

G 3.1630
J. William Attridge
Shirley W. Battan
William G. Boland
Gregory P. Canova
Thomas R. Chapman
Owen F. Clarke, Jr.
Bruce P. Clausen
William B. Collins
J. Lawrence Coniff
Robert K. Costello
John R. Ellis
Roger A. Gerdes
Jeffrey D. Goltz
Maureen Hart
Richard A. Heath
John W. Hough
Chip Holcomb
Delbert W. Johnson
James Martin Johnson
Leland T. Johnson
Teresa C. Kulik
Jeffrey O. C. Lane
Chanes W. Lean
Ed Mackie



Ken Eikenberry

ATTORNEY GENERAL
OF WASHINGTON

DEPUTIES, DIVISION CHIEFS
AND SENIOR COUNSEL

Ken Macintosh
Michael Maoden
Lee Ann Miller
Michael T. Mitchell
Kathleen D. Mix
Richard M. Montecucco
Meredith Wright Monon
Charie Murphy
Kathy L. Nolan
Robert E. Patterson
Lloyd W. Peterson
James K. Pharms
Jaqueline B. Rosenblatt
Charles F. Secrest
Paul A. Silver
Robert E. Simons
Kathleen D. Spong
Robert G. Swenson
Paul N. Tanaka
Michael E. Tardif
Mary M. Tennyson
Theodore O. Torve
David E. Walsh
William L. Williams
Robert A. Wright

January 11, 1993

RECEIVED

JAN 14 1993

City Attorney's Office

The Honorable Dean Sutherland
State Senator, District 17
422 John A. Cherberg Building
P.O. Box 40417
Olympia, Washington 98504-0417

Re: Opinion Request 92-6-10

Dear Senator Sutherland:

By letter previously acknowledged, you have requested an opinion on several questions regarding annexation of adjoining territory by the City of Vancouver. I have paraphrased these questions as follows:

1. When a city is offering water/sewer utility services to non-city residents pursuant to RCW 35.92.200, may the city offer a reduced rate (such as the rate charged city residents) conditioned upon the agreement of the non-city residents to sign a petition for annexation to the city?
2. May a city use city facilities, such as city employee time and the use of city funds for printing and postage, to solicit signatures for an annexation petition or otherwise to promote an annexation using the petition method?
3. Is there a limited time period within which an annexation petition must be circulated and filed?
4. Is the signature of a person on an annexation petition valid if he/she sold his/her property in the petitioned area prior to the petition's filing?
5. May a person withdraw his/her signature from an annexation petition?
6. If a person signs a waiver of objection to annexation as a condition of receiving certain city services,

ATTORNEY GENERAL OF WASHINGTON

Honorable Dean Sutherland

Page 2

January 11, 1993

may that person be counted as having signed the petition?

For the reasons stated below, we answer yes to the first, second, and sixth questions, and we answer the other questions in the manner indicated in the analysis.

ANALYSIS

Your opinion request concerns the relationship between two powers granted by the legislature to cities: The power to annex additional territory to the city, and the power to extend utility services to non-residents of a city. The latter power is conferred on cities by RCW 35.92.200, which reads as follows:

City may extend water system outside limits--
Contracts for outside service. A city or town may enter into a firm contract with any outside municipality, community, corporation, or person, for furnishing them with water without regard to whether said water shall be considered as surplus or not and regardless of the source from which such water is obtained, which contract may fix the terms upon which the outside distribution systems will be installed and the rates at which and the manner in which payment shall be made for the water supplied or for the service rendered.

The power of a city to annex territory is covered by a number of different statutes, which detail four different ways by which cities may annex territory. Under RCW 35.13.015, cities may annex territory under the resolution method, in which the legislative body of the annexing municipality initiates the process through a resolution, and the annexation is completed if approved by the voters at a subsequent election. Under RCW 35.13.020-.120, cities may annex using the election method, in which an annexation election may be initiated by qualified voters residing in the area proposed to be annexed. Under RCW 35.13.125-.170, the third method is called the petition method, in which the annexation is initiated by property owners in the area to be annexed. This method requires a public hearing and a formal ordinance of annexation, but does not specifically require an election. Finally, cities may also use the ordinance method (RCW 35.13.180-.190), which is a summary procedure permitting limited annexation of territory for municipal purposes, where the property in question is owned by the city itself or by the

ATTORNEY GENERAL OF WASHINGTON

Honorable Dean Sutherland
Page 3
January 11, 1993

federal government, or where the owners have given consent to such annexation.

As I understand your questions, they relate only to the use of the petition method outlined above. As noted earlier and discussed more fully later, the petition method does not require an annexation election, but permits the annexation by ordinance if the legislative body of the city makes the requisite findings and, at its discretion, chooses to annex the territory in question. See RCW 35.13.130-.150.

With this background in mind, I turn to your specific questions.

1. When a city is offering water/sewer utility services to non-city residents pursuant to RCW 35.92.200, may the city offer a reduced rate (such as the rate charged city residents) conditioned upon the agreement of the non-city residents to sign a petition for annexation to the city?

