

VOLUME NO. 44

OPINION NO. 42

APPROPRIATIONS - Authority of Legislature to direct;
HOUSING, BOARD OF - Authority to invest funds;
PUBLIC FUNDS - Investment of by Board of Housing;
STATE AGENCIES - Authority of administrative agency or board relative to legislative authority;
STATUTORY CONSTRUCTION - Plain meaning of words used;
MONTANA CODE ANNOTATED - Sections 17-2-102(b)(i)(A), 90-6-101 to 90-6-127, 90-6-104(13), 90-6-107, 90-6-116;
MONTANA CONSTITUTION - Article VII, sections 9, 12;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 33 (1989).

HELD: Board of Housing funds not specifically pledged under a trust indenture must be deposited in the housing authority enterprise fund and invested in accordance with the unified investment program as provided by sections 90-6-104(13) and 90-6-107, MCA.

November 20, 1992

Michael J. Mulroney
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Dear Mr. Mulroney:

On behalf of the Montana Board of Housing, you have requested my opinion on the following question:

Is the Board of Housing required to maintain all funds not specifically pledged to a trust indenture in the Housing Authority Enterprise Fund established by section 90-6-107, MCA?

Your question arises as a result of House Bill 41, enacted by the Special Session of the Fifty-second Montana Legislature in July 1992. 1992 Mont. Laws Spec. Sess., ch. 11. The Legislature was convened for the purpose of making up an anticipated revenue shortfall in the state budget; House Bill 41 transferred approximately \$2.2 million held in special accounts to the general fund to assist in balancing the budget. Among the transfers ordered by the Legislature was the sum of \$500,000 from the Housing Authority Enterprise Fund (HAEF). § 90-6-107(4), MCA (temporary). Because there were no monies held in that fund, and in an effort to provide assurance to its present and future bondholders, the Board resolved not to transfer any monies to the general fund as directed by Chapter 11, section 8(2), 1992 Mont. Laws Spec. Sess. The Board has acted on the assumption that funds are not required to be left in the

HAEF. Your inquiry is limited to resolution of the issue whether the Board's assumption is correct.

The Montana Board of Housing (Board) was created as part of the Housing Act of 1975, enacted for the purpose of making public monies available for affordable housing to low income persons. §§ 2-15-1814, 90-6-101 to 127, MCA. The Board consists of seven members, appointed by the Governor, and is allocated to the Department of Commerce for administrative purposes only. § 2-15-1814(2), (5), MCA. The Board is authorized by law to issue notes and bonds, to make and service loans, to invest funds, to collect reasonable interest and fees to cover its operating and administrative expenses, and to work with governmental agencies and private organizations and corporations to facilitate low-income housing development. § 90-6-104, MCA. Generally speaking, the Board operates by issuing tax exempt bonds at a fixed interest rate and selling mortgages at a higher rate to pay off the bonds, fund operational expenses, cover overall risks, and fund other low-income housing programs. Its operations are funded through an administrative fee assessed on mortgages. Because of the successful operation of the program, the Board has not required or received state general fund monies since 1977.

As part of the Housing Act of 1975 (Act), the Legislature created a fund in the proprietary fund category of the state treasury, now designated as the housing authority enterprise fund. § 90-6-107, MCA. The use of a proprietary fund evinces the Legislature's intent that the Board be financed and operated in a manner similar to private business enterprises so that its operations are financed primarily through user charges. § 17-2-102(b)(i)(A), MCA. See also Minutes, Senate State Administration Committee, March 11, 1975, comments of Rep. Gerke ("This system will be as self-financing and self-sustaining as possible, with little or no cost to the state"). Although its operations are self-sustaining, the Board is subject, like other state agencies, to legislative review of its expenditures and appropriation of funds on a biennial basis.

For each of the last three fiscal years, the Board's operating expenses have been less than the appropriation authorized by the Legislature. In fiscal year 1992, the Board's appropriations authority exceeded its spending by approximately \$767,000. The unspent appropriations, together with all other Board assets, are held outside the state treasury in revenue subaccounts administered under either a trust indenture or a trust agreement. In 1989, the Board created a Housing Trust Fund, managed under a trust agreement, which is used to finance housing needs and new programs as well as loan or grant projects. Except for this trust fund and its financial programs fund, all other funds within the Board's control are held under various trust indentures. All of the operating expenses of the Board come out of the indentured funds and are controlled by the terms of the trust indentures themselves.

In establishing the HAEF, the Legislature directed:

All funds from the proceeds of bonds issued under this part, fees, and other moneys received by the board, moneys appropriated by the legislature for the use of the board in carrying out this part, and moneys made available from any other source for the use of the board shall be deposited in the housing authority enterprise fund except where otherwise provided by law. All funds deposited in the housing authority enterprise fund, except funds appropriated by the legislature for use of the board in payment of expenses incurred in carrying out this part, are continuously appropriated to and may be expended by the board for the purposes authorized in this part.

