

OFFICE OF THE CITY ATTORNEY

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Legal Opinion 2022-020

TO: Mayor Jordan Hess, City Council, Dale Bickell, Eran Pehan, Marty Rehbein, Ginny Merriam, Mary McCrea, Leigh Griffing, Eric Anderson, Department Mayor, Department City Clerk, Department Attorney

FROM: Jim Nugent, City Attorney

DATE December 12th, 2022

RE: Pursuant to Mont. Code Ann. § 7-5-4401 and City Charter, population of each city council ward is to be as nearly equal as possible prior to candidate filing commencing for 2023 city elections.

FACTS:

Prior to the commencement of filing for city council elections city council must review city council ward boundaries in order to establish city council ward populations to be as nearly equal as possible. Pursuant to subsection Mont. Code Ann. § 13-1-403(1) “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 Mont. Code Ann. § 13-1-107(2) a municipal primary election is held on Tuesday following the second Monday in September preceding a general election. It appears that the 2023 municipal election will occur Tuesday, September 12th, 2023.

Pursuant to subsection Mont. Code Ann. § 13-1-104(1) general elections are to be held on the first Tuesday after the first Monday in November. In 2023 this will be November 7th, 2023.

The 2023 municipal candidate election filing period will ultimately be determined by the Missoula County elections and Montana Secretary of State officials who will determine the actual date.

ISSUE(S):

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 for city elections purposes?

CONCLUSION(S):

The City of Missoula Charter, Article II(3), requires that each City Council ward be established and maintained “as equal in population as practically possible”. Montana municipal government law, Mont. Code Ann. § 7-5-4401 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 4th, 1996, effective January 1st, 1997, requires that City Council wards be maintained by the City Council “as equal in population as practically possible”. Article II (3) of the City of Missoula charter states:

“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 practicable 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.)

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.) Montana’s constitution provides “[n]o person shall be denied the equal protection of the laws.” Mont. Const. Article II, § 4. (Emphasis added.) The preamble to the Montana Constitution expresses a desire of the people of Montana 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, D. Mass. 1983 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). As a general matter an apportionment plan with a maximum population deviation under 10% falls within the category of minor deviation. Minor deviations generally are insufficient to establish a prima facie violation of the Equal Protection Clause. See Brown, Supra at 462 U.S. 835, 842-43 (1983) and Nation v. San Juan County, 150 F.Supp 3d 1253, 2015 US

Dist (Utah) LEXIS 165692. Maestas v. Hall, 2012 NMSC-006, 27483d66, 2012 N.M. LEXIS 119.

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* 143 Idaho 464; 129 P.3d 1213, 2005 Ida LEXIS 193.

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 follow: EQUAL PROTECTION.” (Emphasis added.)

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

In addition to the Missoula City Charter provision cited above, Montana Municipal law also requires population of city council wards to be as nearly equal as possible. Subsection Mont. Code Ann. § 7-5-4401(1) 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.)

Mont. Code Ann. § 7-3-218(2) applicable to city council/mayor statutory form of 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.

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

7-1-114. Mandatory provisions.

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

Permissible deviations are decided on a case by case basis based on specific circumstances. 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 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(S):

The City of Missoula Charter, Article II(3), requires that each City Council ward be established and maintained “as equal in population as practically possible”. Montana municipal government law, Mont. Code Ann. § 7-5-4401 also requires ward populations be “as nearly equal as possible”.

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A handwritten signature in black ink, appearing to read "Jim Nugent", is enclosed in a thin rectangular border.

Jim Nugent, City Attorney

JN: mcs