1-1-1974

Annexation in Montana--A Time for Change

J. Martin Burke

University of Montana School of Law, jmartin.burke@umontana.edu

Follow this and additional works at: https://scholarship.law.umt.edu/mlr

Part of the Law Commons

Recommended Citation

Available at: https://scholarship.law.umt.edu/mlr/vol35/iss1/5

This Comment is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.
Suburban growth has resulted in numerous problems for municipal governments in Montana. Of these problems, the most critical is the economic impact of suburbia. The growth of the suburbs has resulted in increased use of city facilities and services, necessitating greater government expenditure. Although using city facilities, the suburbanite is freed from city taxation. Thus, while government costs increase, the city tax base does not. Indeed if anything, the city tax base may decrease. For, as is often the case, suburban development may result in the relocation of city businesses to the suburban area. Thus, suburban growth may ultimately threaten one of the chief sources of city tax revenue—the business community.

In response to the problems created by the advent of suburbia, many Montana cities have resorted to annexation. Unfortunately, while suburban expansion in Montana is a phenomenon of the last two decades, Montana annexation procedures are much older. As a result, Montana annexation laws fail to meet the needs of the time. Too often, their stringent requirements have made annexation almost impossible.

The purpose of this comment is to focus on Montana’s annexation procedures and evaluate them in light of present problems. The statutory and judicial history of Montana annexation will be analyzed in some detail. A proposal for the revision of Montana annexation laws will be suggested.

MONTANA ANNEXATION—A LEGISLATIVE HISTORY

Montana’s annexation statutes date from the late 1800’s. The Political Code of Montana 1895, §§ 4724-4727 outlined the first Montana annexation procedures. Under those statutes, only contiguous territory could be annexed by the city. If the city desired to annex, an ordinance by the city council and two elections were required. In the first election, the residents of the city voted. If a majority of those voting approved annexation, a petition for annexation was submitted to the county commissioners. An election was then held in the proposed addition. A ma-

1 The effects of the growth of the suburbs on the county has also been significant. A myriad of special improvement districts have been created; the inadequacy of sewage facilities has resulted in polluted streams; larger county police forces are needed; a tremendous duplication of equipment such as road machinery has resulted. All factors considered, the fragmentation of government caused by the expansion of the urban fringe has increased governmental inefficiency and correspondingly government costs.

2 Cullen and Noe, Stumbling Giants, A Path to Progress Through Metropolitan Annexation, 39 Notre Dame Lawyer 57, 58 (1963).

3 Political Code of Montana 1895, §§ 4724, 4726.
Majority of the electors residing therein had to approve the annexation before the territory could be annexed.4

The Political Code of Montana 1895, § 4726 was repealed by the state legislature in 1905 and a new annexation statute was promulgated.5 This new statute provided for city council annexation of land “which had been or may be platted” and which was contiguous to the city.6 The 1905 statute is the basis for Montana’s present annexation procedure.7 It authorizes annexation by the resolution of the city council “when (annexation) is in the best interest of such city or town, and the inhabitants thereof, and of the inhabitants of any contiguous platted tracts or parcels of land. . . .”8 Unlike its predecessor, however, the 1905 statute requires no election for annexation. Rather, the resident freeholders of the area to be annexed are given the opportunity to submit written protests. If a majority of the resident freeholders protest, the council is not authorized to annex.9 In terms of effect, this right of protest is one of the most important features of the present annexation statute. As will be later discussed, more so than any other provision, the right of protest has served to hamper legitimate annexation efforts.

In 1925, the legislature first distinguished annexation by cities of the first class from annexation by second and third class cities.10 Under the provisions of the 1925 amendment, any freeholder of property to be annexed by second or third class cities could protest. The resident freeholder requirement remained, however, for protests against annexation by first class cities.11 This latter distinction which still exists has been a source of judicial controversy.12

The 1945 legislature provided an alternative method of annexation, i.e. annexation by petition.13 According to the 1945 act, if one-third of the “resident freeholder electors” of the territory to be annexed petition for annexation, the city council must submit the question of annexation to an election.

