OFFICE OF THE CITY ATTORNEY

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

Legal Opinion 2009-008

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Carla Krause, Engineering; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Kelly Elam, City Clerk's Office; Donna Gaukler, Parks & Rec Director; Jackie Corday, Parks & Rec; Roger Millar, OPG Director; Mike Barton, OPG; Tim Worley, OPG; Janet Rhoades, OPG; Mary McCrea, OPG; Denise Alexander, OPG

FROM: Jim Nugent

DATE March 9, 2009

RE: Municipal Annexation is not a taking of Property for just Compensation Purposes

---

FACTS:

During some city council comment pertaining to the proposed Chickasaw Subdivision application there has been some concern expressed that City annexation constituted a taking.

ISSUE(S):

Is municipal annexation of land a taking of property without the payment of just compensation?

CONCLUSION(S):

No. The Montana Supreme Court has stated at least four (4) times that municipal annexation of land does not constitute a taking.

LEGAL DISCUSSION:

The Montana Supreme Court has stated at least four (4) different times that municipal (city) annexation of land is not a taking of property. Municipal annexation is not a compensable taking of property and the levying of future city taxes after annexation does not constitute a taking.

In 1965 in Harrison v. City of Missoula, 146 Mont. 420, 425 407 P.2d 703, 706-___, 1965 Mont. LEXIS 411, the Montana Supreme Court stated:

> The appellants' brief is absent of light as to what is a "taking of property." If the alleged taking is that of future taxes that would be levied by the City the allegation is without merit. Town of Mt. Pleasant v. Beckwith, 100 U.S. 514, 25 L. Ed. 699; Kelly v. City of Pittsburgh, 104 U.S. 78, 26 L.Ed. 658. (Emphasis added.)

In 1993, the Montana Supreme Court in Burritt v. City of Butte, 161 Mont. 530, 539; 508 P.2d 563, 567-568, 1973 Mont. LEXIS 629 stated:

> Annexation is generally regarded as a political matter exclusively for the legislature to regulate, unless specifically restrained by the Constitution. The legislature can authorize annexation without the consent and even against the wishes of the people living in the area to be annexed. Harrison v. City of Missoula, 146 Mont. 420, 407 P.2d 703. The extension of the corporate limits of a city is ancillary to governmental maintenance of the health, safety, general welfare, and good order of those communities which are formed by dense collections of citizens in particular localities. Such is constitutional even though the annexed territory may receive no direct benefit from incorporation in return for the municipal burdens thereby imposed upon it. 2 McQuillan Mun.Corp. (3d Ed.) § 7.10, p. 309.
>
> Section 11-403, R.C.M. 1947, was first declared valid and constitutional in Harrison v. City of Missoula, supra. In that case, the protesters claimed section 11-403, R.C.M. 1947, was "class legislation" in that a distinction is made between "freeholder" and "resident freeholder" and that there had been a "taking of property" without due process. We held otherwise. Subsequently this Court upheld the constitutionality of this statute in Calvert v. City of Great Falls, supra, where the protesters challenged the legislative exemptions relating to compulsory annexation of land devoted to industrial and manufacturing enterprises and similar purposes. The same result was reached by this Court in Brodie v. City of Missoula, supra. In *Brodie* we held that the compulsory annexation of territory "wholly surrounded" by the city did not violate federal or state constitutional provisions proscribing the taking of private property without out process of law. See also: Sailors v. Kent Board of Ed., 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967); Hunter v. Pittsburg, 207 U.S. 161, S.Ct. 40, 52 L.Ed. 151 (1907). (Emphasis added.)

In 1993 the Montana Supreme Court engaged in its most detailed explanation as to why municipal annexation is not a taking in Kudloff v. City of Billings, 260 Mont. 371, 375-376; 860 P.2d 140, 142-144; 1993 Mont. LEXIS 274. The Montana Supreme Court stated:

> Kudloff alleges that the annexation of his real property represented an unconstitutional taking because the extension of services under § 7-2-4732, MCA,

was impractical and unfeasible, and because no cost-benefit analysis was performed. However, a regulatory taking of property by a municipality is allowed even if the value of that property and its usefulness is diminished. *Penn Central Transp. Co. v. New York City* (1978), 438 U.S. 104, 131, 98 S.Ct. 2646, 2662-63, 57 L.Ed.2d 631, 652-53. It is only when the owner of the real property has been called upon to sacrifice all economically beneficial use of that property in the name of the common good that a constitutionally-protected taking has occurred. *Lucas v. South Carolina Coastal Council* (1992), U.S. , , 112 S.Ct. 2886, 2895, 120 L.Ed.2d 798, 815.

