

Opinion No. 27

**Airports—Joint Participation—
County and City or Town—County,
Interest in, Contribution by. Lease of
Land—Board of County Commission-
ers, Contract Beyond Term of any
Board Member—Lease, Reentry Pro-
vision—Contracts—Levy of Taxes
for Airports.**

- Held:**
1. A county must have an interest in airport land to devote tax funds to it;
 2. A county may lease land for joint participation in establishing an airport;
 3. A board of county commissioners may enter into a contract extending beyond the terms of the members constituting the board at the time the contract is entered into;
 4. The terms of a lease are discretionary with the board of county commissioners, acting in its official capacity and within the limits of its authority;
 5. The contract will be governed by the provisions of Section 4444, Revised Codes of Montana, 1935. A two mill levy may be made by each of the participating units, that is, the county and city or town may each make the two mill levy.

April 11, 1947

Mr. John M. Comfort
County Attorney
Madison County
Virginia City, Montana

Dear Sir:

You have requested my opinion on the following questions. Each question will be taken up separately.

1. Is it necessary before the board of county commissioners can contribute tax money to a town as joint participation in the establishing, maintenance and equipping of an airport that the county have an interest in the airport land either by way of lease or joint ownership?

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

"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."

In the case of *Yellowstone Packing Co. v. Hays*, 83 Mont. 1, p. 11, 268 Pac. 555, (1928) our court said:

"Aside from powers expressly conferred by statute and those of necessity implied, it (a county) possesses none, and where a reasonable doubt exists as to the existence of a particular power, it must be resolved against it. . . Necessarily, the same rule applies to the board of county commissioners of counties. . . They are inferior tribunals of special and limited jurisdiction, and their actions must affirmatively appear to be in conformity with some provision of law conferring power on them, expressly or by implication, or it will be held to be without authority."

The following cases take the same position as the above:

Judith Basin County v. Livingston (1931) 89 Mont. 438, 298 Pac. 356; *Lewis v. Petroleum County*, 92 Mont. 563, 17 Pac. (2d) 60; *State ex rel Wilson v. Weir*, 106 Mont. 526, 79 Pac. (2d) 305.

The only clear authority for a county to aid in the establishment of an

airport without having a joint interest therein, is contained in Section 4444.3, Revised Codes of Montana, 1935, which follows:

"That any county of this state is hereby authorized and empowered to enter into a contract upon such terms and conditions as it may deem proper, with any incorporated city or town within the limits of said county, to equip, maintain, or improve any municipal airport or landing field owned and operated as such by said city or town, or to purchase, equip, maintain and improve, jointly with any such city or town, an airport or landing field; provided, however, that the amount of money that may be so appropriated by said county shall not exceed in any one (1) year, a sum in excess of an amount equal to one-half ($\frac{1}{2}$) mill levy on the taxable value of all property for tax purposes within said county, for the year in which said appropriation is made."

No provision of Section 5668.35 through 5668.39, Revised Codes of Montana, 1935, as amended by Chapter 54, Laws of 1941, and Chapter 54, Laws of 1945, authorizes participation by the county in establishing airports in any manner except ". . . individually or by the joint action of a county and one (1) or more of the cities and towns within its border. . . ." Thus, the county must have an interest in airport land as a joint-participant to devote tax funds to it by the provision of Section 5668.35, as amended. Under Section 4444.3, Revised Codes of Montana, 1935, contribution may be made to a municipal airport without any interest therein in the county.

2. If the answer to question one is in the affirmative can the county require that its interest in the airport land be by way of ownership of an undivided part rather than by way of a lease?

Although Section 5668.35, Revised Codes of Montana, 1935, as amended, provides that acquisition may be by gift, deed, purchase, or condemnation, land for airport or landing field purposes, the section further provides that there may be used "for such purpose or purposes any property suit-

able therefor that now or may at any time hereafter be acquired, owned or controlled by such county, city or town."

Section 4465.7, Revised Codes of Montana, 1935, provides in part:

"The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law; to purchase, receive by donation, or lease any real or personal property necessary for the use of the county, preserve, take care of, manage and control the same . . ."

The board of county commissioners having a limited authority to **lease any real property necessary for the use of the county**, impliedly has discretionary power to determine what is necessary for the use of the county.

The case of *Bennett v. Petroleum County*, 87 Mont. 436, p. 445, 288 Pac. 1018, involved construction of Section 4465.6 and 4465.7, Revised Codes of Montana, 1935, as amended. Section 4465.6 allows county commissioners, "when there are no suitable buildings, to provide suitable rooms for county purposes." The pertinent portion of Section 4465.7 has been set out above. At page 445, the court says:

"The board of county commissioners is clothed with authority to lease any real property necessary for county purposes 'when there are no necessary county buildings' the words just quoted from the statute clearly have reference to a present proprietorship of such buildings by a county; and were not intended to refer to other like property temporarily held and used under lease from the owner for similar county purposes. The necessity for leasing the property in question was in our opinion addressed to the sound judgment and discretion of the board of county commissioners."

