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Legal Opinion 2021-002

TO: John Engen, Mayor, City Council, Dale Bickell, Eran Pehan, Marty Rehbein, Ginny Merriam, Mary McCrea, Neil Pennanen, Leigh Griffing, Eric Anderson, Kirsten Hands

CC: Department Attorney

FROM: Jim Nugent, City Attorney

DATE February 17, 2021

RE: City council ward boundary reapportionment review necessary for each City Council Municipal election prior to candidate filing commencing.

FACTS:

Wednesday, February 17, 2021 city council committee of the whole discussion generated questions about city council wards being as equal in population as practically possible.

Pursuant to subsection 13-1-403(1) MCA “the candidate filing deadline for election to a local government office is NO SOONER THAN 145 DAYS AND NO LATER THAN 85 DAYS BEFORE THE ELECTION. (Emphasis added.)

Pursuant to subsection 13-1-107(2) MCA a municipal primary election is held on Tuesday following the second Monday in September preceding a general election.

Pursuant to subsection 13-1-104(1) MCA general elections are to be held on the first Tuesday after the first Monday in November.

ISSUE:

For municipal election purposes, what does the City of Missoula Charter as well as Montana municipal government law require with respect to equality of population of city council wards?

CONCLUSION:

The City of Missoula Charter requires that each City Council ward be established and maintained “as equal in population as practically possible”. Montana municipal government law, Section 7-5-4401 MCA also requires ward populations be “as nearly equal as possible”.

LEGAL DISCUSSION:

City of Missoula Charter, Article II(3), page 4 approved by voters on June 4, 1996, effective January 1, 1997, provides that City Council wards be maintained by the City Council “as equal in population as practically possible.” Article II, section 3 of the City of Missoula charter provides:

“City Wards. The City Council shall have the authority to, by ordinance, determine the number of City wards. Each ward shall be established and maintained by the City Council to be generally regular in shape and as equal in population as practicably possible. Each ward shall be represented on the City Council by two City Council members who shall reside in that ward. At the time of adoption of this Charter, the number of wards in the City shall be six (6).” (Emphasis added.)

The first sentence of this city charter provision provides that the city council has ordinance authority to establish city council wards. Subsections 7-5-4401 (2) and (3) MCA places statutory parameters of not less than 4 or more than 10 city council wards for a city of the first class such as Missoula and also indicates that city council wards are established by city council ordinance. The city charter establishes the number of city council members per ward at two per ward. This City charter provision is consistent with Mont. Code Ann. §7-4-4402 MCA and §7-5-4401 MCA. §7-5-4401(1) MCA provides that the division of a municipality into a ward must have “regard to population so as to make them as nearly equal as possible.” §7-3-218(2) MCA pertaining to city council/mayor forms of government, also provides that city council election districts be “apportioned by population.” (Emphasis added.) Montana's constitution provides “[n]o person shall be denied the equal protection of the laws.” Mont. Const. art. II, § 4. (Emphasis added.) The preamble to the Montana Constitution expresses a desire of the people of Montana in part for "equal opportunity."

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution requires election districts or voting units for local government offices to be as equal in population as possible. Apportionment, which denies the rule of one person, one vote, is violative of equal protection laws. The “one person, one vote” legal rule applies to all political subdivisions including cities and towns. This has been held to be the standard consistently in Federal courts since *Baker v. Carr*, 369 US 186, 82 S.Ct. 691, (1962). See *Latino Political Action Committee, Inc. v. Boston*, 568 F. Supp. 1012, holding that a population variance of 23.6% for city council districts invalid.

With respect to “as nearly equal as possible”, the U.S. Supreme Court held “[a] redistricting plan that deviates more than 10% in population among the districts is prima facie unconstitutional under the Equal Protection Clause.” *Brown v. Thomson*, 462 U.S. 835, 842-43, 77 L. Ed. 2d 214, 103 S. Ct. 2690 (1983).

"The ultimate inquiry," after a prima facie case of discrimination has been **shown, is "whether the legislature's plan may reasonably be said to advance a rational state policy'** and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of this

plan exceed constitutional limits.” *Id.* at 843 (quoting *Mahan v. Howell*, 410 U.S. 315, 328, 35 L. Ed. 2d 320, 93 S. Ct. 979 (1973)). Also, see *Favors v. Cuomo*, 2014 US Dist LEXIS 70783.

Maximum population deviation expresses the difference between the least populous ward/district and the most populous ward/district in terms of the percentage those wards/districts deviate from the ideal district size calculated by dividing the total population by the number of districts. *Idaho Legislative Reapportionment Plan 2002 v. Ysura* 142 Idaho 464.

