

46 Op. Att'y Gen. No. 15

CITIES AND TOWNS - Authority to use excess cash to create irrevocable trust fund;
INITIATIVE AND REFERENDUM - Effect of referendum on matter beyond authority of local government;
PUBLIC FUNDS - Authority of city to use excess cash to create irrevocable trust fund;
TAXATION AND REVENUE - Propriety of city levying taxes when it has cash surplus;
MONTANA CODE ANNOTATED - Sections 7-1-4124, 7-5-131(2)(a), 7-6-202, -4133, -4222, -4229, -4230, -4240, -4601, 7-7-4264, 17-6-204, 90-5-109;
MONTANA CONSTITUTION - Article III, section 5; article XI, section 4;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 20 (1987), 40 Op. Att'y Gen. No. 17 (1983), 39 Op. Att'y Gen. No. 55 (1982).

HELD:

A city with general government powers must add any excess cash balance into the calculation of its annual budget and may not use such cash to create a ten-year irrevocable trust fund operated by a third-party trustee.

April 3, 1996

Mr. Lee Kerr
Forsyth City Attorney
P.O. Box 69
Forsyth, MT 59327

Dear Mr. Kerr:

You have requested my opinion on a question which I have phrased as follows:

May a city with general government powers, which established a trust fund from previously unbudgeted, nontax revenues, disregard those revenues in determining the annual levy and use the money to create an irrevocable ten-year trust fund?

Your question arose as a result of a controversy over the spending of interest from a trust fund established in 1981 by the City of Forsyth, a general government powers municipality. In 1981 the city received \$750,000 from a partnership of utility companies as a fee for the city's issuance of industrial revenue bonds to finance pollution control devices for the power generation facilities at Colstrip, Montana.

The city council decided to invest the money by entering into a trust agreement with a trust company for management of the trust and referred to the voters the option of either using all of the trust income for annual budget expenditures or using only 50 percent of the trust income for annual budget expenditures. The ballot language also indicated that the city council would refer the matter to the voters again in ten years. In November 1981 the voters approved using 50 percent of the trust income for annual budget expenditures and reinvesting the remaining income.

An ordinance was passed by the city council after the vote authorizing \$750,000 to be invested in the "City of Forsyth Trust Fund." The ordinance provided that the city council could enter into a contract with a trust company that would manage the trust fund for a period not to exceed ten years for a fee authorized by the council. A trust agreement was executed between the city and the First Trust Company of Montana. The agreement provided that the trustee would manage the trust in accordance with the voter preference and created a trust fund in which one-half of the trust income was reinvested and the other half transferred to the city at a time the city would determine. Neither in 1981 nor in any year thereafter was the trust corpus used to determine the city's general operating expenses or the annual tax levy.

In 1991, a second election was held where the voters again approved using one-half of the trust income for budget expenditures and reinvesting the remainder of the trust income. Believing that the vote only affected the original principal amount and having 22.5 percent more than the original principal in the fund,

the city council entered into a new trust agreement, reserving the 22.5 percent in a subaccount from which the city could spend all of the income or principal. The remainder was to be managed as it had been for the original ten years with 50 percent of the interest going to cover city expenses and 50 percent being reinvested. You were requested by the mayor of Forsyth to seek an opinion as to whether there was a violation of the public vote by the establishment of this subaccount. As you correctly point out, however, the validity of the trust fund must be examined before addressing its management. Because I conclude, as explained below, that the establishment of the trust fund was not authorized by law, it is unnecessary to address the issue of the validity of the creation of the subaccount.

The City of Forsyth is an incorporated city with general government powers. In addressing the question presented here, this opinion is restricted to the validity of a trust fund established by a city, such as Forsyth, which has general government powers; it does not necessarily affect the validity of a trust fund created by a city with self-government powers.

As an incorporated city with general government powers, Forsyth is a municipal corporation vested with "legislative, administrative, and other powers provided or implied by law." Mont. Const. art. XI, § 4(1)(a). The powers of incorporated cities and towns must be liberally construed. Mont. Const. art. XI, § 4(2). This rule of construction, however, "does not of its own force confer new powers on local governments." 40 Op. Att'y Gen. No. 17 at 66 (1983). Although express or implied powers are to be construed liberally, there must nonetheless be some constitutional or statutory basis for their existence. *Id.*; see also 42 Op. Att'y Gen. No. 20 at 74-75 (1987) (county with general government powers has no inherent authority to establish housing for the elderly). Therefore, there must be a statutory provision that either explicitly or implicitly confers authority on the city to establish a trust fund with the bond issuance fee, saving the money at ten-year increments and not using it to reduce the annual all-purpose tax levy that supports the city's operating budget.