---

4Political Code of Montana 1895, § 4726.
5Laws of Montana (1905), Ch. 30, § 1; re-enacted Revised Codes of Montana § 3214 (1907).
6Id.
7Revised Codes of Montana, § 11-403 (1947) [hereinafter R.C.M. 1947].
8Id.
9Id.
10Laws of Montana (1925), Ch. 52.
11Id.
13R.C.M. 1947, § 11-403(3) was also added in 1925. The provision expands the concept of “contiguity.” The section provides that “when two or more adjacent tracts taken as a whole shall adjoin the city, they may be included in one resolution for annexation although one or more of the tracts alone may not be adjacent to the corporate limits as then existing.”
14Laws of Montana (1945), Ch. 168, §§ 4, 5 (now R.C.M. 1947, §§ 11-506—11-513). It is to be noted that in 1927, almost twenty years earlier, the state legislature passed a law providing for the exclusion of any area from the city by means of petition. Laws of Montana (1927), Ch. 33 (now R.C.M. 1947, §§ 11-501—11-505).
tion to the city electorate. If a majority of those voting favor annexation, then the council must adopt a resolution annexing the area. Thus, given this act, annexation can either be accomplished by action of the city council subject to freeholder protest or by freeholder petition.

The 1945 annexation act, however, contains two rather unique provisions. First, the act limits annexation by petition to cities of a population between 20,000 and 35,000. This limitation appears completely illogical. Certainly, its result is to make voluntary annexation available to only a few Montana cities.

Secondly, the 1945 enactment qualifies the extent of voluntary annexation by specifically excluding any land used "in whole or in part for agricultural, mining, smelting, refining, transportation or any industrial or manufacturing purpose or any purpose incident thereto." Undoubtedly, this latter provision was the result of the efforts of the strong mining interests in the state. This same exclusion was to be incorporated later as part of the annexation procedures in R.C.M. 1947, § 11-403.

Between 1945 and 1959, no important changes were made in the annexation procedures of Montana. In 1959, however, the legislature added a very significant provision to the basic annexation statute whereby a city of the first class might "include as part of such city any platted or unplatted tract or parcel of land that is wholly surrounded by such city." If the above situation exists, only a city council resolution is required for annexation. The fact that a majority of the resident freeholders protest the annexation is no bar to annexation of this nature. It is this latter provision that makes the amendment so important.

The legislature, however, qualified the extent of annexation by this method by incorporating a provision similar to the exclusionary pro-

---

1R.C.M. 1947, § 11-506.
4R.C.M. 1947, § 11-509.
5By means of a separate act also passed by the 1945 Legislature, the meaning of the term "contiguous" was further qualified. According to this act, Laws of Montana (1945), Ch. 95, § 1 (now R.C.M. 1947, § 11-404), land would still be "contiguous" to the city although it was separated "from such city or town by a street or other roadway, irrigation ditch, drainage ditch, stream, river or a strip of unplatted land too narrow or too small to be platted." In at least two cases, this statute has been utilized by the court in upholding city annexation efforts, Calvert v. City of Great Falls, 154 Mont. 213, 462 P.2d 182 (1969); Brodie v. City of Missoula, 155 Mont. 185, 468 P.2d 778 (1970).
6In 1957, R.C.M. 1947, § 11-503(1) was amended to provide that cities of the first class might annex unplatted contiguous lands that had been surveyed and for which a certificate of survey had been filed, Laws of Montana (1957), Ch. 239. The 1957 Legislature also enacted a law providing annexation procedures for contiguous lands owned by the government, Laws of Montana (1957), Ch. 189 (now R.C.M. 1947, §§ 11-511—11-513).
7Laws of Montana (1959), Ch. 238.
8Hereinafter termed compulsory annexation.
vision in the 1945 act. This provision excludes from compulsory annexation any land used for: agricultural, mining, smelting, refining, transportation, or any industrial or manufacturing purpose or for the purpose of maintaining or operating a golf or country club, an athletic field or aircraft landing field, a cemetery or a place for public or private outdoor entertainment or any purpose incident thereto. . . .

Because it rids the city of the freeholder veto problem, the compulsory annexation method has become a very important tool for the first class cities of the state and has been used often.

Following in the footsteps of the 1945 and 1959 legislatures, the 1961 legislature amended R.C.M. 1947, § 11-403(1) to provide that city councils of the first class cities may not annex land used for “industrial or manufacturing purposes” unless the owners of such land give their written consent. With the addition of this provision, the legislature came full circle in barring first class cities from annexing industrial and manufacturing properties. As will be discussed later, serious questions have been and may be raised as to this special treatment accorded certain property.

Since 1961, no other major changes have been made in Montana's annexation statutes. The Montana legislature, however, has recently considered bills which would completely revise annexation procedures in Montana. Hopefully, the legislature will soon act to remedy the many problems inherent in the present annexation statutes.

