VOLUME NO. 40 OPINION NO. 1

ELECTIONS - Election of city aldermen, length of term of office after reapportionment;
REAPPORTIONMENT - Length of term of office of city aldermen after reapportionment;
MONTANA CODE ANNOTATED - Sections 7-4-4101, 7-4-4402.

HELD: Aldermen elected to four-year terms in 1981 need not run for reelection in 1983 as a result of reapportionment and redistricting.

6 January 1983

Mae Nan Ellingson
Missoula Deputy City Attorney
201 West Spruce Street
Missoula MT 59802

Dear Ms. Ellingson:

You have requested my opinion as to whether the six Missoula aldermen who were elected to four-year terms in 1981 must run for reelection in 1983 as a result of reapportionment. You note in your request that because of the disparity in population among the six existing wards, the Missoula City Council intends to implement a reapportionment plan that will take effect in time for the 1983 local election.

The rules concerning the number of aldermen to be elected and the length of their term of office are a matter of legislative discretion and are set by state law. See Bonner v. District Court, 122 Mont. 464, 206 P.2d 166 (1949). The relevant statutes are sections 7-4-4101 and 7-4-4402, MCA, which provide that there shall be two aldermen from each ward who shall hold office for a term of four years, and that the terms of the two aldermen from each ward shall be staggered, i.e., one of the two terms shall begin every two years. Thus, the six Missoula aldermen who ran for election in 1981 do not, according to state law, stand for reelection until 1985. Because the boundaries of their wards will most likely be changed as a result of the impending reapportionment, the question arises as to

whether all 12 aldermen should run for election in 1983 from the newly-formed wards.

My research has revealed no Montana case law on point. However, over the past two decades several other states have litigated the question of whether representation of a newly-formed district by a holdover elected official is unconstitutional under the one-person, one-vote rule set forth in Reynolds v. Sims, 377 U.S. 533 (1964). The holdings in those cases are summarized below.

The majority of courts have held that where the term of an elected official runs beyond the reapportionment year, the official may be held over for the duration of the term for which he or she was elected without there being a violation of the notions of equal protection and representative government. See Ferrell v. Oklahoma ex rel. Hall, 339 F. Supp. 73 (W.D. Okla. 1972), aff'd mem., 406 U.S. 939 (1972), where the court held that after reapportionment a two-year transitional period during which holdover state senators would be representing voters in a different geographical area than that from which they were elected did not offend the Equal Protection Clause of the United States Constitution. The court noted:

> It is impossible, where Senate District boundaries are changed, to avoid having some voters represented by a Senator for [sic] whom they had no opportunity to support or oppose. We observe, in passing, that this also happens with regard to new registrants who reach the age of 18 years shortly after an election and to people moving from one area to another. Certainly no one would argue that those voters were thereby denied their constitutional rights.

Id. at 82. In a recent Colorado case, In re Reapportionment of the Colorado General Assembly, 647 P.2d 191 (Colo. 1982), the Colorado Supreme Court recognized that:

> [T]he complexities of the reapportionment process may result occasionally in a six-year delay of the opportunity of some persons to vote for a [state] senator. Where this result is absolutely necessary [because of the legal

> requirement of staggered terms], it does not constitute a constitutional deprivation unless the change is shown to be the result of an invidious discrimination.

Id. at 198. The Colorado Supreme Court also noted in Kallenberger v. Buchanan, 649 P.2d 314 (Colo. 1982), that:

> Because Colo. Const. Art. V, § 5 requires that state senators be divided "so that one-half of the Senators, as nearly as practicable, may be chosen biennially," the redrawing of district boundaries every ten years results, for two years after the boundaries have changed, in half the members of the Senate being "holdover" senators from pre-Reapportionment districts. This anomaly is addressed by deeming that a holdover senator, although elected from the old district, represents the citizens of the new senate district of which he is a resident.

Id. at 316-17. The idea that an elected official must constantly represent the same individuals who had an opportunity to vote for him or her has been rejected in other cases. See Anggelis v. Land, 371 S.W.2d 857 (Ky. 1963), where the Kentucky Appeals Court stated:

> Although a Senator is required...to be a resident of the district from which he is elected, once he is elected he represents generally all the people of the state and specifically all the people of his district as it exists during his tenure in office. Certainly no one would suggest that a Senator represents only those persons who voted for him. The fact that the persons who are represented by the Senator from the Twelfth District are no longer the ones who elected him indicates there is a hiatus following a redistricting of the state. However, this situation is comparable to that which results when persons move from one district to another.

Id. at 859. And in Selzer v. Synhorst, 113 N.W.2d 724 (Iowa 1962), the Supreme Court of Iowa quoted from

Stoyles and Kennedy, Constitutional and Legal Aspects of the Plan, 39 Iowa L. Rev. 4:

> While representation of a constituency different from that which elected the senator or representative is exceptional, it is sometimes unavoidable if both continuity of the legislative body and responsiveness to population growth and change are to be achieved.

Selzer at 729-30. The court went on to state that "the idea that we are personally represented and represented only by officials for whom we have voted stretches too far the theory of representative government." Selzer at 730.

