

OFFICE OF THE CITY ATTORNEY

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

Legal Opinion 2009-006

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Brentt Ramharter, Finance Director; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Carla Krause, Engineering; Jolene Ellerton, Engineering; Dan Jordan, Public Works; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; 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, City Attorney

DATE: March 6, 2009

RE: Property owners' legal ability to Petition to have their land annexed into a Municipality

FACTS:

During the City Council's recent subdivision review of proposed Chickasaw Place Subdivision there were some citizen assertions that the City could not annex agricultural land. However, initially it must be noted that the Chickasaw Subdivision land was not being used for agricultural use at the time the property owners petition to have their property annexed into the City was presented to the City Council. Historically, Montana's petition annexation laws were more restrictive. A 1985 Montana State Legislature Amendment to Subsection 7-2-4601(3) MCA specifically authorized the owner of property to submit a petition for annexation of their own land and to have it be reviewed on its merits.

ISSUE(S):

(1) Pursuant to the petition method of municipal annexation is there a decades old general provision restricting annexation of land actually being used as agricultural land at the time the annexation petition is presented to the City Council?

(2) Is there a more recent Montana legislative enactment that authorizes a property owner to petition to have their land considered for annexation upon its merits?

CONCLUSION(S):

(1) Pursuant to Section 7-2-4608 MCA there is a more than six decades old general restriction on annexation power pertaining to land which at the time the petition for proposed annexation is presented to the “city council” is actually being used for “agricultural” purposes.

(2) More recently the 1985 Montana State Legislature pursuant to HB-384, Chapter No. 279, Volume 1 Laws of Montana, Forty-Ninth Legislature 1985 made it easier for property owner(s) to petition to have their land annexed as long as all the property owners have signed the annexation petition. HB384 (1985) amended Subsection 7-2-4601(3) MCA of the petition method of city annexation to allow a property owner to petition to have their land annexed to a city and have approval or disapproval determined on the merits of the petition.

LEGAL DISCUSSION:

The petition method of municipal annexation is set forth in Title 7, Chapter 2, Part 46 MCA entitled “Annexation by Petition”. Generally, the statutory provisions are many decades old and often historically pertained to annexing “territory” and conducting elections within the territory being considered for annexation; but the Legislature desired to protect land being used as agricultural from being annexed by the will of others than the property owner(s) desire to be annexed. A more than six decades old general statutory provision set forth in Subsection 7-2-4608(2) MCA restricts annexation power with respect to territory that “is used” for “agricultural” purposes at the time the annexation petition is presented to the City Council. Section 7-2-4608 MCA provides:

7-2-4608. Restrictions on annexation power. (1) No territory which, at the time such petition for such proposed annexation is presented to such council or legislative body, forms any part of any incorporated city or town shall be annexed under the provision of this part. (2) No parcel of land which, at the time such petition for such proposed annexation is presented to such council or legislative body is used in whole or in part for agricultural, mining, smelting, refining, transportation, or any industrial or manufacturing purposes or any purpose incident thereto shall be annexed under the provision of this part. (Emphasis added.)

However, in 1985 the City of Missoula and other Montana Municipalities requested the Montana State Legislature to authorize any property owner to be able to petition their own land for annexation to a municipality and authorize that annexation petition to be determined on its merits and without the necessity of any election being held in the territory being annexed.

The 1985 Montana State Legislature responded favorably to the request of Montana’s Municipalities by enacting HB-384 (1985) Chapter No. 279 Laws of Montana, Forty-Ninth Legislature 1985 entitled:

AN ACT PROVIDING THAT AN ELECTION ON THE QUESTION OF WHETHER TO ANNEX IS NOT NECESSARY IF ALL THE PROPERTY OWNERS IN THE TERRITORY TO BE ANNEXED HAVE SIGNED THE ANNEXATION PETITION: AMENDING SECTIONS 7-2-4601 AND 7-2-4606, MCA. (Emphasis added.)

This 1985 Montana State Legislation allowed property owners to petition to have that land annexed and have the City Council determine the annexation decision on its merits. Section 7-2-4601 MCA provides:

Part 46
Annexation by Petition

7-2-4601. Annexation by petition. (1) The boundaries of any incorporated city or town may be altered and new areas annexed as provided in this part.

(2) The council or other legislative body of a municipal corporation, upon receiving a written petition for annexation containing a description of the area to be annexed and signed by not less than 33-1/3 of the registered electors of the area proposed to be annexed, shall without delay submit to the electors of the municipal corporation and to the registered electors residing in the area proposed by the petition to be annexed the question of whether the area should be made a part of the municipal corporation.

(3)(a) The governing body of a municipality need not submit the question of annexation to the qualified electors as provided in subsection (2) if it has received a written petition containing a description of the area requested to be annexed and signed by:

(i) more than 50% of the resident electors owning real property in the area to be annexed; or

(ii) the owner or owners of 50% of the real property in the area to be annexed.

(b) The governing body may approve or disapprove a petition submitted under the provisions of subsection (3)(a) upon its merits. When the governing body approves the petition, it shall pass a resolution providing for the annexation. (Emphasis added.)

Pursuant to the rules of statutory construction the more particular or more specific statutory provision (an owner may petition to have their property annexed and have it decided on its merits) is to prevail over a more general statutory provision that may appear to be in conflict. See Section 1-2-102 MCA which provides:

1-2-102. Intention of the legislature – particular and general provisions. In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the

latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it. (Emphasis added.)

A specific statute prevails over a general statute pursuant to Section 1-2-102 MCA and Montana Supreme Court case law such as Smith v. State, MT 94, 288 M 383, 958 P.2d 677 (1988); 1998 Gould v. Cooney, 253 M 90, 831 P.2d, 593 (1992); Harris v. Bailey, 244 M 279, 798 P.2d 96 (1990) and Gallatin Saddle & Harness Club v. White, 246 M 273, 805 P.2d 1299 (1990).

The 1985 Montana State Legislature amendment to Subsection 7-2-4601(3) MCA allowing property owners to petition for annexations to be reviewed on their merits is also the most recent Montana State Legislative intent. Statutory construction is to follow the State Legislative intent. See Chennault v. Sager, 187 M 455, 610 P.2d 173 (1980). The cardinal principle of statutory construction is that the intent of the legislature is controlling. State v. Meader, 184 M 232, 601 P.2d 386 (1979) and Baker National Insurance Agency v. Department of Revenue, 175 M 9, 571 P.2d 1156 (1977).

CONCLUSION(S):

(1) Pursuant to Section 7-2-4608 MCA there is a more than six decades old general restriction on annexation power pertaining to land which at the time the petition for proposed annexation is presented to the “city council” is actually being used for “agricultural” purposes.

(2) More recently the 1985 Montana State Legislature pursuant to HB-384, Chapter No. 279, Volume 1 Laws of Montana, Forty-Ninth Legislature 1985 made it easier for property owner(s) to petition to have their land annexed as long as all the property owners have signed the annexation petition. HB384 (1985) amended Subsection 7-2-4601(3) MCA of the petition method of city annexation to allow a property owner to petition to have their land annexed to a city and have approval or disapproval determined on the merits of the petition.

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Jim Nugent, City Attorney

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