

VOLUME NO 37

OPINION NO. 119

ANNEXATION - Methods of annexation by municipal corporations - Planned Community Development Act; LAND USE - Adoption of a comprehensive land use plan as a prerequisite to municipal annexation; STATUTES - Repeal by implication; STATUTORY CONSTRUCTION - Construction of section 11-525, R.C.M. 1947; STATUTORY REVISION - Need for revision of municipal annexation provisions; REVISED CODES OF MONTANA, 1947 - Sections 11-201, 11-403, 11-403(2), 11-405, 11-511 through 11-526, 11-3801, 67-506 and 67-507.

- HELD: 1. If a proposed annexation of land having no resident freeholders meets the annexation standards of section 11-519, R.C.M. 1947, including the requirement that the area to be annexed is included in and consistent with a master community development plan previously adopted pursuant to Title 11, chapter 38, R.C.M. 1947, and the city also complies with the PCDA planning and public hearing requirements of sections 11-518 and 11-520, R.C.M. 1947, the city may proceed under annexation procedures of section 11-403, R.C.M. 1947.
2. 36 OP. ATT'Y GEN. NO. 72 is overruled insofar as it held that the Planned Community Development Act of 1973, sections 11-514 through 11-525, R.C.M. 1947, repealed section 11-403, R.C.M. 1947.

7 March 1978

Leo Fisher, Esq.  
City Attorney  
City of Whitefish  
Whitefish, Montana 59937

Dear Mr. Fisher:

You have requested my opinion concerning the following question:

Should the City of Whitefish, a third class city as defined in section 11-201, R.C.M. 1947, annex contiguous land with no resident freeholders under annexation procedures set forth in section 11-403, R.C.M. 1947, or those procedures in the Planned Community Development Act of 1973, sections 11-514 to 11-526, R.C.M. 1947?

You have stated that the city council of Whitefish, following the procedures of section 11-403(2), R.C.M. 1947, has conditionally approved the proposed annexation described in your request. The approval is subject to determination concerning the council's authority to proceed under section 11-403(2). At the time of approval the City of Whitefish did not have a master plan for community development as authorized by Title 11, chapter 38, R.C.M. 1947, but has subsequently adopted such a plan.

The Planned Community Development Act of 1973 (PCDA), sections 11-514 through 11-526, R.C.M. 1947, established comprehensive annexation procedures applicable to all classes of cities and towns. The express purpose of PCDA is to provide a just, equitable and uniform method of extending municipal boundaries. Section 11-515, R.C.M. 1947.

When PCDA was enacted in 1973 there were several existing municipal annexation statutes found in chapters 4 and 5 of Title 11. PCDA did not expressly repeal these laws. Rather, it provided in relevant part:

\* \* \*

In so far as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling. The method of annexation authorized in this act shall be construed as supplemental to and independent from other methods of annexation authorized by state law.

Section 11-525, R.C.M. 1947. A prior Attorney General opinion concluded that the language of section 11-525 repeals only those existing annexation provisions "which covered areas specifically addressed in PCDA." 37 OP. ATT'Y GEN. NO. 72 (April 14, 1976). That opinion considered section 11-403, R.C.M. 1947, the provision in question here, holding:

Section 11-403 was repealed with the passage of the Planned Community Development Act of 1973 and is no longer a proper procedure for annexation.

Opinion No. 72 precludes the City of Whitefish from proceeding under section 11-403.

Absent some change in the law, some clear oversight, or manifest error, prior Attorney General opinions will not be

reconsidered. Cf. State v. Board of Examiners, 131 Mont. 188, 194, 309 P.2d 336 (1957), and State ex rel. Ebel v. Schye, 130 Mont. 537, 541-42, 305 P.2d 350 (1957). Two facts support a reconsideration of Opinion No. 72. The first is action by the 1977 Legislature specifically amending section 11-403. See Laws of Montana (1977), ch. 570, sec. 1. This, standing alone, is not sufficient for reconsideration since the Legislature cannot resurrect a repealed statute by amending it, Department of Revenue v. Burlington Northern Inc., 169 Mont. 202, 209, 545 P.2d 1083 (1976); State v. Holt, 121 Mont. 459, 469, 194 P.2d 651 (1948). The second fact, however, supports reconsideration: Opinion No. 72 fails to mention Missoula Rural Fire District v. City of Missoula, 168 Mont. 70, 540 P.2d 958 (1975), a case decided a year prior to the opinion. That case considered the effect of section 11-525 upon pre-existing annexation laws.

While both Missoula Rural Fire District and Opinion No. 72 reject the contention that PCDA was intended merely as an "alternative" to existing annexation statutes, the opinion's statutory construction of section 11-525 differs in important respects from that of the Supreme Court. The opinion utilizes a "subject matter" approach, concluding that since both PCDA and section 11-403 provided for annexation of "contiguous" areas, PCDA repealed the latter section. However, Opinion No. 72 also held that sections 11-511 through 11-513, R.C.M. 1947, were not repealed since those sections concern annexation of government property, a subject matter not specifically addressed in PCDA.