In concluding this analysis of the legislative history of Montana’s annexation statutes, it will be noted that the basic annexation procedure has not been altered since 1905. Cities have remained burdened with the freeholder veto authorized by the early statute. In the last 68 years, the addition of compulsory annexation has been perhaps the most significant change made by the legislature. As noted, however, compulsory annexation is useful only under prescribed conditions. Ultimately, Montana has no viable annexation procedure which will insure the success of reasonable annexation attempts.

MONTANA ANNEXATION—A JUDICIAL HISTORY

Annexation has traditionally been considered a political matter under the exclusive control of the legislative branch. As a result, the

---

**Footnotes:**

23 R.C.M. 1947, § 11-509.
26 Laws of Montana (1961), Ch. 217.
27 In 1967, the legislature amended R.C.M. 1947, § 11-403 to provide that land which has been platted for parks is subject to annexation, Laws of Montana (1967), Ch. 281.
28 House Bill 556 was introduced in the 43rd Legislature by Norman, Fagg, Holmes, Turman, Cox, Towe, Regan, Huennekens, and Marbut.
role of the courts in annexation proceedings has been very limited. As was stated in *Penland v. City of Missoula*,[20] "[T]he exercise of the discretion given by the legislature to the city may be reviewed by a court only when and if they have proceeded contrary to statute." Thus, in the event a municipality follows the statutory procedure for annexing land, theoretically the courts would have no authority to question the annexation itself. Montana courts have, however, on numerous occasions been presented annexation cases. The role of the court in all of these cases has been limited to the traditional judicial functions of interpreting the language of the statutes and reviewing the constitutionality of the various provisions.

The major judicial controversies during the history of annexation in this state have centered on the following areas: the difference in protest rights between first class and second and third class cities; the exemptions provided for industrial and manufacturing concerns; the nature of the compulsory annexation; and the definition of "resident freeholder" and "industrial or manufacturing."

A. **Protest Rights**

As was noted earlier, R.C.M. 1947, § 11-403 authorizes only affected resident freeholders to protest annexation in first class cities while any affected freeholder may protest annexation in the second or third class cities. This distinction has been challenged on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment. At the outset, it is important to recognize that the legislature is under no constitutional obligation to even consider the protests of people living in areas to be annexed. As was stated in *Harrison v. City of Missoula*: [31] "The legislature can authorize annexation without the consent and even against the wishes of the people living in the area to be annexed."[32]

If, however, people are given a protest right in the proceedings as in Montana, may the legislature constitutionally classify protesters on the basis of city size? The *Harrison* case was the first in Montana to treat this question of discriminatory class legislation. The court very summarily dismissed as without merit the appellant's contention that the protest distinction was unconstitutional. The court reasoned that since the legislature need not have permitted anyone to protest, it could therefore exercise its discretion in allowing protest from any group.

*Harrison*, however, did not settle the issue. Indeed, in light of U.S. law...
Supreme Court decisions in the latter part of the 1960's,\textsuperscript{33} it appeared that a good argument could be made that the limitation of protest rights to resident freeholders in first class cities might be unconstitutional. The Montana supreme court, however, appears to have settled that issue in its very recent decision in \textit{Burritt v. City of Butte}.\textsuperscript{34} The court in that case cited the \textit{Harrison} proposition that the legislature could deny the right to protest. It emphasized the general rule on classification "that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced would be treated alike."\textsuperscript{35} The court found that the differences between the larger and smaller cities served as a basis to justify the classification. The court noted that the problems of the larger cities were considerably different from those of smaller cities. For this reason, the legislature determined that annexation should be made easier in the larger cities. In concluding the court stated:\textsuperscript{36}

The classification established by the legislature in limiting protests to annexation to resident freeholders in first class cities, while permitting protests by freeholders without regard to residence in smaller cities is not only a rational distinction but also promotes a compelling governmental interest and is therefore constitutional.

That a compelling state interest is being served by the statute is perhaps too strong. Yet clearly, absent some appeal to a higher court, the \textit{Harrison} ruling would appear to settle forever the residency classification question.

\textbf{B. RESIDENT FREEHOLDER DEFINED}

As if the classification question were not enough, the court has also been compelled to define the meaning of resident freeholder. \textit{Kunesh v. City of Great Falls}\textsuperscript{37} was the first case to define "resident freeholder." In that case, the court ruled that a resident freeholder is "one who is a resident within the area to be annexed, holding a present legal title to a freehold estate in real property located within the area to be annexed."\textsuperscript{38}

In \textit{Burritt}, the court was presented the interesting question of whether or not a corporation could be considered a resident freeholder for protest purposes. The City of Butte had annexed property owned or leased by various corporations as well as property held by a partner-

\textsuperscript{33}Kramer v. Union Free School District, 395 U.S. 621 (1969) (a case dealing with class distinction as to the right to vote in school elections); and Cipriano v. City of Houma, 395 U.S. 701 (1969) (dealing with classification with regards to the right to vote in municipal bond elections).

