

CITIES AND TOWNS - Authority of self-governing municipalities to enter interlocal agreement for operation of electric and natural gas utility;

CITIES AND TOWNS - Limitations on powers of self-governing local governments;

CITIES AND TOWNS - Grants to nonprofit corporation for public purposes;

CITIES AND TOWNS - Application of municipal debt limits to debt incurred by public benefit nonprofit corporation where debt is subject to “nonappropriation clause” and is without recourse against municipalities;

CORPORATIONS - Operation of electric and natural gas utility by public benefit nonprofit corporation;

CORPORATIONS - Power to create public benefit nonprofit corporation with municipal power authority as sole member;

INTERLOCAL AGREEMENTS - Powers of authority created by interlocal agreement;

MUNICIPAL GOVERNMENT - Authority of self-governing municipalities to enter interlocal agreement for operation of electric and natural gas utility;

MUNICIPAL GOVERNMENT - Limitations on powers of self-governing local governments;

MUNICIPAL GOVERNMENT - Grants to nonprofit corporation for public purposes;

MUNICIPAL GOVERNMENT - Application of municipal debt limits to debt incurred by public benefit nonprofit corporation where debt is subject to “nonappropriation clause” and is without recourse against municipalities;

PUBLIC SERVICE COMMISSION - Regulation of public benefit nonprofit corporation as public utility;

MONTANA CODE ANNOTATED - Title 35, chapter 2, part 1; Title 69, chapter 3, part 5; sections 7-1-101, -102, -111, -4124(9), 7-3-1104, -2103, 7-11-101 to -108, -101, -102, -104, 35-2-114(14)(f), (17), (21)(a), (25), (32)(a), -117(2), -118(1), (d), (e), (f), (g), (p), -213(1)(e), -514(2), -520, 69-3-101.

- HELD:
1. Under the Montana Nonprofit Corporation Act, an authority created pursuant to an interlocal agreement among self-governing municipalities may incorporate a public benefit nonprofit corporation to operate an electric and natural gas utility.
 2. An authority created by interlocal agreement between self-governing municipalities may exercise only those powers that any of the municipalities might exercise.

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3. Operation of an electric and natural gas utility is a public purpose for which a self-governing municipality may grant funds.
4. Debt incurred through corporate bonds issued by a public benefit nonprofit corporation incorporated by an authority created by interlocal agreement between self-governing municipalities is not subject to laws regulating municipal debts or obligations if the municipalities are not legally obligated to appropriate money to pay the debt and the debt is without recourse to the spending power of the municipalities.

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Mr. Robert M. McCarthy
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Dear Mr. McCarthy:

Five years ago, Attorney General Mazurek issued an opinion to you holding that a local government with self-government powers has the authority to own and operate an electric and natural gas utility. 48 Op. Att'y Gen. No. 14 (2000). You have now requested my opinion on related questions that I have phrased as follows:

1. Does the Montana Nonprofit Corporation Act, Mont. Code Ann. tit. 35, ch. 2, pt. 1, permit the creation of a public benefit nonprofit corporation whose sole member is a public power authority created by interlocal agreement under Mont. Code Ann. §§ 7-11-101 to 7-11-108, and whose purpose is the acquisition and operation of an electric and natural gas utility?
2. Does Montana law allow a self-governing local government to provide financial support to the MPPA to facilitate the transaction, and if so under what conditions?

I.

The cities of Bozeman, Great Falls, Helena, and Missoula, and the consolidated city-county government of Butte-Silver Bow (hereafter “the Municipalities”), all self-governing local governments under Mont. Code Ann. § 7-1-101 *et seq.*, have entered an interlocal agreement creating the Montana Public Power Authority (“MPPA”) for the purpose of acquiring and operating certain electrical and natural gas transmission and distribution systems serving customers formerly served by the Montana Power Co. (“the T & D assets”). Your letter informs me that MPPA has in turn incorporated Montana Public Power, Inc. (“MPPI”), to serve as the legal entity that holds and operates the T & D assets.

