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TO: Legislative Finance Committee

FROM: Julie Johnson, Legal Services Office

RE: Authority for Renovation of Wing D of the Montana Mental Health Nursing Care Center

INTRODUCTION

The Legislative Finance Committee has asked me to prepare a legal opinion considering various aspects of a plan whereby Wing D of the Montana Mental Health Nursing Care Center in Lewistown, Montana, is renovated to house approximately 25 inmates for the Department of Corrections (DOC). The money to fund the renovation is to come from the Department of Public Health and Human Services (DPHHS).

QUESTIONS/SHORT ANSWERS

1. Can the Architecture and Engineering Division (A & E) proceed with a $813,000 renovation of Wing D at the Montana Mental Health Nursing Care Center without first obtaining legislative approval for the project?

No. Section 18-2-102, MCA, expressly provides that the construction of a building, including a renovation "costing more than $150,000" may not occur "without the consent of the legislature." Section 18-2-102(2)(a), MCA, however, allows the Governor to authorize the "emergency repair or alteration of a building" and to "transfer funds and authority as necessary to accomplish the project." As far as is known, the Governor has not officially authorized the transfer under this section. However, were the Governor to authorize the "alteration" of Wing D and the transfer necessary to fund the alteration, I believe this action would potentially be subject to a challenge as it does not appear that a true emergency exists here. It is my understanding that DOC currently has the ability, although perhaps strained, to house its aging and elderly inmates.

2. Does § 17-7-211(2), MCA, allow the Budget Director to approve a long-range building program budget amendment that significantly expands the scope of a capital project approved by the Legislature? Specifically, can the Budget Director approve an amendment to expand a capital project appropriation made in House Bill No. 4 (2007), designated for "improvements" to the Montana Mental Health Nursing Care Center, to authorize a transfer to fund a $813,000 renovation of Wing D of the Montana Mental Health Nursing Care Center to create 25 secure assisted living inmate beds for the Department of Corrections 5 years later?

No. Although § 17-7-211(2), MCA, permits the Budget Director to authorize long-range budget amendments when requested by an agency, the authority permits only:

> (a) the transfer of excess funds appropriated to a capital project within an agency to increase the appropriation of <u>another capital project</u> within that agency; or
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> (b) financing to expand a project with funds that were not available for consideration by the legislature.

§ 17-7-211(2), MCA. (Emphasis added). First, the funds DPHHS has transferred to A & E for the project are not from another capital project, but are general funds appropriated to DPHHS in House Bill No. 2 (HB 2) in 2011, which should revert back to the general fund. Nevertheless, even if the Budget Director has authority to expand a capital project and to approve a long-range budget amendment under § 17-7-211(2)(b), MCA, this authority to transfer funds does not obviate the statutory requirement that any renovation of a state-owned building costing more than $150,000 must be approved by the Legislature.

3. Can DPHHS funds from HB 2 be legally transferred to fund the alterations to the Montana Mental Health Nursing Care Center?

No. I do not believe that § 17-7-211(2), MCA, gives the Budget Director the authority to transfer funds in this case. Section 17-7-211(2)(a), MCA, allows the Budget Director to transfer excess funds appropriated to a capital project within an agency to increase the appropriation of another capital project within that agency. The funds that DPHHS has transferred to A & E did not come from another capital project. Instead, they came from general funds received by DPHHS as a part of its HB 2 budget during the 2011 session. Therefore, the Budget Director is not allowed to transfer funds in the form of a long-range building program budget amendment under § 17-7-211(2)(a).

Nor is the Budget Director realistically entitled to authorize the transfer under §17-7-211(2)(b), MCA. This statute permits "financing to expand a project with funds that were not available for consideration by the legislature." The general fund dollars appropriated to DPHHS in 2011 do not constitute "funds that were not available for consideration by the legislature" in 2007. Nevertheless, even if it could be argued that an agency's HB 2 appropriation made in 2011 can be transferred to one of its capital projects that was approved and funded 4 years earlier, the project still must be approved by the Legislature pursuant to § 18-2-102, MCA.

FACTS

In the 2011 session, the Legislature passed House Bill No. 2 (HB 2), which appropriated $2.9 million from the general fund to the Department of Corrections under the restricted category of "Secure Care Growth Population." Specifically, HB 2 stated that "Funding in Secure Care Population Growth may be used only to support secure assisted living beds and secure contract beds." (HB 2; D-6). Apparently, during the session, DOC told the Legislature that the funding would be used to acquire 100 contract inmate beds and 20 secure assisted living inmate beds for its aging population.

Previously, in the 2007 May special session, the Legislature passed House Bill No. 4 (HB 4), which appropriated money for several capital projects, including a $750,000 appropriation from the long-range building program account for "improvements" to the Montana Mental Health Nursing Care Center in Lewistown, Montana. Of the original $750,000 appropriated in 2007, only $7,000 remains unencumbered.