\textsuperscript{34}\textit{Burritt v. City of Butte}, supra note 29 at 567-568.

\textsuperscript{35}\textit{Id.} at 568.

\textsuperscript{36}\textit{Id.} at 569.

\textsuperscript{37}122 Mont. 285, 317 P.2d 297 (1957).

\textsuperscript{38}\textit{Id.} at 301; in accord, Brodie v. City of Missoula, 155 Mont. 185, 468 P.2d 778, 783 (1970).
ship. The court turning to the context of R.C.M. 1947, § 11-403 held that the statute contemplated "... actual residence on property sought to be annexed in order to qualify for protest." Thus, the statute "excludes a corporation which possesses no actual residence as distinguished from a legal residence. ..."

According to this interpretation, only natural persons are capable of being resident freeholders for purposes of protest. A corporation or a partnership, therefore, could not be a resident freeholder and thus had no right to protest.

The court ruling in Burritt is of great significance for the cities. One of the greatest sources of tax revenue is the business community. The definition given "resident freeholder" permits greater ease in the annexation of business districts. Because most of the property in the business area is owned corporately or held in partnership, few resident freeholders if any exist to protest the annexation of business districts.

C. Compulsory Annexation

Although seldom litigated, a very important provision of the Montana annexation statute is that authorizing first class cities to annex platted or unplatted land wholly surrounded by the city. As noted earlier, this provision permits annexation despite freeholder protest. Annexation is generally accompanied by an increase in taxes for those annexed. As a result, it is quite often impossible for a Montana city to annex residential areas because the resident freeholders will usually protest any annexation attempt. The compulsory annexation provision, however, eliminates this freeholder veto. As stated in Brodie v. City of Missoula, compulsory annexation makes possible the "orderly and uniform extension of city boundaries and city services. . . ."

Although Brodie dealt with the compulsory annexation provision, the only case strictly dealing with the requirements for compulsory annexation was Calvert v. City of Great Falls. In that case, the city was attempting to annex the fifteenth addition of Great Falls. The addition was completely surrounded by the City of Great Falls. In one place, along the border of the addition, however, was a drive-in theater covering approximately thirteen acres of land. The theater as a "place of public outdoor entertainment" was exempt from the compulsory annexation provisions. The appellant, a resident freeholder of two lots in the addition, claimed that the city had no authority to annex the land. He contended that the exempt theater rendered certain properties non-contiguous to the city. According to the appellant, "wholly surrounded" as used in the statute meant "wholly contiguous." The court relying on

---

*Burritt v. City of Butte, supra note 29 at 567.
*R.C.M. 1947, § 11-403(1).
*R.C.M. 1947, § 11-403(1).*
R.C.M. 1947, § 11-404 held that land need not be wholly contiguous to be subject to compulsory annexation. Most importantly, the court defined “wholly surrounded” saying that:44

[T]he term “wholly surrounded” means that a tract of land where all lands on the side of the tract are within the city and where it is impossible to reach the tract without crossing such territory. (sic.)

While the statute as interpreted by the court makes annexation of areas encircled by the city a simple matter, the process of surrounding an unincorporated area is not easy. Often a city in attempting to annex objecting residential areas will have to resort to annexing strips of property surrounding the residential area. A danger, however, presents itself with regards to strip annexation of this nature. If the strips are not large enough, they may result in what is termed “shoestring annexation.” Courts have reacted negatively to this type of annexation.45 Thus, although for first class cities compulsory annexation is a valuable tool, creating the proper conditions for its exercise may be quite cumbersome.

D. Exemptions

Undoubtedly, the most interesting and questionable provisions of the Montana annexation statutes are those exempting lands used for certain purposes. As mentioned earlier, first class cities are not permitted to annex land used for industrial or manufacturing purposes.46 In the case of compulsory annexation, a long list of exemptions is provided.47 Consistently the Supreme Court of Montana has upheld these exemptions.

The exemption provisions were first challenged in Harrison. The court in that case quickly dismissed the constitutional question. Declaring that a statute bears the presumption of constitutionality and that “no statute will be held unconstitutional unless its violation of the fundamental law is clear and palpable,”48 the court ruled the questioned section of the statute constitutional.

