

## 48 Op. Att'y Gen. No. 12

APPROPRIATIONS - City's appropriation to private, non-profit corporation;  
APPROPRIATIONS - Construction of article V, section 11(5), as it applies to local governments;  
CITIES AND TOWNS - City's appropriation to private, non-profit corporation;  
CONSTITUTIONS - Scope of construction by attorney general in an opinion;  
CORPORATIONS - City's appropriation to private, non-profit corporation;  
COUNTIES - Appropriations to private, nonprofit entities by local governments;  
LOCAL GOVERNMENTS - Appropriations to private, nonprofit entities by local governments;  
MUSEUMS - City's appropriation to private, non-profit corporation;  
PUBLIC FUNDS - City's appropriation to private, non-profit corporation;  
TAXATION AND REVENUE - City's appropriation to private, non-profit corporation;  
MONTANA CODE ANNOTATED - Sections 7-1-2101, -2103, -4101, -4124, 7-16-2202, -4103, -4104, -4105;  
MONTANA CONSTITUTION - Article V, section 11(5); article XI, section 4;  
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 111 (1988), 42 Op. Att'y Gen. No. 89 (1988), 39 Op. Att'y Gen. No. 25 (1981) (overruled), 38 Op. Att'y Gen. No. 111 (1980), 37 Op. Att'y Gen. No. 105 (1978) (overruled), 37 Op. Att'y Gen. No. 25 (1978) (overruled).

HELD:

1. A city with general government powers may appropriate funds to a private, non-profit corporation for operation of a private museum, if it is determined that the operation of the museum is for a public purpose and if the city enters into a contract with the corporation guaranteeing the public purpose of the enterprise.
2. Article V, section 11(5), of the Montana Constitution limits only appropriations made by the Montana legislature and does not limit expenditures by local governments.

May 18, 2000

Mr. Gary Ryder  
Colstrip City Attorney  
P.O. Box 72  
Hysham, MT 59038

Dear Mr. Ryder:

You have requested my opinion on two questions which I have rephrased as follows:

1. Does Mont. Code Ann. § 7-16-2202, which authorizes a county government to establish a program to provide grants to private, nonprofit museums, or any other statutory provision, authorize a city government to create such a program?
2. Does Mont. Code Ann. § 7-16-2202 violate article V, section 11(5), of the Montana Constitution?

The City of Colstrip is a recently incorporated city with general government powers. A private, tax-exempt organization, known as the Schoolhouse History and Art Center ("SHAC"), has asked the city for an appropriation of \$50,000 to operate a private museum. You ask whether Mont. Code Ann. § 7-16-2202 may be used by a city to authorize the appropriation to the museum.

Mont. Code Ann. § 7-16-2202 allows for the establishment of museums by counties and provides:

The board of county commissioners of each county of the state, in addition to all other powers conferred upon them, have the authority to:

(1) establish or acquire museums, collections of exhibits, and articles, matters, and things to be included in or added to the museums and collections;

(2) contribute to publicly owned museums not owned by the county;

(3) provide facilities for the presentation of visual and performing arts and similar cultural activities; and

(4) *establish a program to provide grants to private, nonprofit museums and private, nonprofit facilities for the arts and the humanities.*

(Emphasis added.) This section, by its plain language, refers solely to the authority of counties, not cities. As described more fully below, a statute that defines only the authority of a county may not be used as a basis for authority for a city. Cities and counties have separate sets of statutes defining the scope and nature of the authority of each.

Under the Montana Constitution, article XI, section 4(1), subsections (a) and (b) respectively, a city has "the powers of a municipal corporation and legislative, administrative, and other powers provided or implied by law" and a "county has legislative, administrative, and other powers provided or implied by law." Cities and counties with general government powers have only the powers given to them by the legislature. 42 Op. Att'y Gen. No. 111 (1988); D & F Sanitation Serv. v. City of Billings, 219 Mont. 437, 444, 713 P.2d 977, 981 (1986); Mont. Code Ann. §§ 7-1-2101 (nature of county government), 7-1-4101 (nature of municipal government). Two separate sets of laws define the powers of cities and the powers of counties. Compare Mont. Code Ann. § 7-1-2103 (county general powers) with Mont. Code Ann. § 7-1-4124 (city general powers).

