

COUNTIES - 38 Op. Att’y Gen. No. 57 (1979) overruled in its entirety;
COUNTIES - Lease-purchase agreement with “non-appropriation” clause under county debt limit statutes;
COUNTIES - Lease-purchase agreement with “non-appropriation” clause under statute requiring election on incurrence of indebtedness or liability for a single purpose;
COUNTY GOVERNMENT - 38 Op. Att’y Gen. No. 57 (1979) overruled in its entirety;
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ELECTIONS - Lease-purchase agreement with “non-appropriation” clause under statute requiring election on incurrence of indebtedness or liability for a single purpose;
LOCAL GOVERNMENT - 38 Op. Att’y Gen. No. 57 (1979) overruled in its entirety;
MONTANA CODE ANNOTATED - Title 76, chapter 6; sections 7-7-2101(1), (2), -2402, -3413, -4201, 7-21-3413;
MONTANA CONSTITUTION OF 1889 - Article XVIII, section 2;
MONTANA LAWS OF 2007 - Chapter 187;
OPINIONS OF THE ATTORNEY GENERAL - 38 Att’y Gen. No. 56 (1979), 49 Op. Att’y Gen. No. 3 (2001).

HELD: A Lease-Purchase Agreement which includes a non-appropriation clause and which allows for termination without penalty to the County does not constitute indebtedness or liability for the purposes of Mont. Code Ann. § 7-7-2101(1) or (2) and therefore does not require voter approval.

June 5, 2007

Mr. Kenneth L. Oster
Valley County Attorney
501 Court Square, #20
Glasgow, MT 59230

Dear Mr. Oster:

[P1] You have requested an Attorney General Opinion interpreting Montana law governing limitations on county indebtedness. I have rephrased your question as follows:

Does a Lease-Purchase Agreement which includes a non-appropriation clause and allows for termination without penalty to the County constitute indebtedness for the purposes of Mont. Code Ann. § 7-7-2101(1) or (2)?

[P2] You provided the following background information. Valley County proposes to enter into a Lease-Purchase Agreement for the establishment of a detention center. The agreement would be a long-term lease with an option to purchase. The Lease-Purchase Agreement would include a non-appropriation clause. The clause would provide for termination of the Lease-Purchase Agreement in the event the County did not appropriate funds to cover the rental payments due under the agreement in any given fiscal year. Termination of the Lease-Purchase Agreement would be without penalty or liability to the County. In the event the Lease-Purchase Agreement was terminated, the Lessor would have the right to repossess the leased property.

[P3] County indebtedness is governed by Mont. Code Ann. § 7-7-2101. As amended by the 2007 legislative session, 2007 Mont. Laws, ch. 187 (effective July 1, 2007), it provides:

Limitation on amount of county indebtedness. (1) A county may not issue bonds or incur other indebtedness for any purpose in an amount, including existing indebtedness, that in the aggregate exceeds 2.5% of the total assessed value of taxable property, determined as provided in 15-8-111, within the county, as ascertained by the last assessment for state and county taxes.

(2) Except as provided in 7-7-2402 and 7-21-3413, a county may not incur indebtedness or liability for any single purpose to an amount exceeding \$500,000 without the approval of a majority of the electors of the county voting at an election as provided by law.

(3) This section does not apply to the acquisition of conservation easements as set forth in Title 76, chapter 6.

[P4] Thus, a county may not incur indebtedness that would, together with the county's other outstanding indebtedness, exceed 2.5% of the total taxable value of property in the county. A county is also prohibited, except as provided in Mont. Code Ann. §§ 7-7-2402 and 7-21-3413, from incurring indebtedness for a single purpose in an amount exceeding

\$500,000 without first obtaining approval from the electors. Central to both subsection (1) and (2) is a determination of what constitutes “indebtedness” or “liability.”

[P5] In your letter you note that two Attorneys General have previously considered whether similar lease-purchase agreements constituted indebtedness. The first concluded that even though the annual payments of an installment purchase contract did not exceed the debt limit and the county had an option to cancel the contract at any time, the contract still constituted indebtedness for a single purpose pursuant to Mont. Code Ann. § 7-7-2101(2) and must therefore be approved by a majority of the county electorate. 38 Mont. Atty. Gen. No. 56 (1979).

[P6] Subsequently, I issued an Opinion interpreting the statutes governing debt limitations of municipal governments and concluded that a long term lease with an option to purchase, which contained a non-appropriation clause and which could be terminated without penalty to the city, did not constitute indebtedness pursuant to Mont. Code Ann. § 7-7-4201. 49 Mont. Atty. Gen. No. 3 (2001).

[P7] In reaching that conclusion, I noted, “[t]he basis for the various debt limitation statutes appears to be an aversion to the practice of obligating future legislative bodies to appropriate funds for current projects.” The Opinion concluded that a lease-purchase agreement would not create a “debt” subject to the limitations found in section 7-7-4201.