The principle expressed above seems applicable here, so the sound discretion of the board of county commissioners will govern the matter of a lease insofar as Section 4465.7 is concerned.

Section 5668.35 makes no specific provision for a lease, but does pro-

vide for the use of land "controlled" by the county for airport purposes. If the board of county commissioners under Section 4465.7, at its discretion, leases land for airport purposes, as necessary for the use of the county for joint participation with a town or towns in establishing an airport, the county should by virtue of the terms of the lease, "control" such land and come within Section 5668.35, as amended. By Section 5668.36, Revised Codes of Montana, 1935, as amended, land "controlled" for airport purposes is "controlled" for a public use and as a matter of public necessity.

From the above, I conclude that the board of county commissioners may lease land for joint participation with a town or towns in establishing an airport. Since the matter of joint participation is discretionary under Section 5668.35, as amended, I do **not** conclude that any particular type of interest or estate in the land is necessary or to be required. The joint participation at its inception is voluntary and subject to terms, as their respective powers allow, agreed upon by the participants.

3. In its joint participation with a town in maintaining or equipping an airport, how can the county validly contract with the town to contribute tax money, raised under Section 5668.38, Revised Codes of Montana, 1935, as amended by Chapter 54, Laws of 1945, in a certain apportioned amount for a period of time beyond the terms of members of the board making the contract

The answer to this question lies in the following language of the court in *Bennett v. Petroleum County*, *supra*, pages 446, 447:

"However, the respondent further contends that the contract is void since it purports upon its face to extend the county's obligation beyond the term of office of members of the existing board of county commissioners when the contract was made. The statute authorizes the board of county commissioners as a legally constituted entity, acting for the county, among other things, to lease real property necessary for use of the county, and to provide suitable rooms for county purposes

when there are no necessary county buildings. (Sec. 4465, Rev. Codes 1921, as amended by Chap. 38, Laws of 1929.) In this respect, there is no further limitation or restriction placed on the board, and no time limit fixed as to the term of any lease of such property. While the board of county commissioners, in dealing with county business, is possessed of only such authority as is especially conferred upon it by statute or necessarily implied (State ex rel Blair v. Kuhr, 86 Mont. 377, 382 Pac. 758), here the authority is expressly conferred to lease a building for county purposes when no such building is owned by the county, and is necessary. The statute specifically confers the power to so contract upon the board of county commissioners, the body existing at the time, and the mere fact that the term of office of a member of the body which so contracts may expire before the contract, does not in any manner affect its validity. Were the rule of law otherwise, the business of counties would be very greatly hampered and at times suspended, with resulting damage. The board of county commissioners functions for the municipal corporation in its authorized powers as a continuous body, and while the personnel of its membership changes, the corporation continues unchanged. The county has power to contract, and its contracts are the contracts of its board of county commissioners, not of the individual members thereof."

From the above, it is clear that a board of county commissioners can enter into a contract of the type in question extending beyond the term of office of any of the members in office at the time the contract is made.

4. If a lease arrangement is proper between the county and a town owning the airport land or between a private owner and the town and county jointly participating in the airport expenses, can a provision be validly put in the lease whereby the land will revert to the town or private owner in case the county fails in the future to contribute tax money raised under the levy specified by Section 5668.38

R.C.M. 1935, as amended by Chapter 54 of the Laws of 1945?

Simpson vs. Silver Bow County, 87 Mont. 83, p. 92, 285 Pac. 195 states what has been repeatedly held by our Court:

"It is fundamental that a board of county commissioners may exercise only such powers as are expressly conferred upon it by law or necessarily implied from those expressly granted; but it is equally true that, when powers are granted to the board, and no mode of exercise is indicated, the board may in its discretion select any appropriate mode or course of procedure."

Section 4465.21, Revised Codes of Montana, 1935, provides:

"The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law: 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."

Section 4465.7, quoted above, provides in part for leasing of real or personal property necessary for the use of the County by the county commissioners. No mode of exercise of the leasing powers of the county commissioners is prescribed. Where the property leased is necessary for the use of the county, the discretion of the board of county commissioners will govern the terms of the lease. A provision for reentry by the lessor upon failure of the county to contribute tax money raised for airport purposes under Section 5668.38, Revised Codes of Montana, 1935, as amended, would be valid if approved by the board.

5. In respect to contracts and the levy of taxes for establishing and maintaining of airports by joint action of a town and a county does Section 4444.3 R.C.M. 1935 or Sections 5668.35-5668.38 inclusive, R.C.M. 1935 as amended govern as to terms?