With your letter you have provided copies of the interlocal agreement creating the MPPA and the Bylaws and Restated Articles of Incorporation for MPPI. The interlocal agreement provides that the purposes of the MPPA are: (1) to investigate the feasibility of acquiring the T & D assets; (2) upon a determination by 2/3 of the Board of MPPA that it is in the MPPA’s best interest to do so, to pursue acquisition of and to acquire the T & D assets; and (3) thereafter “to own, operate, manage, and administer the same.” Interlocal Agreement, § 2.4. The agreement further authorizes the MPPA to incur bond or debt obligations for the financing of the acquisition. *Id.*, § 2.5.f. This provision is expressly conditioned as follows:

[P]rovided, however, that each such bond or debt obligation issues by MPPA and represented by a certificate or instrument shall contain on its face a statement substantially to the effect that (i) neither Montana, any municipality or local governmental unit thereof, or any other municipal corporation, quasi-municipal corporation, subdivision, authority, or agency thereof is obligated to pay the principal or interest thereon; and (ii) no tax funds may be used to pay the principal or interest thereon; and (iii) neither any nor all of the faith and credit nor taxing power of Montana, any municipality or local governmental unit thereof, or any other municipal corporation, quasi-municipal corporation, subdivision, authority, or agency thereof, is pledged to the payment of the principal or interest thereon. . . .”

Id. The agreement further empowers the MPPA “to negotiate and enter into contracts, to perform contracts, to make covenants and representations, to convey and receive legal rights, and to take such other actions as may be reasonably incident to the Acquisition or Development of the T & D Assets.”

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MPPA has in turn incorporated MPPI, a Montana public benefit nonprofit corporation. According to its Restated Articles of Incorporation, MPPI's initial member is MPPA. Additional members may join the corporation, but membership is limited to the State, its agencies or instrumentalities, political subdivisions of the State, or "authorities, associations, or other entities comprised [sic] solely of the State or its political subdivisions." MPPI is organized to pursue "any lawful activity for which a corporation may be formed under the Montana Nonprofit Corporation Act and not for pecuniary profit or financial gain."

MPPA and MPPI have entered into a written Agreement under which MPPA has agreed to provide seed money for MPPI's use in pursuing the acquisition of the T & D assets. The agreement states that the offer for acquisition must be structured to "permit [MPPI] to offer adequate, reliable low-cost electric and natural gas utility services to the inhabitants of the Authority's Members," and that the expenditures are therefore for a public purpose. Agreement, § 1. The Agreement provides further that MPPI will offer to purchase all of the stock of NorthWestern Corporation, which now controls the T & D assets, and, if successful in purchasing the assets, will sell to South Dakota Public Power Incorporated ("SDPPI") any T & D assets located in South Dakota or Nebraska. Under the Agreement, MPPI will operate the T & D assets not conveyed to SDDPI until such time as they might be conveyed to MPPA in the future.

MPPI has entered into an Agreement with SDPPI for the conveyance of the South Dakota and Nebraska assets to SDPPI in the event MPPI acquires the T & D assets. The Agreement also contemplates that there will be a transition period of up to three years during which "MPPI will be responsible for the integrated operations of the assets of MMPI and SDP during the Transition Period." The Agreement allows either party to terminate its involvement in advance of the stock purchase, with the non-terminating party free to proceed with the acquisition effort without the involvement of the other party.

Your letter informs me that MPPI intends to finance the acquisition of the T & D assets through an arrangement with an investment banking firm providing for the issuance and sale of bonds. The bonds will be corporate debt of MPPI and not municipal bonds issued by the Municipalities or MPPA. The debt incurred for the purchase of the assets will be secured only by the revenue produced by the operation of the T & D assets. The arrangement will include an agreement ensuring that the financing will not be a debt of MPPA or any of its member local governments and that the credit or taxing power of the local governments will not be pledged in support of the debt instruments. Although these agreements have not apparently been finalized at this time, I assume for purposes of this opinion that the arrangements will be as described.

