

Opinion No. 210.

**County Commissioners—Holidays,
Meetings Held on—Meetings—Lands—
Business, Transacted on Legal Holidays
by Board of County Commissioners.**

Held: A board of county commissioners may hold a meeting on a legal holiday or a Sunday and transact county business if the business transacted is in the interest of the county and because of an emergency may not with safety be postponed. But in order to claim per diem, the meeting must be a legal meeting of the board, attended by at least a majority of the board. A board of county commissioners may not delegate its authority and duty to determine rate of rent of county properties, determine which county properties should be repaired, and how and to what extent, all of which require the judgment and discretion of the board itself.

May 12, 1944.

Mr. Dan D. Sullivan, Chairman
Board of County Commissioners
Silver Bow County
Butte, Montana

Dear Mr. Sullivan:

You have requested my opinion on the following questions:

1. Do the statutes of the state of Montana, permit the board of county commissioners of a third class county to meet on a Sunday, or a legal

holiday to attend to a condition they deem to be for the best interest of the county?

2. Under the statutes of the state of Montana is the board of county commissioners authorized when they deem it for the best interests of the county, to employ a firm of realtors or some trustworthy and reliable person to collect rents, and recommend to the board any repairs that should be made, to tax deed property held by the county? This involves the collection of rents from hotels, rooming houses, apartments, etc., and necessary repairs to plumbing and other hazardous conditions that may arise?

Section 4462, Revised Codes of Montana, 1935, provides for the regular meetings of the boards of county commissioners on certain days of the month, but specifically excepts its provisions as to time of sessions from application to counties of the first four classes. Therefore, this section does not apply to your board, your county being one of the third class, insofar as time of meetings is concerned. This statute provides for the regular meetings of the board at which regular business may be transacted. Section 4463 provides for other meetings, as follows:

"Such other meetings must be held to canvass election returns, equalize taxation, and other purposes as are prescribed in this code or provided by the board." (Emphasis mine.)

Section 4464, Revised Codes of Montana, 1935, as amended by Chapter 176, Laws of 1939, provides the compensation of members of the board as follows:

"Each member of the board of county commissioners is entitled to eight dollars per day for each day's attendance on the sessions of the board, and seven cents per mile for the distance necessarily traveled in going to and returning from the county seat and his place of residence, and no other compensation must be allowed."

Our Supreme Court has on numerous occasions held that a board of county commissioners is an executive body of limited powers and must in every instance justify its action by reference to the provisions of law defining and

limiting its powers, or those powers which may arise by necessary implication from an express power. (State v. Cronin, 109 Pac. 144, 41 Mont. 293; Ainsworth v. McKay, 175 Pac. 887, 55 Mont. 270; State v. McGraw, 240 Pac. 812, 74 Mont. 152; Yellowstone Packing & Provision Co. v. Hays, 268 Pac. 555, 83 Mont. 1; Judith Basin County v. Livingston, 298 Pac. 356, 89 Mont. 438; Morse v. Granite County, 119 Pac. 286, 44 Mont. 78.)

To determine then whether your board may meet on a Sunday or holiday we must look to some statute granting such power specifically or impliedly. In interpreting statutes, one must apply reason and determine what the legislature reasonably intended from the words used.

In interpreting the statutes above quoted, therefore, it only seems reasonable to assume that the legislature in providing meetings for the board to transact regular business of the county, it meant that such meetings be held only on regular business days. The county board is the business and executive body of the county and therefore should conduct the business of the county only on regularly established business days.

However, by the enactment of Section 4463, Revised Codes of Montana, 1935, providing for other meetings, it is reasonable to suppose that the legislature recognized the fact that conditions might arise when it would be necessary for the board to meet on days other than the regular business days. In other words, emergencies might arise, where it would be necessary that the board meet on a Sunday or legal holiday to transact some important business which, for the best interests of the county, could not be put off until the next day, or which could not be done on a regular business day. Therefore, they provided for extra meetings, for "other purposes as prescribed in this code or provided by the board." It is therefore my opinion that the board may hold a meeting on a Sunday or legal holiday to transact business necessary for the best interest of the county, if such business on account of an emergency may not be transacted on a regular business day. Whether or not an emergency exists at any particular time is a question of fact in each instance.