There is Court case law indicating that any redistricting plan that contains a population deviation above 10% is prima facie discrimination. The Idaho Supreme Court, when holding a 10.69% population deviation unconstitutional because of insufficient evidence to overcome the presumption of unconstitutionality, held “The Equal Protection Clause requires states to ‘make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable,’” *Smith v. Idaho Commission on Redistricting*, Idaho, 38 P. 3d 121 (2001) (quoting *Reynolds v. Sims*, 377 U.S. 533, 577, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964)). A subsequent Idaho Supreme Court case *Bingham County v. Idaho Commissions for Reapportionment*, 137 Idaho 870, 874, 55 P.3d 863, 867 (2002) held that a legislative redistricting plan with a population deviation of 11.79% (6.26% overall 5.53% below ideal size) was presumptively unconstitutional. The purpose of one person one vote is to protect voters, not regions.

Later the Idaho Supreme Court, citing Bingham County case stated in *Twin Falls County v. Idaho Commission Redistricting*, 152 Idaho 346, 271 P.3d 1202, 2012 Ida LEXIS 24 (2012) that: “Thus, the hierarchy of requirements governing a plan for apportioning the legislature is as follows: EQUAL PROTECTION.” (Empasis added.)

Federal Courts measure “population equality” by total population in each district apportioned.

Montana Municipal law requires population of city council wards to be as nearly equal as possible. Subsection 7-5-4401 (1) MCA states:

7-5-4401. Division of municipalities into wards.

(1) The first city or town council election under the provisions of this title must divide the city or town into wards for election and other purposes, having regard to population so as to make them as nearly equal as possible. (*Emphasis added.*)

(2)(a) Cities of the first class must be divided into not less than four or more than 10 wards.

(b) Cities of the second class must be divided into not less than three or more than six wards.

(c) Cities of the third class must be divided into not less than two or more than four wards.

(d) Towns must be divided into not less than two or more than three wards; provided, however, that the town council may by ordinance reduce the number of wards in a town to only one if it so desires.

(3) All changes in the number and boundaries of wards must be made by ordinance. No new ward must be created unless there shall be within its boundaries 150 or more electors.

MCA § 7-3-218(2) applicable to the city council/mayor statutory form of local government requires that city council districts be apportioned by population. Mont. Code Ann. § 7-3-218 provides:

7-3-218. Selection of commission members. The commission shall be:

- (1) elected at large;
- (2) elected by districts in which candidates must reside and which are apportioned by population;
- (3) elected at large and nominated by a plan of nomination that may not preclude the possibility of the majority of the electors nominating candidates for the majority of the seats on the commission from persons residing in the district or districts where the majority of the electors reside; or
- (4) elected by any combination of districts, in which candidates must reside and which are apportioned by population, and at large. (*Emphasis added.*)

Mont. Code Ann. § 7-3-113(1)(j) provides that § 7-3-218(2) is applicable to the city council/mayor form of municipal government.

7-4-4402. Terms of office.

- (1) Except as provided in subsection (2), an alderman shall hold office a term of 4 years and until the qualification of his successor.
- (2) At the first annual election held after the organization of a city or town under this title, the electors of the city or town must elect two alderman from each ward, who must, at the first meeting of the council, decide by lot their terms of office, with one from each ward to hold for a term of 4 years and one, for a term of 2 years and until the qualification of their successors. In the succeeding election and thereafter, one alderman from each ward will be elected for a 4-year term. (*Emphasis added.*)

It is mandatory that Montana municipal governments are subject to all state laws regulating the election of local officials. Subsection 7-1-114(1)(d) MCA provides:

7-1-114. Mandatory provisions.

- (1) A local government with self-government powers is subject to the following provisions:

....

- (d) all laws regulating the election of local officials;

....

- (2) These provisions are a prohibition on the self-government unit acting other than as provided.

.... (*Emphasis added.*)

Montana law does not currently establish an absolute maximum permissible fixed percentage deviation from the average equal population number. It appears permissible deviations are decided by the courts on a case by case basis based on specific circumstances. However, court cases indicate a plan that deviates more than a total of 10% in population among the districts is prima facie unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to

the United States Constitution. There is recognition that deviation from target population for “one person, one vote” in each election district is the sum of the percentages by which the most over represented district and the most under represented district deviate from the target equal population figure. For example, if one city council ward was 3% above the target population and another city council ward was 3% under, the actual deviation range from equal populations in each ward is 6% not 3%.

CONCLUSION:

The City of Missoula Charter requires that each City Council ward be established and maintained “as equal in population as practically possible”. Montana municipal government law, Section 7-5-4401 MCA also requires ward populations be “as nearly equal as possible”.

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/s/ Jim Nugent

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