In *Penn Central*, New York City enacted a Landmarks Preservation Law (Landmarks Law) to protect historic landmarks and neighborhoods from destruction or alteration. Pursuant to this Landmarks Law, the Landmark Preservation Commission (Commission) designated the Grand Central Terminal (Terminal), which was owned by Penn Central Transportation Company (Penn Central), a landmark. Thereafter, Penn Central entered into a lease with UGP Properties (UGP), allowing UGP to construct a multistory office building over the Terminal. Pursuant to the Landmarks Law, the parties submitted their building plan to the Commission, which rejected the plan for the building as destructive of the Terminal's historic and aesthetic features. *Penn Central*, 438 U.S. at 109-17, 98 S.Ct. at 2651-56, 57 L.Ed.2d at 639-45. Penn Central and UGP filed suit, claiming that the application of the Landmarks Law had "taken" their property without just compensation. The trial court granted injunctive relief to the plaintiffs. That judgment was reversed by the New York Supreme Court, Appellate Division, which held that there was no taking because there was no proof that the regulation deprived the plaintiffs of all reasonable beneficial use of the property. *Penn Central*, 438 U.S. at 119, 98 S.Ct. at 2656-57, 57 L.Ed.2d at 645. The New York Court of Appeals affirmed, summarily rejecting the claim that the Landmarks Law had taken property without just compensation. *Penn Central*, 438 U.S. at 120-21, 98 S.Ct. at 2657-58, 57 L.Ed.2d at 645-46. On certiorari, the United States Supreme Court stated that land-use regulations which adversely affect recognized real property interests, such as zoning regulations, are commonly upheld. *Penn Central*, 438 U.S. at 125, 98 S.Ct. at 2659-60, 57 L.Ed.2d at 648-49. The Supreme Court further stated that any interference with the property at issue was not of such a magnitude that compensation was required to sustain it. *Penn Central*, 438 U.S. at 137, 98 S.Ct. at 2665-66, 57 L.Ed.2d at 656-57. The Supreme Court, in affirming the appellate courts, held that the restrictions imposed were substantially related to the promotion of the general welfare while permitting reasonable beneficial use of the Terminal to the plaintiffs. *Penn Central*, 438 U.S. at 138, 98 S.Ct. at 2666, 57 L.Ed.2d at 657.

In *Lucas*, the petitioner purchased two residential lots on a South Carolina barrier island, intending to build single-family homes, in 1986. In 1988, the South Carolina legislature enacted the Beachfront Management Act (Act), which barred Lucas from building any permanent structures on his land. *Lucas*, U.S. at , 112 S.Ct. at 2889, 120 L.Ed.2d at 807-08. He filed suit in the South Carolina Court of

Common Pleas, contending that the Act effected a taking of his property without just compensation. The court agreed, finding that the Act rendered Lucas' property valueless. The Supreme Court of South Carolina reversed, holding that, because the Act was designed to prevent serious public harm, no compensation was owed to Lucas. *Lucas*, U.S. at , 112 S.Ct. at 2890, 120 L.Ed.2d at 808-09. On certiorari, the United States Supreme Court stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Lucas*, U.S. at , 112 S.Ct. at 2893, 120 L.Ed.2d at 812. Here, Lucas was required to sacrifice *all* economically beneficial uses in the name of the common good by leaving the property in its natural state. *Lucas*, U.S. at , 112 S.Ct. at 2895, 120 L.Ed.2d at 814-15. The state is required to compensate a property owner only if it seeks to sustain a regulation that deprives the property owner of all economically beneficial uses of his property. That rule, however, does not apply if the use or interest the state is attempting to regulate was not part of the owner's original estate or title. Under the latter circumstances, the state is not required to compensate the property owner. *Lucas*, U.S. at , 112 S.Ct. at 2899, 120 L.Ed.2d at 819-20. According to that case;

> [a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. . . . It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the essential use of land . . . The question, however, is one of state law to be dealt with on remand.
>
> *Lucas*, U.S. at , 112 S.Ct. at 2900-01, 120 L.Ed.2d at 821-22.

On that basis, the Supreme Court reversed and remanded the case.

The case at hand is similar to *Penn Central* in that the annexation of the property may have diminished the value and usefulness of the property. However, any effect the annexation had on the value of the property does not rise to the level of *Lucas* which would require compensation. As stated in *Lucas*, the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers. . . ." *Lucas*, U.S. at , 112 S.Ct. at 2899, 120 L.Ed.2d at 820.

In 1974, Kudloff had been granted a special exception allowing ski-related uses of the real property. The record in this case indicates that this special exception remained effective after the City annexed Kudloff's property. In addition, there is no evidence in the record that Kudloff ever requested a zoning change or special variance for ski-related uses after the annexation took place. Kudloff is hard-pressed to argue that a "taking" occurred when he never attempted to ascertain whether he could use the property for ski-related purposes. For the above reasons, Kudloff's allegation that an unconstitutional taking has occurred is without merit. (Emphasis added.)

CONCLUSION(S):

No. The Montana Supreme Court has stated at least four (4) times that municipal annexation of land does not constitute a taking.

OFFICE OF THE CITY ATTORNEY

Jim Nugent, City Attorney

JN:jlw