It must be borne in mind, however, that no business of the board may be transacted except at a meeting of the board, nor may any member claim his per diem, except for attendance upon a regularly called and held meeting of the board. By this I mean that one member may not meet or attend to any business requiring action of the whole board on a Sunday or holiday or any other day and claim his per diem therefor. The business must be of an emergency nature and such as may not be postponed or done on a business day; the meeting must be a legal meeting, the board must be in session, as the statute says, "... eight dollars per day for each day's attendance on the sessions of the board." (See Rankin v. Jauman, 4 Idaho 394, 36 Pac. 1111; Van Siclen v. Queens County, 32 Hun. (N. Y.) 62. Generally see note in 1 A. L. R. 287.)

As to the second question, you have advised me that your county has acquired considerable property through tax deed title. This property consists of business blocks, rooming houses, apartments, etc. The property is rented to business firms, or private individuals as tenants occupying rooms or apartments as living quarters. In order to keep this property occupied it is necessary to keep it in good repair as to plumbing and so forth. This requires constant attention, for the reason that on occasions sewers, water pipes, etc., become in disrepair and need immediate attention in order to prevent further damage to the property or to adjoining property. This has occasioned personal attention at all hours of the day and night. In addition to this, in order to secure the payment of rentals, it is necessary that personal collections be made from tenants, rather than depend upon them coming to the commissioners' offices to pay.

Section 4441, Revised Codes of Montana, 1935, provides that a county is a body politic and corporate and as such has only such powers as are specified in the code, or in special statutes and such powers as are necessarily implied from those expressed. Section 4442 provides that the powers of a county may only be exercised by the board of county commissioners, or by agents, and officers acting under their authority or authority of law.

The Supreme Court of this state has frequently held that a board of county

commissioners may exercise only such powers as are expressly conferred upon it or which necessarily are implied from those conferred, and where there is a reasonable doubt as to the existence of a particular power in the board, it must be resolved against the board and the power denied. (See Lewis v. Petroleum County, 92 Mont. 563, 17 Pac. (2nd) 60; State ex rel. Blair v. Kuhr, 86 Mont. 377, 283 Pac. 758; Simpson v. Silver Bow County, 87 Mont. 83, 285 Pac. 195.)

It may thus be seen that the powers of a board of county commissioners are limited and confined strictly to those conferred by statute, or necessarily implied from those conferred. Therefore, in determining whether a board has a particular power or authority, it is necessary to look to the statutes granting it specifically or determine if such power or authority may reasonably be implied from those granted. The fact situation in each particular case then becomes pertinent.

The general powers of the board are found in Chapter 345 of the Political Code of Montana, 1935, which as applicable here, provides that the board has jurisdiction and power under such limitations and restrictions as are prescribed by law.

4465.21. "To represent the county and have the care of the county property, and the management of the business and concerns of the county in all cases where no other provision is made by law."

4465.24. "To perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government."

It is clear that there is no specific statute giving the board of county commissioners power or authority to employ an individual or firm to collect rents and supervise the repair and maintenance of property belonging to the county and leased or rented. If such power or authority exists, it must be implied from a specific power granted. The statute, Section 4465.21, confers upon the board the power and duty to have the care of county property and the management of the business of the county in all cases where no other provisions are made by law. We are unable to find any specific

statute making it the duty of any official of the county to collect rents or supervise the upkeep, maintenance or repair of county property. The power and duty, if any, therefore must be lodged with the board under the general powers granted or reasonably and necessarily implied from Sections 4465.21 and 4465.24, Revised Codes of Montana, 1935. The only question then presented is as to the mode or exercise of such power or duty. In performing this duty, must the board personally do the work necessary, that is collect the rents, look after the necessary repairs, etc., or may they employ some person to do so?

The Supreme Court has held that whenever a power is conferred upon a board of county commissioners, but the mode in which the authority is to be exercised is not indicated, the board in its discretion may select any appropriate mode of course of procedure. (*Fisher v. Stillwater County*, 81 Mont. 31, 261 Pac. 607; *Arnold v. Custer County*, 83 Mont. 130, 269 Pac. 396.)

