



Montana Legislative Services Division
Legal Services Office

To: Economic Affairs Interim Committee
From: Jameson Walker, Staff Attorney
Date: April 8, 2016
Re: State Fund Parking Garage

Summary

The following report provides laws applying to a proposed acquisition by the Montana State Fund of a parking facility from the City of Helena.

Background

The city of Helena approached the State Fund to purchase its multitered parking facility bordering 15th Street. Although the process is in the initial stages, the parking facility is valued at approximately \$7,500,000. In an overhead view, the parking garage is perpendicular to the Montana State Fund building.



The parking facility has three tiers and is connected to the State Fund building.



Currently, the State Fund leases approximately 350 parking permits from the city per year. It has an agreement to lease parking spots through 2040. The State Fund estimates that it is paying \$71 per permit per month or approximately \$298,200 per year. It estimates that it receives approximately \$11,000 for the sale of unused permits. It is unknown whether the State Fund intends to use all of the spaces in the parking structure if it purchases the structure. It is also understood that State Fund would eventually hold the title to the structure, listing it as a capital asset. This would make the purchase outside the purview of the Board of Investments.

Applicable Law

Independent Public Corporation Subject to Certain Agency Laws

The State Fund was established by the Legislature to provide a guaranteed market for employers to provide workers' compensation insurance. Designed to operate as an insurance company, the Legislature established the State Fund as an independent public corporation:

39-71-2313. State compensation insurance fund created -- obligation to insure. (1)

There is a state compensation insurance fund known as the state fund that is a nonprofit, independent public corporation established for the purpose of allowing an option for employers to insure their liability for workers' compensation and occupational disease coverage under this chapter.

(2) The state fund is required to insure any employer in this state who requests coverage, and it may not refuse to provide coverage unless an employer or the employer's principals have defaulted on a state fund obligation and the default remains unsatisfied.

While 39-71-2313, MCA, establishes the State Fund as an independent public corporation, laws applying to state agencies generally apply to it, unless otherwise exempted:

39-71-2363. Agency law -- annual report. (1) The state fund is subject to state laws applying to state agencies, except as otherwise provided by law, and it is exempt from the provisions of The Legislative Finance Act in Title 5, chapter 12, and the provisions of Title 17, chapter 7, parts 1 through 4. The state fund may use the debt collection procedures provided in Title 17, chapter 4, part 1.
[...]

Importantly, this statute specifically exempts the State Fund from the requirements the Long-Range Building Program statutes (Title 17, chapter 7, parts 1 through 4, MCA). These statutes include legislative approval for construction plans by state agencies.

As indicated below, other statutes exempt the State Fund from office space requirements applicable to state agencies.

Statutes Authorizing the “Administration” of the State Fund

Several statutes authorize the State Fund to provide for its “administration”, which may potentially include office space and parking space. Under, 39-71-2311, MCA, the State Fund must be neither more nor less than self-supporting in its administration:

39-71-2311. Intent and purpose of plan -- expense constant defined. (1) It is the intent and purpose of the state fund to allow employers an option to insure their liability for workers' compensation and occupational disease coverage with the state fund. The state fund must be neither more nor less than self-supporting. Premium rates must be set at least annually at a level sufficient to ensure the adequate funding of the insurance program, including the costs of administration, benefits, and adequate reserves, during and at the end of the period for which the rates will be in effect. In determining premium rates, the state fund shall make every effort to adequately predict future costs. When the costs of a factor influencing rates are unclear and difficult to predict, the state fund shall use a prediction calculated to be more than likely to cover those costs rather than less than likely to cover those costs. The prediction must take into account the goal of pooling risk and may not place an undue burden on employers that are not eligible for the tier with the lowest-rated premium for workers' compensation purposes.

(2) Unnecessary surpluses that are created by the imposition of premiums found to have been set higher than necessary because of a high estimate of the cost of a factor or factors may be refunded by the declaration of a dividend as provided in this part. For the purpose of keeping the state fund solvent, the board of directors may implement multiple rating tiers as provided in 39-71-2330 and may assess an expense constant, a minimum premium, or both.
[...]