The DOC and DPHHS have recently announced a plan whereby A & E will renovate Wing D of the Montana Mental Health Nursing Care Center to create 25 secure assisted living inmate beds for DOC's elderly and infirm inmates. The estimated cost to renovate Wing D is approximately $813,000. Apparently, DPHHS has transferred funds to A & E for the project. The scheduled completion of the renovation is December 1, 2012, with inmates set to arrive on December 15, 2012.

It has been suggested that the Budget Director has authority to transfer funds from DPHHS to A & E for the renovation/alteration of Wing D under § 17-7-211, MCA. This section provides that "[a]n existing capital project may not be expanded beyond the scope of the project approved by the legislature unless the expansion of the project is authorized by a long-range building program budget amendment approved by the budget director." This section also provides:

> (2) A proposed long-range building program budget amendment must be submitted to the budget director through the architecture and engineering division of the department of administration. The budget director, through a long-range building program budget amendment, may authorize:
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> (a) the transfer of excess funds appropriated to a capital project within an agency to increase the appropriation of another capital project within that agency; or
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> (b) financing to expand a project with funds that were not available for consideration by the legislature.

It is my understanding that the budget director has approved a long-range building program budget amendment to HB 4 2007 to expand the scope of the "improvements" authorized by the 2007 Legislature to include the renovation of Wing D and to transfer $813,000 to A & E to fund the renovation.

LAW

I. Section 18-2-102, MCA, Requires Legislative Approval of a Remodel of a State-Owned Building in Excess of $150,000.

The proposed plan contemplates the renovation of a wing at the Montana Mental Health Nursing Care Center, which is a state-owned building. Section 18-2-102, MCA, limits an agency's ability to construct a building without legislative approval if the cost exceeds $150,000. Section 18-2-101(2), MCA, provides that the term "construction" includes the "construction, alteration, repair, maintenance, and <u>remodeling</u> of a building and the equipping and furnishing of a building during construction, alteration, repair, maintenance, and remodeling." (Emphasis added). Even when a project exceeding $150,000 can be financed in a manner that does not require a legislative appropriation, the project still must be approved by the Legislature in the form of a joint resolution. § 18-2-102, MCA.

Section 18-2-102(2)(a), MCA, allows the governor to authorize repairs or alterations of a building in the event of an emergency:

> The governor may authorize the emergency repair or alteration of a building and is authorized to transfer funds and authority as necessary to accomplish the project. Transfers may not be made from the funds for an uncompleted capital project unless the project is under the supervision of the same agency.

The Montana Supreme Court has interpreted § 18-2-102, MCA, to "require legislative approval of a remodeling project" in excess of the statutory limits. <u>Goodover v. Dept. of Administration</u>, 201 Mont. 92, 95, 651 P.2d 1005, 1007 (1982). For example, in <u>Goodover</u>, two Montana state senators sued the Department of Administration over a decision to move the Senate chambers by the committee in charge of the Capitol renovation program. Even though the Legislature had enacted statutes allowing the committee to decide the allocation of use and space within the Capitol, the Montana Supreme Court held that the committee nevertheless was required to report its decision to move the Senate chambers to the full Legislature for its approval of the plan pursuant to § 18-2-102, MCA.

Following the <u>Goodover</u> ruling, former Montana Attorney General Mike Greely likewise concluded that restoration and repair of the Daly mansion, a state-owned building, was subject to § 18-2-102, MCA, even though the project was funded by local private groups. 42 A.G. Op. 66 (1988). Attorney General Greely noted that even if the funding was not from a legislative appropriation, the Legislature still needed to approve the project through a joint resolution. <u>Id.</u>

I did not locate any case law discussing § 18-2-102(2)(a), MCA, and a Governor's ability to authorize repairs or alterations of a building in the event of an emergency. Nor is the term "emergency" defined in Title 18.

II. Section 17-7-211, MCA, Permits the Budget Director to Authorize a Long-Range Building Program Budget Amendment.

Section 17-7-211, MCA, allows the Budget Director to authorize a long-range building program budget amendment in certain circumstances. Specifically, the statute provides:

> An existing capital project may not be expanded beyond the scope of the project approved by the legislature unless the expansion of the project is authorized by a long-range building program budget amendment approved by the budget director.

However, this authority is not unlimited. The Budget Director may authorize only the following two items through a long-range building program budget amendment:

1. the transfer of excess funds appropriated to a capital project within an agency to increase the appropriation of another capital project within that agency; or
2. financing to expand a project with funds that were not available for consideration by the Legislature.

I did not locate any case law or Attorney General opinions citing § 17-7-211, MCA.

III. Section 17-7-138, MCA, Provides That Expenditures by an Agency Must Be Made in Substantial Compliance With the Budget Approved by the Legislature.

