



Montana Legislative Services Division
Legal Services Office

TO: Members of the SJR 4 (2013) Workgroup
FROM: Helen Thigpen, Staff Attorney, Environmental Quality Council
DATE: November 1, 2013
RE: Analysis of Reeder's Alley Properties in Helena and Review of Acquisition and Disposal Laws Relating to Heritage Commission Properties

Introduction

During the September 2013 Environmental Quality Council (EQC) meeting, committee members inquired about the history of the state's ownership of Reeder's Alley and the adjoining Pioneer Cabin and Caretaker's House. The purpose of this memorandum is to provide the EQC and members of the SJR 4 workgroup with information on the state's acquisition of these properties and to provide a summary of the legal documents upon which their conveyance was based. Because staff has also received inquiries regarding the process the Montana Heritage Commission (Commission) follows to acquire and dispose of properties, a summary of the statutes and administrative rules that govern these processes is also provided below.

Background -- Reeder's Alley and the Pioneer Cabin and Caretaker's House

The Commission obtained Reeder's Alley from Darrell and Kathleen Gustin (Gustins) in 2001. The property was formally held by The Alley, LLC, a limited liability company that was formed by the Gustins for the purpose of managing Reeder's Alley. The Alley, LLC, was dissolved after Reeder's Alley was gifted to the Commission.¹ The Montana Board of Land Commissioners (Land Board) approved the acquisition of Reeder's Alley on November 19, 2001.²

The deed for the Reeder's Alley property states that the grant from The Alley, LLC, was made to the Heritage Commission "for permanent endowment purposes" and that through execution of the deed, the grantor made a charitable contribution to a qualified endowment as defined in 15-30-165, MCA (renumbered 15-30-2327 in 2009). The contribution allowed the grantors to qualify for the endowment tax credit authorized by 15-31-161, MCA.

The deed for Reeder's Alley also contains language stating that the property is subject to certain limitations including existing rights-of-way; various building, use, zoning, sanitary, and environmental restrictions; two easements, a contract of encroachment, city resolutions and

¹ The Montana Secretary of State lists the status of The Alley, LLC, as "inactive" and states the reason for the status as "voluntary dissolution" occurring in 2003. See <https://app.mt.gov/bes/> for more information.

² Minutes of the Montana Board of Land Commissioners (November 19, 2001).

ordinances and an unrecorded lease agreement. There do not appear to be additional restrictions in the deed for Reeder's Alley; however, a more in-depth assessment of the property, including an analysis of any associated documents of record, would need to be completed for a comprehensive analysis. In addition, there may be potential questions regarding whether the language in the deed that references "permanent endowment purposes" acts as a condition that may limit potential future uses of the property. This question would need to be analyzed further in order to assess any potential legal restrictions imposed by the permanent endowment language.

The conveyance of Reeder's Alley to the Commission in 2001 did not include the Pioneer Cabin or Caretaker's House. These structures were owned by an organization known as the Last Chance Gulch Restoration Association (LCGRA). In 2004, the LCGRA approached the Commission to explore donating the Pioneer Cabin and the Caretaker's House to the Commission.³ Following a request for authorization by the Commission to acquire the property, the Land Board approved the acquisition on June 19, 2006.⁴

Similar to the deed for Reeder's Alley, the deed for the Pioneer Cabin and the Caretaker's House sets forth certain limitations and obligations. For example, the deed includes language stating that the conveyance is subject to "any and all prior reservations, exceptions, restrictions, limitations, conditions, or provisions, of record, as may be contained in prior Patents, Deeds, or Grants, or which may be imposed by law". This type of language is common in any deed transferring property.

However, unlike the deed for Reeder's Alley, the deed for the Pioneer Cabin and the Caretaker's House specifically states that the grant to the Commission is subject to the express condition that the properties must "be used exclusively for the public purpose of the historic preservation of the Pioneer Cabin and Caretaker's House, and public display of the Pioneer Cabin and the artifacts contained therein". Significantly, the clause also states that "should the above-described property cease to be used for the above-described purpose, that the same shall revert to the Grantor". This language created what is known as a reversionary interest in the LCGRA because it reserved to the LCGRA, as the grantor of the property, a future ownership interest in the event the property is not used for the purposes described in the deed. There are different types of reversionary interests that may be created, and further investigation would be

³ Minutes of the Montana Board of Land Commissioners (June 19, 2006).

⁴ *Id.*

needed to determine the type of reversionary interest that was created in the deed for the Pioneer Cabin and the Caretaker's House.⁵

Copies of the deeds for Reeder's Alley and for the Pioneer Cabin and Caretaker's House are attached to this memorandum and were provided to members of the EQC and previously posted to the EQC's interim committee website under the "meeting and materials" link for September 11 and 12, 2013.

Summary of Property Acquisition and Disposal Laws

As described in 22-3-1001, MCA, the purpose of the Commission is to "acquire and manage, on behalf of the state, properties that possess outstanding historical value, display exceptional qualities worth preserving, are genuinely representative of the state's culture and history, and demonstrate the ability to become economically self-supporting". To achieve this purpose, the Commission is charged with purchasing both real and personal property that possess these characteristics and must do so in a way that protects the properties while encouraging economic independence.

Section 22-3-1003(8), MCA, authorizes the Commission to acquire and sell both real and personal property. This section requires the Commission to adopt rules that establish a policy for acquiring and selling property. Pursuant to the policy, the Commission must consider several factors, including but not limited to the following:

- whether the property represents the state's culture and history;
- whether the property can become self-supporting;
- whether the acquisition or sale will create significant social and economic impacts to affected local governments and the state; and
- whether the sale is supported by the Director of the Montana Historical Society.

