

OFFICE OF THE CITY ATTORNEY

435 Ryman • Missoula MT 59802
(406) 552-6020 • Fax: (406) 327-2105
attorney@ci.missoula.mt.us

Legal Opinion 2018-030

TO: City Council, Mayor John Engen, Dale Bickel, Mike Haynes, Mary McCrea, Denise Alexander, Andrew Boughan, Jenny Baker, Leigh Griffing, Steve Johnson, Marty Rehbein, Kirsten Hands, Kelly Elam, Ginny Merriam, Kevin Slovarp, Troy Monroe, Eric Anderson, John Wilson, Lori Hart, Dennis Bowman, Michelle Haley, Logan McInnis, Donna Gaukler, Mike Brady, Scott Hoffman, Jeff Brandt, Gordy Hughes, Department Attorney

FROM: Jim Nugent, City Attorney

DATE December 5, 2018

RE: Montana state law specifically provides that for properties located outside the city limits a city may require the property owner to consent to annexation in order to connect to municipal utility service. Montana Supreme Court has held that city required waivers of protest to annexation are valid and legal and that any covenant made for the direct benefit of the property runs with the land.

FACTS:

A city council member was recently criticizing the more than four decades old city process and procedure that properties located outside the city limits that are connecting to a municipal utility must either be annexed or consent to future annexation that includes waiving protest to future annexation in exchange for obtaining direct benefit to their land by connecting to and receiving municipal utility service.

ISSUE:

Is it legal for a Montana municipality to require that property owners of property that is located outside the city limits that is receiving the direct benefit of municipal utility services to agree to consent to city annexation and waive protest to future city annexation, if annexation is delayed after the property is connected to the municipal utility and providing direct benefit to the property?

CONCLUSION:

Yes, it is legal for a city to require that properties that are located outside the city limits that are receiving the direct benefit of municipal utility services for their property be required to consent to annexation or waive protest to future annexation. If city annexation is to be delayed the

Montana Supreme Court has held that it is valid and legal for a city or town to require the property owner to consent to future annexation and to waive protest to any future annexation.

LEGAL DISCUSSION:

Pursuant to section 7-13-4314 MCA, Montana state law specifically authorizes a Montana city or town to require property receiving the direct benefit of municipal utility services to be annexed into the city or town. Section 7-13-4314 MCA states:

“7-13-4314. ANNEXATION AS REQUIREMENT FOR RECEIVING SERVICE. ANY PERSON, FIRM, OR CORPORATION RECEIVING WATER OR SEWER SERVICE OUTSIDE OF THE INCORPORATED CITY LIMITS MAY BE REQUIRED BY THE CITY or town, AS A CONDITION TO INITIATE SUCH SERVICE, TO CONSENT TO ANNEXATION OF THE TRACT OF PROPERTY SERVED BY THE CITY or town. The consent to annexation is limited to that tract or parcel or portion of tract or parcel that is clearly and immediately and not potentially being serviced by the water or sewer service.” (emphasis added)

The Montana Supreme Court in Gregg v. Whitefish City council, 2004 Mt 262, 323 Mont. 109, 99 P 3d 151(2004) citing and quoting section 7-13-4314 MCA, stated at paragraph 22, that “A MUNICIPALITY MAY REQUIRE CONSENT TO ANNEXATION AS A CONDITION OF INITIATING SERVICE TO A PARCEL OF LAND. (emphasis added)

Montana cities and towns are statutorily identified as being a body politic and corporate with the general powers of a corporation. In addition, it is logical, reasonable common sense that a city or town be explicitly authorized by Montana state law to require that property located outside the city limits that is receiving the direct benefit of municipal water or sewer utility service be required to annex into the city at a time that is at the discretion of the city.

The Montana Supreme Court in Schanz v. City of Billings, 182 M 328, 597 P 2d 67, 72; 1979 Mont. LEXIS 832 (1979) held that a city requiring property to be annexed prior to extension of water or sewer services was not tantamount to coercion. The Montana Supreme Court in Schanz v. City of Billings also affirmed the district court’s determination that the city annexation was for the plaintiff Schanz’s benefit, in this specific case in order to receive City of Billings water and sewer service for his residential subdivision. Schanz *supra* 597 P 2d 67, 71.

