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April 8, 2016

Curtis Larsen  
Interim General Counsel  
Montana State Fund  
855 Front Street  
Helena, MT 59604

Dear Mr. Larsen:

This letter is our response to your request that we review and update an opinion Joe Mazurek previously offered on behalf of our firm regarding the authority of the Montana State Fund ("MSF") and MSF's board of directors (the "MSF Board") to acquire and own real estate. Specifically you have asked us to determine whether legislative changes since Mr. Mazurek offered his opinion have altered MSF's authority to acquire the land and existing parking structure (collectively the "Parking Garage") adjacent to MSF's current office building from the City of Helena Parking District. In connection with our analysis, you requested we similarly review and consider the impact of legislative changes, including SB 123 from the 2015 session, on other prior legal opinions indicating MSF possessed sufficient legal authority to acquire and own real property.

**Prior Opinions**

The prior legal opinions relevant to our analysis include the opinions expressed in the following:

1. Letter dated March 30, 2006, from then Director of Legal Services for the Montana Legislature Greg Petesch to Associate Fiscal Analyst Kris Wilkinson (the "Petesch Opinion," a copy of which is attached as Exhibit A); and
2. Memorandum dated September 2, 2015 from then MSF General Counsel Nancy Butler to Laurence Hubbard (the "Butler Opinion," a copy of which is attached as Exhibit B).

Our firm's prior opinions are reflected in the draft letter dated June 13, 2008, from Mr. Mazurek to then MSF General Counsel Nancy Butler (the "Mazurek Opinion" a draft copy of which is

attached at pages 4-5 of Exhibit B).<sup>1</sup> All three of these opinions concluded that MSF had the legal authority to acquire and own real estate under its own enabling statutes. Additionally, it is worth noting that the Petesch Opinion relied heavily on the provisions of Title 33 as legal support for the ultimate opinions, even before it was expressly applied to MSF by SB 123. *See* Petesch Opinion, p. 2. Mr. Petesch appropriately justified this reliance on the provisions of Montana's Constitution requiring the assets of MSF to be managed as a "prudent expert" would manage assets "in the conduct of a private insurance organization." *See* Petesch Opinion, p. 2 (citing Mont. Const. Art. VIII, Section 13(4)).

### **Summary of Current Opinions**

The prior opinions offered by Ms. Butler and Mssrs. Mazurek and Petesch were well reasoned and remain valid, and were not negatively impacted by SB 123 or any other legislative changes. If anything, the express application of Title 33 to MSF enacted through SB 123 only reinforces and provides even greater clarity to MSF's long-standing legal authority to acquire and own real property. It therefore remains our opinion that MSF may acquire, own and operate real estate, including the Parking Garage, in its own name, and that such property must be considered MSF's sole property. It is also our opinion that the MSF Board possesses the exclusive legal authority to consider and authorize the acquisition by MSF.

### **Basis and Assumptions**

Our opinions are based on the current statutes specifically governing MSF, as well as the statutes governing private insurance carriers, which now apply to MSF. Our opinion is also based on the following factual assumptions:

1. The primary purpose of MSF acquiring the Parking Garage is to provide parking spaces for MSF employees; and
2. Acquisition of the Parking Garage will not cause the aggregate value of MSF's owned real estate to exceed ten percent of MSF's admitted assets.

### **Analysis**

MSF is a "nonprofit, independent public corporation." Mont. Code Ann. § 39-71-2313. MSF has similar powers to perform all functions and exercise the powers of a private insurance carrier that are necessary, appropriate, or convenient for the administration of the state fund." Mont. Code Ann. § 39-71-2316(1)(p). Effective January 1, 2016, MSF is expressly subject to

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<sup>1</sup> While neither of our staffs have been able to locate a signed copy of the Mazurek Opinion, the records of both Crowley Fleck and MSF indicate this letter accurately reflects Mr. Mazurek's final legal conclusions on this matter, and that he communicated those conclusions to Ms. Butler in September of 2008. This letter will serve to reaffirm that earlier opinion, and will provide your formal documentation of our current opinion.

provisions in Title 33 that are generally applicable to authorized workers' compensation insurers, subject to certain exceptions. *See* Mont. Code Ann. § 39-71-2375(1). Under Montana law, private insurance carriers are expressly authorized to acquire, own and operate real estate for the purpose of carrying out their insurance business. Mont. Code Ann § 33-12-307(3). Specifically, Mont. Code Ann. § 33-12-307(3) provides:

- (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.