This statute does not specifically apply to building purchases; however, it requires the State Fund to set premiums at a level to ensure adequate funding, including the costs of administration. Thus, 39-71-2311, MCA, could potentially be implicated if the cost of the parking garage is determined to be unreasonably expensive.

Additionally, the State Fund has authority to operate in a manner customary to the insurance business, which could potentially include office space purchases. This includes authority to take necessary steps for its administration. Indeed, 39-71-2315, MCA, permits the State Fund Board to perform all necessary or convenient acts over the administration of the program:

39-71-2315. Management of state fund -- powers and duties of board -- business plan required. (1) The management and control of the state fund is vested in the board, subject to the statutory limitations imposed by this part.

(2) The board is vested with full power, authority, and jurisdiction over the state fund except that the board may not dissolve or liquidate the state fund. To fulfill the objectives and intent of this part, the board may perform all acts necessary or convenient in the exercise of any power, authority, or jurisdiction over the administration of the state fund or in connection with the insurance business to be carried on under the provisions of this part, as fully and completely as the governing body of a private mutual insurance carrier and subject to the regulatory authority of the insurance commissioner in Title 33, except as provided in 33-1-115 and 39-71-2375.

[...]

Additionally, 39-71-2316, MCA, allows the State Fund to perform functions similar to that of a private insurance carrier to ensure its administration:

39-71-2316. Powers of state fund. (1) For the purposes of carrying out its functions, the state fund may:

[...]

(p) perform all functions and exercise all powers of a private insurance carrier that are necessary, appropriate, or convenient for the administration of the state fund.

Under the Insurance Code, which is generally applicable to the State Fund, private casualty insurers are permitted to acquire property for administrative purposes:

33-12-307. Mortgage loans -- income producing real estate -- real estate for accommodation of business -- quantitative limitations.

[...]

(3) (a) An insurer may acquire, manage, and dispose of real estate for the convenient accommodation of the insurer's or the insurer's affiliates' business operations, including home office, branch office, and field office operations.

(b) Real estate acquired under this subsection (3) may include excess space for rent to others if the excess space, valued at its fair market value, would otherwise be a permitted investment under subsection (2) and is so qualified by the insurer.
[...]

In sum, the applicable statutes permit the State Fund to take acts necessary for its administration, and applicable insurance laws allow corporations to purchase real estate for business operations. Thus, providing office space and parking space for State Fund employees could potentially fall within these statutes.

Legislative Authority to Provide Office Space

While the statutes cited above generally permit State Fund to provide for its administration, 2-15-1019, MCA, specifically allows the State Fund Board of Directors to provide “office space” for the program:

2-15-1019. Board of directors of state compensation insurance fund -- legislative liaisons. (1) There is a board of directors of the state compensation insurance fund.
[...]
(3) The board may provide for its own office space and the office space of the state fund.
[...]

This statute has been previously determined to be a specific statutory grant to allow the State Fund to purchase property without the restrictions placed on other state agencies. As a result, the requirement under 2-15-121, MCA, for the Department of Administration to allocate office space for State Fund would likely not apply:

2-15-121. Allocation for administrative purposes only.
[...]
(3) The department head of a department to which any agency is allocated for administrative purposes only in this chapter shall:
(a) represent the agency in communications with the governor;
(b) allocate office space to the agency as necessary, subject to the approval of the department of administration.

In sum, the State Fund Board of Directors likely does not need to seek an allocation of office space by the Department of Administration because 2-15-1019, MCA, contains a specific grant of authority to provide for its own office space. Thus, the State Fund has statutes authorizing it to provide for its administration and a statute specifically allowing for it to provide office space.

Does Office Space Include Parking?