Because of the difference in authority and structure of cities and counties, and because they are based upon two different constitutional grants of authority, the statutes authorizing acts by a county with general government powers do not operate to authorize such acts by a city. A city must have its own statutory authority.

Your particular question is whether Mont. Code Ann. § 7-16-2202(4), which expressly allows counties to grant money to private, nonprofit museums, may be used as a basis for a city's authority to make similar grants. Section 7-16-2202(4), by its own terms, applies only to counties, and not cities. It therefore may not be used as a source of authority for a city to make grants to private, nonprofit museums.

I have not found a specific counterpart to § 7-16-2202(4) that expressly authorizes cities to grant money to private, nonprofit museums. Under § 7-16-4103, a city may "procure, construct, establish, maintain, and operate swimming pools, skating rinks, . . . and museums." Sections 7-16-4104(1)(b) and -4105 also allow a city or town to borrow money, issue bonds, or levy mills for procuring, equipping and maintaining a public museum. These sections do not authorize, however, the appropriation of public funds to a private nonprofit organization for the operation of a private museum.

It has been suggested by the Montana League of Cities and Towns that Mont. Code Ann. § 7-1-4124(9) should be considered. Section 7-1-4124(9) provides that a municipality with general powers has the power to "make grants and loans of money, property, and services *for public purposes* ." (Emphasis added.) This section does not state whether the grants must be made to public entities or may be made to private entities. Giving the statutes a liberal construction, which I must do under article XI, section 4(1)(c), I conclude for purposes of this opinion that Mont. Code Ann. § 7-1-4124(9) allows the grants of monies to public or private entities, as long as the grant is for a public purpose.

The question, then, is whether the operation of SHAC constitutes a "public purpose." It has long been held in Montana that an essential element of a "public purpose" is that the project affects the "inhabitants as a community and not merely individuals." Stanley v. Jeffries, 86 Mont. 114, 129, 284 P. 134, 138 (1929). That the grant of money for a public purpose incidentally benefits a private individual or entity is not determinative. As the Court stated in Stanley, "the purpose to be served [may be] found to be a public one, although private individuals might profit thereby. The mere fact that the money raised will go to individuals [does not] condemn the [a]ct in question since the test is not who receives the money, but, Is

the purpose for which it is to be expended a public purpose?" Id. The true test of whether or not an enterprise is for a public purpose is "whether the work to be done 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." Id.

There is little doubt that, generally speaking, the operation and support of a museum that is open for the education and enjoyment of the general public is considered a public purpose. See, e.g., Willett v. State Bd. of Exam'rs, 112 Mont. 317, 115 P.2d 287 (1941) (authorizing sale of bonds for construction of building to house books and records of veterans' organizations, the Montana Pioneer Society, the Sons and Daughters of Montana Pioneers, and the historical society for the State of Montana); 42 Op. Att'y Gen. No. 89 (1988) (tax increment funds may be used to support Yellowstone Art Center).

With respect to SHAC specifically, the governing body of the City of Colstrip must determine that expending funds in support of SHAC would be to a "public purpose," i.e., that support of SHAC would enhance the education and enjoyment of the general public and would not be merely for the gain of SHAC. If the operation of SHAC is determined to be a public purpose, then, under Mont. Code Ann. § 7-1-4124(9), the city may make the grant of money to SHAC. Of course, the grant should be made in accordance with procedures that assure strict accountability of the monies. Such assurance may be gained by requiring SHAC to enter into an agreement assuring that the grant monies will be used in accordance with the public purpose as determined by the governing body of the City.

