

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2012-020

**TO:** Mayor, John Engen; City Council; Bruce Bender; Mike Barton; Laval Means; Mary McCrea; Jen Gress; Denise Alexander; Tom Zavitz; Pat Keiley; Marty Rehbein; Nikki Rogers; Kelly Elam; Gail Verlanic; Brentt Ramharter

**CC:** Legal Staff

**FROM:** Jim Nugent, City Attorney

**DATE** November 30, 2012

**RE:** Freeholder requirements as qualifications for holding City Office are unconstitutional pursuant to both equal protection clauses of the Fourteenth Amendment of the United States Constitution and Article II, Section Four of the Montana Constitution.

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### FACTS:

During the Wednesday November 28, 2012, Missoula City Council Plat Annexation and Zoning Committee during public comment pertaining to a newly proposed amendment to the City's general accessory dwelling unit zoning ordinance regulations a citizen asserted that only five (5) of the twelve (12) City Council Members appeared to be owner occupied (or resident freeholders) city residents. Multiple citizens commenting during public comment expressed their opinion that City Council Members who were not owner occupied residents (resident freeholders) should not vote on the proposed ordinance generally amending city accessory dwelling unit zoning regulations.

### ISSUE(S):

Are Freeholder requirements for City Council Members unconstitutional as being repugnant to the equal protection clauses of the United States and Montana Constitutions?

### CONCLUSION(S):

Yes. In 1978 the Montana Supreme Court in a contested City Council election arising in the City of Missoula held that Freeholder requirements for City Council Members are unconstitutional.

Further, in Montana State Law 1985 the District Court for the Fourth Judicial District in a Missoula County Attorney initiated lawsuit against three (3) City of Missoula Planning Board appointees held that Montana State Law limiting membership on the Missoula Planning Board to “Freeholders” is a violation of the equal protection clauses of the United States and Montana Constitutions.

### **LEGAL DISCUSSION:**

“Freeholder” and “Freehold” are defined in Black’s Law Dictionary Eighth Edition at page 690 as meaning “Freeholder: One who possesses a Freehold” and “Freehold: an estate in land in Fee Simple, in Fee tail, or for term or life, any real property interest that is or may become possessory.”

In 1977 Montana Municipal elections were still held in the spring of odd numbered years. In the spring of 1977 in the Ward 5 City Council Election Republican incumbent, Attorney Jim Sadler lost to Democratic challenger Thomas Connolly 722 votes to 589. Incumbent Sadler then sued newly elected Connolly asserting that Connolly was not a Freeholder and therefore did not meet the State law residency requirements for City Council as well as asserting that Connolly by swearing on his application to run for City Council office thereby violated Montana’s Corrupt Practices Act. The District Court ruled in favor of Incumbent Sadler and Connolly appealed to the Montana Supreme Court.

In Sadler v. Connolly, 175M 484, 575 P2d 51 (1978) the Montana Supreme Court unanimously held that Montana State Law Freeholder requirements for Municipal City Council were unconstitutional pursuant to the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Montana Supreme Court relied heavily on a 1970 United States Supreme Court Case Turner v. Fouche (1970) 396 U.S., 346, 90 S.C.T. 532, 24L, Ed. 2d 567.

The Montana Supreme Court in Sadler, supra at pages 487-489 stated:

“The United States Supreme Court considered the constitutionality of a freeholder requirement for school board membership in Turner v. Fouche (1970), 396 U.S. 346, 90 S. Ct. 532, 24 L Ed. 2d 567, 581. In Turner the Court found it unnecessary to determine whether the Georgia freeholder requirement could withstand the strict scrutiny, or “compelling state interest”, test stating:

...it seems impossible to discern any interest the qualification can serve. It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property \*54 if he is to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools, a lessee who effectively pays the property taxes of his lessor \*488 as part of his rent, or a state and federal taxpayer contributing to the approximately 85% of the Taliaferro County annual school budge derived from sources other than the board of education’s own taxes on real property.

“Nor does the lack of ownership or realty establish a lack of attachment to the community... However reasonable the assumption that those who own realty do possess such an attachment,

Georgia may not rationally presume that the quality is necessarily wanting in all citizens of the county whose estates are less than freehold.”

While the holding in Turner is limited to the factual context there, we find the reasoning persuasive for purposes of the instant determination.

A host of federal decisions specifically hold freeholder requirements for public office holding violative of equal protection, regardless of the standard employed in determining the constitutionality of such requirements. Davis v. Miller, (D.C. Md. 1972), 339 F. Supp. 498; Anderson v. City of Belle Glade, (S.D. Fla. 1971), 337 F. Supp. 1353; Connerton v. Oliver, (S.D. Tex. 1971), 333 F. Supp. 201.

An identical qualification, that of section 11-3215, R.C.M. 1947, requiring candidates for the office of city commissioner to own real estate within the municipality, was held unconstitutional on its face by the United States District Court for the District of Montana, in Warden v. City of Bozeman, Memorandum No. 2341, (D.C. Mont. Butte Division, 1973).

The freeholder requirements of sections 11-714 and 11-725 have no bearing on efficient functioning of the election process or in promoting a candidate’s ability, responsibility and interest in the office sought. We fail to see how payment of property taxes bears any conceivable relation to one’s qualifications for city government and, should it do so, we take notice of the fact that, as lessee, a nonfreeholder effectively pays the property taxes of his lessor by way of rent. As a United States taxpayer, he contributes to funds which ultimately return to the city in the form of revenue sharing and other federally funded programs.

