

Opinion No. 59.

Schools and School Districts—
Budget, School—Board of School
Budget Supervisors—Election,
School—Levies, school District—
Taxes, School District.

Held: When, after the adoption of the preliminary budget for a school district, it is found that the amount which will be received from the district ten (10) mill levy and from all other sources during the ensuing school year, will not be sufficient to meet and take care of the expenditures proposed to be made during such year, the board must determine and make an estimate of the amount of such deficiency and the number of mills of additional levy required to be made and must call an election to be held prior to July 1, at which election such levy must be submitted to the electors.

The provision of the statute that such election shall be held before July 1, is directory only if suit is instituted to test the validity of the election after it has been held.

If no suit is brought to restrain the holding of the election after July 1, an election held at such time will be valid and any levy authorized at such election will be legal, providing all other requirements of the statute relative to the calling, holding and determination of such election are complied with.

If such election is held after July 1, it must be held in time to permit the board of county commissioners to make the levy and extend the same upon the tax roll, as provided by law.

August 2, 1945.

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

Dear Mr. Roe:

I have your letter in which you enclose a request for an opinion from the board of school budget supervisors, with reference to a question arising during the consideration of the elementary budget of Rocker School District No. 2.

It appears from the facts given that in figuring the cash balances of this particular school budget, the total sum of registered warrants for the school year ending June 30, 1944, was not taken into consideration when the cash balances of said district were submitted to the county superintendent. This mistake was discovered after the board was in session, and it now appears that the present amount of outstanding and registered warrants reach the sum of \$1,230.90. The taxable valuation of the Rocker school district and the amount of revenue which may be brought in, together with the balance on hand, will total \$4,142.90. Adding this amount to the registered warrants would make an aggregate sum of \$5,373.80. It thus appears that there will not be sufficient moneys from the levy allowed by law and all other sources to maintain this school for the ensuing year.

Upon consideration of this subject, and after reviewing all pertinent statutes, it occurs to me that the only remedy in this situation is as provided under Section 1019.7, Revised Codes of Montana, 1935, which provides as follows:

"If, after the board of school trustees of any district has adopted the preliminary budget for such district for the ensuing school year it appears to such board that the amount which will be received from a district ten (10) mill tax levy and from all other sources during such ensuing school year, for the general fund of such district, as shown by the county superintendent's estimate of revenues, will not be sufficient to meet and take care of expenditures proposed to be made during the ensuing school year from such general fund, as contained in such preliminary budget, the board must determine and make an estimate of the amount of such deficiency and the number of mills of additional levy required to be made to meet and take care of such deficiency, and must call an election, in the manner prescribed by law, for the purpose of obtaining the approval of the qualified electors of the district to the making of such additional levy, and such election must be held before the 1st day of July; provided, however, that if it appears to the board of school trustees of any district at any meeting thereof held prior to the general school election on the first Saturday in April, that a levy in excess of ten (10) mills will be required to maintain the schools in such district during the next ensuing school year, such board of trustees may determine the number of mills so required in excess of ten (10) mills, and may submit the question of such additional levy at the next ensuing general school election."

It will be noted, of course, that this section provides that the election "must be held before the 1st day of July." However, our Supreme Court had occasion to construe this statute in the case of *Chicago, etc., Railroad Co. v. Fallon County*, 95 Mont. 568, 28 Pac. (2d) 462, wherein it held that the requirement for the holding of the election before the 1st day of July was directory and not mandatory. The court said at pages 578 and 579 of the Montana Report:

"The only purpose in providing that the election must be held before July 1st was to have the question determined in time to prepare the budget and make the levy . . .

"The act in question (referring to

Section 1019.7, supra) bears evidence that the intention of the legislature was not to limit the power to hold an election at a later date than that specified, but to insure its timely exercise . . .”

With reference to the case cited, it may be well to point out here that this case was one brought to recover taxes paid under protest, on the ground that the election was invalid having been held after July 1. On this point the court said:

“In considering whether the quoted language is mandatory or directory, we point out that the attack here made comes after the election, and not before. That this is an important fact is shown by the rule adopted by this court, from the case of *Jones v. State ex rel. Wilson*, 153 Ind. 440, 55 N. E. 229, 233, in the case of *Goodell v. Judith Basin County*, 70 Mont. 222, 224 Pac. 1110, and reaffirmed in *Weber v. City of Helena*, 89 Mont. 109, 297 Pac. 455, as follows: ‘All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election or that its omission shall render it void.’”

And on the question of whether a provision of a statute is mandatory or directory, the court further said:

“While there is no absolute test by which to distinguish mandatory from directory provisions of a statute, language however mandatory in form, may be deemed directory whenever ‘the legislative intent does not require a mandatory construction’ (59 C. J. 1073). ‘Whether a statute is mandatory or directory depends on whether the thing directed to be done is of the essence of the thing required, or is a mere matter of form. Accordingly, when a particular pro-

vision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly and prompt conduct of business, it is generally regarded as directory, unless followed by words of absolute prohibition; and the same is true where no substantial rights depend on the statute, no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner other than that prescribed, with substantially the same results.’ (51 C. J. 1074.)”

Therefore, it is my opinion:

1. When, after the adoption of the preliminary budget for a school district, it is found that the amount which will be received from the district ten mill levy and from all other sources during the ensuing school year will not be sufficient to meet and take care of the expenditures proposed to be made during such year, the board must determine and make an estimate of the amount of such deficiency and the number of mills of additional levy required to be made and must call an election to be held prior to July 1, at which election such levy must be submitted to the electors.

2. The provision of the statute that such election shall be held before July 1, is directory only if suit is instituted to test the validity of the election after it has been held.

3. If no suit is brought to restrain the holding of the election after July 1, an election held at such time will be valid and any levy authorized at such election will be legal, providing all other requirements of the statute relative to the calling, holding and determination of such election are complied with.

4. If such election is held after July 1, it must be held in time to permit the board of county commissioners to make the levy and extend the same upon the tax roll, as provided by law.

Sincerely yours,

R. V. BOTTMOLLY,
Attorney General