Finally, it is worth noting the provisions of § 17-7-138(1)(a), MCA:

> (1) (a) Expenditures by a state agency must be made in substantial compliance with the budget approved by the legislature. Substantial compliance may be determined by conformity to the conditions contained in the general appropriations act and to legislative intent as established in the narrative accompanying the general appropriations act. An explanation of any significant change in agency or program scope must be submitted on a regular basis to the interim committee that has program evaluation and monitoring functions for the agency pursuant to Title 5, chapter 5, part 2. <u>An explanation of any significant change in agency or program scope, objectives, activities, or expenditures must be submitted to the legislative fiscal analyst for review and comment by the legislative finance committee prior to any implementation of the change</u>. A significant change may not conflict with a condition contained in the general appropriations act. If the approving authority certifies that a change is time-sensitive, the approving authority may approve the change prior to the next regularly scheduled meeting of the legislative finance committee. <u>The approving authority shall submit all proposed time-sensitive changes to the legislative fiscal analyst prior to approval.</u> If the legislative fiscal analyst determines that notification of the legislative finance committee is warranted, the legislative fiscal analyst shall immediately notify as many members as possible of the proposed change and communicate any concerns expressed to the approving authority.

17-7-138, MCA. (Emphasis added).

ANALYSIS

Given that the projected cost of the renovation of Wing D of the Montana Mental Health Nursing Care Center exceeds $150,000, the renovation must be approved by the Legislature absent the Governor declaring an emergency under § 18-2-102(2)(a), MCA. Although one could argue that HB 4 (2007), in conjunction with § 17-7-211, MCA, permits a transfer of funds from DPHHS to A & E to renovate Wing D at a cost of $813,000 without first seeking and obtaining legislative approval, this argument ignores the clear and unambiguous directive of § 18-2-102, MCA.

Moreover, it is unlikely that § 17-7-211(2), MCA, applies here. According to the statute, the Budget Director may authorize the following through a long-range building program budget amendment:

> (a) the transfer of excess funds appropriated to a capital project within an agency to increase the appropriation of another capital project within that agency; or
> (b) financing to expand a project with funds that were not available for consideration by the legislature.

While a Budget Director may expand the scope of a capital project, the Budget Director cannot authorize a renovation that exceeds $150,000. Also, although the Budget Director has authority to transfer excess funds from one capital project to another capital project within an agency, subsection (a) does not allow the budget director to authorize the transfer of funds from a HB 2 appropriation to DPHHS to a capital project. Furthermore, prospective HB 2 funds do not qualify as "funds that were otherwise not available for consideration" under subsection (b). This subsection most logically applies to grants or private funding and not to a prospective appropriation for an agency's operating budget.

Nor can a legitimate argument be made that the Legislature, by approving $750,000 in "improvements" to the Montana Mental Health Nursing Care Center in 2007, of which all but $7,000 has been encumbered, implicitly approved the proposed $813,000 renovation to Wing D 5 years later. There is no evidence that the 2007 Legislature, considered, let alone approved, the renovation of Wing D when it approved HB 4 (2007) for "improvements."

Moreover, § 17-7-138, MCA, provides:

> Expenditures by a state agency must be made in substantial compliance with the budget approved by the legislature. Substantial compliance may be determined by conformity to the conditions contained in the general appropriations act and to legislative intent as established in the narrative accompanying the general appropriations act.

This section also provides:

> An explanation of any significant change in agency or program scope, objectives, activities, or expenditures must be submitted to the legislative fiscal analyst for review and comment by the legislative finance committee prior to any implementation of the change.

Finally, according to the statute:

> (b) For the purposes of this subsection (1), an agency or program is considered to have a significant change in its scope, objectives, activities, or expenditures if:
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> (i) the operating budget change exceeds $1 million; or
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> (ii) the operating budget change exceeds 25% of a budget category and the change is greater than $75,000. If there have been other changes to the budget category in the current fiscal year, all the changes, including the change under consideration, must be used in determining the 25% and $75,000 threshold.

Section 17-7-138, MCA. Although DPHHS has not yet hit the $1 million mark, it is nearing it, so this statute may apply if the costs of alteration rise. Nevertheless, DPHHS intends to spend $813,000 from its 2011 HB 2 appropriation for the renovation of Wing D.

CONCLUSION

In conclusion, there is no authority for A & E and DPHHS to proceed with the renovation of Wing D absent legislative approval or the Governor authorizing the alterations due to an emergency. In the event the Governor declares that an emergency exists, the issue becomes a fact-driven inquiry as to whether there is an emergency.

The planned renovation has never been considered, let alone approved, by the Legislature. While the Budget Director may issue a budget amendment and expand the scope of a capital project, he cannot approve a renovation that exceeds $150,000.

The authority to approve the "construction, alteration, repair, maintenance, and remodeling of a building" in excess of $150,000 lies squarely with the Legislature. The authority may also extend to the Governor in the case of an emergency. DPHHS must submit its plan to renovate Wing D to the Legislature for its consideration and approval pursuant to § 18-2-102, MCA.

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