

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2013-008

**TO:** John Engen, Mayor; City Council; Bruce Bender; Jessica Miller, Don Verue, Gregg Wood, Denise Alexander, Mary McCrea, Kevin Slovarp, Jolene Ellerton, Marty Rehbein, Nikki Rogers, Kelly Elam

**CC:** Legal Staff

**FROM:** Jim Nugent, City Attorney

**DATE** April 5, 2013

**RE:** Montana Municipalities may require municipal annexation of property receiving Municipal Sanitary Sewer Service. Petition method of Municipal Annexation may be utilized.

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### **FACTS:**

Recently an inquiry arose as to whether property owners seeking Municipal Sanitary Sewer Service for property proposed to be used as manufacturing business could be required to be annexed in order to receive Municipal Sanitary Sewer Service. The statutory method of annexation to be utilized for the annexation, is the petition method of annexation set forth in title 7, chapter 2, part 46 entitled “Annexation by Petition” with 100% of the property owners signing the petition.

### **ISSUES:**

- (1) May a Montana Municipality require property to be annexed when municipal sanitary sewer service is provided to the property?
- (2) Are each of Montana’s municipal statutory methods of annexation separate and distinct methods of annexation?
- (3) Does the city governing body have the ability to determine which statutory method of annexation to utilize with respect to a specific annexation?

### **CONCLUSIONS:**

- (1) Yes, pursuant to Section 7-13-4314 MCA a Montana Municipality may require municipal annexation of property receiving Municipal Sewer Service.

(2) Montana municipal annexation statutes provide and the Montana Supreme Court has held that each of Montana's statutory methods of municipal annexation are separate and distinct.

(3) Montana's municipal annexation statutes provide and the Montana Supreme Court has held that the municipal governing body may determine which separate and distinct method of municipal annexation to utilize to annex specific land.

## **LEGAL DISCUSSION:**

Montana Municipalities may require municipal annexation as a requirement for receiving Municipal Sanitary Sewer Service. Section 7-13-4314 MCA provides:

**7-13-4314. Annexation as a requirement for receiving service.** Any person, firm, or corporation receiving water or sewer service outside of 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.

The petition method of annexation is the Municipal annexation method to utilize when annexing property receiving Municipal Sanitary Sewer Service. Section 7-2-4608 MCA provides:

**7-2-4608. Restrictions on annexation power.** (1) Territory that is part of an incorporated city or town at the time a petition for proposed annexation is presented as provided in [7-2-4601](#) may not be annexed under the provisions of this part.

(2) Except as provided in subsection (3), a parcel of land that, at the time a petition for proposed annexation is presented to the governing body of a city or town, is used in whole or in part for agricultural, mining, smelting, refining, transportation, or any industrial or manufacturing purpose or for any purpose incident to those uses may not be annexed under the provisions of this part.

(3) The provisions of subsection (2) do not apply if the petition submitted to the governing body of the city or town is signed by 100% of the owners of the land proposed to be annexed and the annexation is in accordance with the city's or town's adopted growth policy.

Pursuant to 46 Attorney General Opinion No. 12(1995) issued to the City of Shelby Montana Attorney General Joe Mazurek held that a municipality may establish a rule requiring a property owner's consent to Municipal annexation as a condition of continued Municipal Sewer and/or water service. The Attorney General stated that the City of Shelby had the authority to adopt a rule requiring sewer service pursuant to Section 69-7-201 MCA, pertaining to operation of municipal utilities.

Later, the City of Whitefish adopted a municipal resolution (1) requiring that property owners consent to municipal annexation in order to continue to receive city utility services; and (2) allowing the city to imply consent to annexation from property owners that continued to receive Municipal Utility Services after the property owner received notice requiring the property owner to disconnect from the Municipal Utility if they did not want their property to be annexed. Both the District Court and Montana Supreme Court held the City of Whitefish

resolution procedure to imply consent to be a valid proper method to determine if a property owner wished to continue to receive City Municipal Utility Services. *Gregg v. Whitefish City Council* 2004 MT 262, 323 M 109, 99 P3d 151 (2004).

In its 1982 decision in *State ex. Rel. Hilands Golf Club v. City of Billings* (1982), 198 Mont. 475, 478 P. 2d 345, 346, in dicta, the Montana Supreme Court concluded that 1979 Montana State Legislative amendments to Montana's municipal annexation laws had created eight methods of annexation which were separate and distinct.

1989 in *Missoula Rural Fire District v. City of Missoula*, (1989) 237 Mont. 444; 775 P. 2d 209; 1989 Mont. LEXIS 145 the Montana Supreme Court affirmed a 1988 District Court ruling to the effect that the 1979 Montana State Legislative amendments to Montana's municipal annexation laws nullified an injunction against the City of Missoula annexing certain lands and impliedly overruled a prior 1975 Montana Supreme Court decision involving the same land and same party litigants, explaining that now the several methods of municipal annexation were separate and distinct from each other.

The District Court relied on the 1979 Montana State Legislative amendments to indicate that each method of annexation was separate and distinct from the other methods, *supra* at 446. The Montana Supreme Court in *City of Missoula*, in affirming the District Court noted, *supra* at 447-448 that the 1979 Montana State Legislature made two significant changes to Montana's municipal annexation laws when it (1) "separated each of the types of annexation provided for . . . into separate statutes; and (2) deleted some then existing statutory language pertaining to detraction of lands from a rural fire district and statutorily provided that the methods of annexation were independent from the other methods of annexation and the municipal governing body could in its discretion select one of the municipal annexation procedures to utilize.