⁵ There is often confusion as to whether a reversionary interest is classified as a "possibility of reverter" or a "fee simple subject to condition subsequent". The distinction is relevant because it may affect whether the reversion to the grantor is automatic or subject to the grantor taking some action to reenter the property, although in either case, some action on part of the grantor would likely need to occur. Disputes may occur over whether a deed created an automatic or contingent reversion and whether the event allegedly causing the reversion actually occurred. If there is any doubt with regard to a deed, rules of construction applicable to written instruments would be applied to determine the terms of the deed.

1. Property Acquisition

The procedures the Commission must follow to acquire both real and personal property are set forth in 8.112.102, ARM. In general, to acquire property the Commission must:

- consider the factors listed in 8.112.102, 8.112.106, 8.112.109, and 8.112.110, ARM, which are similar to, but more in depth, than the factors listed above that are referenced in 22-3-1003, MCA;
- provide public notice in the geographical area of the proposed acquisition that includes a brief statement and description of the property that is being considered for acquisition;
- hold a hearing in the general geographic area where the property being considered is located and allow comments on the proposed acquisition; and
- assess the property for acquisition upon consideration of the criteria listed in the rules and on the comments provided by affected local government officials, professional historians, and the public.

For personal property, the Commission makes the final decision and is not required to recommend the acquisition to the Land Board. For real property, the Commission makes an acquisition recommendation to the Land Board, and the Land Board decides whether or not to approve the acquisition. Under the rules adopted by the Commission, the preference is for all acquisitions to be conveyed to the Commission unconditionally.⁶

2. Property Disposal

The procedures for disposing of real and personal property are set forth in 8.112.206 and 8.112.209, ARM, respectively. The process for selling real property is as follows:⁷

- The Commission establishes a real property sales committee that makes a recommendation to the executive committee using the criteria established by rule in 8.112.202, ARM.
- The executive committee decides whether to:
 - proceed to the next level of review;

⁶ 8.112.105, ARM.

⁷ The process for selling personal property is somewhat similar to the process for selling real property and is therefore not explained further in this memorandum. However, additional information from staff may be requested regarding the sale of personal property.

- request additional information regarding the sale criteria;
 - forward a recommendation directly to the full Commission for consideration; or
 - deny the recommendation.
- If the executive committee elects to further consider a property for sale, the real property sales committee prepares a written report that addresses several factors, including but not limited to:
 - the quality of the significance of the property in Montana history;
 - whether the property can become self-supporting;
 - the economic and social benefits the property provides to the public compared to the potential economic and social benefits to the public possible with private ownership;
 - whether the property is an educational resource for the study and interpretation of Montana's history;
 - the manner in which local and state agencies with operations or facilities in the area of the proposed sale would be notified of the potential sale and how these entities would be affected by the potential sale;
 - the need for any preservation covenants in a proposed sale agreement;
 - a copy of a letter of support by the Director of the Historical Society or a description of why support was not provided; and
 - a letter from the State Historic Preservation Officer indicating whether he or she supports the proposed sale.
- Following the report from the real property sales committee, the executive committee decides whether to:
 - publicly notice the sale and hold a hearing as specified in the rules;
 - request additional information; or
 - deny the recommendation.
- Following public notice and a hearing, the Commission decides whether to proceed with the proposed sale and recommend the proposal, along with any covenants or conditions, to the Land Board.

Following the recommendation by the Commission, the Land Board considers whether to sell the property and include any covenants or conditions on the property. The process governing sales of state-owned property by the Land Board is set forth in Title 77, chapter 2, part 3, of the MCA. Pursuant to 77-2-301, MCA, the Land Board decides "when sales of state land are to be held and what state lands are to be offered for sale". In addition, pursuant to 77-2-308, MCA, the Land Board has the authority to "disapprove any sale which in its opinion would be disadvantageous to the state". Any governmental or private entity or any person who is 18 years of age or older may purchase state land. State land, however, may not be sold to the federal government except in limited circumstances.⁸ Upon approval by the Land Board, state land is sold through a public auction held at the county courthouse of the county in which the land is located, with limited exceptions on the location of the auction.⁹ Notice of the sale must be provided as set forth in 77-2-322, MCA, and the land must be sold to the "highest qualified bidder" and cannot be sold "for less than the value determined by the board after appraisal".¹⁰

In addition to the process for selling state property described above, 77-2-351, MCA, which was enacted by House Bill 902 in 1991, provides that state land may be sold or exchanged to another public entity, including a city or county government, for consideration other than the appraised value. Section 77-2-351, MCA, states that "Notwithstanding any other section in this chapter, any 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, 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".

If the land in question is not held by the state as trust land for the support of the common schools, for a state institution, or for another specific purpose, 77-2-351, MCA, authorizes the Land Board to "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". For purposes of this section, a public entity is defined as any entity that is a county, city, municipal corporation, school district, regional water authority, or special improvement or taxing district. There do not appear to be any court cases that interpret

⁸ 77-2-306(3), MCA (prohibiting land from being sold to the federal government except for the purpose of building federal facilities and structures).

⁹ 77-2-321, MCA (providing that all "sales of state lands shall be only at public auction held at the county courthouse of the county in which the lands are located". State lands are those lands defined in 77-1-101(8), MCA, and do not include certain lands such as lands granted through the issuance of a patent).

¹⁰ 77-2-323, MCA.

this section, but the legislative history suggests that it has been used several times since it was enacted.

The foregoing provides a summary of the acquisition and disposal laws pertaining to existing or potential Commission properties. Please let me know if committee members would like additional information on any item raised in this memorandum.