Mont. Code Ann. § 33-12-307(3).

Given the current use of the Parking Garage for MSF's employee parking, MSF's acquisition and operation of the Parking Garage would satisfy the "convenient accommodation" test. As a result, acquiring the Parking Garage for the purpose of providing parking for MSF employees engaged in the business operations of MSF is directly authorized under Mont. Code Ann. § 33-12-307(3). Further, the presence of excess space or existing leases to other parties does not disqualify MSF from acquiring the Parking Garage for its own operations, because as outlined above, Mont. Code Ann. § 33-12-307(3)(b), expressly authorizes acquisition of real estate that includes excess income producing space.

MSF can hold title to the Parking Garage in its own name, so long as the acquisition and operation meets the other restrictions imposed on MSF. In fact, to the extent that MSF funds are used to acquire the Parking Garage, it must be titled in MSF's own name and shall constitute MSF's "sole property." Mont. Code Ann. § 39-71-2320. However, MSF is subject to a limitation on the percentage of its asset value it can commit to real estate acquired and held for operational purposes. MSF cannot acquire real estate for purposes of meeting its own operation needs if after the acquisition "the aggregate amount of all real estate then held by the insurer under subsection (3) would exceed 10% of its admitted assets." *See* Mont. Code Ann. § 33-12-307(4)(d). For purposes of our opinion, we assume that acquisition of the Parking Garage will not violate the 10% limitation of this statute.

Under the applicable statutory provisions and the assumptions described above, we therefore opine that MSF can acquire, hold title to, and maintain and operate the Parking Garage for conveniently accommodating the operation of MSF's business and providing parking spaces for MSF employees. Further, to the extent space may exist in the Parking Garage which is not needed for its own current ongoing insurance operations, MSF may lease the excess space to others.

Additionally, it is our opinion that the MSF Board has the sole and exclusive authority to authorize MSF's acquisition of the Parking Garage. The Board is the entity charged with "management and control" of MSF. Mont. Code Ann. § 39-71-2315(1) (effective January 1, 2016). Pursuant to Mont. Code Ann. § 39-71-2315(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.

Mont. Code Ann. § 39-71-2315(2). Additionally, the MSF Board is expressly authorized to provide for the office space of MSF. *See* Mont. Code Ann. § 2-15-1019(3); *and* Petesch Opinion, p. 3. Further, MSF is exempt from legislative approval of its finances and the long range building project approval process. *See* Mont. Code Ann. § 39-71-2363(1) (MSF "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."); *and* Petesch Opinion, p. 3-4. As a result, MSF's acquisition of real estate does not require legislative authorization. Therefore, the MSF Board has independent and exclusive authority to consider and authorize the acquisition of real estate, or any other asset, by MSF.

Thank you for the opportunity to assist MSF in this matter. Please contact me with any questions regarding this opinion.

Sincerely yours,

CROWLEY FLECK PLLP



Michael Green

MWG/alc  
Attachments

March 30, 2006

Kris Wilkinson  
Associate Fiscal Analyst  
Legislative Fiscal Division  
Room 110, State Capitol  
P.O. Box 201711  
Helena, MT 59620-1711

Dear Ms. Wilkinson:

I am writing in response to your request for an analysis of the authority of the Montana Board of Investments to construct a new office building for the State Compensation Insurance Fund (State Fund) without legislative approval through the long-range building program. This letter will constitute my analysis.

The proposal has the Montana Board of Investments investing the assets of the State Fund in a new office building to house the Montana State Fund's operations. The State Fund will be responsible for paying the Montana Board of Investments for the rental of the building, which will include a reasonable return on investment. This process would be similar to the process used by the Montana Board of Investments for the construction of the current building that houses the Montana Board of Investments.

Article VIII, section 13(4), of the Montana Constitution provides:

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.

This provision was enacted by Constitutional Amendment No. 34, proposed by Chapter 516, Laws of 1999, and was approved at the general election held November 7, 2000. Although the primary focus of the discussion on this provision concerned investment in private corporate capital stock, the provision explicitly directs the Montana Board of Investments to invest Montana State Fund assets in the same manner that a prudent expert would use in investing the assets of a private insurance organization. Title 33, chapter 12, MCA, governs insurer investments.

