

No. 434

**COUNTY COMMISSIONERS—CITIES AND TOWNS—  
COUNTIES—GARBAGE DISTRICTS****Held: County commissioners may not include within a garbage and ash collection district any area within the corporate limits of a city.**

June 26, 1942.

Mr. Frank J. Roe  
County Attorney  
Silver Bow County  
Butte, Montana

Dear Mr. Roe:

You have submitted to this office for opinion the question whether the County Commissioners of Silver Bow County may, under the provisions of Section 4465.28, Revised Codes of Montana, 1935, include within a garbage and ash collection district the corporate area of the City of Walkerville. You have expressed your opinion on the question in the following words:

"The more sensible method of dealing with this problem would seem to be to allow the Board of County Commissioners of Silver Bow County to include the area of Walkerville within a garbage and ash collection district to be created by said Board pursuant to the provisions of Section 4465.28. . . . By so doing it would be possible to have garbage collected in the area in and around Walkerville in the same manner as it is done in other parts of Silver Bow County outside the corporate limits of the City of Butte. Such procedure would mean much to the people concerned and would make for improved sanitary and health protection in this county."

With this expression we heartily agree. However, the legal question involved is at to the power of the board of county commissioners to include the corporate area of Walkerville within such a district. Our Supreme Court has on many occasion stated a board of county commissioners has only such powers as are specifically granted by statute, or which are necessarily implied from those granted. In the case of *Edwards v. County of Lewis and Clark*, 53 Mont. 359, 365, 165 Pac. 297, the Court said:

"A county is but a political subdivision of the state for governmental purposes, and as such is at all times subject to legislative regulation and control, except insofar as the Constitution has placed limitations upon the law-making power. (*Hersey v. Neilson*, 47 Mont. 132, 131 Pac. 30.) Within those limitations the legislature may circumscribe or extend the powers to be exercised by a county, as it sees fit. The statutes constitute the charter of a county's power, and to them it must look for the evidence of any authority sought to be exercised. (7 R. C. L. 936.)"

And in the case of *Hersey v. Neilson*, 47 Mont. 132, 145, 131 Pac. 30, where the question involved was as to the authority of the board of county

commissioners of Hill county to let a contract for county printing, the Court said:

"That the authority of the board of county commissioners of Hill county to let a contract for county printing must be found written in the statutes, or necessarily implied, or it does not exist, is well understood." (Citing *State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092.)

The Court continued:

"In *Morse v. Granite County*, 44 Mont. 78, 119 Pac. 286, this court, in speaking of the authority of a county, said, 'Its board of commissioners—its executive body—is a body of limited powers, and must in every instance justify its action by reference to the provisions of law defining and limiting these powers.'"

Section 4441, Revised Codes of Montana, 1935, provides:

"Every county is a body politic and corporate, and as such has the power specified in this code, or in special statutes, and such powers as are necessarily implied from those expressed."

This section was numbered 2870 in the 1907 Codes, and in speaking of it, the Supreme Court, in the case of *Hersey v. Neilson*, *supra*, said:

"Under the doctrine of the maxim, 'Expressio unius exclusio alterius,' the county does not have any powers other than those indicated in section 2870 above. The legislature in its wisdom has seen fit to prescribe the conditions upon which its agents—the counties—may conduct county business, and in the absence of constitutional restrictions the authority to do so cannot be doubted."

To the same effect see also the following cases: *Independent Publishing Company v. County of Lewis and Clark*, 30 Mont. 83, 86, 75 Pac. 860; *Yellowstone County v. First Trust and Savings Bank*, 56 Mont. 439, 450, 128 Pac. 596; *Lewis v. Petroleum County*, 92 Mont. 563, 565, 17 Pac. (2nd) 60.

The only statute governing the power of the board of county commissioners to create garbage and ash collection districts is Section 4465.28:

"The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law: To create, abolish and change garbage collection districts in **thickly settled areas contiguous to corporate limits of cities and not included therein**. Such districts shall be created under rules to be promulgated by said board, which rules shall provide for petition on the part of a majority of taxpayers residing within such areas, for the survey of proposed districts by the county health officer as to boundaries and methods of disposal of garbage and ashes within such districts. When such a district has been created under the authority of this section the county commissioners shall be authorized and empowered to levy not to exceed three mills on the taxable property within such district for the maintenance and support thereof." (Emphasis mine.)

This section is very plain and provides specifically the commissioners may create such a district only in "thickly settled areas contiguous to corporate limits of cities," and "not included therein." Under the authorities above cited, therefore, the board of county commissioners has only such power to create such districts as the statute gives it, i. e., "in thickly settled areas contiguous to corporate limits of cities," and not included in corporate limits of cities. We think the reason for limiting the power of the county commissioners in creating such districts is apparent when we consider the legislature has in Section 5039.6, Revised Codes of Montana, 1935, authorized the cities to create such districts within their respective corporate limits.

It is well also to note Section 4465.28, *supra*, provides:

“When such a district has been created **under the authority of this section**, the county commissioners shall be authorized and empowered to levy not to exceed three mills on the taxable property within such district for the maintenance and support thereof.”

It is only “when the district is created under the authority of this section” the commissioners are authorized to make the levy for its maintenance. If not created as provided in this section, the commissioners would have no authority to make the levy. Therefore, if any area within the corporate limits of the city were included in the district, the commissioners would have no authority to make a levy on the taxable property within such area, and such a levy would be void.

We are advised by a delegation of officials and residents of Walkerville, including the Mayor and councilmen, of the necessity and expediency of having the corporate area of the City of Walkerville included in a district created by the county commissioners under this section. This delegation has made it very clear that, if it is necessary to proceed under Section 5039.6, *supra*, a levy necessary to meet the cost of maintenance would be extremely burdensome—if not prohibitive. It is also very apparent there is an urgent need for such a district from the standpoint of sanitation and health. We are impressed with the enthusiastic and earnest interest shown by the officials of the city.

However, it is but our duty to interpret the statutes as they are written. The Supreme Court of Montana stated in the case of *Franzke v. Fergus County*, 76 Mont. 150, 159, 245 Pac. 962:

“The fact that the contemplated action may be in the best interest of the county is not an admissible argument. The doctrine of expediency does not enter into the construction of statutes.”

It is therefore my opinion the county commissioners may not include within a garbage and ash collection district any area within the corporate limits of a city.

Very truly yours,

HOWARD M. GULLICKSON  
Attorney General