

MEMORANDUM

To: Marty Lambert, County Attorney, Gallatin County

From: Christopher B. Gray, Law Office of Christopher B. Gray, PLLC

Date: June 30, 2005

Re: Questions about Big Sky Incorporation from Kate Wilson

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You have asked me to address the four sets of questions from Kate Wilson, dated June 21, 2005, regarding the interpretation of law as it pertains to the possible incorporation of Big Sky. In this review, I have taken a fresh look of the language of the statute and some of the more respected sources of law on the matter. I have not referred to any previous work or attorneys in the Gallatin County Attorney's Office or attorneys who have investigated the matter on behalf of clients in the past.

I have taken no advocacy positions. I have prepared the following upon your request and I assume you will use the contents of the memo at your discretion.

An immediate issue presents itself in the discussion of creation of municipalities. The legislature has plenary authority. The legal commentator McQuillin summarizes this concept as follows:

Courts lack the power to impose new requirements or change requirements already imposed by the legislature in the discharge of its legislative functions relating to the incorporation of municipalities.

2 McQuillin, *Municipal Corporations* §3.13. A Montana court may find itself constrained from straying from the language of the antiquated incorporation statutes. Thus the plain language of those statutes and the construction thereof will provide the most reliable legal guideposts in the formation process for a Montana municipality.

In my opinion the questions asked by Ms. Wilson will hinge on the construction of statutes pertaining to the formation and administration of municipalities in Montana. Case law regarding statutory construction is clear as stated in the following authorities:

- 1) "General rules of statutory construction require this Court to interpret the statutory language before us, without adding to, or subtracting from, it. §1-2-101, MCA. Words and phrases used in statutes of Montana are construed according to

the context and the approved usage of the language. §1-2-106, MCA. Therefore, when interpreting statutes, this Court will use the plain and ordinary meaning of a word.” *Carroll v. W.R. Grace & Co.*, (1992), 252 Mont. 485, 487, 830 P.2d 1253.

2) “The development of the case law of Montana with respect to the rules of statutory construction may be summarized by the following analysis: (1) Is the interpretation consistent with the statute as a whole? (2) Does the interpretation reflect the intent of the legislature considering the plain language of the statute? (3) Is the interpretation reasonable so as to avoid absurd results? . . .” *Wombold v. Associates Financial Services Co., Montana, Inc.*, 2004 MT 397, ¶ 35, 325 Mont. 290, 104 P.3d 1080.

3) The Montana Supreme Court will interpret related statutes to harmonize and give effect to each. *Chain v. Mont. DMV*, 2001 MT 224, ¶ 15, 306 Mont. 491, 36 P.3d 358,

In my analysis using the above authority, *inter alia*, it is easiest to take some of the questions out of order.

1. Who are inhabitants and registered electors as it pertains to organizing municipalities in Montana?

The word “inhabitant” is used in §7-2-4101(1), MCA in describing the limits of the proposed city or town. McQuillin defines “inhabitant” as

“...one who actually and permanently resides in the area embraced in the incorporation petition.”

2 McQuillin, *Municipal Corporations* §3.14, citing *State v. Board of County Commissioners of Cherry County*, 182 Neb. 419, 155 NW 2d 351. Taking McQuillin’s lead, it is logical, based on the phrase “permanently resides” that an “inhabitant” is the same as a “resident” under Montana law.

Montana has a general definition of the term “residence” as the “place where a person remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns in seasons of repose.” §1-1-215, MCA. Residence cannot be lost until another is gained and can be changed only by the union of act and intent. *Id.* Unmarried minors are included under the residency of their parents. §1-1-215(4), MCA. Residence is also defined under Montana election statutes in a similar fashion where:

The residence of an individual is where the individual's habitation is fixed and to which, whenever the individual is absent, the individual has the intention of returning.

§13-1-112, MCA.

Ms. Wilson wanted to know the difference between “registered electors” and “inhabitants.” “Elector” means an individual qualified to vote under state law. §13-1-101(10). An elector must register pursuant to the requirements of Title 13, Chapter 2, Part 2, MCA and must provide a specific street address or geographic location to describe the location of the electors residence. §13-2-208(1), MCA. In anticipation of the question, registered elector status and inhabitant status are not mutually exclusive. To require be so would lead to an “absurd” result outside the rules of statutory construction. *Wombold*, at ¶35.

Here, any distinction between “registered electors” and “inhabitants” is only necessary in context of the two-part test in determining the limits of a city or town and its division into wards. §7-2-4101(2)(a) states:

The petition must describe the limits of the proposed city or town and of the several wards thereof, each of which shall contain 50 or more registered electors and must not exceed 1 square mile for each 500 inhabitants resident therein.