When the question of whether the board in doing a certain act has implied authority or power, the courts, in determining the question have considered the particular facts in each case and the circumstances surrounding the transaction.

In the case of *Arnold et al., v. Custer County*, 83 Mont. 130, 269 Pac. 396, the court held a board of county commissioners had implied power to enter into a contract with an abstract company to furnish the needed data in obtaining tract deeds from its tract index.

In the case of *Blair v. Kuhr*, 86 Mont. 377, 283 Pac. 758, the court held that a board of county commissioners had implied power to contract with a company to reclassify, reappraise and revalue all property in the city of Havre.

And in the case of *Simpson v. Silver Bow County*, 87 Mont. 83, 285 Pac. 185, a contract entered into by the board with an individual to furnish the board information to enable it while sitting as a board of equalization to assess and tax property according to law, was held to be within the implied power of the board.

On the other hand, the court held that the board of county commissioners does not have the power or authority to employ counsel in a case to which the county is not a party. (See *Williams*

v. Board of Commissioners of Broadwater County, 28 Mont. 360, 72 Pac. 755.)

In those cases holding that the board has power to contract for the performance of some act or service which will assist the board in performing its duty, the court has considered the specific facts and circumstances of the case before it, and determined the question on the ground that such a contract was a reasonable exercise of the power of the board and was for the best interests of the county. As the court said in the case of *Arnold v. Custer County*, supra, "In the matter of implied powers of boards, when questioned, each case must depend largely upon the facts involved."

It is clear that the duty of renting the property here involved and of collecting the rents and attending to the repairs and maintenance, is that of the board and not of any county official. The question then presents itself, may the board delegate its authority.

In 15 C. J. under the general head of counties, in an article on county commissioners, their powers, authority and duties, under the heading "Delegation of Authority," it is stated at page 465, Section 116:

"The right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent. Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, an employee or a servant." (Emphasis mine.)

(Citing: *House v. Los Angeles County*, 104 Cal. 73, 37 Pac. 796; *People v. Illinois Cent. R. Co.*, 266 Ill. 636, 107 N. E. 803; *Potts v. Henderson*, 2 Ind. 327; *Denison v. Watts*, 97 Iowa 633; 66 N. W. 886; *Carter v. Kruger*, 175 Ky. 399, 194 S. W. 553; *People v. St. Clair County*, 15 Mich. 85; *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. R. 105.) The Supreme Court of this state has approved such rule. (See *State ex rel. Nelson v. Timmons*, 57 Mont. 602, 189 Pac. 871.)

Under the facts here considered, it would seem clear that the duty of collecting rents is purely ministerial and

executive and does not involve judgment or discretion and may be delegated. On the other hand, however, the duty of fixing the amount of rent and amount of repairs to property, would entail judgment and discretion and may not be delegated by the board, but must be performed by the board itself.

I think the situation here with reference to making repairs, etc., is similar to the facts in the *Nelson v. Timmons* case, *supra*, where our Supreme Court in holding that the board could not delegate its authority to making purchases for those needing relief, said:

“The plan contemplated by the board undertakes to confer upon the applicant for relief the authority to make the purchases, determine the quality and price, and bind the county by his judgment.”

A contract, therefore, involving the fixing of rents, collecting thereof, repairing and maintaining county property, is in part valid and in part invalid. However, this does not make the entire contract invalid. As is said in 15 *Corpus Juris*, page 547:

“Where only a part of the services contracted for in a particular case are within the power of the board to engage, the contract is nevertheless valid as to that part.” (Citing *Galveston County v. Ducie*, 91 *Tex.* 665, 45 *S. W.* 798.)

It is therefore my opinion:

1. That a board of county commissioners may hold a meeting on a legal holiday or a Sunday and transact county business if the business transacted is in the interest of the county and because of an emergency may not with safety be postponed. But in order to claim *per diem*, the meeting must be a legal meeting of the board, attended by at least a majority of the board.
2. That a board of county commissioners may not delegate its authority and duty to determine rate of rent of county properties, determine which county properties should be repaired, and how and to what extent, all of which require the judgment and discretion of the board itself.

Sincerely yours,
R. V. BOTTOMLY
Attorney General