



Montana Legislative Services Division

Legal Services Office

May 18, 2005

Senator Rick Laible
529 Moose Hollow Road
Victor, Montana 59875

Dear Senator Laible:

I am writing in response to your request for an analysis of the fiduciary responsibility of a board of trustees of a school district with respect to the transfer of land to a public or private entity seeking the exchange to use the property to provide a service that benefits the school district.

Section 20-6-603(2), MCA, provides that except for land that is granted to or held by the state in trust or land acquired by conditional deed under the provisions of section 20-6-605, MCA, the trustees may, upon approval by the electorate, accept as partial or total consideration for the exchange of the land a binding written agreement by a public or private entity seeking the exchange to use the property to provide a service that benefits the school district. The deed for the exchange of land is required to contain reversionary clauses that allow for the return of the land to school district ownership if the binding written agreement is not complied with.

By its own terms, this provision deals only with land that is owned by a school district. Section 20-6-603(2), MCA, is similar to section 77-2-351, MCA, governing state-owned land. That section provides that lands may be sold to or exchanged for other land or for other consideration with another public entity on terms and in a manner that the Board of Land Commissioners, after consultation with the appropriate legislative committee, may determine to be in the state's best interest, subject to The Enabling Act and constitutional restrictions. In the case of land that is not granted to or held by the state in trust for the support of the common schools, for a state institution, or for another specific purpose, the Board may accept as partial or total consideration for the transfer of the land a binding commitment by the transferee to use the property to provide a community service or a benefit that fulfills a public purpose. The sale or exchange of the property may not be finally concluded until 60 days' public notice of the terms of the proposed sale or exchange has been given. As used in section 77-2-351, MCA, "public entity" means any county, city, municipal corporation, school district, or special improvement or taxing district.

I have had occasion to interpret section 77-2-351, MCA, in the past, and I will summarize that analysis because I believe that analysis is determinative of your inquiry. Section 77-2-351, MCA, grants discretion to the Board of Land Commissioners to determine whether a proposed transfer is in the state's best interest. This statutory grant of discretion is consistent with the provisions of Article X, section 4, of the Montana Constitution, creating the Board of Land Commissioners and authorizing the Board to control lands under regulations and restrictions provided by law.

Real property acquired by the state is state land as defined in Article X, section 11, of the Montana Constitution. 36 A.G. Op. 104 (1976). Article X, section 11, of the Montana Constitution, deals with the disposition of all state lands and interests in state land as follows:

Section 11. Public land trust, disposition. (1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised.

(2) No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition, or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

(3) No land which the state holds by grant from the United States which prescribes the manner of disposal and minimum price shall be disposed of except in the manner and for at least the price prescribed without the consent of the United States.

(4) All public land shall be classified by the board of land commissioners in a manner provided by law. Any public land may be exchanged for other land, public or private, which is equal in value and, as closely as possible, equal in area. (emphasis added)

It was recognized in the case of Newton v. Weiler, 87 Mont. 164, 286 P. 133 (1930), that the constitutional provisions relating to trust lands are limitations upon the power of disposal by the Legislature. Section 77-1-202(1), MCA, provides that the Board of Land Commissioners has general authority over the disposition of state lands. The Board is to exercise its authority in accordance with the principle that the lands are held in trust for the attainment of worthy objects helpful to the well-being of the people of the state.

In State ex rel. Olsen v. Montana Armory Board, 128 Mont. 344, 275 P.2d 652 (1954), the Montana Supreme Court held that a law directing the Montana Armory Board to convey an armory and land upon which it was situated to the city of Poplar was unconstitutional because it violated Article XVII, section 1, of the 1889 Montana Constitution, from which Article X, section 11, of the 1972 Montana Constitution was derived. The Court noted that the armory was state land and that disposition of the armory was within the authority of the Board of Land Commissioners. While the basis for the constitutional violation was not clearly articulated, the holding was clarified in State ex rel. Werner v. District Court, 142 Mont. 145, 382 P.2d 824 (1963). Neither decision discusses whether the law in question was violative of the constitutional provision because it was a "special" and not a "general" law. Section 77-2-351, MCA, appears to meet the test of a general law because it operates in the same manner upon all persons in like circumstances and excludes no class of governmental entity. See Grossman v. State, 209 Mont. 427, 682 P.2d 1319 (1984), and Linder v. Smith, 193 Mont. 20, 629 P.2d 1187 (1981).