The city budgeting laws are based upon an annual cycle, with the city assessing its revenues and liabilities in each fiscal year. Except for some construction costs, all appropriations lapse at the end of a fiscal year. Mont. Code Ann. § 7-6-4240. There is no statutory provision that allows the city to create a "fund" that, in effect, takes monies out of this cycle. All of the city's revenues and appropriations are subject to the annual budgeting procedure. Every year the city council must determine the amount of anticipated revenue accruing to each fund and the total amount of anticipated expenditures from the fund. Mont. Code Ann. § 7-6-4229. Under Mont. Code Ann. § 7-6-4230, the tax levy necessary to support each fund is then calculated:

(1) Following the determinations required by 7-6-4229, the council shall determine the amount to be raised for each fund for which a tax levy is to be made **by adding the cash balance in excess of outstanding unpaid warrants at the close of the preceding fiscal year and the amount of the estimated revenues**, if any, to accrue to the fund during the current fiscal year. It shall then deduct the total amount so obtained from the total amount of the appropriations and authorized expenditures from the fund as determined by the council in the budget adopted and approved. The amount remaining is the amount necessary to be raised for any fund by tax levy during the current fiscal year.

(Emphasis added.) In determining the amount of money to be raised for each fund, the council must add the "cash balance" in excess of outstanding unpaid warrants at the close of the preceding fiscal year in any fund.

It is unclear what fund should receive unanticipated revenues from a bond issuance fee. The fee is considered a cost of issuing the bonds and there is no requirement that it be used to offset the bond debt. Mont. Code Ann. § 90-5-109. Regardless of what fund the money goes into, however, the fee must be considered a "cash balance" as it is money that is left over or remaining at the end of the fiscal year. 39 Op. Att'y Gen. No. 55 (1982). While the council may create a reserve fund for future contingencies, such a fund may not exceed one-third of the total amount authorized and appropriated for any given fund. Mont. Code Ann. § 7-6-4230(2).

The bond issuance fee was unanticipated revenue which, when it was received, had not been dedicated or appropriated to a particular fund. Nonetheless, I have found no statutory authority allowing a city to establish a fund which is separate and distinct from this annual budgeting process and the assessment of

the annual tax levy. The bond issuance fee was a "cash balance" that had to be considered in setting the next year's budget and levy. This is the exclusive and mandatory method for establishing a city budget. By diverting the cash into an irrevocable trust fund, the city acted outside this statutory process.

As a general rule, a taxing authority may anticipate future debt or obligations and need not wait until money is actually due in order to levy a tax. McQuillin, Municipal Corporations § 39.02.10. Nonetheless, this general rule does not allow the accumulation of capital for some unknown contingency:

This does not, however, warrant unnecessary accumulation in the treasury for the remote future or for contingencies which may never occur. Such a practice is unjust to the people, because it deprives them of the use of money taken from them for a considerable period, and is impolitic, as it may tempt those having the custody of funds to use them improperly.

Id. Montana follows this principle. In Rogge v. Petroleum County, 107 Mont. 36, 80 P.2d 80 (1938), the Court stated that a "tax cannot be levied for the sole purpose of accumulating funds in the public treasury, such as for remote or future contingencies that may never occur."

Here, I assume that the city continued to levy a tax while it accumulated extra money in the trust fund and that the interest from the trust fund was not sufficient to cover all of the city's expenditures and appropriations. In continuing to levy the tax while having surplus funds, the city essentially was levying the tax while maintaining and accumulating income in the trust fund. Such practice contravenes the general rule that a city may not continue to tax its citizens while accumulating funds for a remote contingency that may never occur.

The city could not validate its action by putting the issue to the voters. It is well established that the powers of initiative and referendum do not extend to matters involving the annual budget. Mont. Code Ann. § 7-5-131(2)(a). The Greens at Ft. Missoula, LLC v. City of Missoula and Save the Fort, 52 St. Rep. 501, 897 P.2d 1078 (1995). The people of the State of Montana may approve or reject by referendum any act of the legislature except an appropriation of money. Mont. Const. art. III, § 5. The referenda of 1981 and 1991 concerned the appropriation of money to the trust fund and, as such, were ineffectual.