§ 90-6-107(1), MCA. The Act further provides that "[f]unds appropriated by the legislature for use of the board in payment of expenses incurred in carrying out this part shall be deposited in the housing authority enterprise fund." § 90-06-107(3), MCA.

The Board is empowered, pursuant to section 90-6-104(13), MCA, to invest funds in accordance with Title 17, chapter 6, MCA, which provides for the state's unified investment program. See Mont. Const. Art. VIII, § 13. The Legislature directed, however, that "all investment income from funds of the board less the cost for investment as prescribed by law must be deposited in the housing authority enterprise fund[.]" § 90-6-104(13), MCA.

The Housing Act makes available to the Board an alternative to investing funds through the unified investment program. Under section 90-6-116, MCA, the Board may, in its discretion, secure its bonds by a trust indenture between the Board and a corporate trustee. "The board may provide by a trust indenture for the payment of the proceeds of the bonds and the revenues to the trustee under the trust indenture of another depository and for the method of disbursement, with safeguards and restrictions it considers necessary." § 90-6-116(1), MCA. Expenditures incurred in carrying out a trust indenture may be treated as part of the Board's operating expenditures. § 90-6-116(2), MCA. This alternative method of securing revenue bonds was upheld by the Montana Supreme Court against a challenge that it violated the state constitution. Huber v. Groff, 171 Mont. 442, 459-60, 558 P.2d 1124, 1133-34 (1976).

The issue presented by your inquiry is not resolved by the court's decision in Huber. That case stands for the principle that the Legislature appropriately authorized the Board of Housing to utilize a trust indenture in the issuance of its revenue bonds and to allow the proceeds from the bond sale to be handled by a trustee, rather than through the unified investment program or by resolution of the Board. Your question, in contrast, involves the power of the Legislature to direct the Board's handling of funds other than those pledged to a trust indenture.

The Montana Board of Housing is a creature of statute; the Housing Act of 1975 established it as a state agency. See Minutes, Senate State Administration Committee, March 11, 1975 (comments of Pat Melby). As a "public corporation," the Board "received all of its powers directly from the legislature and its duties and responsibilities are set out clearly by the statute which created it." Huber, 171 Mont. at 457, 558 P.2d at 1132. It is well-established in Montana that "[a]dministrative agencies enjoy only those powers specifically conferred upon them by the legislature." Bick v. State, Department of Justice, 224 Mont. 455, 457, 730 P.2d 418, 420 (1986). Thus, the Board possesses no common law powers, and may not exceed the authority conferred on it by statute. State ex rel. Anderson v. State Board of Equalization, 133 Mont. 8, 17, 319 P.2d 221, 226-27 (1958); Bell v. Department of Licensing, 182 Mont. 21, 22-23, 594 P.2d 331, 332-33 (1979); 43 Op. Att'y Gen. No. 33 at 98, 100 (1989).

The authority of the Legislature relative to that of an administrative agency is particularly well-defined in matters of revenue and spending. The Montana Constitution directs the Legislature to "insure strict accountability of all revenue received and money spent by the state," Art. VIII, § 12, and mandates a balanced budget, Art. VIII, § 9. Notwithstanding the Governor's duty to submit a proposed budget to the Legislature, "the budget in Montana is a *legislative* budget[,] not an *executive* budget[.]" State ex rel. Judge v. Legislative Finance Committee, 168 Mont. 470, 480, 543 P.2d 1317, 1322 (1975) (emphasis in original). "In other words[,] the legislature has the power to adjust and finalize the budget." *Id.* As recognized in Huber, the Board of Housing is a public corporation; as such, "its revenue is subject to the control of the legislature, and when the legislature directs the application of a revenue to a particular purpose, or its payment to any party, a duty is imposed and an obligation created on the [Board]." State ex rel. Wilson v. Weir, 106 Mont. 526, 533, 79 P.2d 305, 308 (1908). But see § 90-6-126, MCA (state agrees not to impair obligations of an agreement between the board and its bondholders).

Given these standards, the answer to your inquiry turns on the meaning of the language used in sections 90-6-104 and 90-6-107, MCA, requiring certain monies to be "deposited in the housing authority enterprise fund" and the extent, if any, to which those provisions conflict with the Board's discretionary authority to secure its bonds by trust indenture.