There is no applicable statutory definition for “office space” or “administration” that includes employee parking. Additionally, there is no statutory mandate for agencies to provide parking

places for employees. However, statutes in the State Building Code (Title 50, chapter 60, part 2, MCA) require that parking spaces are part of an inspection of a public building. The statutes further require that an accessible exterior route must be provided from accessible parking and passenger loading zones (*See* 50-60-213 and 50-60-214, MCA). This suggests that parking and office spaces are related.

Additionally, a search of Helena city ordinances reveals that parking spaces must be provided according to the square footage of an office. (See Title 11, chapter 22, Helena City Code). Again, this suggests a relationship between office spaces and related parking. Thus, the requirement for the State Fund Board to provide for office space in 2-15-1019, MCA, could potentially encompass the authority to provide employee parking.

Board of Investments

It is understood that the State Fund would purchase the parking structure from its own funds, independent of the Board of Investments. The Board of Investments informally stated that it will not seek to participate in the transaction, as it is anticipated that the structure will be listed as an asset and not an investment. Thus, the issue is whether the parking structure should be listed as an asset or an investment.

Under the Montana Constitution, the Board of Investments handles all investments for the State Fund:

Section 13. Investment of public funds and public retirement system and state compensation insurance fund assets. (1) The legislature shall provide for a unified investment program for public funds and public retirement system and state compensation insurance fund assets and provide rules therefor, including supervision of investment of surplus funds of all counties, cities, towns, and other local governmental entities. Each fund forming a part of the unified investment program shall be separately identified. Except as provided in subsections (3) and (4), no public funds shall be invested in private corporate capital stock. The investment program shall be audited at least annually and a report thereof submitted to the governor and legislature.

[...]

(4) Investment of state compensation insurance fund assets shall be managed in a fiduciary capacity in the same manner that a prudent expert acting in a fiduciary capacity and familiar with the circumstances would use in the conduct of a private insurance organization. State compensation insurance fund assets may be invested in private corporate capital stock. However, the stock investments shall not exceed 25 percent of the book value of the state compensation insurance fund's total invested assets.

Furthermore, 39-71-2320, MCA, codifies this constitutional requirement, stating that any of the State Fund's investments must be handled through the Board of Investments:

39-71-2320. Property of state fund -- investment required -- exception. All premiums and other money paid to the state fund, all property and securities acquired through the use of money belonging to the state fund, and all interest and dividends earned upon money belonging to the state fund are the sole property of the state fund and must be used exclusively for the operations and obligations of the state fund. The money collected by the state fund for claims for injuries occurring on or after July 1, 1990, may not be used for any other purpose and may not be transferred by the legislature to other funds or used for other programs. However, state fund money must be invested by the board of investments provided for in 2-15-1808, and subject to the investment agreement with the board of investments, the earnings on investments are the sole property of the state fund as provided in this section.

While it is authorized to invest state funds, the Board of Investments is, naturally, limited to making investments of state funds:

17-6-201. Unified investment program -- general provisions. [...]

(4) The board has the primary authority to invest state funds. Another agency may not invest state funds unless otherwise provided by law. The board shall direct the investment of state funds in accordance with the laws and constitution of this state. The board has the power to veto investments made under its general supervision.

[...]

Previously, the current State Fund office building was determined to be a capital asset and not an investment within the purview of the Board of Investments. The rationale behind this was that the predominant use of the building would be for the State Fund's own business operations. Under Generally Accepted Accounting Principles (GAAP), the classification of the office building should have been an asset and not an investment. As a result, the title to the office was transferred to the State Fund under a memorandum of understanding.

Regarding the parking structure, there are no statutes stating that acquisition of a parking garage constitutes an investment or an asset. However, under GAAP principles, if the structure is predominantly for the use of the State Fund, then the structure could potentially be considered an asset of the State Fund and not an investment to be handled through the Board of Investments. At present, it is unknown whether the State Fund will be the predominant user of the structure or whether it intends to make money off leasing parking spaces. Certainly, if it is not the predominant occupant of the parking structure, then it could potentially fall within the definition of an investment, requiring the supervision of the Board of Investments.