

VOLUME NO. 44

OPINION NO. 18

APPROPRIATIONS - Investment of excess bond proceeds and calculation of levy to pay bond interest and principal;

APPROPRIATIONS - Use of prior year's reserve to calculate current fiscal year's reserve;

TAXATION AND REVENUE - Investment of excess bond proceeds and calculation of levy to pay bond interest and principal;

TAXATION AND REVENUE - Use of prior year's reserve to calculate current fiscal year's reserve;

MONTANA CODE ANNOTATED - Sections 7-6-2319, 7-6-2330, 7-7-123, 7-7-124, 7-7-2260 to 7-7-2274.

- HELD: 1. Because the prior fiscal year's reserve is not considered part of the amount "appropriated and authorized to be spent during the current fiscal year," it may not be used to calculate the current fiscal year's reserve under section 7-6-2319(2), MCA.
2. The term "cash balance" in section 7-6-2319(1), MCA, means the cash in a fund on June 30 less any current liabilities.
3. Excess bond proceeds may not be retained in a separate fund and invested without first using the proceeds to calculate the amount of annual tax levy for a sinking fund. Any remainder of the proceeds may be invested in accordance with section 7-7-123, MCA.

August 14, 1991

Dennis Paxinos
 Yellowstone County Attorney
 P.O. Box 35025
 Billings MT 59107

Dear Mr. Paxinos:

You have requested my opinion on the following three questions, which I have rephrased as follows:

1. Does the phrase "appropriated and authorized to be spent from the fund during the current fiscal year" as used in section 7-6-2319(2), MCA, mean that the prior fiscal year's reserve is to be included in the calculation of the current fiscal year's reserve?
2. Does the phrase "cash balance in the fund at the close of the preceding fiscal year" as used in section 7-6-2319(1), MCA, mean the amount of cash in the fund on June 30 or is it the amount of cash less the current liabilities on that date?
3. May excess proceeds from a bond issuance be retained in a fund and invested for the purpose of retiring the bonds on their call date and, if so, is the amount in the fund considered in the calculation of reserves?

Your first question involves interpretation of section 7-6-2319(2), MCA, which provides:

The board may add to the amount necessary to be raised for any fund by tax levy during the current fiscal year an additional amount as a reserve to meet expenditures to be made from the fund during the months of July to November of the next fiscal year. The amount which may be so added to any fund as the reserve may not exceed one-third of the total amount appropriated and authorized to be spent from the fund during the current fiscal year, after deducting from the amount of the appropriations and authorized expenditures the total amount appropriated and authorized to be spent for election expenses and payment of emergency warrants.

Put another way, the first question you have presented asks whether a prior year's reserve is to be included within the amount used for the calculation of the current year's fund reserve because the prior year's reserve was set aside for expenditure in July through November of the "next fiscal year" and, thus, is included in the "total amount appropriated and authorized to be spent from the fund during the current fiscal year." It is my opinion that section 7-6-2319(2), MCA, does not allow for the prior fiscal year's reserve to be included in the amount used for the calculation of the current year's fund reserve. In interpreting a statute, a court may not depart from the statute's clear meaning. Thornock v. State, 229 Mont. 67, 745 P.2d 324 (1987). The explicit language of section 7-6-2319(2), MCA, limits the amount of a fund reserve to one-third of the total amount "appropriated and authorized to be spent from the fund during the current fiscal year." The phrase by its plain meaning refers to the amounts appropriated and authorized to be spent in the current fiscal year, not in a prior fiscal year.

Further, section 7-6-2330, MCA, requires that all appropriations shall lapse at the end of the fiscal year. This section precludes an appropriation that would carry over into the next fiscal year. Thus, monies reserved in a prior fiscal year cannot be considered amounts appropriated and authorized to be spent in the next fiscal year.

In your second question, you ask for the definition of the term "cash balance" as used in section 7-6-2319(1), MCA, which provides, in pertinent part:

Following the determinations required by 7-6-2318, the board shall determine the amount to be raised by tax levy for each fund by adding the cash balance in the fund at the close of the preceding fiscal year and the amount of the estimated revenues to accrue to the fund during the current fiscal year.

You note that in the past the term "cash balance" at the close of the fiscal year has been interpreted to mean the amount of cash in the fund on June 30 less the current liabilities. However, a different interpretation has been suggested in which the current liabilities are not deducted from the cash balance. I assume by "current liabilities" you mean county obligations that are currently due and payable from the cash balance in the fund, such as outstanding warrants. The purpose of deducting the current liabilities or outstanding warrants is to obtain an accurate accounting of the actual amount of cash that is available in the fund for the next fiscal year. If current liabilities were not considered, the cash balance would be artificially high and the cash balance would not be accurately reflected in the proposed budget. As a result, it is my opinion that "cash balance" in section 7-6-2319(1), MCA, means the cash in a fund on June 30 less any current liabilities.

Your last question concerns investment of excess bond proceeds. You state that approximately \$1 million of the original 1985 bond issue for the construction of the Yellowstone County Detention Center was not used for construction. After the construction was completed, the excess proceeds were invested in long-term United States Government securities. The investment maturity is scheduled to coincide with a prepayment option on the bonds of February 1, 1993. In setting the annual mill levy to support the sinking fund for the bonds, the county has not taken into consideration the excess bond proceeds, but has set the levy to meet the annual principal and interest obligations as they become due. This investment practice is intended to allow the county to retire the debt early, thus reducing the long-term tax burden on the taxpayers of the county. The first part of your question is whether the county may invest the proceeds on such a long-term basis and not use them to calculate the annual mill levy.

