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Legal Opinion 2009-003

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Roger Millar; OPG Director; Mike Barton, OPG; Steve King, Public Works Director; Kevin Slovarp, City Engineer; Dan Jordan, Public Works; Marty Rehbein, City Clerk; Nikki Rogers, Deputy City Clerk; Brentt Ramharter, Finance Director

CC: Dept. Atty.

FROM: Jim Nugent, City Attorney

DATE February 23, 2009

RE: Missoula City Charter and Montana state law provide that City council ward populations be maintained as nearly equal in population as practically possible

FACTS:

2009 is a City of Missoula Municipal government election year. Six City Council wards will have one of their two City Council elected positions open to election in 2009. The City of Missoula Charter and Montana State local government laws provide that city council wards be established and maintained as equal in population as practically possible. New residential construction and additional City annexations within the past two (2) years in conjunction with historic slight deviations for the 2007 City of Missoula Municipal elections may serve as a basis for reviewing estimated City Council ward populations for some minor reapportionment purposes. Historically, Missoula County election officials have encouraged City officials to utilize existing precinct boundaries in conjunction with City Council ward boundaries so precincts are not split by City Council ward boundaries.

ISSUE:

What do the City of Missoula Charter, Montana law, and U.S. Supreme Court case law require with respect to the 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 by the City Council.

Montana state municipal government law requires that city council wards be established having regard to population so as to make them as nearly equal as possible. 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)). The purpose of one person one vote is to protect voters, not regions.

With respect to "as nearly equal as possible" the U.S. Supreme Court has 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). Maximum population deviation expresses the difference between the least populous district and the most populous district in terms of the percentage those 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.

LEGAL DISCUSSION:

The City of Missoula Charter, approved by voters on June 4, 1996, and effective January 1, 1997, provides that City Council wards be maintained by the City Council "as equal in population as practically possible."

3. 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.)

City of Missoula Charter, Article II (3), p. 4.

This provision of the city charter expressly establishes the number of city council members per ward at two per ward. This City charter provision is also consistent with Mont. Code Ann. § 7-4-4402 which specifies that at least at its first annual election a city "must elect two aldermen from each ward." Mont. Code Ann. § 7-1-114(1)(d) provides that a local government with self-government powers is subject to "all laws regulating the election of local officials."

Mont. Code Ann. § 7-5-4401, pertaining to municipal elections, establishes criteria and guidelines for the division of municipalities into wards for city council election purposes. Mont. Code Ann. § 7-5-4401(1) 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." Mont. Code Ann. § 7-3-

218(2), pertaining to city council/mayor forms of government, also provides that city council election districts be “apportioned by population.” (Emphasis added.)

Several decades ago, the U. S. Supreme Court indicated that it had jurisdiction of lawsuits attacking state apportionments of election districts as unconstitutional. *Baker v. Carr*, 369 US 186, 82 S.Ct. 691, (1962). The Equal Protection Clause of the Fourteenth Amendment 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 requirement is known as the “one person, one vote” legal rule. It applies to all political subdivisions including cities and towns. This has been held to be the standard consistently in Federal courts since *Baker*. 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.

Montana's constitution likewise provides “[n]o person shall be denied the equal protection of the laws.” Mont. Const. art. II, § 4. (Emphasis added.) Also, the preamble to the Montana Constitution expressed the desire of the people of Montana in part for “equal opportunity.”

In another U.S. Supreme Court case, 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). This 10% should be viewed as a 10% total deviation, range, difference, or gap between the most populous city council ward and the least populous city council ward.

“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)).

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

Montana Municipal statutory provisions are general with respect to city council ward population apportionments, but they do expect population of city council wards to be as nearly equal as possible.

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.

(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. (*Emphasis added.*)

Mont. Code Ann. § 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.*)

7-1-114. Mandatory provisions.

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

(a) all state laws providing for the incorporation or disincorporation of cities and towns; for the annexation, disannexation, or exclusion of territory from a city or town; for the creation, abandonment, or boundary alteration of counties; and for city-county consolidation;

(b) Title 7, chapter 3, part 1;

- (c) all laws establishing legislative procedures or requirements for units of local governments;
 - (d) all laws regulating the election of local officials;
 - (e) all laws that require or regulate planning or zoning;
 - (f) any law directing or requiring a local government or any officer or employee of a local government to carry out any function or provide any service;
 - (g) except as provided in subsection (3), any law regulating the budget, finance, or borrowing procedures and powers of local governments;
 - (h) Title 70, chapters 30 and 31.
- (2) These provisions are a prohibition on the self-government unit acting other than as provided.
- (3) (a) Notwithstanding the provisions of subsection (1)(g) and except as provided in subsection (3)(b), self-governing local government units are not subject to the mill levy limits established by state law.
- (b) The provisions of 15-10-420 apply to self-governing local government units.
(Emphasis added)

Pursuant to Montana statutes and case law, there is not an absolute maximum fixed percentage deviation from the average equal population number which courts recognize. It is decided on specific circumstances on a case-by-case basis. However, a plan that deviates more than a total of 10% in population among the districts is prima facie unconstitutional under the Equal Protection Clause. 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 by the City Council.

Montana state municipal government law requires that city council wards be established having regard to population so as to make them as nearly equal as possible. 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)). The purpose of one person one vote is to protect voters, not regions.

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OFFICE OF THE CITY ATTORNEY

A handwritten signature in cursive script that reads "Jim Nugent". The signature is written in black ink and is positioned below the text "OFFICE OF THE CITY ATTORNEY".

Jim Nugent, City Attorney

JN: mdg