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Any opinions expressed herein are contingent on the facts you have provided as stated above.

II.

Your first question requires consideration of the Montana Nonprofit Corporation Act, Mont. Code Ann. tit. 35, ch. 2 (“the Act”). The Act provides for the creation of a public benefit nonprofit corporation with members. See Mont. Code Ann. § 35-2-213(1)(e) (articles of incorporation may provide for members); cf., e.g., Mont. Code Ann. §§ 35-2-514(2), 35-2-520 (explaining certain rights of members of public benefit corporations.)

Nothing in the Act bars MPPA from membership in a public benefit nonprofit corporation. The Act defines “member” generally as a “person” having the right to vote. Mont. Code Ann. § 35-2-114(21)(a). The Act in turn defines “person” to include “any . . . entity,” id. (25), “entity” to include a “state,” id. (14(f), “state” to include a “governmental subdivision,” id. (32)(a), and “governmental subdivision” to include “an authority,” id. (17). I therefore conclude that MPPA may be a member of MPPI.

The powers of a nonprofit corporation include the power to acquire and dispose of property or any interest in property, including another corporation or its stock. Mont. Code Ann. § 35-2-118(1)(d), (e), (f). Nothing in the Act limits the authority of a Montana non-profit corporation to owning and holding property in Montana, and accordingly the Act poses no barrier to the acquisition of the T & D assets located in other states. MPPI therefore has the power to acquire the T & D assets, whether through a purchase of them individually or through acquisition of the stock of their current owner, “[u]nless its articles of incorporation provide otherwise,” id. (1). While a detailed interpretation of MPPI’s articles is beyond the scope of this opinion, it would appear that the articles do not prohibit the acquisition or subsequent conveyance of the T & D assets. The plan for acquisition and disposition of the assets as described above is therefore within MPPI’s corporate powers.

A nonprofit corporation also has the power, subject to its articles, to “carry on a business.” Id. (1)(p). Again, nothing in MPPI’s articles appears to prohibit the operation of an electric and natural gas utility business, and nothing in the statutes would appear to prevent the corporation from carrying on business activities in states other than Montana. I therefore conclude that MPPI has the corporate power to do so.

A nonprofit corporation finally has the power “to make contracts and guaranties; to incur liabilities; to borrow money; to issue notes, bonds, and other obligations; and to pledge any of its property, franchises, or income.” Id. (1)(g). MPPI’s articles do not appear to

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limit this power, and I therefore conclude that its corporate powers extend to the financing activities described in I. above.

I note that Mont. Code Ann. § 35-2-117(2) precludes incorporation of a nonprofit corporation if the incorporation would violate another provision of law. I perceive no other provisions of law that would preclude incorporation of MPPI for the purpose of operating an electric and natural gas utility. MPPI will be within the definition of a “public utility” in Mont. Code Ann. § 69-3-101. That statute provides that “every corporation, public or private” that provides utility services is a “public utility,” without distinguishing or exempting a public benefit nonprofit corporation. It therefore appears that if MPPI receives all required regulatory approvals, it may operate as a public utility in Montana.

Montana law vests in the Public Service Commission the authority to regulate rates and services of entities providing electric and natural gas service to consumers. It is accordingly beyond the proper scope of this opinion to determine what financing and regulatory requirements will apply to MPPI and whether MPPI will meet them. Specifically, I express no opinion as to whether the financing arrangements described in Part I. comply with the requirements of Mont. Code Ann. tit. 69, ch. 3, pt. 5, dealing with investment and financing of public utility assets.

Based on the foregoing, it is my opinion that the Montana Nonprofit Corporation Act allows the creation of MPPI as a public benefit nonprofit corporation with MPPA as its sole member, and that MPPI has the corporate power to acquire the T & D assets in the manner described in Part I. above, to operate an electric and natural gas utility business as described in Part I. above, and to finance its operations as described in Part I. above. This conclusion is predicated on the facts as stated in Part I., and I express no opinion as to the MPPI’s corporate power to engage in any activity other than the ones there described.