The Montana Supreme Court in *City of Missoula* specifically stated:

"In summary, the 1979 Legislature deleted the sentence of . . . which provided that the Planned Community Development Act controlled. Moreover, the language providing that the detraction statute was supplemental to 'the other method of annexation, was also deleted. Finally, the city was left with discretion over the method of annexation to be used. Each statutory method of annexation is now separate and distinct from all other methods." (Emphasis added.)

The Montana Supreme Court in *City of Missoula* went on to note that:

"The legislature further exhibited its intent to make separate and distinct annexation methods by stating that: 'when the proceedings for annexation of territory to a municipality are instituted as provided in this part, the provisions of this part and no other apply, except where otherwise explicitly indicated. [ . . . ] Therefore, not only did the legislature delete the language that Part 47 detraction method superseded all others, but it also explicitly stated that each annexation method was independent from all other annexation methods." (Emphasis added.)

Examples of the separate and distinct nature of each statutory method of annexation are established in sections 7-2-4204, 7-2-4304, 7-2-4408, 7-2-4505, 7-2-4609 and 7-2-4718 MCA which state:

Title 7, Chapter 2, Part 42 “Addition to Municipalities”

**7-2-4204. Applicability of part.** (1) When the proceedings for annexation of territory to a municipality are instituted as provided in this part, the provisions of this part and no other apply, except where otherwise explicitly indicated.

(2) The governing body of the municipality to which territory is proposed to be annexed may in its discretion select one of the annexation procedures in parts 42 through 47 that is appropriate to the circumstances of the particular annexation. The municipal governing body must then follow the specific procedures prescribed in the appropriate part.

Title 7, Chapter 2, Part 43 “Annexation of Contiguous Land”

**7-2-4304. Applicability of part.** (1) When the proceedings for annexation of territory to a municipality are instituted as provided in this part, the provisions of this part and no other apply, except where otherwise explicitly indicated.

(2) The governing body of the municipality to which territory is proposed to be annexed may in its discretion select one of the annexation procedures in parts 42 through 47 that is appropriate to the circumstances of the particular annexation. The municipal governing body must then follow the specific procedures prescribed in the appropriate part.

Title 7, Chapter 2, Part 44 “Annexation of Contiguous Government Land”

**7-2-4408. Applicability of part.** (1) When the proceedings for annexation of territory to a municipality are instituted as provided in this part, the provisions of this part and no other apply, except where otherwise explicitly indicated.

(2) The governing body of the municipality to which territory is proposed to be annexed may in its discretion select one of the annexation procedures in parts 42 through 47 that is appropriate to the circumstances of the particular annexation. The municipal governing body must then follow the specific procedures prescribed in the appropriate part.

Title 7, Chapter 2, Part 45 “Annexation of wholly surrounded land”

**7-2-4505. Applicability of part.** (1) When the proceedings for annexation of territory to a municipality are instituted as provided in this part, the provisions of this part and no other apply, except where otherwise explicitly indicated.

(2) The governing body of the municipality to which territory is proposed to be annexed may in its discretion select one of the annexation procedures in parts 42 through 47 that is appropriate to the circumstances of the particular annexation. The municipal governing body must then follow the specific procedures prescribed in the appropriate part.

Title 7, Chapter 2, Part 46 “Annexation by Petition”

**7-2-4609. Applicability of part.** (1) This part does not repeal parts 43 and 45 having reference to extension of the corporate limits of cities of the first, second, and third classes to include contiguous land but provides an alternative method that the

municipal governing body may in its discretion choose to use for the annexation of territory or territories to municipal corporations.

(2) When any proceedings for annexation of territory or territories to any municipal corporation are commenced under this part, the provisions of this part and no other apply to such proceedings.

(3) When the proceedings for annexation of territory to a municipality are instituted as provided in this part, the provisions of this part and no other apply, except where otherwise explicitly indicated.

Title 7, Chapter 2, Part 47 "Annexation with the Provision of Services"

**7-2-4718. Construction.** (1) The method of annexation authorized in this part is independent from other methods of annexation authorized by state law.

(2) The governing body of the municipality to which territory is proposed to be annexed may in its discretion select one of the annexation procedures in parts 42 through 47 that is appropriate to the circumstances of the particular annexation. The municipal governing body must then follow the specific procedures prescribed in the appropriate part.

The 1989 Montana Supreme Court in *Missoula Rural Fire District v. City of Missoula*, *supra* at 449 stated that:

The 1979 statutory amendment creates methods of annexation which are separate and independent of each other. We hold that the 1979 statutory amendment renders the 1974 injunction no longer valid or applicable and MRFD v. City of Missoula was statutorily overruled. The District court properly held that the 1979 legislative changes allow the City to annex real property by certain statutory provisions without detraction prior to annexation.”

## **CONCLUSIONS:**

(1) Yes, pursuant to Section 7-13-4314 MCA a Montana Municipality may require municipal annexation of property receiving Municipal Sewer Service.

(2) Montana municipal annexation statutes provide and the Montana Supreme Court has held that each of Montana's statutory methods of municipal annexation are separate and distinct.

(3) Montana's municipal annexation statutes provide and the Montana Supreme Court has held that the municipal governing body may determine which separate and distinct method of municipal annexation to utilize to annex specific land.

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