Section 4444.3, insofar as it provides for joint purchase, equipment, maintenance and improvement of an airport, is in conflict with sections 5668.35 through 5668.39, Revised

Codes of Montana, 1935, as amended, and is repealed by implication. The former section provides for a one-half mill levy, the latter sections for a two mill levy for airport purposes. The latter sections are also detailed and specific in providing for joint participation, while section 4444.3 is general.

Sections 5668.35 through 5668.39, as amended, and Section 4444.3 pertain to the same subject in providing for joint participations. They are in conflict as to the authorized levy and method of obtaining joint participation. Sections 5668.35 through 5668.39, as amended, were more recently enacted and therefore work an implied repeal of that portion of Section 4444.3 providing for joint participation. The principle of implied repeal is stated in *State ex rel Jackson v. District Court*, 107 Mont. 30, 33, 79 Pac. (2d) 665;

"Repeals by implication are not favored. Where two Acts of the Legislature deal with the same subject, effect must be given to both, if possible. But if their provisions are so repugnant as to be irreconcilable, or if the later Act is inconsistent in its provisions with the first, and plainly shows upon its face that it was the intention of the Legislature in enacting it that it should be the only law on the subject, the prior statute is to be treated as repealed by it. (*Territory ex rel Largey v. Gilbert*, 1 Mont. 371; *Lane v. Commissioners of Missoula County*, 6 Mont. 473, 13 Pac. 136; *Dunn v. City of Great Falls*, 13 Mont. 58, 31 Pac. 1017; 1 *Sutherland on Statutory Construction*, sec. 138)."

In *State ex rel. Wilson v. Weir*, 106 Mont. 256, 534, 79 Pac. (2d) 305, the court stated:

"We recognize and approve the rule that repeals by implication are not favored. However, if the last Act is in conflict with a prior law on the same subject, the last one controls and works an implied repeal, and this even though the legislature does not see fit to either expressly repeal it, or even to expressly state that the last Act repeals all Acts or parts of Acts in

conflict with the latter." (Emphasis mine)

Repeal by implication of an inconsistent portion of a statute by a later act is discussed in *State ex rel Esgar v. District Court*, 56 Mont. 464; 185 Pac. 157. At page 468 the court states:

"It is further firmly settled, not only by repeated decisions of this court, as well as those of courts of the highest character throughout the country, but also by the text-writers upon the subject, that if one statute conflicts with a portion of another, so as to exhibit an inconsistency, then the inconsistent portion of the previous statute cannot stand, and is said to be repealed by implication. When two statutes conflict, the subsequent repeals the former by implication only so far as it conflicts therewith." (*United States v. 196 Buffalo Robes*, supra; *State ex rel Eagye v. Bawden*, supra; *Diver v. Koekuk*, 126 Iowa, 691, 3 Ann. Cas. 669, 102 N.W. 542; *Chicago etc. Ry. Co. v. McElroy*, 92 Ark. 600, 123 S.W. 771; *Blackwell v. State*, 45 Ark. 90; 36 Cyc. 1973, and cases there cited; *Sutherland on Statutory Construction*, sec. 152; *Lewis' Sutherland on Statutory Construction*, secs. 247, 355) . . .

"Every piece of legislation is enacted for the purpose of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment. A partial repeal of a statute may be accomplished by a partial repugnancy of another statute—the rule being that the repeal extends only so far as the repugnancy extends, and leaves all the remainder in full force. (*Quinette v. St. Louis*, 76 Mo. 402; *County Court v. Griswold*, 58 Mo. 199; *Makner v. Faulhaber*, 94 Mo. 430, 6 S.W. 372; *Van Rensselaer v. Snyder*, 9 Barb. (N.Y.) 308; *Harrington v. Trustees*, 10 Wend. (N.Y.) 550; *Dean vs. Bliss*, 5 Beav. 582; *Bowen v. Lease*, 5 Hill (N.Y.) 225; *Williams v. Potter*, 2 Barb. (N.Y.) 316.)

"In *Stadler v. City of Helena*, 46 Mont. 126, 139, 127 Pac. 458 the fol-

lowing rule of construction, peculiarly applicable to the question now under consideration, was quoted with approval by Mr. Justice Holloway: "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together, and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special will prevail over the general statute."

Contracts under section 4444.3 are thus limited to aid of **municipal airports** by a one-half mill levy by the county. Contracts under sections 5668.35 through 5668.39, as amended, are authorized by the general powers set out in section 4444, Revised Codes of Montana, 1935, which provides in part:

"It (the county) has power:

"3. To make such contracts . . . as may be necessary to the exercise of its powers."

Hence, where joint participation is involved, the contract would be under Section 4444, supra.