Although section 33-1-102(5), MCA, provides that Title 33, MCA, does not apply to the workers' compensation insurance program provided for in Title 39, chapter 71, part 23, MCA, and related sections establishing the State Fund, the provisions of Title 33, chapter 12, MCA, governing permissible investments by private insurance organizations are applicable to the investment of

State Fund assets by the Montana Board of Investments pursuant to Article VIII, section 13(4), of the Montana Constitution. Section 33-1-206(1)(c), MCA, provides that workers' compensation insurance is included as a type of casualty insurance. Investments by private casualty insurance companies are governed by Title 33, chapter 12, part 3, MCA. Section 33-12-307(3), MCA, authorizes a casualty insurance company to acquire real estate for the convenient accommodation of the insurer's business operations and establishes the authority to include excess space for rent to others if the excess space would be a permitted investment under section 33-12-307(2), MCA.

Under this analysis, the Montana Board of Investments may invest the assets of the State Fund in a new office building to house the State Fund's operations if the Board determines that the rate of return will justify the investment as prudent.

The investment analysis is not determinative of whether the construction of a new office building is permissible without legislative approval through the long-range building program. The State Fund is established in section 39-71-2313, MCA, as 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. The State Fund is a unique entity within state government that is a blend incorporating statutes governing private insurance companies and statutes governing state agencies. However, the State Fund is solely a statutory creation and is subject to legislative control through the enactment, amendment, and repeal of the statutes governing the State Fund. In addition, section 39-71-2314, MCA, provides that the State Fund is subject to laws that generally apply to state agencies, including but not limited to Title 2, chapters 2, 3, 4 (only as provided in section 39-71-2316), and 6, and Title 5, chapter 13, MCA. The State Fund is not exempt from a law that applies to state agencies unless that law specifically exempts the State Fund by name and clearly states that it is exempt from that law.

Section 39-71-2320, MCA, provides that 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.

However, State Fund money must be invested by the Board of Investments provided for in section 2-15-1808, MCA, and subject to the investment agreement with the Board of Investments, the earnings on investments are the sole property of the State Fund. In addition, section 39-71-2316(2), MCA, requires the State Fund to include a provision in every policy of insurance issued pursuant to Title 39, chapter 71, part 23, MCA, that incorporates the restriction on the use and transfer of money collected by the State Fund as provided for in section 39-71-2320, MCA. This provision incorporates the constitutional prohibition against the impairment of contracts contained in Article II, section 31, of the Montana Constitution and Article I, section 10, of the United States Constitution and protects those funds against legislative diversion.

Section 2-15-1019, MCA, establishes the Board of Directors of the State Fund and provides that the State Fund is attached to the Department of Administration for administrative purposes only as prescribed in section 2-15-121, MCA, but authorizes the Board to hire its own staff. This provision reflects the condition contained in section 2-15-121(2)(d), MCA, that an administratively attached entity may not hire its own staff unless specifically indicated otherwise

in Title 2, chapter 15, MCA. Section 2-15-121(3)(b), MCA, provides that the department head of a department to which any agency is allocated for administrative purposes only in Title 2, chapter 15, MCA, shall allocate office space to the agency as necessary, subject to the approval of the Department of Administration. However, section 2-15-1019(3), MCA provides that the Board may provide for its own office space and the office space of the State Fund. This provision is inconsistent with section 2-15-121(3)(b), MCA. Section 1-2-102, MCA, provides that in the construction of a statute, the intention of the Legislature is to be pursued if possible. When a general and particular provision are inconsistent, a particular intent will control an inconsistent general provision. This tenet of statutory construction is also reflected in section 1-3-225, MCA.

Therefore, it is my opinion that the Board of Directors of the State Fund may provide office space for the State Fund without seeking an allocation of office space by the Department of Administration even though the State Fund is not specifically exempt from section 2-15-121(3)(b), MCA, as contemplated by section 39-71-2314, MCA.

