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Helena -
L & C Foundation

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Legal

February 14, 1978

Mr. John Nichols
Chief Librarian
Lewis and Clark Library
120 South Last Chance Mall
Helena, Montana 59601

RE: Request for Legal Opinion on Proposed Foundation
Program

Dear John:

You have requested our opinion concerning the authority of the Lewis & Clark City-County Library Board to create a foundation program to accept and expend money from gifts, grants and donations. Your request poses several inter-related questions which I will attempt to answer one by one.

1. Does the Board of Trustees have the authority to establish a program for the acceptance and expenditure of gifts without the approval of the city or county governing bodies?

The duties and powers of a library board of trustees are set forth in Chapter 2, Section 44, of the Revised Codes of Montana, 1947. The library board of trustees has exclusive control of the expenditure of the public library fund and of the operation and care of the library. Section 44-222, R.C.M. 1947, sets forth the specific powers and duties of the library board. It provides that the board shall:

" * * * *

(8) Have the power to accept gifts, grants and donations from whatever source and to expend the same for the specific purpose of the gift, grant or donation. These gifts, grants and donations shall be kept separate from regular library funds and are not subject to reversion at the end of the fiscal year.

(9) Exercise such other powers, not inconsistent with law, necessary for effective use and management of the library."

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Since you are specifically required to keep gifts, grants and donations separate and apart from the public library funds, it is our opinion that you have the implied authority to take whatever steps necessary to establish and maintain control over those separate funds. The power to organize a foundation or other program which is necessary or desirable to accomplish that purpose can certainly be implied from the broad statutory powers granted to the board. We are of the opinion, therefore, that the consent of the city or county government need not be obtained in order for the Board of Trustees to create such an entity.

2. What sort of an entity may the board create to insure tax-exempt status?

Although this question was not specifically raised in your request, it must be addressed before the remaining questions can be answered. The Board's obvious interest is to create some sort of entity or fund separate and apart from the statutory public library fund.

The Lewis and Clark Library, as an agency of a political subdivision, is not a taxable organization. Contributions made to it for public purposes are charitable contributions and are already tax deductible. Section 170(c), I.R.C. However, if a new organization is created by the Board to accept, hold, invest and expend gifts, the Board must insure that that organization is also tax exempt in order that contributions made to it and its operation will also be tax deductible.

The Internal Revenue Code grants exemption from income tax to corporations, community chests, trusts or foundations organized and operated exclusively for religious, charitable, scientific, literary or educational purposes. Those terms are given their generally accepted meanings. Erection and maintenance of public buildings, monuments and works and lessening the burdens of government are by regulation "charitable". Both of those purposes would be accomplished by the type of program you propose. I.R.S. Reg. §1.501(c)(3)-1(d)(2).

In order to qualify for tax-exempt status, the entity must be organized and operated exclusively for one or more of those exempt purposes. None of its earnings may inure to the benefit of private shareholders or individuals; and it may not, as a substantial part of its activities, attempt to influence legislation or participate in political activities.

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Its assets must be permanently dedicated to an exempt purpose, even in the event of its dissolution. Although a community chest, fund, trust or foundation may qualify as an exempt organization, I believe the most commonly used entity for the purpose you propose is a non-profit corporation. The corporation would be organized under the Montana Non-Profit Corporation Act, Chapter 23 of Section 15, R.C.M. 1947.

There does not appear to be any requirement that the Board itself create or maintain the non-profit corporation or other organization. Because the general operation of the library is the Board's responsibility, it may be advisable for the Board to do so. As you are probably aware, however, the Great Falls library has a non-profit corporation of the type you propose which is separate and distinct from the board of trustees. I am not sure of the reason for doing so; but my guess is that if the funds are outside the control of the board of trustees, there is less pressure from the local governmental agencies to use the funds for general operating purposes.

In any event, the Board must create an organization which operates for one of the purposes set forth in Section 501(c)(3) of the IRC. It is our recommendation that this non-profit corporation be formed for the charitable and educational purposes you propose.

3. Whether the organization must obtain tax-exempt status and an employer identification number?

Every exempt organization is required to have an employer identification number, whether or not it has employees. Despite the fact that the library has non-profit status as a public agency, the new organization must apply for a new employer identification number on I.R.S. Form SS-4. In addition, the organization must apply for recognition as an exempt organization within 15 months of the time it is created. It is better, however, to apply for exempt status immediately. The non-profit corporation or other entity to be created for the purposes you propose should have little difficulty obtaining the exemption. The application should be made on I.R.S. Form 1023 with the District Director of the Internal Revenue Service, who will, in turn, notify the organization whether it satisfies the requirements necessary to have tax-exempt status.

