

Opinion No. 113**Cemetery—Public Cemetery District Act—Tax for Operating Revenue—
Elections, General and Primary Distinguished—Cities.**

- Held:**
- 1. County commissioners may acquire property for county cemetery purposes from an incorporated city or town only pursuant to Chapter 2 of Title 9, Revised Codes of Montana, 1947.**
 - 2. The tax for the purpose of raising funds for operation of a cemetery district are to be levied pursuant to Section 9-209, Revised Codes of Montana, 1947.**
 - 3. A primary election is not a general election within the meaning of Section 9-205, Revised Codes of Montana, 1947.**

June 2, 1950.

Mr. Bert W. Kronmiller
County Attorney
Big Horn County
Hardin, Montana

Dear Mr. Kronmiller:

You have submitted the following questions for my opinion:

1. May the county acquire an existing cemetery from an incorporated municipality under either Chapter 2 or Chapter 4 of Title 9, Revised Codes of Montana, 1947?
2. How are taxes to be levied for the operation and maintenance of a cemetery acquired by the county?
3. The contingent inquiry as to whether or not the election required under Chapter 2 of Title 9, Revised Codes of Montana, 1947, may be held at the time of the primary election in your county?

Please take note that all further statutory references made throughout this opinion are to the Revised Codes of Montana, 1947.

It is well settled law in Montana that the County Commissioners have only such power and authority as has been granted to them by the State Legislature. (Chapter 8 of Title 16; *Sullivan v. Big Horn County*, 66 Mont. 45, 212 Pac. 1105; Opinion No. 123, Volume 22, Reports and Official Opinions of Attorney General). Likewise a city's power and authority emanates from statutes and no acts may be exercised by the city unless there is an express law or the act is deemed authorized by necessary implication therefrom. (*State ex rel. Great Falls Housing Authority v. City of Great Falls, et al.*, 110 Mont. 318, 100 Pac. (2d) 915 and cases cited therein).

Sections 9-305 and 9-306 which were first enacted as Sections 2884 and 2885 in our 1895 Political Code, declared that incorporated cities and towns were to have jurisdiction over their burial grounds—the same Sections gave the County Commissioners control and authority over cemeteries which unincorporated municipalities owned. These Sections are quoted below. You will note that the power to regulate and to tax for the operation and purchase of the cemetery is given to the authorities having the jurisdiction granted in Section 9-306.

Section 9-305 (5172) "Public cemeteries, under whose control The public cemeteries of cities, towns, villages, or neighborhoods must be inclosed and laid off into lots, and the general management, conduct, and regulation of internments, permits to inter, or to remove interred bodies, the disposition of lots, keeping the same in order, are under the jurisdiction and control of the cities and towns owning the same, if incorporated; if not, then under the jurisdiction and control of the Board of County Commissioners of the county in which they are situated."

Section 9-306 (5173) "Who exercise jurisdiction and control over. The Board of County Commissioners, City Trustees, or other corresponding authorities having jurisdiction and control of cemeteries, may make general rules and regulations therefor, and appoint sextons and other officers to enforce obedience to the same, with such other powers and duties regarding the cemetery as they may deem necessary, including the right by taxation to raise money, purchase land, and lay out cemeteries, and manage them."

The 1919 enactment of what is now Section 9-401 gave the County Commissioners power they previously did not have. Under that provision, which is also Chapter 4 of Title 9 of the 1947 Revised Codes of Montana in its entirety, the County Commissioners were given the authority to establish and operate cemeteries outside of an incorporated municipality or to conduct jointly, with the acquiescence of the municipality, the cemetery it then owned, but Chapter 4, Title 9 expressly denied the power of the county authorities to acquire an established cemetery from an incorporated city or town.

It is my opinion that Chapter 2 of Title 9 was enacted in 1943 to rectify this situation. I quote from Section 9-201 of that Chapter:

"There is hereby deemed and declared a public cemetery district act for the State of Montana. A cemetery district may contain the entire territory embraced within a county or **any** portion or subdivision thereof."