With the implied repeal of **that portion** of section 4444.3 which provides "or to purchase, equip, maintain and improve jointly with any such city or town, an airport or landing field," by the specific provisions of sections 5668.35 through 5668.39, as amended, in joint participation the county and the cities and towns participating may each levy a two mill tax.

Section 5668.38, Revised Codes of Montana, 1935, as amended, provides in part:

"For the purpose of establishing, constructing, equipping, maintaining and operating airports and landing fields under the provisions of this act the county commissioners of (sic) the city or town council may each year assess and levy in addition to the annual levy for general administrative purposes a tax of not to exceed two (2) mills on the dollar of taxable value of the

property of said county, city or town. In the event of a jointly established airport or landing field, the county commissioners and the council or councils involved shall determine in advance the levy necessary for such purposes and the proportion each political subdivision joining in the venture shall pay, based upon the benefits it is determined each shall derive from the project."

This section, read with its companion sections, clearly shows the legislative intent to authorize joint participation by a county with a city or town in establishing an airport. It provides the only means of raising revenue for such purpose in view of the implied repeal of the portion of section 4444.3, Revised Codes of Montana, 1935, providing for joint projects. The two mill levy authorized in section 5668.38, as amended, is not subject to apportionment between the participating county and city or town for joint participation" . . . the county commissioners, of (sic) the city or town council may each year assess and levy in addition to the annual levy for general administrative purposes a tax of not to exceed two (2) mills. . . ." To construe "or" to limit the two mill levy to any one of the subdivisions of government listed would mean no power of raising revenue in the other units.

Without each unit having authority to raise revenue, no joint participation would be possible. To carry out the legislative intent of joint participation, "or" must be construed to mean "and", as has been done by our court to effectuate legislative intent in *State ex rel Carry v. Cooney*, 70 Mont. 355, 225 Pac. 1007, and *State ex rel Williams v. Kamp* 106 Mont. 444, 452, 78 Pac. (2d) 585.

It must be remembered that individual action by counties, cities or towns to establish airports is authorized. A two mill levy can be made to carry out individual action by these units. No provision is made for a different levy if joint participation occurs. Section 5668.38, as amended, provides in part:

"In the event of a jointly established airport or landing field, the

county commissioners and the council or councils involved shall determine in advance the levy necessary for such purposes and the proportion each political subdivision joining in the venture shall pay . . . " (Emphasis mine).

In joint participation, the levy is determined and the proportion each subdivision is to pay is fixed. No limitation upon the levy by a unit or subdivision is set by the above portion of the section, for the maximum of two mills is fixed by a preceding portion of the section.

From the above, it is apparent that each subdivision participating in an airport project can make up to a two mill levy for airport purposes. As a result, taxpayers in cities or towns participating in joint airport projects with counties could be subjected to a maximum 4 mill levy for airport purposes under Section 5668.38, as amended. A two mill levy by the city or town and a two mill levy by the county on property within the city or towns would be about the 4 mill levy.

However, this does not constitute double taxation or violate the uniformity of taxation provisions of the Constitution (Section 11, Article XII). The taxes levied are for the same purposes, but are levied by different jurisdictions authorized to tax, viz., counties, cities and towns. The principle stated in *State ex rel Siegfriedt v. Carbon County*, 108 Mont. 510, 514, 92 Pac. (2d) 301, is applicable here:

"Since a township and city is embraced within its territorial limits are wholly distinct municipal corporations and are organized for different purposes, each may exercise the taxing power for road purposes within its own territorial limits without reference to the exercise of like powers by the other, and hence the fact that a statute authorizing the levy of a tax for road purposes by townships does not exempt property within cities embraced therein, which also have a right to levy taxes thereon for the same purposes, does not render it invalid as violating constitutional provisions requiring uniformity of taxation and prohibiting double taxation."

Therefore, a two mill levy by each participating subdivision is authorized and may be levied.

Insofar as the opinion in Vol. 19, Opinions of Attorney General, page 270, numbered 166, is in conflict with this opinion it is hereby expressly overruled.

It is, therefore, my opinion that under Sections 5668.35 through 5668.39, Revised Codes of Montana, 1935, as amended:

(1) A county must have an interest in airport land to devote tax funds to it;

(2) A county may lease land for joint participation in establishing an airport;

(3) A board of county commissioners may enter into a contract extending beyond the terms of the members constituting the board at the time the contract is entered into;

(4) The terms of a lease are discretionary with the board of county commissioners, acting in its official capacity and within the limits of its authority;

(5) The contract will be governed by the provisions of Section 4444, Revised Codes of Montana, 1935. A two mill levy may be made by each of the participating units, that is, the county and city or town may each make the two mill levy.

Sincerely yours,
R. V. BOTTOMLY
Attorney General