In the Calvert case, the court’s attention was more particularly focused on the constitutionality of the exemptions provided in the compulsory annexation provisions.49 The appellant contended that the exemp-
tions constituted class legislation. The court noted that classifications must be reasonable. Quoting from *State v. Safeway Stores Inc.*, the court stated:

_We must assume that the Legislature was in a position and had the power to pass upon the wisdom of the enactment, and in the absence of an affirmative showing that there was no valid reason behind the classification, we are powerless to disturb it._

Given this rule of law, the court turned to the statute to determine if there was a reasonable basis on which a distinction could be made between different types of property. The court concluded that reasonable factors did exist upon which a valid distinction could be made. While owners of property used for residential or commercial purposes received benefits from annexation, for owners of agricultural, recreational, or industrial lands, annexation meant only an increased tax burden and possible zoning problems. As there was no showing that the exemption provision was unreasonable, the court ruled that it was constitutional.

### E. REQUIREMENTS FOR EXEMPTION

Rather than merely attack the constitutionality of the exemption provision itself, some plaintiffs have attempted to claim an exemption for their land. In *Brodie*, the plaintiff attempted to avoid annexation by declaring that his lands were agricultural and thus exempt from compulsory annexation. At stake were thirty acres of land which the plaintiff had leased for the purposes of grazing horses and cattle. Given the fact that the property was leased only on a month to month basis and the fact that there were apparently residential plans for the land, the court determined that the agricultural use was only incidental.

In *Burritt*, the plaintiff contended that the land annexed was used for industrial purposes. Included in the annexation attempt were a “commercial shopping center with a number of retail stores, a motel, a gas station, a barber shop, a real estate office, a movie theater, a veterinary office and animal hospital and a Safeway store.” The plaintiffs through an expert witness sought to give the word “industrial” its economic definition whereby an industry is:

_any department or branch of art, occupation, or business conducted as a means of livelihood or for a profit; especially one which employs labor and capital and is a distinct branch of trade._

Accepting this definition of “industry” would of course result in the exemption of most businesses. The court, however, rejected this broad definition and ruled that for the purposes of the statute.

---

80-106 Mont. 182, 76 P.2d 81 (1938).
81 Calvert v. City of Great Falls, *supra* note 19 at 186.
82 Brodie v. City of Missoula, *supra* note 19 at 781.
83 Burritt v. City of Butte, *supra* note 29 at 564.
84 Id. at 565-566.
industrial purpose is limited to any factory or business concern which is engaged primarily in the manufacture or assembly of goods or processing of raw materials unserviceable in their natural state which are extracted, processed, or made fit for use or are substantially altered or treated so as to create commercial products or materials.

The fact that a business like Safeway had a meat market and an in-store bakery, both of which fit the definition of industrial purpose, would not operate to bring Safeway within the exemption. Again, the court returned to the Brodie concept and ruled that the bakery and meat market were only incidental to the operations of a retail store.56

In conclusion, the judicial role in Montana annexation has been limited. As the preceding discussion has indicated, however, the judiciary has played an important role in interpreting the language of the statutes. In cases like Burritt and Calvert, the court's definition of terms actually eased the burden facing the city in annexation proceedings. Nevertheless, the courts may only go so far. For any substantial changes in the annexation procedures, Montana cities must ultimately look to the legislature.

MONTANA ANNEXATION—A CRITICAL EVALUATION

In attempting an evaluation of Montana's annexation laws, one must first define the purpose of such laws. Once a need and thus a purpose for annexation is established, one may determine whether existing laws are conducive to the accomplishment of that purpose.

Clearly, the purpose of annexation statutes has traditionally been to provide a means whereby a metropolitan area could be united effectively and regulated by a single government. Annexation procedures should, therefore, permit a city government to extend its control over contiguous areas which may properly be considered part of the city as far as social, political and economic interests are concerned.

Too often in the past, unincorporated fringe areas have proven a burden for the city. Lack of sewage facilities and other services have led to health problems which affected not only the residents of the unincorporated area but also the residents of the city.57 Furthermore, as was noted in the introduction, the financial burden on the city has increased with the increase in size of the urban fringe. The ultimate effectiveness of city planning and zoning has also in some cases been negated by uncontrolled development of non-incorporated fringe areas of the city. Control by one government assures uniformity of regulations as well as orderly development, both of which are necessary for the proper health, safety and welfare of the inhabitants of the area. Thus, as a

56Id.
matter of policy, annexation of areas which practically speaking are a part of a municipal community should be a simple matter.