Missoula Rural Fire District adopts a more flexible approach:

If a city can annex an area using existing annexation procedures which are not inconsistent with the 1973 Act, it may continue to do so. But the city must follow the procedures of the 1973 Act in all other instances, \*\*\*.

168 Mont. at 75. The "inconsistent" test of Missoula Rural Fire District supplants that of Opinion No. 72. State ex rel. Ebel v. Schye, *supra*; State ex rel Barr v. District Court, 108 Mont. 433, 435, 91 P.2d 399 (1939). While applications of either test may result in identical results in some cases, different conclusions may be reached in others.

The express language of section 11-525, as well as its interpretation in Missoula Rural Fire District, does not

repeal prior annexation statutes but merely makes PCDA provisions "controlling" where prior provisions are "inconsistent."

At issue in Missoula Rural Fire District was a provision of section 11-519(2)(d) of PCDA prohibiting annexation of existing fire districts. The Supreme Court held that annexation of fire district land under any annexation statute would be inconsistent with the proscription of section 11-519(2)(d). 168 Mont. at 75-76.

Section 11-519, R.C.M. 1947, prescribes other minimum standards for proposed annexations:

(1) A municipal governing body may extend the municipal corporate limits to include any area which meets the general standards of subsection (2) of this section.

(2) The total area to be annexed must meet the following standards:

(a) it must be contiguous to the municipality's boundaries at the time the annexation proceeding is begun;

(b) no part of the area may be included within the boundary of another incorporated municipality;

(c) it must be included within and the proposed annexation must conform to a comprehensive plan as prescribed in Title 11, chapter 38, R.C.M. 1947; and

(d) no part of the area may be included within the boundary, as existing at the inception of such attempted annexation, of any fire district organized under any of the provisions of chapter 20, Title 11, if the fire district was originally organized at least 10 years prior to the inception of such attempted annexation. However, a single-ownership piece of land may be transferred from a fire district to a municipality by annexation as provided in 11-2008(5).

(3) In fixing new municipal boundaries, a municipal governing body shall, wherever practical, use natural topographic features such as ridgelines and streams and creeks as boundaries, and if a street is used as a boundary, include within the municipality land on both sides of the street; and such outside boundary may not extend more than 200 feet beyond the right-of-way of the street.

Any attempted annexation which violates one of those standards is "inconsistent" with PCDA and void. See Missoula Rural Fire District, supra. Therefore, as a preliminary matter, the area to be annexed must be contiguous to present city boundaries; the area may not be included within any other incorporated municipality; the annexation must be consistent with a comprehensive master plan previously adopted under Title 11, chapter 38, R.C.M. 1947; and no part of the area may be within a fire district organized under Title 11, chapter 20, R.C.M. 1947, with specific exceptions. If the proposed annexation does not meet these standards, the proposed annexation cannot be accomplished under PCDA or any other annexation provision.

Since Whitefish did not have a master community plan at the time the annexation ordinance was conditionally approved, the approval is void.

Whitefish is by no means unique in its failure to adopt a master plan under Title 11, chapter 38. Master plans are generated by "planning boards," which may be city, county, or city-county boards. The creation of a planning board is discretionary. Section 11-3801, R.C.M. 1947, provides that the governing bodies of cities and counties "may" create planning boards, and in practice many localities have not established boards. But while the creation of a planning board and the adoption of a master plan are discretionary under Title 11, chapter 38, the plain words of section 11-519(c) are mandatory, prohibiting annexation unless a plan has been adopted and the proposed annexation is consistent with the plan.

The planning requirement is consistent with the overall purpose of PCDA to put an end to "indiscriminate growth patterns" in cities, section 11-516, R.C.M. 1947, and compel urban planning. Cities which do not now have planning boards or master plans should act now to establish them.

The failure of Whitefish to comply with section 11-519(c) does not prevent it from initiating new annexation proceedings now that it has adopted a master plan. The question remains whether it must follow PCDA procedures exclusively or whether it may follow the annexation procedures set forth in section 11-403(2) provided it complies with minimum standards of section 11-519. This question is answered by determining whether application of section 11-403(2) would be inconsistent with the provisions of PCDA.

Briefly summarized, section 11-403(2) provides for initiation of annexation proceedings by city council resolution. Written notice is then given to all property owners within the area to be annexed and general notice given by newspaper publication. Twenty days are allowed for expressions of disapproval by freeholders within the territory to be annexed, and the area cannot be annexed if written protests are filed by a majority of area freeholders. Freeholder has a statutory definition, being a person having an estate of inheritance or life. Sections 67-506 and 67-507, R.C.M. 1947.