**\*489** Further, to prevent public representation by nonfreeholders is to restrict the field of candidates from which the voters can select. A substantial segment of the voting populace, i.e. nonfreeholders, may thereby be prevented from seeking full representation of their interests. Warden v. City of Bozeman, supra; Cf. Bullock v. Carter, (1972), 405 U.S. 134, 92 S.Ct. 489, 31 L. Ed.2d 92.

Appellant enjoys a “...federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications, “Turner v. Fouche, 396 U.S. 362, 90 S. Ct. 541, 24 L. Ed. 2d 580 We hold the freehold requirements of sections 11-714 and 11-725, R.C.M. 1947, bear no relation whatsoever to a person’s qualifications and ability to serve as city councilmen, such that the result of the application of said requirements is one of invidious discrimination. As such, the above freeholder requirements are unconstitutional, as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution. (Emphasis added)

Subsequent to the 1978 Montana Supreme Court decision in Sadler, approximately seven (7) years later citizens J.E. McHatton, Stephen O. Jackson and Gary S. Marbut went to Missoula County Attorney Robert L. Deschamps III and complained that contrary to Montana State law requiring that planning board members be Freeholders, the City of Missoula had appointed three of its five planning board members contrary to State law requiring Freeholders be appointed. When the Missoula County Attorney requested that the City remove its three non Freeholder

members from the Planning Board the City declined to do so stating that State Law Freeholder requirements for the Planning Board were unconstitutional.

The Missoula County Attorney and the three (3) citizen complainers then joined together as Co-Plaintiff's and in Fourth Judicial District Court in Cause number 61545 sued the three (3) nonfreeholder City Planning Board appointees Michael Copeland, Dale Harris, and Richard Chapman seeking a Court ruling that they were not eligible to be planning board members because they were not resident freeholders as stated in Montana State Planning Board laws.

District Court Judge Douglas E. Harkin declared the Montana State Law Freeholder requirements for Planning Board Members unconstitutional and void as violating the equal protection clauses of the United States and Montana Constitutions. District Court Judge Harkin stated at pages 10-11 of his ruling:

The very reason that there is often heated opposition to the planning board, i.e. that it is making decisions and recommendations that have a direct impact on the property and activities of everyone in Missoula County, is the exact reason that planning board membership should not be limited to "freeholders"

A citizen should not be denied the right to render public service as a planning board member solely because he does not own land within Missoula County. By way of example, two classes of citizens immediately come to mind that, although they are not "freeholders", may have extremely valuable contributions to make to community development; senior citizens, who have paid a lifetime of property taxes, have sold their home but retain a valuable historical perspective of community growth and young couples that are vitally concerned with the local community where they plan to purchase their first home.

Citizens that are not "freeholders" pay their share of taxes through rent and income taxes that are returned to the community in the form of federal and state grants and expenditures.

The mere fact of ownership of a piece of land gives a "freeholder" no greater inherent qualification to serve on the Missoula Planning Board than a citizen that does not own land. Nor can it be rationally presumed that land ownership is indicative of a stronger attachment to the community.

The same reasons that the United States Supreme Court in Turner and the Montana Supreme Court in Sadler found a violation of the equal protection clause are directly applicable to the Missoula Planning Board.

## XII. MYERS VS. BARTE

On only one occasion to date has an appellate court been required to review the "freeholder" question in connection with a planning commission. In Meyers vs. Barte, 297 S.E.2d 406 (1981), the Supreme Court of Appeals of West Virginia held that the chief function of a planning

commission was the development of a comprehensive plan which embraced all facets of community life, many of which were entirely unrelated to a freeholder's interest. The court stated:

“The commission plans for the development and growth of all citizens of the community, rich and poor, landowners and tenants. To limit its membership to a freeholder class is an arbitrary and irrational classification.”

### XIII. Conclusion

There is no rational basis to exclude persons that do not own property from membership on the Missoula Planning Board. The requirement that citizen members be “freeholders” is wholly irrelevant to the purpose and duties of the Missoula Planning Board. Limiting membership on the Missoula Planning Board to “freeholders” is a violation of the equal protection clause of the United States and Montana Constitutions.” (Emphasis Added)

Subsection (1) of the Fourteenth Amendment to the United States Constitution provides:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added).

The preamble to the Montana Constitution provides:

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution. (Emphasis added)

Article II, Section four of the Montana Constitution entitled “Individual dignity” provides:

**Section 4. Individual dignity.** The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas. (Emphasis added)

It is one of the clearest legal principals that exist in Montana. Resident freeholder requirements as qualifications for Montana Municipal elected or appointed offices are unconstitutional and void. Montana courts established this legal principal decades ago.

**CONCLUSION(S):**

Yes. In 1978 the Montana Supreme Court in a contested City Council election arising in the City of Missoula held that Freeholder requirements for City Council Members are unconstitutional. Further, in Montana State Law 1985 the District Court for the Fourth Judicial District in a Missoula County Attorney initiated lawsuit against three (3) City of Missoula Planning Board appointees held that Montana State Law limiting membership on the Missoula Planning Board to “Freeholders” is a violation of the equal protection clauses of the United States and Montana Constitutions.

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/s/ \_\_\_\_\_  
Jim Nugent, City Attorney

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