Given this analysis of the need and purpose of annexation and having considered the nature of Montana's annexation laws, it is apparent that Montana's annexation procedures are outmoded and quite inadequate. Undoubtedly, the biggest problem with the Montana annexation procedures is the difficulty entailed in effecting annexation. As was discussed earlier, the voluntary annexation provisions of R.C.M. 1947, §§ 11-506-11-513 are limited to cities of 20,000-35,000 inhabitants. Practically speaking, these latter limitations make that act meaningless for almost all Montana cities. Thus, Montana really has no viable voluntary annexation procedure.

Of greater impact than the limited scope of voluntary annexation, however, is the fact that annexation by the city council has been made very difficult because of the veto power which is granted freeholders. Except in situations wherein a city has control of some vital service such as sewage or water, it is unlikely that the residents of an unincorporated area will idly accept annexation and increased taxation. As a result, cities desirous of annexing areas are forced as a practical matter to attempt to encircle residential areas to avoid the protest provision. This latter procedure may be costly and may ultimately prove fruitless. In the final analysis, the whole procedure is time consuming and borders on the absurd.

If in fact the policy of annexation is to permit a city to expand its control over areas constituting natural city expansion, then people living in areas which appropriately are part of the city should have no veto power. Although the denial of such protest rights initially may seem a denial of due process, as mentioned earlier, courts have consistently ruled that the denial of protest rights is not unconstitutional. As one commentator on the subject has stated:

The argument that the resident and owner of property in the fringe area have an absolute right to determine whether the area should be annexed cannot be reconciled with the rights and interests of the residents and property owners in the total surrounding community.

Certainly, it has always been the rule in a nation such as ours that the common good takes precedence over the wishes of an individual or a small group of individuals. To preserve protest provisions like those in Montana can only seriously hamper or negate any reasonable annexation efforts.

Finally, the exemption provisions of the annexation laws are both unclear and unfair. Admittedly, discrimination between lands with

respect to the right of a municipality to annex has been upheld.\(^5\) As mentioned earlier, however, some reasonable basis for the classification is required.\(^6\) The Supreme Court of Montana has found a rational basis for the classifications provided by Montana law.\(^6\) The rational basis found by the court is highly questionable. The idea expressed in Calvert that industrial and manufacturing property does not receive any substantial benefit from the city is erroneous. More than likely, the very existence of a manufacturing company may depend on the existence of a city. It would therefore appear that property used for manufacturing, industrial and other similar purposes, while perhaps not benefitting from the traditional services offered residents by a city, nevertheless, does receive substantial benefits from the city. Even assuming, however, some technical basis for distinction, the Montana exemptions are overbroad and in some cases unjustified.

R.C.M. 1947, \(\text{§} \) 11-403(1) is a good example of the overbreadth of the exemption provisions. That section states that all lands used for:

agricultural, mining, smelting, refining, transportation, or any industrial or manufacturing purpose or for the purpose of maintaining or operating a golf or country club, an athletic field or aircraft landing field, a cemetery or a place for public or private outdoor entertainment or any purpose incident thereto shall not be annexed under this provision.

Clearly, these exclusions are far too broad. As a matter of policy, annexation should be permitted whenever the land to be annexed is contiguous to and receives any substantial benefit from the city. While a legitimate exclusion might be found to exist for large tracts of agricultural land, the above exclusion is questionable as it concerns “mining, smelting, refining or transportation property, a golf or country club or a place for public or private outdoor entertainment.”\(^6\) There appears no reason why owners of property used for the above-named purposes should be automatically exempt from city taxes. No one can question that the existence of the city is of benefit to such places. As is often the case, golf courses and places of outdoor public or private entertainment are operated solely for the purposes of profit. Like all other business establishments, therefore, they should be subject to annexation and thus taxation by the city which makes their existence possible.

Much property used for industrial, mining, smelting, etc. also realizes benefits from the city’s existence. The fact alone that such land uses have led to the development and growth of cities places a responsibility on companies using the property to bear a share of the city’s expense.

\(^{5}\text{Clark v. Kansas City, 176 U.S. 114 (1900).}\)

\(^{6}\text{Calvert v. City of Great Falls, supra note 19 at 185.}\)

\(^{6}\text{Id. at 185-186.}\)

\(^{6}\text{As far as athletic fields, aircraft landing fields or cemeteries are concerned, it would appear that if they were operated by a school system or the city or county, exclusion would be proper. A private athletic field, however, utilized as a business for purposes of profit should not be excluded.}\)
Certainly, a provision exempting all such property automatically is un-justifiable.

In conclusion, Montana’s annexation statutes do not meet the needs of Montana cities. Although admittedly annexation continues to take place, the process is often burdensome. A full scale revision of Montana law in this area is therefore proposed.