When the language of a statute is plain and unambiguous, the statute speaks for itself. Dunphy v. Anaconda Co., 151 Mont. 76, 80, 438 P.2d 660, 662 (1968). The rules of statutory construction require that the language of the statute be given its plain and ordinary meaning. Rierson v. State, 188 Mont. 522, 527, 614 P.2d 1020, 1023, on reh'g, 622 P.2d 195 (1980). My function in interpreting a statute is "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA. In construing statutes, words employed should be given such meaning as is required by the context, and as

is necessary to give effect to the purpose of the statute. In re Shun T. Takahaski's Estate, 113 Mont. 490, 494, 129 P.2d 217, 220 (1942).

Section 90-6-116, MCA, authorizes the Board, in its discretion, to enter into a trust indenture with a corporate trustee in connection with the Board's issuance of various bond offerings. Section 90-6-107(1), MCA, requires that, *except where otherwise provided by law*, all funds received by or made available to the Board be deposited in the HAEF. Likewise, except for expenses incident to the cost for investment, section 90-6-104(13), MCA, requires all investment income from funds of the Board to be deposited in the HAEF. With the exception of funds appropriated by the Legislature for use of the Board in payment of expenses, all other funds deposited in the HAEF are continuously appropriated and may be expended by the Board for the purposes authorized by law. § 90-6-107(1), MCA. Giving equal weight to each of these provisions, I conclude that the commitment of funds to a trust indenture is "otherwise provided by law" within the meaning of section 90-6-107, MCA, and accordingly that funds so pledged are an appropriate expenditure for which the Board is not required to maintain funds in the HAEF.

With respect to funds not specifically pledged to a trust indenture, you question whether they are required to be maintained in the HAEF. I look to the plain meaning of the language and the context in which it is used to resolve this issue. Generally speaking, "deposit" means to commit to custody, to place, or to lodge for safe-keeping. Black's Law Dictionary 438 (6th ed. 1990). In the context of financing and investment, "deposit" may be used either as a short- or long-term placement of funds, but usually contemplates a withdrawal at some point in time. See generally Tit. 17, ch. 6, pt. 1, MCA. Under the Housing Act, the Board's authority is circumscribed: it may either enter into trust indentures for the purpose of protecting and enforcing the rights and remedies of its bondholders, and deposit and invest the bond proceeds and revenues directly with the trustee, § 90-6-116(1), MCA, or deposit and invest funds not required for immediate use with the state treasurer for participation in the unified investment program, § 90-6-104(13), MCA. Therefore, funds not pledged to a trust indenture and, in any case, funds appropriated by the Legislature for use of the Board in payment of its expenses, § 90-6-107(3), MCA, must be deposited in the HAEF. The Board possesses no statutory authority to otherwise direct these funds within its control.

I find the language of the Housing Act of 1975 to be clear and unambiguous. Unless the Board in its discretion invests funds through the unified investment program or pledges funds pursuant to a trust indenture, it must maintain its monies in the HAEF. Although the Board may withdraw funds from the HAEF for expenditure in accordance with its statutory authorization, the statutes are particularly clear with respect to those funds appropriated by the Legislature for use of the Board in payment of expenses. There is no provision for such funds to be withdrawn from the HAEF and invested elsewhere. § 90-6-107(1), (3), MCA. Additionally, section 90-6-104(13), MCA, makes it clear that unless

the trust indenture provisions of section 90-6-116, MCA, are invoked, Board funds must be invested with the unified investment program and investment income deposited and maintained in the HAEF.

The Board makes a strong argument that these funds are better utilized when invested in accordance with its trust arrangements. Indeed, as indicated by the Board's trustee, it may be prudent on the part of the Board to continue to hold its funds in trust as additional security for bondholders relying on the Board's pledge of its general obligation. The issue raised, however, is not one of prudent investment or wise policy choices. It is, rather, a question of the Legislature's authority to direct the placement of monies under the State's control. Clearly, the Legislature has such authority and exercised it in the Housing Act of 1975 by giving the Board explicit direction in the placement and use of funds under its control. The Board's policy arguments are more appropriately directed to the legislative body in seeking additional flexibility in the handling of its funds.

Finally, there has been some suggestion of the Legislature's inability to impair the Board's existing contractual obligations with its bondholders. However, insofar as your request may seek a determination concerning the constitutionality of section 90-6-107(4), MCA (temporary), I must decline to address that issue. A presumption exists that statutes are constitutional, and, as Attorney General, I am bound to defend the validity of state law. It is therefore necessary for me to decline consideration of questions involving the constitutionality of state statutes.

THEREFORE, IT IS MY OPINION:

Board of Housing funds not specifically pledged under a trust indenture must be deposited in the housing authority enterprise fund and invested in accordance with the unified investment program as provided by sections 90-6-104(13) and 90-6-107, MCA.

Sincerely,

MARC RACICOT
Attorney General