Holdover of elected officials after reapportionment has also been upheld in California, in Visnich v. Sacramento County Board of Education, 112 Cal. Rptr. 469 (1974), in Griswold v. County of San Diego, 107 Cal. Rptr. 845 (1973), and in Legislature of State of California v. Reinecke, 516 P.2d 6 (Cal. 1973); in Delaware, in Twilley v. Stabler, 290 A.2d 636 (Del. 1972); in Indiana, in Stout v. Bottorff, 249 F. Supp. 488 (S.D. Ind. 1965); in Michigan, in New Democratic Coalition v. Austin, 200 N.W.2d 749 (Mich. 1972); in Nebraska, in Barnett v. Boyle, 250 N.W.2d 635 (Neb. 1977); in Oregon, in McCall v. Legislative Assembly, 634 P.2d 223 (Or. 1981); and in Texas, in Carr v. Brazoria County, Texas, 341 F. Supp. 155 (S.D. Tex. 1972), aff'd mem., 468 F.2d 950 (5th Cir. 1972), in Robinson v. Zapata County, Texas, 350 F. Supp. 1193 (S.D. Tex. 1972), in Pate v. El Paso County, Texas, 337 F. Supp. 95 (W.D. Tex. 1970), aff'd mem., 400 U.S. 806 (1970), and in Childress County v. Sachse, 310 S.W.2d 414 (Tex. 1958). See also Mader v. Crowell, 498 F. Supp. 226 (M.D. Tenn. 1980), where the court refused to order all state senators to stand for reelection in 1980 merely because a reapportionment plan had gone into effect. Tennessee law required staggered four-year terms for state senators, and although the shifting of boundaries of voting districts resulted in some voters who had last voted in 1976 not being entitled to vote until 1982, the court noted:

> The temporary disenfranchisement of these voters violates neither the equal protection clause nor any other constitutional

> provision.... Shifts from odd-numbered to even-numbered districts and vice versa are an unavoidable consequence of the reapportionment ordered by this court.
>
> Moreover, the deprivation suffered is de minimis at most and the remedy urged by plaintiffs would not justify the massive intrusion into the state's political machinery.... The disenfranchisement is temporary in nature....
>
> Plaintiffs submitted no evidence that the General Assembly made these shifts for invidious or discriminatory purposes. Rather, this disenfranchisement results simply from the neutral and inoffensive concatenation of the Tennessee Constitutional provision for overlapping senatorial terms, this court's order requiring reapportionment, and the legislature's laudable objective to achieve near perfection in equalizing the population of senatorial districts. Accordingly, plaintiffs' claim on this ground cannot prevail.

Id. at 231. See also 20 C.J.S. Counties § 77, p. 840; and 67 C.J.S. Officers § 67, p. 375, and § 70, p. 378.

It is true that in a few cases courts have permitted the shortening of the terms of certain elected officials, but only under special circumstances, none of which seem to be apparent in the matter at hand. In In re Apportionment Law, 414 So. 2d 1040 (Fla. 1982), the Florida Supreme Court held that the Florida Constitution required all state senators to stand for election in order to run from newly-formed districts. The Florida Constitution, however, specifically required that while state senators were elected for four-year terms, after a reapportionment some senators were to be elected for two-year terms in order to maintain staggered terms. See also Williams v. Meyer, 127 N.W. 834 (N.D. 1910), where the North Dakota Constitution mandated shortened terms. There have also been cases where truncation of a term of office was upheld because it was permitted by state law, Groh v. Egan, 526 P.2d 863 (Alaska 1974); or implemented by voter initiative, State ex rel. Christensen v. Hinkle, 13 P.2d 42 (Wash. 1932).

Some courts have also ordered the shortening of terms of office after a reapportionment where the elected officials were subsequently found by the courts to have been elected under an unconstitutional apportionment plan. See Chavis v. Whitcomb, 307 F. Supp. 1362 (S.D. Ind. 1969), where the court had found multimember districting provisions of the Indiana apportionment statutes to be unconstitutional in that they canceled out the voting strength of a cognizable racial minority.

There is no provision in Montana law, either in the Constitution or in the statutes, that authorizes the shortening of an alderman's term of office. The fact that ward boundaries may change as a result of reapportionment and that some voters may be represented for two years by an alderman for whom they had no opportunity to vote has not justified the deviation from state law in other jurisdictions. On the contrary, where state law provides for the length of term of an elected official and for the staggering of terms to ensure continuity and stability, these requirements have been held paramount to the temporary disenfranchisement that necessarily follows a reapportionment.

What I have attempted to do in this opinion, absent any controlling decisions from the Montana Supreme Court in this area, is demonstrate how courts from other jurisdictions have interpreted language similar to that found in our statutes. However, a great many questions remain unanswered, to be worked out in the reapportionment scheme itself. In summary, the requirements found in Montana state law regarding four-year staggered terms for aldermen, the absence of any applicable statute authorizing the removal of incumbents from office after reapportionment, and the case law of those states to which I have already referred are persuasive.

THEREFORE, IT IS MY OPINION:

> Aldermen elected to four-year terms in 1981 need not run for reelection in 1983 as a result of reapportionment and redistricting.

Very truly yours,

MIKE GREELY
Attorney General