A PROPOSAL

Problems with annexation statutes are commonplace. Consequently, many proposals have been made concerning the updating of annexation procedures. With the experience of other states in mind and considering the present condition of annexation in Montana, the following proposal is made.

First, a voluntary annexation statute should be enacted whereby the residents of an urban area, regardless of size, may petition the city council for annexation. Unlike the present statute, no election should be necessary for purposes of voluntary annexation. Rather, a petition describing accurately the area to be annexed and bearing the signature of a majority of the people living in the area should be required. In all events, the area to be annexed must be contiguous to the city. The city council should be empowered to exercise its discretion in determining whether to annex any part or all of the area. The same rule of reason as described below should serve as a standard for the council's deliberations on this point. The council's decision should be subject to review by a court in the event that its action is claimed to be unreasonable and arbitrary.

Secondly, a new procedure for annexation by city council resolution should be established. The legislature in promulgating the new statute should specifically recognize the need of cities to extend their boundary lines in order to prevent suburban sprawl and governmental duplication and to assure orderly development of the metropolitan area.

Unlike the present statute, no distinction should be made between cities of the first class and cities of the second class. Furthermore, as suggested earlier, no veto power should exist as is presently provided in Montana law. Rather, annexation should be strictly based on a rule of reason.

The present Montana code with regards to city council annexation states that the council may annex an area when “in the judgment of the council . . . it will be to the best interest of such city and the inhabitants of any contiguous platted tracts or parcels of land . . . that the boundaries of such city shall be extended so as to include the same within the corporate limits thereof. . . .” This concept should be

---

*For example, Holliman *supra* note 58 at 533.

*RCM 1947, § 11-403(1).*
expanded to include specific criteria similar to those adopted by other states to guide the council in its action. The following criteria are suggested as a basis for determining the reasonableness of a city's annexation:

(a) Whether the land is contiguous to the city. Annexation should be prima facie unreasonable if the area sought to be annexed is not contiguous.

(b) Whether the land to be annexed represents the natural growth of the city. As a general rule, the city should be permitted to expand as its changing population needs require. In determining whether expansion is proper, the council should consider whether the area to be annexed is, from a social, economic and political point of view, part of the metropolitan community.

(c) Whether the city presently provides or plans to provide any services to the people living in the area. The capacity of a city to furnish services to an annexed area has been considered an important element in determining the reasonableness of annexation. Also, a determination should be made as to whether the people in the area need any of the services that a city could offer it. This latter point, however, cannot be ruling. Ultimately it is the need of the area as a whole which must be considered. Although there is no necessity that the city provide any services to an area to be annexed, equal protection concepts would seem to require that people in an annexed area be entitled to the same

---

In the State of Washington, for example, the legislature has prescribed the following as a basis for evaluating the reasonableness of municipal annexation proceedings, WASHINGTON REVISED CODES § 35-13.173 (1965):

1. Immediate and prospective population of the area;
2. The assessed valuation of the area to be annexed;
3. The history and prospect for construction of improvements in the area to be annexed;
4. The needs and possibilities for geographical expansion of the city;
5. The present and anticipated need for governmental services in the area proposed to be annexed including water supply, garbage disposal, zoning, streets and alleys, curbs, sidewalks, police and fire protection; playgrounds, parks and other municipal services and transportation and drainage;
6. Capabilities of city, county or other political subdivisions to provide governmental services when need arises;
7. The immediate and potential revenues that would be derived by the city as a result of annexation and the relation to the cost of providing services for the area.

In Hughes v. City of Carlsbad, 53 N.M. 150, 203, P.2d 995, 997 (1949), the Supreme Court of New Mexico held that the following factors should be taken into account when considering the reasonableness of annexation:

1. Whether the land to be annexed was platted and sold for town lots;
2. Whether it was being sold as urban property;
3. Whether the land represents the actual growth of the city;
4. Whether the inhabitants of the area are in need of municipal services;
5. Whether the land is chiefly valuable by reason of its adaptability for urban purposes;
6. Whether the said area combined with the city constitutes one community unit;
7. Whether the area to be annexed is contiguous to the present area of the city;
8. Whether annexation is in the best interests of the people of both areas.

---

Henrico County v. City of Richmond, 177 Va. 754, 15 S.E.2d 309, 321 (1941).
services generally afforded by the city to the people and property already in the city. This latter criterion is rather important as people living in the urban fringe might well claim that city annexation is for revenue purposes only. Annexation strictly for revenue has been deemed void by some courts.\(^6\) If, however, the area annexed has been receiving city services or if the residents of the annexed area have been using city facilities, then the fact that annexation is merely for purposes of revenue should make no difference.