In 36 A.G. Op. 113 (1976), Attorney General Woodahl determined that notwithstanding the waiver of federal restrictions on land, in order for the state to transfer title of state land to a city, all state constitutional and statutory requirements must be fulfilled. The state was not able to transfer title of the old state prison to the city of Deer Lodge until general legislation was enacted that fulfilled the requirements of Article X, section 11(2), of the Montana Constitution. Attorney General Woodahl noted that the Department of State Lands was drafting legislation to provide for the special circumstances presented by obsolete institutions. The Legislature enacted section 77-2-302, MCA, in 1977 to allow the Board of Land Commissioners to transfer ownership of former institutions. It is apparent that section 77-2-321, MCA, is derived from section 77-2-302, MCA, and the same analysis that applies to section 77-2-302, MCA, should apply to section 77-2-321, MCA. There can be no federal restrictions on land subject to section 77-2-321, MCA, because, as noted earlier, the section precludes its application to those lands. An actual transfer of the old state prison to the Powell County Museum and Arts Foundation was accomplished by Chapter 480, Laws of 1993.

Pursuant to Article X, section 11, of the Montana Constitution and section 77-1-202(1), MCA, the Board of Land Commissioners is placed in a trustee status with regard to state lands. Section 72-34-114, MCA, states:

(1) The trustee shall administer the trust with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would use to accomplish the purposes of the trust as determined from the trust instrument.

(2) The trustor may expand or restrict the standards provided in subsection (1) by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's reliance on these express provisions.

(3) Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

(4) This section does not apply to investment and management functions governed by the Montana Uniform Prudent Investor Act, as set forth in Title 72, chapter 34, part 6.

In Leuthold v. Brandjord, 100 Mont. 96, 47 P.2d 41 (1935), the Supreme Court noted that although the Board of Land Commissioners has large discretionary power in administering the laws relating to the disposition of state lands, the Board is nevertheless subject to the rules and regulations prescribed by the Legislature. The Legislature has provided the Board with the authority to accept as consideration the dedication of certain state land to a public purpose. This authority is consistent with the duty of the Board as trustee as provided in section 72-34-320, MCA, which allows a trustee to dedicate land to public use. The comments to section 72-34-320, MCA, note that the section is the same in substance as section 3(c)(9) of the Uniform Trustees' Powers Act (1964).

The state obviously has the authority to dedicate land to public use, as reflected by the system of

state parks, state recreational areas, state monuments, and state historical sites provided for in Title 23, chapter 1, part 1, MCA. The land dedicated to public use is obviously "state land" within the meaning of Article X, section 11, of the Montana Constitution. The decision to authorize the transfer of certain land to a public entity for the consideration of dedication to a public purpose is solely within the discretion of the Board of Land Commissioners. The transfer would remove the burden of maintaining the property from the state. As noted in section 72-34-303, MCA, the grant of a power to a trustee does not require the exercise of the power. The exercise of the power is subject to the trustee's fiduciary duty. The exercise of the power would not, however, violate the Montana Constitution because the exercise of the power would be made pursuant to general law as required by Article X, section 11, of the Montana Constitution. The Board of Land Commissioners has used the provisions of section 77-2-351, MCA, on numerous occasions to transfer state land to a public entity to be used for a public purpose.

With respect to section 20-6-603(2), MCA, the same fiduciary obligation applies to the Board of Trustees. However, section 20-6-603(2), MCA, provides an additional level of security by requiring voter approval for the transfer of the land. In summation, the trustees of a school district, upon approval of the voters of the district, may transfer district land to a public or private entity to use the property to provide a service that benefits the school district without violating a fiduciary responsibility.

I hope that I have adequately addressed your question. If you have additional questions, please feel free to contact me.

Sincerely,

Gregory J. Petesch
Director of Legal Services

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