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Legal Opinion 2017-028

TO: Mayor John Engen; City Council; Bruce Bender; Kevin Slovarp; Jessica Miller; Mike Haynes; Dale Bickell; Drew Larson; Denise Alexander; Leigh Griffing; Dan Jordan; Mary McCrea; Laval Means; Jason Diehl; Jeff Brandt; Chad Nicholson; Mike Brady; Scott Hoffman; Starr Sullivan; Donna Gaukler; and Marty Rehbein

CC: Legal Department Staff

FROM: Jim Nugent, City Attorney

DATE November 12, 2014

RE: Montana municipalities may require municipal annexation of real property receiving municipal sanitary sewer service.

FACTS:

H & H Landholdings, LLC owns real property located at 101 and 105 Johnson that is wholly surrounded by municipal city limits and that has already had its buildings connected to City of Missoula municipal sanitary sewer service for many months. A city council municipal annexation proposal is currently in Missoula City Council committee. The primary current discussion is focused on what to zone the real property at the time of annexation.

ISSUE:

May a Montana municipality require that a real property that is connected to municipal sanitary sewer be annexed into the municipality?

CONCLUSION:

Yes, pursuant to section 7-13-4314 MCA, a Montana municipality may require that any person, firm, or corporation receiving municipal sanitary sewer service may be required to consent to municipal annexation as a condition of initiating municipal sanitary sewer service.

LEGAL DISCUSSION:

Section 7-13-4314 MCA of Montana's municipal utility services laws provides that a Montana municipality may require municipal annexation of real property receiving municipal sanitary sewer service. Section 7-13-4314 MCA provides:

7-13-4314. Annexation as 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. (emphasis added)

Decades ago the Montana Supreme Court recognized and indicated in *Schanz v. City of Billings*, 182 M 328, 597 P 2d 67 (1979), that a Montana city's requiring annexation of real property into the municipality prior to extension of municipal water or municipal sanitary service was not tantamount to coercion..

It is also statutorily recognized pursuant to section 7-13-4312 MCA that a Montana municipality may provide municipal sanitary sewer service to real property located outside the city limits, without necessarily immediately annexing the real property. Section 7-13-4312 MCA provides:

7-13-4312. Authorization to furnish water and sewer services to persons located outside municipality. A city council that owns and operates a municipal water system, a municipal sewer system, or both, to furnish water and sewer services to the inhabitants of a city as a public utility may furnish water from the water system and sewage services from the sewer system to the inhabitants or to any person, factory, industry, or producer of farm or other products located outside of the corporate limits of the city at reasonable rates filed by the city or town council. The city council may make collections to provide water and sewer services in the same manner as collections are made within the corporate limits.

The Montana Supreme Court in *Gregg v. City of Whitefish City Council*, 2004 MT 262, 323 M 109, 99 P 3d 151 (2004) has also recognized that a Montana municipality may require real property owner consent to municipal annexation as a condition for continued receipt of municipal sanitary sewer and/or water services. Further, the Montana Supreme Court in Gregg recognized that a Montana municipality could require that a real property owner whose property was connecting/connected to municipal sanitary sewer and/or water service could be required to agree to waive the right to protest future annexation in order to receive those municipal services. Further, the Montana Supreme Court in Gregg, *supra*, recognized and indicated that the real property owner waivers of protest to municipal annexation directly benefited the real property and were allowable as well as that the waivers of protest of municipal annexation also constituted a covenant running with the land that could be binding on subsequent owners of the real property.

The purpose of the above quoted Montana municipal state laws is to ensure that the local government can later require municipal annexation in exchange for receiving municipal utilities.

Some additional general legal annexation principles pursuant to Montana Supreme Court case law should be noted as well:

- (1) There are eight separate and independent methods of municipal annexation set forth in Montana municipal annexation law. The municipality's city council determines which method of municipal annexation to utilize with respect to any one specific municipal annexation proposal. See *State ex. Rel. Hilands Golf Club v. City of Billings* (1982) 198 Mont. 475, 647 P. 2d 345 and *Missoula Rural Fire District v. City of Missoula* (1989) 237 Mont. 444, 775 P. 2d 209.
- (2) Municipal procedures with respect to provision of municipal sanitary sewer and water services that invalidate municipal annexation protests for real properties that are already connected to municipal sanitary sewer and/or water services based on waiver of protest to municipal annexation agreements are proper and valid. See *Gregg v. Whitefish City council*, 2004 MT 262, 323 Mont. 109, 99 P. 3d 151, 2994 Mont. LEXIS 437.
- (3) Municipal annexation is not a taking of property. Further the levying of future real property taxes after annexation does not constitute a taking. See *Harrison v. City of Missoula*, 407 P. 2d 703, 706 (1965); *Brodie v. City of Missoula*, 468 P. 2d 778, 783 (1970); *Burritt v. City of Butte*, 508 P. 2d 563, 567-568(1973); and *Kudloff v. City of Billings*, 860 P. 2d 140(1993).
- (4) The determination of public interest with respect to municipal annexation is a determination to be made by the city council. See *Brodie v. City of Missoula*, 468 P.2d 778, 782(1970); *Penland v. City of Missoula*, 318 P. 2d 1089, 1092 (1957); and *Calvert v. City of Great Falls*, 462 P. 2d 182, 184(1969).
- (5) Any attempted challengers to Municipal annexation must have standing to sue and in order to have standing to sue the challengers must be property owners, owning property within the area annexed by the municipality. See *O'Donnell Fire Service and Equipment Co. v. City of Billings*, 219 Mont. 317, 711 P. 2d 822, 824 (1985) and *Knudsen v. Ereaux(Malta)*, 911 P. 2d 835, 838(1996).
- (6) A street or roadway is a tract or parcel of land that constitutes an area of land that may be annexed into a municipality. See *Missoula Rural Fire District v. City of Missoula*, 950 P. 2d 758(1997).
- (7) Municipal street corridor annexations serving legitimate municipal government or public needs are valid annexations. See *Missoula Rural Fire District v. City of Missoula* 950 P.2d 758(1997). The factual circumstances in these municipal annexations included that the city of Missoula had municipal sanitary sewer mains located within the streets and had a municipal interest in protecting those mains as well as preventing illegal unlawful connections to those sanitary sewer mains plus the City of Missoula had street maintenance contract agreements with the Montana Department of Transportation to perform some basic maintenance and snow removal on the streets that were annexed.

CONCLUSION:

Yes, pursuant to section 7-13-4314 MCA, a Montana municipality may require that any person, firm, or corporation receiving municipal sanitary sewer service may be required to consent to municipal annexation as a condition of initiating municipal sanitary sewer service.

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/s/

Jim Nugent, City Attorney

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