. The facility would be located in Forsyth, Montana.

Section 7-8-2102, MCA, generally authorizes counties to erect, furnish, and maintain "a courthouse, jail, hospital, civic center, youth center, park buildings, museums, recreation centers, and any combination thereof and such other public buildings as may be necessary." The term "public buildings" is not defined but presumably refers to those structures which a county utilizes for the discharge of activities committed to its governmental powers. See § 3-5-404(1), MCA (requiring sheriff to provide district court facilities when county commissioners fail to do so); § 7-16-2105, MCA (authority to acquire lands for public recreational purposes such as civic centers, youth centers, museums, and recreational centers); § 7-16-2202, MCA (authority to establish museums); § 7-16-2321(1), MCA (authority of county park board to acquire park-related facilities); § 7-32-2201, MCA (mandating provision of county jail); § 7-34-2201, MCA (authority to construct county hospital). Section 7-8-2102, MCA, is, conversely, not an independent grant of authority to purchase whatever structures a board of county commissioners wishes but, instead, simply allows the construction or acquisition of buildings required for the discharge of expressly conferred powers or of those necessarily incidental to the exercise of clearly mandated county-governance responsibilities. See Mont. Const. art. XI, § 4(1)(b). Although such express or implied powers are to be construed liberally (Mont. Const. art. XI, § 4(2)), there must be some constitutional or statutory basis for their existence since "[r]ecognition of 'inherent' powers of general power county governments would effectively obliterate the distinction between general powers and self-government powers, a result which is obviously inconsistent with article XI of the Montana

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Constitution." 40 Op. Att'y Gen. No. 17 at 63, 66 (1983). See 40 Op. Att'y Gen. No. 51 at 206, 210-11 (1984) (principal purpose of Mont. Const. art. XI, § 4(1)(b) was to allow extension of legislative, or ordinance-making, powers to counties).

General powers counties are neither expressly nor impliedly granted authority to undertake the activity at issue here. As you observe in your letter, the facility will not constitute a county boarding or nursing home under section 7-34-2301, MCA, since it will be operated similarly to an ordinary apartment complex with no medical services or care included. Despite the project's obviously salutary objective, I cannot infer the requisite authority to the county without substantially ignoring article XI, section 4(1)(b) of the Montana Constitution.

That the county does not have the express or implied power to provide the proposed housing, however, does not end my analysis since the Legislature has specifically anticipated the need for public sponsorship of such facilities. Section 7-15-2101(3) and (4), MCA, recognizes that in rural areas there may be "a lack of safe or sanitary dwelling accommodations available to all inhabitants thereof" and that such conditions may "constitute a menace to the health, safety, morals, and welfare of the citizens of the state and impair economic values[.]" To address this problem, residents may petition for creation of a county housing authority (§ 7-15-2102, MCA), and, if the board of county commissioners determines that a lack of safe or sanitary dwelling accommodations exists, it may appoint a five-member housing authority board for the purpose of incorporating the authority (§§ 7-15-2105, 7-15-2107, MCA). Once incorporated, the housing authority is a nonprofit public corporation which must "manage and operate its housing projects in an efficient manner so as to enable it to fix the rentals for dwelling accommodations at the lowest possible rates consistent with its providing decent, safe, and sanitary dwelling accommodations[.]" § 7-15-2113(1), MCA. Before its area of operation can include a city, however, the involved municipal government must adopt a resolution "declaring that there is a need for the county authority to exercise its powers within that city[.]" and the resolution must be approved by the municipality's electors. § 7-15-2111(1), MCA. Municipal housing authorities, whose geographical jurisdiction is limited to the involved city and an area within ten miles of the city boundaries, may also be established through an analogous procedure initiated by petition and city council action. §§ 7-15-4403(1), 7-15-4406, MCA.

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Both county and municipal authorities, moreover, are expressly given authority to provide the housing at issue here. Section 7-15-4456(1), MCA, which applies to municipal housing authorities, states that, "[f]or the purpose of increasing the supply of low-rent housing for elderly families, an authority may develop, construct, and operate new housing or acquire, remodel, and operate existing housing in order to provide accommodations designed specifically for such elderly families." This power is extended to county housing authorities by section 7-15-2112(2), MCA. In view of the explicit commitment of this function to county and municipal housing authorities and the absence of its grant to counties, I can only conclude that the Legislature intended those authorities rather than counties to have the responsibility for constructing or acquiring the facilities contemplated instantly.

THEREFORE, IT IS MY OPINION:

Counties with general government powers do not have the authority to construct or maintain an apartment complex for elderly, low-income citizens which does not otherwise constitute a boarding or nursing home under section 7-34-2301, MCA, and such a structure would not constitute a "public building" under section 7-8-2102, MCA. Such housing, however, may be provided by a county or municipal housing authority.

Very truly yours,

MIKE GREELY  
Attorney General