III.

Your second question requires analysis of the extent of the power of a self-governing local government.

Initially, it is necessary to clarify the role of MPPA. As an entity created by an interlocal agreement, MPPA has only those powers that could be exercised by any of the members that created MPPA. An interlocal agreement may only provide a service “that any of the public agencies entering into the contract is authorized by law to perform.” Mont. Code

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Ann. § 7-11-104. Accordingly, the powers of the Municipalities also define the limits of MPPA's powers.

Generally, self-governing local governments "may exercise any power not prohibited by the constitution, law, or charter. These powers include but are not limited to the powers granted to general power governments." Mont. Code Ann. § 7-1-101. "A local government with self-government powers may provide any services or perform any functions not expressly prohibited by the Montana constitution, state law, or its charter." Mont. Code Ann. § 7-1-102.

In 48 Op. Att'y Gen. No. 14 (2000), Attorney General Mazurek established that the self-governing local government of Butte-Silver Bow has the authority to acquire and operate an electric and natural gas utility. In doing so, he clarified several points pertinent to this inquiry. First, he held that the operation of a utility was a public purpose. Second, he held that the consolidated city-county government could perform any functions that a municipal government could perform. Third, he held that municipal operation of a utility was not prohibited by Mont. Code Ann. § 7-1-111, which precludes a self-governing local government from exercising "any power that establishes a rate or price otherwise determined by a state agency." All of these holdings are instructive with respect to the activities described in Part I.

Attorney General Mazurek's opinion is not dispositive of all of the issues surrounding your second question. Three principal issues remain. The first arises from the fact that the Municipalities intend to operate the utility under the structure of a member-governed public benefit nonprofit corporation of which MPPA is currently the sole member. This raises the issue of whether a self-governing municipality is limited to providing electric and natural gas utility services through T & D assets owned and operated directly by the municipality. In my opinion they are not.

A self-governing municipality may perform any function by any means unless the function or means is prohibited by a specific statute delimiting the powers of self-government local governments, by constitutional norms, or by a provision of its charter. The doctrine of implied preemption is inapplicable to self-governing local governments. D & F Sanitation Serv. v. City of Billings, 219 Mont. 437, 444-45, 713 P.2d 977, 981 (1986). The statutory provision setting forth one method of providing utility services by a municipality therefore cannot implicitly preclude a self-governing local government from choosing any other method that is not otherwise precluded by law. See 49 Op. Att'y Gen. No. 3 (2001) (principle of *expressio unius est exclusio alterius* inapplicable to analysis of powers of self-governing municipality).

The second remaining issue is whether the grant of public funds for the seed money to MPPI is lawful.

A similar question was answered in the affirmative in 48 Op. Att’y Gen. No. 12 (2000). In that opinion it was held that a general power municipality could grant funds to a public benefit nonprofit corporation for the operation of a local museum, relying on Mont. Code Ann. § 7-1-4124(9), which empowers a general government municipality to “make grants and loans of money, property, and services for public purposes.”¹ Since the Municipalities, as self-governing entities, may exercise any power available to a general power municipality, Mont. Code Ann. § 7-1-101, 7-1-102, and since, as held in 48 Op. Att’y Gen. No. 14 (2000), operation of an electric and natural gas utility is a valid public purpose for a municipality, it follows from the reasoning of 48 Op. Att’y Gen. No. 12 that the Municipalities, through MPPA, may provide funding to MPPI. In reaching this conclusion, I rely on the facts as you have provided them, and in particular on the provisions of the interlocal agreement and articles that appear to limit the application of the public funds to the accomplishment of the utility purposes described in Part I.

