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Legal Opinion 2013-016

TO: Mayor John Engen, Bruce Bender, Dan Jordan, Kevin Slovarp, Doug Harby, Ellen Buchanan, Chris Behan, Jessica Miller, Mike Haynes

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE August 8, 2013

RE: Public utility right to continue to maintain public utility already located within a dedicated public street or alley to be vacated.

FACTS:

A City staff member has requested that a written legal opinion be issued concerning the limited rights of a public utility with respect to continued utilization of a dedicated public street or alley that is vacated by the City. A public utility right that is limited to being able to continue to maintain their public utility plant and equipment that is already located within the public street or alley right-of-way.

ISSUE(S):

What is the extent of a public utility's rights with respect to a dedicated public street or alley right of way that is being vacated by a city local government?

CONCLUSION(S):

Pursuant to section 7-14-4115 MCA pertaining to municipal traffic ways and public grounds, a public utility's rights with respect to a dedicated street or alley public right-of-way is limited to the right to continue to maintain the public utility's plant and equipment that is already located within the dedicated public right of way at the time the city government vacates the land as being dedicated public right-of-way.

LEGAL DISCUSSION:

Title 7, chapter 14, part 41 MCA is entitled "GENERAL PROVISIONS RELATED TO MUNICIPAL TRAFFIC WAYS AND PUBLIC GROUNDS". Section 7-14-4114 MCA entitled "PROCEDURE TO DISCONTINUE STREETS" and section 7-14-4115 MCA entitled "DISCONTINUANCE OF STREET NOT TO AFFECT UTILITY EASEMENTS" are included in Title 7, Chapter 14, Part 41 MCA.

Section 7-14-4114 MCA provides as follows:

7-14-4114. Procedure to discontinue streets. (1) The council may discontinue a street or alley or any part of a street or alley in a city or town, if it can be done without detriment to the public interest, upon:

- (a) a petition in writing of all owners of lots on the street or alley; or
- (b) (i) a petition in writing of more than 50% of the owners of lots on the street or alley; and

(ii) approval by a majority vote of the council.

(2) Where the street or alley is to be closed for school purposes, the council may discontinue the street or alley upon a petition signed by 75% of the lot owners on the whole street or alley to be closed.

(3) Before acting upon the petition, a notice must be published, stating when the petition will be acted on and what street or alley or part of a street or alley is asked to be vacated. The notice must be published as provided in [7-1-4127](#).

Section 7-14-4115 MCA provides:

“7-14-4115. DISCONTINUANCE OF STREETS NOT TO AFFECT UTILITY EASEMENTS. The vacation authorized by 7-14-4114 SHALL NOT AFFECT THE RIGHT OF ANY PUBLIC UTILITY TO CONTINUE TO MAINTAIN ITS PLANT AND EQUIPMENT in any such streets or alleys.”(emphasis added).

It is important to note that the public utility right pursuant to section 7-14-4115 MCA is limited. The right is limited “to continue to maintain”. Thus, the public utility must already be located within the dedicated public street or alley right-of-way at the time the street or alley is vacated in order to be able to have the right “to continue to maintain”. If there is no public utility plant or equipment located within the dedicated public street or alley, there is no public utility to be continued. Further, if the public utility ceases its use of the vacated dedicated public street or alley, the public utility right can be lost; because of the discontinuance of the use of the former dedicated public street or alley right-of-way for public utility purposes.

CONCLUSION(S):

Pursuant to section 7-14-4115 MCA pertaining to municipal traffic ways and public grounds, a public utility’s rights with respect to a dedicated street or alley public right-of-way is limited to the right to continue to maintain the public utility’s plant and equipment that is already located within the dedicated public right of way at the time the city government vacates the land as being dedicated public right-of-way.

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/s/

Jim Nugent, City Attorney

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