Further, even if a referendum on such a subject were authorized, the referendum and subsequent vote could not operate to ratify an action that was beyond the scope of the city's authority. It is the widely held rule that the power of referendum is restricted to legislation that is within the power of the municipality to enact or adopt. McQuillin, Municipal Corporations § 16.54. The electorate has no greater power to legislate than the municipality itself. Town of Hilton Head v. Coalition of Expressway Opponents, 307 S.C. 449, 415 S.E.2d 801 (1992). Under the budgeting laws, the city itself had no authority to carry over excess cash and revenue and a vote of the people cannot be used to ratify something over which the city has no discretion. See also State ex rel. Harper v. Waltermire, 213 Mont. 425, 429, 691 P.2d 826, 829 (1984) (invalidating initiative petition that went beyond initiative power authorized under constitution).

The establishment of this particular trust fund also was not a proper form of investment authorized by the statutes. Investment of monies not needed for immediate use must be made in accordance with Mont. Code Ann. § 7-6-202, § 7-6-4601, or § 17-6-204. None of these sections allow the creation of the type of ten-year irrevocable trust fund that was agreed upon by the city and managed by a third-party trustee. These statutes also do not operate as exceptions to the annual budgeting process. Only those revenues may be invested that have already gone through the budgeting process. Money that is "not necessary for immediate use" by a city, county or town may be invested in accordance with Mont. Code Ann. § 7-6-202, which allows investment in certain government securities or mutual funds or a trust limited to government securities.

Mont. Code Ann. § 7-6-202(4) was recently added by the Montana legislature to limit any investment under the statute to a five-year maturity date. Investments with such lengthy maturity dates would necessarily include revenues that could not be used for the general operation of a city, such as investment of a self-insurance fund. If the local government uses the unified investment fund, accumulated income from participation in the fund is remitted at least annually. Mont. Code Ann. § 17-6-204(3). A ten-year irrevocable trust fund where interest is automatically reinvested in the corpus of the trust is not specifically authorized by statute. While the city's goals of planning for future budget shortfalls may be

financially prudent, I must construe the law as it is written and cannot extend or grant powers which are not conferred by the statutes.

The trust fund also was not specifically authorized by the statutes. This was not the situation where a city accepted a grant or bequest of land or money on the condition that the land or money be placed in trust for specific public purposes. See, e.g., Mont. Code Ann. § 7-1-4124 (city authorized to solicit and accept bequests or grants and comply with any condition that is not contrary to the public interest).

You ask into what fund the trust fund monies should be placed. Mont. Code Ann. § 7-6-4133 appears to allow the deposit of the monies into the all-purpose general fund. Mont. Code Ann. § 7-6-4133(1) provides:

Cities and towns making the all-purpose annual mill levy shall deposit into the all-purpose general fund all money received from other sources, including fees, charges, and fines received from the operation of airports, libraries, swimming pools, parking lots, golf courses, and any other operation supported in part or whole from an appropriation of the all-purpose levy and not otherwise provided by law.

While this section generally applies to enterprises that are supported by an appropriation from the all-purpose general fund, it also allows for deposit of "all money received from other sources" supported in whole or in part by the all-purpose levy. Here, the bond issuance fee was intended to reimburse the city for its administrative costs which are normally supported by the all-purpose levy. The bond issuance fee should therefore be deposited in the all-purpose general fund and used to calculate the city's annual operating budget and to set future tax levies. This could result in an artificially low mill levy and create problems in future years. The city, nonetheless, has the discretion to spend the money as it chooses, including but not limited to retiring of bonded indebtedness, maximizing reserve accounts, acquiring new assets, transferring money to a capital improvement fund, or providing services. It is important to recognize, however, that a city's bond obligations or expenditures associated with the provision of a special service are excluded from the calculation of the city's operating budget. Mont. Code Ann. § 7-6-4222 (costs and income associated with special assessments are excluded from the budget and calculated separately), § 7-7-4264.

THEREFORE, IT IS MY OPINION:

A city with general government powers must add any excess cash balance into the calculation of its annual budget and may not use such cash to create a ten-year irrevocable trust fund operated by a third-party trustee.

Sincerely,

JOSEPH P. MAZUREK
Attorney General

jpm/elg/bjh