As noted earlier, the authority of the city to extend its water system outside the city and serve non-residents is conferred in RCW 35.92.200. This statute provides that

A city or town may enter into a firm contract with any . . . person, for furnishing them with water . . ., which contract may fix the terms upon which the outside distribution systems will be installed and the rates at which and the manner in which payment shall be made for the water supplied or for the service rendered. [Emphasis added.]

From the portions of the statute which I have underlined above, several things are clear: (1) A city is not legally obligated to serve non-residents, but does so as a matter of its own discretion; (2) the city has authority to negotiate a contract fixing the terms on which it will furnish water to non-residents; and (3) the same contract can determine what the rates will be.

Turning to your specific question, it appears that a city may decide that it will only furnish water to non-residents upon certain terms, or that it will offer more favorable rates to non-residents upon certain terms, and that this policy position will be the city's negotiating position as it enters into contracts with individual non-residents or groups of non-residents. Since the city is not obligated to serve non-residents at all, the city may choose generally to

ATTORNEY GENERAL OF WASHINGTON

Honorable Dean Sutherland

Page 4

January 11, 1993

discourage non-residents from applying for city service, or alternatively to encourage or even to require non-residents to petition for annexation before the city will supply them with water. In the case of your question, it appears that the city would be willing to furnish water to non-residents without an agreement to annex, but at higher rates. It would appear that these various conditions are well within the authority granted to cities by RCW 35.92.200, and that your first question should be answered in the affirmative.

Issues closely relating to this have been litigated and there is a published Court of Appeals decision consistent with the opinion I have just expressed. In People for the Preservation and Development of Five Mile Prairie v. the City of Spokane, 51 Wn. App. 816, 755 P.2d 836 (Division III, 1988), the court had before it a Spokane city ordinance requiring non-residents who wished to obtain city water service to sign a written agreement, binding on the non-resident and successor owners to his property, to sign any future annexation petition and to "actively promote annexation" in the case of any future annexation proceeding. The ordinance in question was upheld by the Court of Appeals on several grounds, and the court rejected the argument that the covenants in question were arbitrary, capricious, or contrary to public policy, or violative of certain constitutional rights. RCW 35.92.200 was specifically stated as the basis for the city's exercise of its power to impose conditions upon extensions of water service outside the boundaries of the city.

Federal case law also supports the proposition that a city may condition the extension of water or other utility service to non-residents upon agreement to annex to the city without violating any federal constitutional provisions. This specific point was decided in Blackwell v. City of St. Charles, 726 F. Supp. 256 (E.D. Mo. 1989) (aff'd, 917 F.2d 1150 (8th Cir. 1990)).

Given the language of RCW 35.92.200 and the state and federal case law cited earlier, I conclude that a city does have discretion to offer water service to non-city residents at reduced rates in return for their agreement to sign a petition for annexation to the city.

2. May a city use city facilities, such as city employee time and the use of city funds for printing and postage, to solicit signatures for an annexation petition or otherwise to promote an annexation using the petition method?

ATTORNEY GENERAL OF WASHINGTON

Honorable Dean Sutherland
Page 5
January 11, 1993

As noted earlier, your question is about a proceeding in the City of Vancouver involving annexation by petition. Annexation by the petition method does not involve an election, unlike annexation by the resolution method or annexation by the election method.

If either of those other two annexation methods were involved, I would conclude, based on RCW 42.17.130, the city could not use any public facilities in support or opposition to a ballot proposition. RCW 42.17.130 reads in part as follows:

Forbids use of public office or agency facilities in campaigns. No elective official nor any employee of his office nor any person appointed to or employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition. Facilities of public office or agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of employees of the office or agency during working hours, vehicles, office space, publications of the office or agency, and clientele lists of persons served by the office or agency: PROVIDED, . . . the foregoing provisions of this section shall not apply to the following activities"

This statute does not apply, however, to annexations by petition, because petition method annexations never appear on the ballot. A city employee campaigning for an annexation by petition is neither supporting nor opposing a ballot proposition, because no proposition is appearing on any ballot.

Since RCW 42.17.130 does not apply, the question merely becomes whether a city has sufficient interest in an annexation to make the support of annexation by petition an appropriate use of city funds. It seems clear that a city does have a strong interest in the extent of its own boundaries and the nature of the territory and the people served by the municipal government. Annexation questions have a potential impact upon the city's finances and upon almost all aspects of city operations. Therefore I conclude that, under current law, a city may spend public funds and may use city resources in support of an annexation, at least so long as the annexation is by the petition method which does not require or involve the holding of an election. By the same reasoning, the city

ATTORNEY GENERAL OF WASHINGTON

Honorable Dean Sutherland
Page 6
January 11, 1993

resources used could include the time and expenses of city employees working on the annexation issue.¹

3. Is there a limited time period within which an annexation petition must be circulated and filed?

Neither the statutes controlling annexation by petition (RCW 35.13.125-.160) nor case law sets any specific limitations on the time period during which annexation petitions may be circulated and filed. In People v. Spokane, 51 Wn. App. at 823, the court noted that a proposed annexation by petition approved by the Boundary Review Board in 1979 was filed with the city council in 1984. This indicates that signatures on a petition for annexation are valid for at least five years, and may in some circumstances be valid for a longer period. While excessively lengthy delays between the signing of annexation petitions and the actual annexation might raise additional legal issues which would justify invalidating the eventual annexation, I cannot adequately speculate about all the possibilities or arguments which might be made over the course of time in the case of a particular annexation.