Under the statutes, after issuance of a county general obligation bond, all money arising from the sale of the bonds must be paid to the county treasurer and must be "immediately available for the purpose for which the bonds were issued and no other purpose." § 7-7-2260, MCA. The county treasurer must maintain a separate sinking fund account for each outstanding series of such bonds. § 7-7-2261, MCA. All taxes collected to meet interest and principal payments on the bonds are "placed to the credit of the sinking fund." § 7-7-2261(2), MCA. Investment of sinking funds is expressly authorized in section 7-7-123(1)(a), MCA, which provides in pertinent part:

Except as provided in 7-7-124 and whenever outstanding bonds cannot be purchased pursuant to 7-7-2270 and 7-7-4270, the board of county commissioners of a county and the council or commission of a city or town shall invest so much of the bond sinking funds of the county, city, or town *as is not needed for the payment of bonds or interest coupons* in general obligation bonds or securities of the United States ... [and other securities].
[Emphasis supplied.]

Section 7-7-124, MCA, provides that the money in the sinking fund is not available for investment if any of the bonds for which the sinking fund was established are not yet due but are then redeemable under optional provisions. Thus, while investment in government securities is authorized, it is authorized only to the extent that the sinking fund is not needed for payment of the bonds or interest. Here, the excess bond proceeds were invested without first applying them to the interest or principal due on the bonds, and as such, the investment was improper.

Further, in order to impose a levy there must not be sufficient "funds on hand available for the payment of the full amount of the interest and principal" of the bonds. § 7-7-2264, MCA. Only when there are insufficient funds does the county treasurer prepare a statement showing the amount required to be raised by the tax levy during the current fiscal year for payment of the interest and principal becoming due. § 7-7-2264(2), MCA. While the county has placed the excess proceeds in a long-term investment, the proceeds nevertheless are "funds on hand available for the payment of the full amount of the interest and principal" of the bonds. Because the proceeds must be "immediately available for the purpose for which the bonds were issued," the proceeds are part of the sinking fund and, as such, available for the payment of interest and principal due on the bonds. Here, the county had funds to meet the interest obligations but has in the past imposed a levy in order to achieve long-term savings.

A problem similar to the one here was addressed by the Montana Supreme Court in Rogge v. Petroleum County, 107 Mont. 36, 80 P.2d 380 (1938). In Rogge, the county had in its sinking fund more money than was needed to meet the interest and principal payments for the current fiscal year. The county commissioners nevertheless imposed a levy in order to buy outstanding bonds at a discount and thus create a savings to the taxpayers. The Supreme Court held, however, that the board was without authority to impose any levy for the purpose of raising money to purchase outstanding bonds at a discount. While acknowledging that taxpayers in the long run might save money, the Court reasoned that governments may not act like private enterprise because while private interests may invest as they please, "[c]ounty commissioners have only such authority with reference to tax matters as the legislature sees fit to give them." 80 P.2d at 382. Finding no express authority to raise funds with which to buy the county bonds before they mature, the court refused to find any implied authority and reasoned:

Implied authority to do so cannot be said to exist because in so holding we would, in effect, be declaring that a bond issue extending over a period of twenty years, in the discretion of the board might be retired in a lesser time over the protests of the taxpayers. Such a holding would in effect change the obligation of the taxpayers who assumed the bonded indebtedness on the understanding that they would not be called upon to meet the obligations until they matured according to their terms.

Id. While the county commissioners in Rogge and those in Yellowstone County were trying to save taxpayers money, Rogge stands for the general rule that county commissioners must take into consideration the amount of money available in each sinking fund and may not levy additional taxes to pay off bonds early. Here, the county commissioners did not take into consideration the amount of money available in the sinking fund and were, in effect, levying additional taxes to pay off the bonds at a discount. Under Rogge, such a practice is not authorized. The holding in Rogge is equally applicable today as it was then. The governing statutes have not changed in a way that would affect the holding in that case. There is still no express statutory authority to retain and invest bond proceeds in order to retire the bonds early, while levying taxes to be applied toward scheduled payments on the bonds.

You also ask whether the excess proceeds should be considered in calculating the reserves for the sinking fund. In light of the disposition of the first part of your question dealing with the statutory provisions defining the necessary procedures for payment of bond debt and the nature of sinking funds, this portion of your question need not be addressed. The normal procedure is to calculate the amount of money necessary to accumulate in the sinking fund in order to meet the bond obligations when they become due, and to invest any remainder in accordance with section 7-7-124, MCA. Accordingly, in calculating the "reserves" for a sinking fund, I refer you to the statutes discussed above which govern the operation of a sinking fund, sections 7-7-2260 to 2274, MCA, and to the bond indenture agreement.

THEREFORE, IT IS MY OPINION:

1. Because the prior fiscal year's reserve is not considered part of the amount "appropriated and authorized to be spent during the current fiscal year," it may not be used to calculate the current fiscal year's reserve under section 7-6-2319(2), MCA.
2. The term "cash balance" in section 7-6-2319(1), MCA, means the cash in a fund on June 30 less any current liabilities.
3. Excess bond proceeds may not be retained in a separate fund and invested without first using the proceeds to calculate the amount of annual tax levy for a sinking fund. Any remainder of the proceeds may be invested in accordance with section 7-7-123, MCA.

Sincerely,

MARC RACICOT
Attorney General