

nasium in the bond election ballot is surplusage and the location of the site must be determined as an independent matter.

2. That the preliminary work in the construction of a county high school gymnasium may be done by the county and funds realized from bonds used in such work.

December 27, 1946.

Honorable Leon C. Olmstead
Senator from Sweet Grass County
Big Timber, Montana

Dear Senator Olmstead:

You have requested my opinion concerning the following:

The ballot submitted in a bond election for the construction of a gymnasium for the county high school recited the purpose of the bond issue was the "constructing and erecting a high school gymnasium on Lots 6, 7, 8, 9 and 10 (or a portion thereof) of Block 27 in Boulder Addition No. 1 to the City of Big Timber, Montana."

1. You ask if the gymnasium may be constructed on lots other than those described in the ballot.

2. You ask if the foundation may be constructed with the use of county machinery or if the whole building must be built by a contractor after bids are called for and the best bid accepted.

Your first question concerning the inclusion in the ballot of the location of the building raises a serious problem. Section 4630.11, Revised Codes of Montana, 1935, provides that "If bonds are sought to be issued for two (2) or more purposes, then separate ballots must be provided for each purpose." The location of the building is not a bonding proposition and therefore does not violate this section. However, the qualified electors for a county bond issue must be taxpayers—Section 4630.12, Revised Codes of Montana, 1935, as amended by Chapter 138, Laws of 1939—while there is not the requirement of being a taxpayer for eligibility to vote on the question of the acquisition, sale or change of a site for a school building. Section 1262.83, Revised Codes of

Opinion No. 3

School Sites—School Bond Elections.

Held: 1. That the inclusion of a site for a high school gym-

Montana, 1935, as amended by Chapter 207, Laws of 1939, and Section 1002, Revised Codes of Montana, 1935, as amended by Chapter 83, Laws of 1939, and Chapter 65, Laws of 1941.

The inclusion of the proposed site in the ballot for the bond issue does not invalidate the bond issue. In *State v. School District*, 97 Mont. 358, 34 Pac. (2d) 522, our Court considered a bond election at which the selection of a school site was also submitted. The Court said:

"It will be observed that the site matter was submitted at the first election on a separate ballot and in a qualified manner. . . . Did the submission of the question constitute fraudulent misrepresentation to the voters? We do not see how it could have done so. There is nothing in the record before us to support the allegation that anyone was influenced to vote for the bonds by reason of the site matter. There is no evidence that the submission of that subject even in the qualified manner affected the result."

While the site was incorporated in the ballot in your election, yet the reasoning of the above quoted case would apply and would in effect put the burden on the taxpayer who complains to show that there was a sufficient number who were misled.

Also, the lots described are a portion of the present high school site and are owned by the county. Without question the board has the authority to construct the building on a portion of the high school site. The fact the description of lots which are a portion of the high school site was included in the ballot makes one of the conclusions expressed in *Morse v. Granite County*, 44 Mont. 78, 119 Pac. 286, pertinent:

"That the electors have been asked to give their consent to things which the board may or must do without such consent, may not be held to restrict the discretion lodged in it by statute."

If the lots in question were contiguous to the high school and not owned by the county, the board would have the authority without consult-

ing the electorate to purchase the same. Section 1262.83, Revised Codes of Montana, 1935, as amended by Chapter 207, Laws of 1939. Such a situation would come within the rule of the *Morse* case, *supra*. However, if non-contiguous lots were to be used for the building, the electorate would have to be consulted under Section 1262.83, as amended, and such an election would be independent of the bond election.

It is, therefore, my opinion that the inclusion of a site for a high school gymnasium in the bond election ballot is surplusage and the location of the site must be determined as an independent matter in accordance with Section 1262.83, Revised Codes of Montana, 1935, as amended by Chapter 207, Laws of 1939.

The lots described in the ballot under consideration are a portion of the present school site and, therefore, their inclusion in the ballot constitutes surplusage.

If lots other than those described are to be used for the gymnasium site, then it will be necessary to proceed in accordance with Section 1262.83, Revised Codes of Montana, 1935, as amended by Chapter 207, Laws of 1939. Under that section, approval of the electorate is necessary if the lots are not contiguous or part of a previously authorized site.

Your second question is also answered by Section 1262.83, Revised Codes of Montana, 1935, as amended by Chapter 207, Laws of 1939, which requires that "all boards of trustees of county high schools, or districts maintaining high schools, shall be prohibited from letting any contracts for building, furnishing, repairing or other work for the benefit of the school" without submitting the matter for bids. It is to be noted that the prohibition applies to letting of contracts, and your proposal is to use county machinery for preliminary work and subsequently submit for bids the balance of the construction. Section 1262.83, as amended, states that the board of trustees shall have the power "at its discretion as restricted by law to build . . . high school gymnasiums." The letting of bids would be restricted by law, as

above noted, but if the preliminary work is done by the county, then the provisions concerning bids would not be applicable.

It is, therefore, my opinion that the preliminary work in the construction of a county high school gymnasium may be done by the county and funds realized from bonds used in such work.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General.