4. Is the signature of a person on an annexation petition valid if he/she sold his/her property in the petitioned area prior to the petition's filing?

Under RCW 35.13.130, the petition method of annexation requires the petition to be signed by the "owners" of at least "seventy-five percent in value according to the assessed valuation for general taxation of the property for which annexation is petitioned." RCW 35.13.140 implies that a city must find that a petition "meets the requirements herein specified" before it can entertain the petition. One of these requirements is that the petition be signed by "owners" of the property for which the annexation is petitioned. I will not attempt to speculate about the nature of a real property interest which might be required to establish the "ownership" of a particular property. However, absent other circumstances, a petition signed by a person who is no longer the owner of the property at the time the petition is filed would appear not to

¹ I have assumed for purposes of your questions that the city employees are conducting their activities on city time and expense. To the extent you are asking whether city employees may campaign for an annexation on their own time as private citizens, it seems quite clear that they may. See RCW 41.06.250(2). See also Bellevue Firefighters Local 1604 v. Bellevue, 100 Wn.2d 748, 675 P.2d 592 (1984).

ATTORNEY GENERAL OF WASHINGTON

Honorable Dean Sutherland
Page 7
January 11, 1993

satisfy the statutory requirement that the petition be signed by the "owners" of the requisite amount of property. Accordingly, as a general proposition, the "owner" who signs the petition must be the "owner" at the time the petition is filed and the annexation proceeds.

However, it is worth noting that People v. Spokane involved a Spokane ordinance which imposed the requirement to agree to annexation not only on the owner at the time of the agreement, but also upon successor owners of the same property. The Court of Appeals upheld this feature of the Spokane ordinance. See discussion in 51 Wn. App. 816 at 821-822.

Accordingly, although I would generally answer no to your fourth question, there may be circumstances under which a property owner can effectively bind successor owners to a contractual promise to agree to annexation in return for lower utility rates.

5. May a person withdraw his/her signature from an annexation petition?

As a general rule, the Washington State Supreme Court has held that "signatures to petitions, such as recall and annexation, may be withdrawn at any time prior to the assumption of jurisdiction over the petition by the appropriate authority." McAlmond v. City of Bremerton, 60 Wn.2d 383, 385, 374 P.2d 181 (1962). The city does not acquire jurisdiction over an annexation petition until the petition is formally entertained and a date fixed for the public hearing pursuant to RCW 35.13.140. McAlmond, 60 Wn.2d at 385. A city may not entertain a petition and set a date for a public hearing, however, until the petition is filed with the city and it meets all necessary requirements. See RCW 35.13.140. Accordingly, in the absence of an agreement to the contrary, any person who has signed a petition may withdraw his/her signature before a properly completed petition for annexation has been filed with the city and a date has been fixed for public hearing.

However, one of the issues in the Spokane case was an attempt by some of the petitioners to withdraw their names from the petition before it was filed with the city. See discussion in People v. Spokane, 51 Wn. App. at 817-818. The Court of Appeals ruled that, since these people had signed legally binding covenants to petition for annexation, the city had a legally enforceable right to prevent the withdrawal of their names from the petition. As the court observed "neither the city council nor the courts can be parties to a breach of that contract by allowing [the petitioners] to withdraw that support

ATTORNEY GENERAL OF WASHINGTON

Honorable Dean Sutherland
Page 8
January 11, 1993

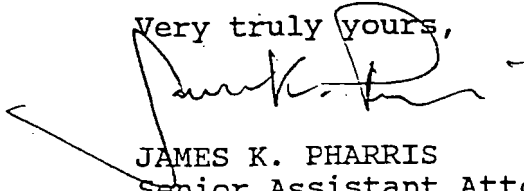
now" 51 Wn. App. 816 at 820. Therefore, my answer to this question is a qualified yes.

6. If a person signs a waiver of objection to annexation as a condition of receiving certain city services, may that person be counted as having signed the petition?

Again, the Spokane case provides an answer. In Spokane, opponents of the petition for annexation claimed that the petition was invalid because "names were included on the basis of a covenant contained in a water service agreement by which [certain landowners, or their predecessor] promised to sign any petition for annexation . . . in consideration of the city furnishing water to their properties. Spokane, 51 Wn. App. at 818. As noted above, the court upheld the enforceability of the covenants, and ruled that a signed waiver of objection to annexation was substantially the equivalent of a signature on a petition for annexation. Accordingly, current statutory law as interpreted by the courts dictates an affirmative answer to your final question.

I hope you will find the foregoing information useful.

Very truly yours,



JAMES K. PHARRIS
Senior Assistant Attorney General

Office of the Attorney General
Ecology Division
629 Woodland Square Lp. SE, 4th Fl.
P.O. Box 40117
Olympia, WA 98504-0117
(206) 459-6159