The third remaining question is whether the debt obligations incurred by MPPI must be considered a municipal debt or obligation of the Municipalities. I answered a similar question in the negative in 49 Op. Att’y Gen. No. 3 (2001). In that opinion I examined a proposal under which the City of Great Falls, a self-governing municipality, sought to enter into a contract for the operation of a water park. The proposal depended on a contractual arrangement under which the city would execute a long-term lease of certain property. The question was whether the lease created a debt or obligation of the city, such that statutes limiting municipal debt or the incurring of certain municipal obligations would apply. The lease agreement contained a “nonappropriation clause” under which the parties agreed that the city was under no obligation from year to year to fund the lease, and could terminate it by failing to appropriate funds in any year to make the lease payments.

The opinion held that the lease did not create a debt or obligation under those circumstances because under the “nonappropriation clause” the City would never be obligated to pay anything other than money that had been validly appropriated for the current year. Since the case law defined a “debt” to exclude any liability payable from

¹ I recognize that Mont. Code Ann. § 7-3-2103 prohibits a county from making a grant to a corporation. This matter presents no occasion to determine whether this provision would preclude a county from participating in MPPA, since Butte-Silver Bow is a consolidated city-county government and under Mont. Code Ann. § 7-3-1104 a consolidated government may exercise any municipal or county power.

currently appropriated revenues, see, e.g., Yovetich v. McClintock, 165 Mont. 80, 526 P.2d 999 (1974) (contract for construction of multipurpose arena funded from previously approved bonds, fire insurance proceeds, and federal funds did not create a government debt), I held that the lease arrangement was not a municipal debt.

On the facts as set forth in Part I., the same analysis controls here. The seed money the Municipalities advanced to MPPA, and MPPA advanced in turn to MPPI, came from current year municipal revenue. The agreements contained no obligation for any Municipality to advance further funds in the future. Moreover, the debt incurred by MPPI will, if the proposed arrangement is effective, be without recourse to the assets of MPPA or the taxing power of any of the Municipalities. Finally, MPPI's operating expenses will be paid solely from the revenues from the utility business. None of the documents would appear to create an obligation on the part of the Municipalities to contribute funds to cover future operating costs.

This holding is consistent with the great weight of authority from other states. Arrangements similar in most pertinent points to the one described in Part I. have been used by local governments across the country for the construction of various kinds of public projects. Where it has been alleged that the debts incurred for the projects are subject to constitutional or statutory debt limits, most cases have held that the limits are inapplicable where the debts are incurred by a separate legal entity, are without recourse to the funds of the local governments, and where the local government has undertaken no obligation to fund the debts. In re Oklahoma Capitol Improvement Auth., 1998 OK 25, ¶ 48 n.54, 958 P.2d 759, 773 n.54 (collecting cases).

IV.

As your letter notes, specific events and circumstances may raise issues as to whether MPPA, as a member of MPPI, may be responsible for MPPI's conduct or debts. See, e.g., Peschel Family Trust v. Collona, 317 Mont. 127, 133, 75 P.3d 793, 796 (2003). It is beyond the scope of an opinion from this office to anticipate and resolve such fact-driven and speculative questions, and accordingly I express no opinion as to whether the provisions discussed above to protect the funds of MPPA and the Municipalities from the obligations of MPPI will be effective in any particular circumstances.

THEREFORE, IT IS MY OPINION:

1. Under the Montana Nonprofit Corporation Act, an authority created pursuant to an interlocal agreement among self-governing municipalities

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may incorporate a public benefit nonprofit corporation to operate an electric and natural gas utility.

2. An authority created by interlocal agreement between self-governing municipalities may exercise only those powers that any of the municipalities might exercise.
3. Operation of an electric and natural gas utility is a public purpose for which a self-governing municipality may grant funds.
4. Debt incurred through corporate bonds issued by a public benefit nonprofit corporation incorporated by an authority created by interlocal agreement between self-governing municipalities is not subject to laws regulating municipal debts or obligations if the municipalities are not legally obligated to appropriate money to pay the debt and the debt is without recourse to the spending power of the municipalities.

Sincerely,

MIKE McGRATH
Attorney General

mm/cdt/jym