4. Whether there are any restrictions on how funds received by the organization are used?

There are several sources of restrictions on how funds received by your proposed organization may be used. The first and most obvious restriction is in the case of a gift, grant or donation given for a specific purpose. Section 44-222(8), R.C.M. 1947, requires the board to spend that money for the stated purpose noted. In addition, the money must be spent for the purposes prescribed in the organization's articles of incorporation or charter. There is no specific statutory restriction other than those which generally require the Board to insure the effective use and management of the library.

Another type of restriction upon the spending of money relate generally to the restrictions placed upon charitable organizations generally by the I.R.S. All of the assets of a non-profit, exempt organization must be permanently dedicated to an exempt purpose. It must operate exclusively for the charitable purpose for which it is organized. No part of its net earnings can benefit private individuals. Nor can it expend money attempting to influence legislation. Regulation 1.501(c)(3)-1(d)(3). Should the organization find it necessary to engage in some sort of business activity which is not substantially related to the charitable, educational or other purpose, it may be subject to tax upon that unrelated business income. Section 511, I.R.C.

5. Whether there are limitations on the duration or types of investments by non-profit organizations?

There are no limitations upon the duration or types of investments made by a non-profit organization. The only restriction, insofar as the Internal Revenue Service is concerned, is that the organization cannot engage in an unrelated business for profit without being taxed upon that unrelated business income. You will also be restricted by the articles of organization which set forth your purposes and powers. So long as all of the income of the organization is used for the charitable purposes set forth, you are not subject to further restriction. Any interest which you may earn on the deposit of state or federal grants would be treated as any other income to the organization unless, of course, there are restrictions or limitations placed upon the conditions of the grant.

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6. Whether bank accounts established and maintained by advisory boards in Lincoln, Augusta, Boulder and Whitehall for assorted gifts and grants are illegal?

The means of financing the operation of the library is established by statute. Section 44-220, R.C.M. 1947, gives the governing body of a city or county the authority to levy taxes in an amount necessary to maintain an adequate public library service. The tax proceeds constitute a separate fund called the "public library fund" which must be used only for the benefit of the public library. The fund is held by the treasurer of the city or county but is controlled solely by the board of trustees.

In the case of a joint city-county library, the participating cities and counties have entered into a contract which designates how the expenses of library operation shall be apportioned and which city or county treasurer shall have custody of the funds. Section 44-219.1, R.C.M. 1947. According to the Inter-Local Library Contract between the City of Helena and the County of Lewis and Clark, the Director of Finance of the City of Helena has custody of the funds of the joint city-county library. The Lewis and Clark County Treasurer is required to transfer quarterly to the City Director of Finance all tax money collected for the city-county library.

Similarly, the Agreement between the Board of Trustees of the Lewis and Clark Library and the Board of County Commissioners of Jefferson County requires the County Commissioners to pay a sum to the Director of Finance. Both the statutory and the contractual provisions apply to tax money collected by the city or county treasurer for operation of the library. They, therefore, apply only to the public library fund itself.

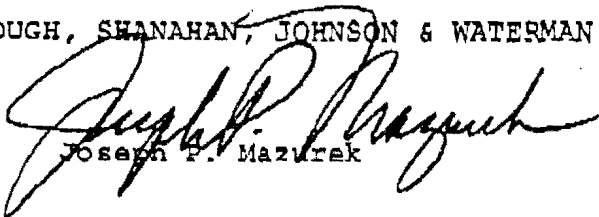
While it may be advisable for the Board of Trustees to maintain control over all funds expended for any library purpose, including gifts which may be made to local advisory boards, that control is not required by statute or by the two contractual agreements. Therefore, it is not illegal for the local advisory boards to maintain separate bank accounts for the collection and expenditure of gifts or grants to the library.

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If you have any questions with respect to this opinion or wish to discuss any aspect of it further, please contact me.

Yours very truly,

GOUGH, SHANAHAN, JOHNSON & WATERMAN



Joseph P. Mazurek

JPM/cks

cc: Mr. Michael J. Mulroney, Chairman