Although I have concluded that Mont. Code Ann. § 7-1-4124(9) authorizes the use of city funds to a private, nonprofit museum operated for a public purpose, the question remains as to whether article V, section 11(5), would preclude a grant of money to SHAC under § 7-1-4124(9). Typically, the Attorney General must decline to issue an opinion as to the constitutionality of a particular statute, as the Attorney General's opinion could not serve to invalidate the statute and the Attorney General's duties may include at some time defending the constitutionality of that statute. Nonetheless, the Attorney General may be called upon to interpret or analyze a particular constitutional provision, such as article V, section 11(5), as long as the analysis does not address specifically the constitutionality of a particular statute. See, e.g., 38 Op. Att'y Gen. No. 111 (1980) (application of article X, section 10, of the Montana Constitution to the Montana School for the Deaf and Blind). Accordingly, I will provide the following analysis of article V, section 11(5), but decline to give an opinion specifically on the constitutionality of Mont. Code Ann. § 7-1-4124.

Constitutional provisions are interpreted in accordance with rules of statutory construction. State ex rel. Gould v. Cooney, 253 Mont. 90, 93, 831 P.2d 593, 594 (1992). It is well established that when a statute is construed, it must be read as a whole, and terms and subsections of the statute should not be isolated from the context in which they are used. State v. Lilburn, 265 Mont. 258, 266, 875 P.2d 1036, 1041 (1994). Further, a statute must be construed according to the plain meaning of the language used therein. Id.

Article V, section 11, is entitled "Bills" and describes the manner and structure of bills passed by the Montana legislature; it does not address the appropriation process to be used by local governments. Subsection (1) of article V addresses amendments to legislative bills; subsection (2) describes voting upon bills; subsection (3) states that bills may contain only one subject; subsection (4) describes the manner of general and special appropriations; and subsection (5) restricts to whom appropriations may be made. Nothing in article V indicates that it applies to the budgeting of any governmental entity other than the Montana legislature. When the subsections of this section are read as a whole and in context, it is clear subsection (5) is limited to appropriations by the Montana legislature and the use of funds by the State of Montana.

Nor does the legislative history of this constitutional provision indicate that section 11(5) would restrict monies controlled by local government entities. In the discussion among the constitutional delegates on this subsection, the question was asked whether the provision would allow monies subject to appropriation by the legislature to go to a group home for children that was under the control of a city or county. Delegate Nutting responded that the provision was intended to allow such an appropriation. IV 1972 Mont. Const. Conv. 661 (1981).

The discussion at the Constitutional Convention also confirmed that only appropriation bills passed by the Montana legislature were governed by article V, section 11(5). Delegate Harper summarized the article in this manner:

Mr. Chairman. I think the committee had one thing in mind, that was, we were writing this section on bills. We're now dealing with the section on appropriation bills. We have just completed writing the section that tells how general appropriation bills must be set up and that no other appropriation bill should contain more than one subject, and so forth. We are now continuing in a separate paragraph on appropriations. I think this is the point we want to stress. Now, the issue is, should any appropriation be made by the state Legislature to any private person or agency of any type not under the control of the state. . . . In other words, that appropriation ought to go for state agencies.

IV 1972 Mont. Const. Conv. 665 (1981). This description supports the interpretation that article V, section 11(5), is limited to appropriations by the Montana legislature.

A number of prior opinions of a previous Attorney General have assumed, without analysis, that article V, section 11(5), applies to counties. See, in particular, 39 Op. Att'y Gen. No. 25 (1981); 37 Op. Att'y Gen. No. 105 (1978); and 37 Op. Att'y Gen. No. 25 (1977). Notably, these opinions relied upon article V, section 11(5), as well as Mont. Code Ann. § 7-7-2103 to hold that counties may not make grants to private entities. Section 7-7-2103 states, "No county must ever give or loan its credit in aid of or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation." Although this section and these prior opinions address the authority of counties and not cities, to the extent these prior opinions suggest that article V, section 11(5), affects the activities of local governments generally, they are overruled.

THEREFORE, IT IS MY OPINION:

1. A city with general government powers may appropriate funds to a private, non-profit corporation for operation of a private museum, if it is determined that the operation of the museum is for a public purpose and if the city enters into a contract with the corporation guaranteeing the public purpose of the enterprise.
2. Article V, section 11(5), of the Montana Constitution limits only appropriations made by the Montana legislature and does not limit expenditures by local governments.

Sincerely,

JOSEPH P. MAZUREK  
Attorney General

jpm/elg/dm