

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 89

PUBLIC FUNDS - Use of tax increment funds by city for art center operated by private nonprofit corporation;
TAXATION AND REVENUE - Use of tax increment funds by city for art center operated by private nonprofit corporation;
URBAN RENEWAL - Use of tax increment funds by city for art center operated by private nonprofit corporation;
MONTANA CODE ANNOTATED - Sections 7-8-2103, 7-15-4204(1), 7-15-4206, 7-15-4255, 7-15-4267(1)(b), 7-15-4282, 7-15-4288.

HELD: The proposed grant of \$125,000 to the Yellowstone Art Center is a legal use of tax increment funds.

15 June 1988

James L. Tillotson
Billings City Attorney
P.O. Box 1178
Billings MT 59103

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Dear Mr. Tillotson:

You have asked my opinion on the following question:

Is a proposed grant of \$125,000 to the Yellowstone Art Center from the Billings City Council a legal use of tax increment funds?

The Yellowstone Art Center is a public fine arts museum. The Center is located in a building which is owned by Yellowstone County and managed by a commission (Yellowstone County Fine Arts Center Commission) appointed by the Board of County Commissioners pursuant to section 7-8-2103, MCA. The museum is operated and governed by the Yellowstone Art Center Foundation, a nonprofit corporation which owns all museum assets other than the building. The five members of the commission appointed to manage the building also serve on the Board of Trustees for the Yellowstone Art Center Foundation in order to coordinate the functions of the Commission and the Foundation.

Yellowstone County provides 14 percent of the Yellowstone Art Center's annual budget. The remainder of the museum's budget is raised by the Foundation, which has been granted tax-exempt status by the Internal Revenue Service as an educational and charitable foundation under 26 U.S.C. § 501(c)(3).

The Foundation is currently purchasing a building from Burlington Northern Railroad (BN) which is located immediately to the north of the museum building on land owned by BN. The Foundation leases the land from BN. The Billings City Council has proposed to grant the Foundation the sum of \$125,000 in tax increment funds to be used to construct public parking for the museum. The proposed location of the parking area is on the land which the Foundation is leasing from BN. Construction of the parking lot will require partial demolition of the building which the Foundation is purchasing from BN.

In order to receive the grant, the Foundation will be required to meet certain conditions. The Foundation must obtain a long-term (20-year) lease on the land from BN. The Foundation may use up to \$11,700 of the grant to pay off the existing purchase agreement with BN; the balance is to be used for building demolition, stabilization and weatherization of the undemolished portion of the building, and construction of the paved parking lot. The finished parking lot must be open to the public and utilized for the Yellowstone Art Center. The Foundation will be required to enter into a written

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development agreement with the City concerning the terms and conditions of the grant.

You have asked whether the proposed grant would be a lawful expenditure of tax increment funds.

Pursuant to section 7-15-4282, MCA, a municipality such as Billings is authorized to provide for tax increment financing as part of its plan for urban renewal. Section 7-15-4288, MCA, sets forth the costs which may be paid by tax increment financing:

The tax increments may be used by the municipality to pay the following costs of or incurred in connection with an urban renewal project:

- (1) land acquisition;
- (2) demolition and removal of structures;
- (3) relocation of occupants;
- (4) the acquisition, construction, and improvement of streets, curbs, gutters, sidewalks, pedestrian malls, alleys, parking lots and off-street parking facilities, sewers, waterlines, waterways, public buildings, and other public improvements authorized by parts 41 through 45 of chapter 12, parts 42 and 43 of chapter 13, and part 47 of chapter 14 and items of personal property to be used in connection with improvements for which the foregoing costs may be incurred; and
- (5) costs incurred in connection with the redevelopment activities allowed under 7-15-4233.

The proposed grant would be used to pay for demolition and removal of a structure and for construction of a parking lot. Both costs are specifically included within the scope of section 7-15-4288, MCA. Assuming that the museum properties are located within a designated urban renewal area, the proposed improvements would qualify as an urban renewal project. See § 7-15-4206(19), (15)(b) and (c), (16)(b) and (c), MCA.

The underlying question, however, is whether the grant funds will be used for public purposes in view of the legal status of the grantee Foundation. Article VIII, section 1 of the Montana Constitution provides that

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"[t]axes shall be levied by general laws for public purposes." Does the legal status of the Foundation, a private nonprofit corporation, render the proposed grant invalid as violative of this constitutional provision?

I conclude that it does not. The proposed expenditures are for a public purpose, and the nature and capacity of the recipient are not determinative of the validity of the expenditures.

Whether a particular purpose for which tax funds may be expended is a "public purpose" is a question primarily for the Legislature, and the legislative decision is given a presumption of correctness. See Grossman v. State, 41 St. Rptr. 804, 682 P.2d 1319 (1984). The fact that individuals, associations, or corporations derive special benefit from an expenditure does not necessarily affect its validity; as long as the legislation authorizing the expenditure serves a public purpose, the recipient may be a nonpublic entity such as a private nonprofit corporation. See, e.g., Jones v. Burns, 138 Mont. 268, 357 P.2d 22 (1960). The test is not who receives the money, but whether the purpose for which it is to be expended is a public one. Stanley v. Jeffries, 86 Mont. 114, 284 P. 134 (1929).

When it enacted the Urban Renewal Law in 1959, the Legislature declared that the powers conferred by the new law "are for public uses and purposes for which public money may be expended." § 7-15-4204(1), MCA.

The Legislature has given municipalities the express authority to contract with both public and private entities, including corporations, to provide services in connection with an urban renewal project. §§ 7-15-4255, 7-15-4206(11), MCA. The municipality has all the power necessary or convenient to carry out the purposes and provisions of the Urban Renewal Law, including the construction of public improvements. §§ 7-15-4251, 7-15-4255(1)(b), MCA. Construction of parking lots and off-street parking facilities in connection with an urban renewal project is a public improvement for which tax increment financing is authorized. § 7-15-4288(4), MCA. The municipality may incur the entire expense of the public improvement in exercising its powers. § 7-15-4267(1)(b), MCA,

Construction of a public parking lot for use by a public fine arts museum is "essentially public and for the general good of the inhabitants, satisfying their needs or contributing to their convenience, rather than merely for gain or for private objects." Stanley v. Jeffries, supra, 284 P. at 138. In view of the express statutory

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authorization and the cases discussed above, I am satisfied that the proposed grant is for a public purpose and is in compliance with Montana law.

THEREFORE, IT IS MY OPINION:

The proposed grant of \$125,000 to the Yellowstone Art Center is a legal use of tax increment funds.

Very truly yours,

MIKE GREELY
Attorney General