

**VOLUME NO. 35****Opinion No. 48**

**CITIES AND TOWNS — Departments, health, joint city-county board; CITIES AND TOWNS — Departments, health, participation in district board; COUNTY BOARD OF HEALTH — Joint city-county board; INTERLOCAL COOPERATION AGREEMENTS — City-county, joint health services. Sections 11-946, 16-4904, 69-4505, 69-4506, and 69-4507, R.C.M. 1947.**

**HELD: 1. Section 69-4505, R.C.M. 1947, applies only to cities of the first and second class, and requires them to establish and maintain boards of health.**

2. Section 11-946, R.C.M. 1947, permits all cities and towns to establish and maintain boards of health.

3. Pursuant to section 69-4506, R.C.M. 1947, a city-county board of health may not be created other than between cities of the first and second class, and counties.

4. Pursuant to section 69-4507, R.C.M. 1947, cities, other than first and second class cities, cannot participate in a district board of health.

5. Pursuant to section 16-4904, R.C.M. 1947, counties and all cities may enter into interlocal cooperation agreements to provide common board of health services.

December 24, 1973

Mr. Tim Reardon, Attorney  
Department of Health  
and Environmental Sciences  
Legal Unit  
1424 Ninth Avenue  
Helena, Montana 59601

Dear Mr. Reardon:

You have asked my opinion on the following questions:

1. Does section 69-4505, R.C.M. 1947, allow any city, other than a first or second class city, to form a city health board?
2. Under section 69-4506, R.C.M. 1947, may counties and cities, other than first and second class cities, form and participate in city-county boards of health?
3. Does section 69-4507, R.C.M. 1947, permit a city, other than a first or second class city, to participate in a district board of health?

In reference to your first question, section 69-4505, Revised Codes of Montana, 1947, states:

**There is** a city board of health in each first and second class city consisting of five (5) persons who are appointed by the governing body of the city and serve at their pleasure. Terms of appointed members **shall** be staggered and **shall** be for three (3) years each. The governing body of the city **shall** establish the staggered order of terms and all regulations necessary to establish and maintain the board. (Emphasis supplied)

The legislature in this section used mandatory terms. The use of the emphasized words makes it clear that cities of the first and second class must establish and maintain city boards of health. Section 69-4505, supra, is not, however, the only applicable statute.

Section 11-946, R.C.M. 1947, in speaking of the powers of all city and town councils, states:

The city or town council has powers: to provide for a board of health, and to prescribe its powers and duties, and when such board of health is provided, for the same to have jurisdiction within the city or town limits, and within three miles thereof.

This section is permissive in its language, and grants to **all** cities and towns, regardless of their classification, the power to establish a city board of health.

In reference to your second question, section 69-4506, R.C.M. 1947, states, in part:

By mutual agreement between the county commissioners and the governing body of the city, **the county and a first or second class city, or cities, may form a city-county board of health.** ... (Emphasis supplied)

A county is an involuntary corporation for governmental purposes and has only such powers as the law prescribes or as arise by necessary implication therefrom. **Helena Gun Club v. Lewis and Clark County**, 141 Mont. 490, 379 P.2d 436 (1963). A county must derive its powers by express, direct grant from the legislature. **Plath v. Hi-Ball Constructors, Inc.**, 139 Mont. 263, 362 P.2d 1021 (1961). The grant from the legislature in section 69-4506, supra, specifically restricts a county to the formation of a city-county health board with cities of the first and second class. Lacking authority from the legislature, a county is not authorized to form a city-county health board with cities other than those of the first and second class.

In **State ex. rel. Griffin v. Butte**, 151 Mont. 546, 445 P.2d 739 (1968), the Montana Supreme Court held that cities have only those powers granted them by statute. Unless a power is vested in the municipality by express law or necessary implication therefrom, the presumption is against the exercise by the city of any power. Only cities of the first and second class are given the authority by section 69-4506, supra, to form a city-county health board. Without such authorization, cities other than first and second class cities cannot exercise the power. **State ex rel. Griffin v. Butte**, supra.

In reference to your third question, section 69-4507, R.C.M. 1947, states in part:

By mutual agreement, two (2) or more adjacent counties may unite to create a district board of health. First and second class cities located in those counties may elect to be included in the district. ...

**State ex rel. Griffin v. Butte**, supra, is again controlling. Without authorization from the legislature, the presumption is against the exercise of power by a city. Section 69-4507, supra, does not authorize cities other than cities of the first and second class to elect to participate in a district board of health.

However, the legislature has enacted chapter 49 of Title 16, R.C.M. 1947, dealing with interlocal cooperation agreements. Section 16-4904, R.C.M. 1947, states in part:

Any one or more public agencies may contract with any one or more other public agencies to perform any administrative service, activity or undertaking which any of said public agencies entering into the contract is authorized by law to perform provided that such contract shall be authorized by the governing body of each party to said contract.

...

Section 11-946, supra, allows any city to provide for a board of health, and section 69-4504, R.C.M. 1947, creates a county board of health in each county. Section 16-4904, supra, allows a public agency to contract with another public agency to perform an administrative service when both agencies are authorized by law to perform such services. As all cities and counties are authorized to create boards of health, it appears as though a contract may be entered into pursuant to section 16-4904, supra, for the provision of such common services.

THEREFORE, IT IS MY OPINION:

1. Section 69-4505, R.C.M. 1947, applies only to cities of the first and second class, and requires them to establish and maintain boards of health.
2. Section 11-946, R.C.M. 1947, permits all cities and towns to establish and maintain boards of health.
3. Pursuant to section 69-4506, R.C.M. 1947, a city-county board of health may not be created other than between cities of the first and second class, and counties.
4. Pursuant to section 69-4507, R.C.M. 1947, cities, other than first and second class cities, cannot participate in a district board of health.
5. Pursuant to section 16-4904, R.C.M. 1947, counties and all cities may enter into interlocal cooperation agreements to provide common board of health services.

Very truly yours,

ROBERT L. WOODAHL  
Attorney General