The terms “registered electors” and “inhabitants” in §7-2-4101(1) can only be logically provided as a requirement in defining the boundaries of a proposed ward and for no other reason when read in context with the remainder of the statute as well as other Montana law as set forth below. In other words, a proposed ward inside a proposed municipality must: 1) have at least 50 registered electors; and 2) must not exceed one square mile for each 500 inhabitants.

2. Is there a density requirement implied in the organization statute?

Montana law on statutory construction requires one look to the plain meaning of a statute without adding to or subtracting from it. *Carroll* at 487. It is my opinion implying meaning into a statute is “adding to” that statute and is impermissible. In addition, Montana law requires that different statutes be “harmonized to give effect to each.” *Chain* at ¶15.

The mention of 50 registered electors and 500 inhabitants per square mile is only the method upon which the proposed wards are divided within the outside boundaries of the proposed municipality. To imply that the amount of registered electors and inhabitants in the area of a proposed ward is a condition precedent to the formation of a Montana municipality transcends the rules of statutory construction. See, *Wombold*, *Carroll* and *Chain*, *supra*. The only conditions precedent in the petition process are the requirements that the:

...petition [be] in writing, [and be] signed by not less than two-thirds of the registered electors but not more than 300 such electors, who are residents of the state and residing within the limits of the proposed incorporation...

§7-2-4101(1), MCA and “the number of inhabitants is 300 or upwards.” §7-2-4103, MCA. Then the County can proceed with the remainder of the formation process under Title 7, Chapter 2, Part 41, MCA.

In the effort to “harmonize” statutes to give meaning to all pursuant to *Chain*, one can not ignore the requirement after formation of a municipal corporation it be divided into wards. §7-5-4401, MCA. The number of wards is determined on the size of the municipality. *Id.* Dependent on its size or class (see §7-1-4111, MCA) a Montana municipality may have anywhere from one to ten wards. §7-5-4401, MCA.

Therefore, one only needs to read the organization requirements of §§7-2-4101 and 4103, MCA in context with the post incorporation process for the formation of wards in §7-5-4401, MCA to come to the conclusion that no density requirement exists as a condition precedent to formation, as even the smallest or least dense of municipalities can consist of one ward.

3. *What shape must a ward be?*

Once again I refer back to the rule that a court must look to the reasonable plain meaning of words in a statute. *Wombold* at ¶35. One can look to the plain definitions of the word “mile” as a unit of measure consisting of 5280 feet and a “square mile” being a measure of the actual square footage in an area consisting of one mile by one mile. A square mile is a unit of actual area and not necessarily a description of shape.

If the legislature wanted to have wards in the shape of a square within a municipality it would have described those wards as a “section” of land. A “section” is a description of geographic measurement that actually is shaped as a square that is one mile by one mile. In addition, the bounds of political subdivisions and bodies corporate can not fit on a grid. Geographic and other restrictions will always create boundaries that will not lend themselves to geometric figures. To require square wards within the boundaries of a municipality would create unworkable problems and force absurdities unsupportable in law. *Chain* at ¶15.

4. *Can a municipality be created that encompasses two counties?*

It is my opinion that the creation of a municipality that lies in two counties where at least one of the county governments only has general powers could be successfully challenged.

Even after the promulgation of the 1972 Montana Constitution the “the basic assumption concerning the power of local government is that local government lacks power unless it has been specifically granted to it for those local governments that choose to retain general government powers.” *D & F Sanitation v. City Of Billings* (1986), 219 Mont. 437, 445, 713 P.2d 977. In other words, general powers local government only has the powers given to it by the legislature.

I find no provision where the legislature has given any authority to form a cross-county municipality. Conversely, and by way of emphasis of the point that the legislature has spoken on cross county corporate issues, the legislature has given counties such powers to form other governmental districts and entities across county lines. *See, e.g.*, §7-13-2204, MCA (petition to create a water and sewer district in adjacent counties must be filed in each county) and §81-4-394, MCA (creation of joint herd districts across county boundaries), *inter alia*. The legislature could have or can give the authority for counties to form municipalities across county lines.

Gallatin County only has general local government powers. Based on the rule that general powers local governments can only do what the legislature grants, it would be a risky proposition to incorporate any municipality across county lines with Gallatin County without such a specific grant. *D & F Sanitation* at 445. Specific legislation allowing a cross county municipality would be the best and safest method in which to accomplish this task.