The long-range building program is provided for in Title 17, chapter 7, part 2, MCA. Section 17-7-201, MCA, defines a building as including a building, facility, or structure constructed or purchased wholly or in part with state money and a building, facility, or structure owned or to be owned by a state agency, including the Department of Transportation. Section 17-7-202, MCA, requires each state agency to submit to the Department of Administration, on forms furnished by the Department, a proposed long-range building program, if any, for the agency or institution. Each agency is also required to furnish any additional information requested by the Department relating to the utilization of or need for buildings. Section 17-7-203, MCA, requires the Governor to submit to the Legislature the requests of all state agencies compiled in the form of a comprehensive, long-range proposed building program containing specifically enumerated information. That section also provides that a building program proposed by the Governor for the ensuing biennium in the form of a capital construction budget is required to include enumerated information including any changes in the law necessary to ensure an effective, well-coordinated building program for the state. Section 17-7-204, MCA, provides that the executive budget for all state agencies must include detailed recommendations for the state long-range building program presented in order of importance by fund type. Each recommendation is required to be presented by agency or branch by funding source, with a description of each proposed project, an explanation of the problem to be addressed by the proposed project, alternative methods of addressing the problem, the rationale for the selection of a particular alternative, and a projection of increased operating costs incident to the project for the next three bienniums.

Section 17-7-102, MCA, defines an "agency" for the purposes of Title 17, chapter 7, MCA, as all offices, departments, boards, commissions, institutions, universities, colleges, and any other person or any other administrative unit of state government that spends or encumbers public money by virtue of an appropriation from the Legislature under section 17-8-101, MCA. Section 17-8-101(1), MCA, implements Article VIII, section 14, of the Montana Constitution by providing that money deposited in the general fund, the special revenue fund type (except money deposited in the treasury from nonstate and nonfederal sources restricted by law or by the terms of an agreement, such as a contract, trust agreement, or donation), and the capital projects fund type, with the exception of refunds authorized in section 17-8-101(4), MCA, may be paid out of

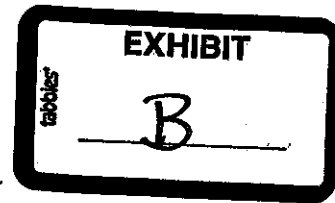
the treasury only on appropriation made by law. Section 39-71-2321(2), MCA, provides that all money deposited in the State Fund may be spent as provided in section 17-8-101(2)(b), MCA. That subsection provides that money may be expended from the state treasury under general laws, or contracts entered into in pursuance of law, permitting the disbursement if a subclass is established on the state financial system. Under this provision, the money deposited in the State Fund is exempt from the appropriation process. Therefore, the State Fund is not an "agency" as defined section 17-7-102, MCA. Because the State Fund is not an "agency" for the purposes of Title 17, chapter 7, MCA, the State Fund is not subject to the requirements of the long-range building program. In addition, section 39-71-2314, MCA, which provides that the State Fund is subject to laws that generally apply to state agencies, does not apply because the State Fund is not a "state agency" for the purposes of Title 17, chapter 7, MCA.

I hope that I have adequately addressed your questions. If I can provide additional information or if this analysis raises other questions, please feel free to contact me.

Sincerely,

Gregory J. Petesch  
Director of Legal Services





Nancy Butler  
General Counsel  
855 Front Street . P.O. Box 4759  
Helena, MT 59604-4759  
Phone: 406-495-5138 . Fax: 406-495-5023  
e-mail: nbutler@mt.gov

## MEMORANDUM

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DATE: September 3, 2015  
TO: Laurence A. Hubbard  
CC: Mark Barry  
Curtis Larsen  
FROM: Nancy Butler

SUBJECT: Parking Garage

Question: May MSF purchase from the City of Helena, the parking garage (land and garage) in use by MSF?

Background and Discussion:

Purchase of a parking garage by MSF would be considered the purchase of property, or stated another way, the acquisition of an asset. Due to the necessity to have a budget approved by the Board for spending authority to make such a purchase, the Board's approval will be necessary. In addition we need to review the Board's and MSF's ability to make the acquisition of a parking garage. It is clear that in accordance with 39-71-2320, MCA, see below, MSF can own property that is "acquired through the use of money belonging to the state fund".

The actual acquisition of a parking garage- (or any other item necessary for the business of MSF) is supported by statutes delineating the Boards and MSF powers. As seen in 39-71-2315, MCA, below, the board may exercise "any power, authority or jurisdiction over the administration of the state fund or in connection with the insurance business" of the state fund. The insurance business includes far more than specific insurance products and functions. Many functions and products in support of the insurance business fall within "administration" of the state fund. Parking for employees that provide the insurance functions, is just such a support or administrative function. MSF has similar powers as provided in 39-71-2316, MCA, below, "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."

