OFFICE OF THE CITY ATTORNEY

Legal Opinion 2012-016

TO: John Engen, Mayor; City Council; Bruce Bender, CAO; Mike Barton; Dave Deving, OPG; Denise Alexander, OPG; Kathleen Jenks, Municipal Court Judge; 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: Legal Staff

FROM: Jim Nugent, City Attorney

DATE November 1, 2012

RE: City council ward boundary reapportionment review necessary for 2013 City Council Municipal elections prior to candidate filing occurring.

FACTS:

During calendar year 2013 there will be City of Missoula Municipal elections for Mayor, at least six (6) city council officers and a Municipal Court Judge. Pursuant to subsection 13-1-104(2) MCA Municipal general elections are held in every odd numbered year on the first Tuesday after the first Monday in November to elect Municipal officers. November 5, 2013 will be the general election date. Pursuant to subsection 13-1-107(2) MCA a primary election if required, shall be "on the Tuesday following the second Monday in September preceding the general election which would be September 10, 2013. The time period for candidates to file for Municipal Office during 2013 will be an approximate sixty (60) day time period from very late April 2013 until late June 2013 as calculated and determined by the Missoula County Election Administrator. Subsection 13-10-201(6)(a) generally provides "a candidate's declaration for nomination must be filed no sooner than 135 days before the election in which the office first appears on the ballot and no later than 5:00 pm, 75 days before the date of the primary. Any city ward reapportionment must occur before candidates file for office.

ISSUE:

What does the City of Missoula Charter and 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" by the City Council. Montana municipal government law, Section 7-5-4401 MCA 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." This provision of the City charter provides:

> **City Wards.** The City Council shall have the authority to, by ordinance, determine the number of City wards. <u>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</u>. 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 city charter expressly establishes the number of city council members per ward at two per ward. This City charter provision is consistent with Mont. Code Ann. <u>§7-4-4402</u>. Mont. Code Ann. <u>§7-5-4401</u>, 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 "<u>regard to population so as to make them as nearly equal as possible</u>." Mont. Code Ann. <u>§7-3-218(2)</u>, pertaining to city council/mayor forms of government, also provides that city council election districts be "<u>apportioned by population</u>." (Emphasis added.) Montana's constitution provides "<u>[n]o person shall be denied the equal protection of the laws.</u>" 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 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)).

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 populations 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 <u>Bingham County v. Idaho Commissions for Reapportionment</u>, 137 Idaho 870(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.

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 <u>must divide the city</u> or town into wards for election and other purposes, <u>having regard to population so as to make them as nearly equal as possible. *(Emphasis added.)*</u>

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) <u>elected by districts in which candidates must reside and which are apportioned by population;</u>
> (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 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 by the City Council. Montana municipal

government law, Section 7-5-4401 MCA requires ward populations be "as nearly equal as possible".

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Jim Nugent, City Attorney

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