The Montana Attorney General pursuant to 46 Attorney General Opinion 12 (1995) held that a municipality may establish a rule requiring consent to annexation as a condition for continued receipt of municipal water or sewer services by properties receiving municipal utility service prior to the municipality requiring written consent to annexation and waiver of protest annexation agreements as part of the municipality’s process and procedure for allowing properties located outside the city limits to connect to and receive municipal water or sewer service. The Montana Attorney General also indicated that a municipality’s power to make such a rule requiring consent to annexation and waiver of protest to annexation is consistent with

section 69-7-201 MCA entitled “RULES FOR OPERATION OF MUNICIPAL UTILITY” that empowers municipal utilities with the power to make rules for the operation of their municipal utilities.

More recently, the Montana Supreme Court last year in *Tom St. John v. City of Lewistown*, 2017 MT 126, 387 Mont. 444, 395 P. 3d 486(2017) stated in paragraph 25 of its decision that the Montana Supreme Court has previously “HELD THAT REQUIRING CONSENT TO ANNEXATION IN EXCHANGE FOR THE PROVISION OF SERVICES IS PERMISSIBLE”. (emphasis added) citing the *Schanz v. City of Billings* decision.

Later in paragraph 25 the Montana Supreme Court in *Tom St. John v. City of Lewistown* stated:

“We have also held that consent to annex as a condition for CONTINUING to receive utility service by a city is likewise permissible. Gregg, paragraphs 35-38. IF A LANDOWNER IS CURRENTLY RECEIVING CITY SERVICES BUT DOES NOT WISH TO BE ANNEXED OR SIGN A WAIVER, THE OWNER CAN MAKE ARRANGEMENTS TO DISCONNECT FROM SERVICES. Gregg, paragraph 38. (emphasis added)

The Montana Supreme Court in *Gregg v. Whitefish City Council*, 2004 MT 262, 323 M 109, 99 P. 3d 151(2004) noted in paragraph 23 that the City of Whitefish with respect to properties located outside the city limits receiving the direct benefit to their property receiving municipal water and/or sewer utilized waiver of protest agreements that were entitled “CONSENT TO ANNEX AGREEMENT” and “ WAIVER OF PROTEST AGREEMENT” and that the waivers were properly recorded at the county clerk and recorder’s office after being executed by previous landowners. The City of Missoula has for more than four decades required similar written agreements for properties directly benefiting from city sewer service whose property was not immediately annexed and then also filed those agreement with the county clerk and recorder; so that they are public notice that appears in the chain of title for the property. The purpose of recording the waivers of protest to city annexation is to create covenants that run with the land and bind subsequent purchasers of that land.

The Montana Supreme Court then goes on in paragraph 24 of its decision to note that the district court “CONCLUDED THE WAIVERS CONSTITUTE COVENANTS RUNNING WITH THE LAND BECAUSE THE WAIVERS WERE FOR THE DIRECT BENEFIT OF THE PROPERTY ITSELF”. (emphasis added)

It is important to note that title 70, chapter 17 MCA is entitled “SERVITUDES, EASEMENTS, AND COVENANTS RUNNING WITH THE LAND”. Title 70, chapter 17, part 2 is entitled “COVENANTS RUNNING WITH THE LAND”. Section 70-17-203 MCA is entitled “COVENANTS THAT RUN WITH THE LAND”. Pursuant to subsection 70-17-203(1) MCA Montana state law states in pertinent part that: “every covenant contained in a grant of an estate in real property THAT IS MADE FOR THE DIRECT BENEFIT OF THE PROPERTY OR SOME PART OF THE PROPERTY THEN IN EXISTENCE RUNS WITH THE LAND.” (emphasis added) The Montana Supreme Court relies on this state law in *Gregg*, *supra*, in

paragraph 29 of its decision stating that “the waivers are proper because the waivers directly benefit the property” and then in paragraph 30 of its decision states:

“In sum, the District Court properly concluded THE WAIVER OF PROTEST AGREEMENTS RECORDED BY THE CITY CONSTITUTE COVENANTS THAT RUN WITH THE LAND THAT COMPLY WITH STATE ANNEXATION STATUTES. THESE COVENANTS ARE BINDING ON SUBSEQUENT PURCHASERS including the Property Owners in this case. Therefore, the City properly invalidated protests from these Property Owners
“(emphasis added)

Obviously any property connected to municipal water or sewer utility service is property receiving a direct benefit of municipal utility service for that property.

CONCLUSION:

Yes, it is legal for a city to require that properties that are located outside the city limits that are receiving the direct benefit of municipal utility services for the property be required to consent to annexation or waive protest to future annexation. If city annexation is to be delayed the Montana Supreme Court has held that it is valid and legal for a city or town to require the property owner to consent to future annexation and to waive protest to any future annexation.

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/s/ Jim Nugent

Jim Nugent, City Attorney
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