(d) Whether the nature of the land and the use of the land may be deemed urban. The fact that the area is platted and used for homes for people working in the city or making their living because of the existence of the city would be important here. A general question that can be asked in this regard is: but for the existence of the city, would this home, business, etc. exist in the area. Obviously large tracts of agricultural land would not ordinarily be considered urban property. Thus, absent other circumstances annexation of such an area might be considered unreasonable. This criterion will thus negate the need for any exemption provisions as presently provided by Montana law. It makes possible a consideration on a case-by-case approach of the land involved in annexation procedures. Therefore, the problems of overbroad exclusion provision are avoided.

(e) Finally, whether the annexation is in the best interests of both the people of the city and the area to be annexed. The position of the people in the city is just as important as that of the people living in the area to be annexed. The people in the city pay double taxes. They, for example, pay for the maintenance of the city streets as well as the county streets. County residents pay only for the maintenance of county streets. For the city people, annexation means an end to the duplication of governmental services and equalization of the economic burden of maintaining services in the community at large. On the other hand, annexation for the people residing on land subject to annexation may mean only an increase in their tax bill. The conflicting interests of the two groups must thus be weighed.

These latter criteria form a rule of reason for annexation. The legislature should also provide that the people be granted a voice in the annexation process. They should not, however, be given a veto power. The requirement of a public meeting should be incorporated into any new annexation law. People from both city and the area to be annexed should be given the opportunity to express their views on the subject. In this manner, the city council before making any decision may consider the views of the people affected.

Finally, the legislature should provide for judicial review of city annexation. The scope of judicial review should not be limited as under

---


Published by The Scholarly Forum @ Montana Law, 1974
present Montana law merely to the question of whether technical procedures have been followed. Rather, the courts should be granted the authority to negate annexation when the facts show that the action of the city was unreasonable.

CONCLUSION

Revision of the Montana annexation procedures is certain to meet substantial opposition. With the growth of suburbia, the size of work forces hired by various county offices particularly those dealing with law enforcement, road construction and maintenance have increased. Volunteer fire departments and many special districts have been created. These bodies have a vested interest in preserving the status quo. From their standpoint, annexation means only one thing—the reduction of the tax base and a resulting cutback in jobs. Thus, any attempt to establish easier annexation procedures would undoubtedly engender considerable controversy.

When viewed objectively, however, the necessity for change in the annexation procedures is clear. The inability of cities to annex suburban areas may eventually destroy the city economically. Furthermore, the continued duplication of governmental services and the constant friction between two governments serving one community can only ultimately impede the orderly development of a metropolitan area.

Montana has the experience of the more populous states from which to draw. Indeed, the chaotic financial conditions of some of America's largest cities are proof of the consequences of inadequate municipal annexation procedures. The urban sprawl and resulting problems that Montana cities face are insignificant by comparison to those of the nation's larger cities. Yet, suburbia is becoming more a problem for Montana cities. Hopefully, the Montana legislature will provide a remedy for the cities by repealing Montana's antiquated annexation statutes and replacing them with procedures that will ensure effective municipal government.89

89The 43rd Montana Legislative Assembly was presented with H.B. 556 providing a complete revision of Montana annexation procedures. The bill was considered in the 1973 session of the Legislature. The bill establishes new annexation procedures very similar to those suggested in this comment. Two elements of the proposed statute raise some concern. First, the proposed law places too great an emphasis on the provision of city services to the area to be annexed. While the ability of the city to provide services to an annexed area is admittedly an important consideration in determining the reasonableness of annexation, it should not, as suggested by House Bill 556, be a condition precedent to annexation. As mentioned earlier in this comment, people living in areas contiguous to cities are in almost all cases presently using city facilities and thus creating an additional financial burden on the city. Given this fact and other relevant considerations, it may be quite reasonable for a city to annex a contiguous area although no immediate plans to provide services such as sewage facilities is contemplated. The inclusion of additional standards, like those proposed in this comment, as a basis for evaluating the reasonableness of annexation attempts is suggested.
Secondly, section 5 part 3(e) of the statute is quite vague. The section would appear to again provide a resident veto in cases wherein the city is attempting to annex areas in which capital improvements such as sewage facilities, water systems, streets, curbs and gutters are needed. A vote of the residents of the area to be annexed opposing a proposed capital improvement would apparently automatically negate the city's authority to annex the area. The veto provision is one of the greatest problems of the present statute. Any new annexation statute should avoid providing residents a veto power.

With the exception of the above two points, House Bill 556 is well written and would serve as an excellent remedy to the annexation problems presently facing Montana cities.