In addition, MSF will come under Title 33 effective January 1, 2016. Real estate is addressed in 33-12-307, MCA, and states as follows: "... (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. ....” This statute additionally supports acquisition of real estate for MSF operations. However, it will not be directly applicable until January 1, 2015.

The Board also has the power to provide for the office space of the state fund, see 2-15-1019, MCA, below, “(3) The board may provide for its own office space and the office space of the state fund.” It is a given that office space and parking cannot be disconnected. MSF employees typically drive to work, which is not surprising in our rural state. In addition, public transportation is almost non-existent. Access to parking in Helena is generally not a concern, except when an office is located in a downtown area. This typically means less parking space and an increased density of vehicles in need of parking. The safety and security of employees while parking and walking to the office is important as well as the ability to avoid “slip and falls” due to winter weather. A covered parking structure that is connected to the MSF office building, as is the current structure, more than addresses those needs.

### Summary

MSF may own property that is acquired through its own funds. The Board and MSF have the authority to provide for administration of MSF, and parking for employees (just like furniture and computer equipment) are necessary for the administration of MSF. In addition, Title 33 addresses ownership of real estate by an insurer which provides for accommodation of an insurers business operations. Finally, the Board has authority to provide for office space for MSF and providing parking is an indubitable part of providing office space, particularly in our downtown location.

MSF received a legal opinion in approximately 2008 from the Crowley firm in regards to ownership of real property for office space. We could request an update for their opinion on ownership of real property for a parking garage as well. (see attached letter)

In conclusion, I do not see any legal impediment to the purchase of the parking garage by MSF, if approved by the Board, based on the above analysis.

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**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.

**39-71-2315. Management of state fund -- powers and duties of the 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 [section 1]. Bonds may not be issued by the board, the state fund, or the executive director. (effective 1-1-16)

**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.

**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.  
(2) The board is allocated to the department for administrative purposes only as prescribed in 2-15-121. However, the board may employ its own staff.  
(3) The board may provide for its own office space and the office space of the state fund.

June 13, 2008

Nancy Butler  
[insert title and address]

RE: Acquisition and Ownership of Real Property

Dear Ms. Butler:

You have requested an opinion from our firm regarding the authority of the Montana State Fund ("MSF") to acquire and own real property for purposes of providing office space for MSF's general operations. It is our opinion that MSF may acquire and hold title to real property in its own name, and that such property would be considered MSF's sole property. Our opinion is based on the statutes specifically governing MSF, as well as the statutes governing private insurance carriers.

MSF is the assumed business name of the State Compensation Insurance Fund, created by § 2-15-1019, MCA. MSF is a "nonprofit, independent public corporation." § 39-71-2313, MCA. MSF's Board is authorized to:

perform all acts necessary or convenient in the exercise of any power, authority, or jurisdiction over the state fund, either in 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 . . .

*See* § 39-71-2315(2), MCA. Private insurance carriers are authorized to "acquire, manage, and dispose of real estate for the convenient accommodation of the insurer's or the insurer's affiliates' business operations." § 33-12-307(3), MCA. Moreover, the Board is expressly authorized to provide for its own office space and the office space of the MSF. § 2-15-1019(3), MCA. Under these provisions, we believe the only reasonable conclusion is that MSF can acquire and hold title to real property for the operation of a office facilities for its own business operations.

MSF can hold title to real property in its own name. In fact, to the extent that MSF funds are used to acquire the property, it must be titled in MSF's own name and shall constitute MSF's "sole property." § 39-71-2320, MCA. As a result, MSF's acquisition and management of a new building, would exempt from review by the Department of Administration and the Capitol Complex Advisory Committee, because it would not constitute a "state building." § 2-17-811, MCA. As a result, the MSF Board has independent statutory authority to acquire a new building for purposes of housing the operations of MSF.

Thank you for the opportunity to assist MSF in this matter. Please contact me or Michael Green if you have any additional information.

Sincerely yours,

CROWLEY, HAUGHEY, HANSON,  
TOOLE & DIETRICH P.L.L.P.

Joseph P. Mazurek

JPM:mwg