The payments under the lease purchase contract would be made from currently available City revenue. Nothing in the contract as you have described it would obligate the City to make a payment in any future budget year. On the contrary, the City would remain free to decide in any budget year not to make the lease purchase payment. Under the contract the lessee would have no right to sue the City for specific performance of an obligation to pay under these circumstances.

[P8] As I noted above, the question raised in your opinion request centers around whether Valley County’s proposed Lease-Purchase Agreement constitutes an indebtedness or liability for the purposes of section 7-7-2101(1) or (2).

[P9] I find that my 2001 analysis regarding the creation of a debt applies to the Lease-Purchase Agreement you have described. Like the agreement contemplated in that earlier opinion, payments under the Lease Purchase Agreement proposed by Valley County would be made from currently available county revenue. Under the terms of the agreement the County would not be obligated to make any payments in future budget years. Continuation of the agreement would be contingent on the County government

appropriating funds to continue to make the lease purchase payments in any given budget years. If the sitting county government chose not to continue payments and terminated the Lease-Purchase Agreement, the County would incur no penalty or liability. The leased property would simply revert to the lessor. Previous payments made under the Agreement would be equivalent to payment of rent for the leased property and improvements.

[P10] This conclusion is consistent with the Montana Supreme Court's case law addressing the issue of what constitutes a debt or liability. The leading case is State ex rel. Rankin v. State Bd. of Examiners, 59 Mont. 557, 197 P. 988 (1921). There, the Court construed a provision of the 1889 Constitution that generally required voter approval of a debt or liability of the State in excess of \$100,000. The State proposed to issue treasury notes in the aggregate principal amount of \$1,000,000, an amount that, with interest on the notes to maturity, did not exceed the total taxes levied by the State in the fiscal year for general state purposes. The Court held that the notes were not a debt or liability of the State, since the amount required for the payment thereof did not exceed available cash on hand or budgeted appropriations in the current biennium:

In our opinion, the debt or liability intended to be prohibited by section 2 of article 13 of our Constitution is such as is in excess of revenues available or provided for the appropriation years--that is, for the two years intervening between sessions of the legislative assembly--and not current obligations of the state arising during such period of time for which revenues are actually available or provided. The constitutional limitation has reference to such a liability as singly or in the aggregate will obligate the state to an amount in excess of \$100,000 over and above cash on hand and revenues having a potential existence by virtue of existing revenue laws.

Rankin, 59 Mont. at 568, 197 P. at 992.

[P11] The Court has followed Rankin on this issue in other cases: e.g., State ex rel. Diederichs v. Board of Trustees, 91 Mont. 300, 307, 7 P.2d 543, 546 (1932) (expenditure by county of insurance proceeds on hand to rebuild county high school did not create a debt or liability) ("The county does not create a debt or liability within the meaning of this constitutional limit where the payment is to be made from funds already provided."); Graham v. Board of Examiners, 116 Mont. 584, 155 P.2d 956 (1945) (expenditure of cash surplus in State general fund); and Yovetich v. McClintock, 165 Mont. 80, 526 P.2d 999 (1974) (expenditure by county of federal revenue-sharing funds on fairgrounds multi-use facility).

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[P12] On the basis of Rankin and its progeny, I conclude that a long-term non-appropriation lease-purchase agreement does not constitute indebtedness or liability pursuant to section 7-7-2101(1) or (2), because the governmental lessee has no obligation to make rental payments unless and until it has appropriated funds in its budget for the current fiscal year.

[P13] In my 2001 opinion I declined to reconsider Attorney General Greely's opinion in 38 Op. Att'y Gen. No. 56 (1979) because the municipality debt limitation statute, section 7-7-4201, did not deal with the limit on the incurrence of "indebtedness or liability for any single purpose" found in section 7-7-2101. Your request, however, deals with the same provision at issue in Attorney Greely's earlier opinion. Because I have concluded that Montana law does not support the conclusion reached in 38 Op. Att'y Gen. No. 56 (1979), it is overruled in its entirety.

[P14] For the foregoing reasons, the proposed lease purchase arrangement outlined in your opinion request would not create indebtedness or liability under Mont. Code Ann. § 7-7-2101(1) or (2) and would not require voter approval. I express no opinion as to the legality of the proposal under any other state or federal law.

[P15] THEREFORE, IT IS MY OPINION:

A Lease-Purchase Agreement which includes a non-appropriation clause and which allows for termination without penalty to the County does not constitute indebtedness or liability for the purposes of Mont. Code Ann. § 7-7-2101(1) or (2) and therefore does not require voter approval.

Very truly yours,

MIKE McGRATH
Attorney General

mm/anb/jym