The Chapter then outlines the procedure for establishment by the County Commissioners of the cemetery district, that is, the proper petition, hearings, the voting by the electorate and the appointment of trustees to manage and operate the cemetery district. As pointed out in Section 9-201, *supra*, this district may be created in or from any territorial subdivision of the county, which would, of course, include an incorporated municipality. As also previously indicated, *supra*, the county had no power to do this under Chapter 4 of Title 9. Therefore, there is no election of Chapter 2 or Chapter 4 of Title 9 available to the County Commissioners on the facts you have presented me. The County Commissioners must proceed under Chapter 2 of Title 9. This conclusion disposes of your first question.

Although your precise interrogation does not call for the following portion of this opinion, your letter intimated that you perhaps thought Chapters 2 and 4 of Title 9 were repugnant to each other, and that the one lastly enacted would control. It is my measured opinion that the two aforementioned chapters are not so repugnant, that is, the County Commissioners might proceed under Chapter 4 of Title 9 were it not for the fact that the county is contemplating acquisition of an existing cemetery from a municipal corporation. As that is the case, Chapter 2 of Title 9 is the correct authority.

In reply to your second question, it is my opinion that the operational funds for the cemetery district to be created are to be raised under the express provision of Section 9-209. The budget and tax levy provisions of Section 9-209 are clearly an inherent portion of the public cemetery district act. The well-known rule of statutory construction is that the special and detailed provisions of a specific statute will prevail over other or more general statutes, so far as the particular subject matter comes within its provisions. (See *Adair v. Schnack*, 117 Mont. at Page 385, 161 Pac. (2d) 165).

Your third question may be answered in the affirmative with this qualification: In my opinion, a primary election is not a general election within the sense that latter phrase is used in Section 9-205. To quote the pertinent clause:

Section 9-205: "The board must, in its order, designate whether or not a special election shall be held, or whether the matter shall be determined at the next general election. If a special election is ordered, the board must, in its order, specify the time and place for such election, the voting place, and shall in said order appoint and designate judges and clerks therefore. . . ."

My conclusion that a "general primary election" is not a "general election" within the meaning of the above-quoted provision is reached

with the awareness that there is authority for the position that a general primary is a general election within the meaning of like statutes in other jurisdictions. (See 18 Words and Phrases, Permanent Edition 205; Black's Law Dictionary, 3rd Ed. 648; 29 C. J. S. Elections, Section 1.) The question has arisen in California in the case of City Council of San Jose v. Goodwin, 196 Calif. 274, 237 Pac. 548 and it was there held that a primary election was neither a special nor a general election within the meaning those terms connoted in the city's charter. There is abundant authority that a primary election is not even an "election" in the strict sense of that term. (29 C. J. S., Elections, Section 1 at Page 14).

Montana's Revised Codes of 1947 in Section 23-101 defines a general election:

"There must be held throughout the state, on the first Tuesday after the first Monday of November, in the year eighteen hundred and ninety-four, and in every second year thereafter, an election to be known as the **general** election."

There is clear inference in State v. Kehoe, 49 Mont. 582, 114 Pac. 162, and Mulholland v. Ayers, et al., 109 Mont. 558, 99 Pac. (2d) 234, that the Montana court means only the election held every second year in November can be the general election.

The County Commissioners can, of course, designate the primary election as the time of the special election for the proposed cemetery district and utilize the same judges and clerks. Notice of the impending vote on the cemetery district would have to be made pursuant to Section 23-106.

To summarize my opinions on the interrogatories you have presented: The County Commissioners of Big Horn County must follow the dictates of Section 9-201 through 9-215 in their acquisition of the cemetery property from the incorporated municipality of Hardin, Montana. The expenses of the cemetery are to be raised as provided in Section 9-209 of the Public Cemetery District Act. The election upon the measure may be held at the primary election, but as this is not a general election notice must be given as required for special elections. Section 23-106. Note also the requirements of Section 9-205 as respects the election which must be held.

Very truly yours,
ARNOLD H. OLSEN,
Attorney General.