While the right of protest under section 11-403(2) extends to all freeholders of the area to be annexed, the right of protest under PCDA is limited to "resident freeholders." A "resident freeholder" is defined as:

\*\*\* [A] person who maintains his residence on real property in which he holds an estate of life or inheritance or of which he is the purchaser of such an estate under a contract for deed, some memorandum of which has been filed in the office of the county clerk and recorder. (Emphasis added.)

Section 11-516(3), R.C.M. 1947. Annexation under PCDA may be initiated and disapproved only by the governing body of the municipality or by fifty-one percent (51%) of the "resident freeholders" of the territory to be annexed, sections 11-517, 11-518(e) and 11-520(8), R.C.M. 1947. Since there are no "resident freeholders" in the areas under consideration in Whitefish, there is no inconsistency in granting non-resident "freeholders" a right of protest as provided in section 11-403(2).

However, in other respects the application of section 11-403 to the proposed Whitefish annexations is inconsistent with PCDA. Section 11-403 provides no planning requirements which correspond to those of section 11-518, and makes no provision for participation of city or town residents similar to that provided in section 11-520(4) and (5).

Section 11-518 requires that upon initiating annexation questions, the municipality must prepare a comprehensive plan for the area to be annexed. That plan must include maps detailing land use patterns and present services in the area, and a statement of plans for extending additional municipal services into the area. These requirements are

consistent with PCDA's purposes of eliminating indiscriminate municipal growth and providing for planned, equitable development of new areas. The PCDA planning requirement is not limited to residential areas. Section 11-516(2) expressly provides:

Municipalities are created to provide the governmental services essential for sound urban development and for the protection of health, safety and welfare in areas being intensively used for residential, commercial, industrial, institutional and governmental purposes or in areas undergoing such development and future annexation must consider these principles.

PCDA also provides for the input and participation of city or town residents in the annexation process although city residents have no right of protest. There is no similar role granted municipal residents under section 11-403. The PCDA preamble of legislative purpose, section 11-515, expressly finds that many areas are annexed without provision for adequate city services, to the detriment of owners of such areas, and that, similarly, many annexed areas do not pay their just and equal share for municipal services. "Therefore, it is the purpose of this act to develop a just and equitable system of adding to and increasing city boundaries for the state of Montana \*\*\*." Participation of residents of the existing municipality is in line with that purpose. Section 11-520(4) provides, "\*\*\* all residents of the municipality shall be given an opportunity to be heard," and the municipal governing body must take all public comment into consideration in making a final determination concerning the proposed annexation, section 11-520(5).

Any annexation accomplished without comprehensive planning similar to that required under section 11-518 and without a public hearing providing for full public participation as provided in section 11-520(4) and (5) is inconsistent with PCDA. The PCDA planning and hearing provisions are "controlling" and must be followed.

The result is a blending of PCDA with section 11-403, and in the end little is left of section 11-403. That section becomes merely a vehicle to give a voice to non-resident freeholders of areas which the city proposes to annex. The alternative to this amalgamation of annexation procedures is to void all annexation statutes which are inconsistent with PCDA in any respect. This all or nothing approach finds no

support in the limited language of section 11-525: "Insofar as the provisions of this act are inconsistent with the provisions of any other law, the provisions in this act shall be controlling." (Emphasis added.)

The Legislature's approach to existing annexation law in section 11-525 is unfortunate. Testing annexation statutes enacted prior to PCDA for inconsistency is a burdensome task, ultimately producing unsatisfactory results. The annexation provisions existing at the time of PCDA enactment were enacted piecemeal during several legislative sessions. See 36 OP. ATT'Y GEN. NO. 72 (1976). While it is apparent that several of the existing provisions on their face present no inconsistency with PCDA and are intended to have continuing life, specifically those provisions for the excising of territory already included within the municipal boundaries, section 11-501 through 11-505, and provisions for merger of contiguous cities and towns, section 11-405, R.C.M. 1947, other sections such as 11-403 present difficult questions which are better resolved by clear and unambiguous legislation. There is urgent need for new annexation legislation bringing together all modes of annexation into a single, clear, simplified and comprehensive annexation statute.

THEREFORE, IT IS MY OPINION:

1. If a proposed annexation of land having no resident freeholders meets the annexation standards of section 11-519, R.C.M. 1947, including the requirement that the area to be annexed is included in and consistent with a master community development plan previously adopted pursuant to Title 11, chapter 38, R.C.M. 1947, and the city also complies with the PCDA planning and public hearing requirements of sections 11-518 and 11-520, R.C.M. 1947, the city may proceed under annexation procedures of section 11-403, R.C.M. 1947.
2. 36 OP. ATT'Y GEN. NO. 72 is overruled insofar as it held that the Planned Community Development Act of 1973, sections 11-514 through 11-525, R.C.M. 1947, repealed section 11-403, R.C.M. 1947.

Very truly yours,

MIKE GREELY  
Attorney General