



MEMORANDUM

State's Attorney

Birch P. Burdick

Assistant State's Attorneys:

- Mark R. Boening
- Tracy J. Peters
- Leah J. Viste
- Reid A. Brady
- Kara Schmitz Olson
- Kimberlee J. Hegvik
- Tristan J. Van de Streek
- Ryan J. Younggren
- Renata J. Selzer
- Tanya Johnson Martinez
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Victim/Witness Coordinators:

- Brenda Olson-Wray
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Check Division/ Restitution:

- Charlotte Eversvik
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TO: Rick Steen
Chair, Cass County Commission

FROM: Birch P. Burdick
Cass County State's Attorney *Burzeel*

DATE: February 12, 2018

RE: Term limits for Cass County Commissioners

I understand that Jim Kapitan would like the Commission to consider amending the Home Rule Charter's (HRC) language regarding term limits for commissioners. Heather indicated you would like input on the process for amending the HRC.

Background

The existing term limitation language is described in HRC Article 6, §3 (Enclosure 1). As historical context for Mr. Kapitan's current request, see Enclosure 2. I prepared a related opinion dated August 1, 2016 (Enclosure 3). The opinion concluded HRC Article 6, §3 allowed a person who had completed 3 successive terms as commissioner to run again if a period of time elapsed between the successive terms and the new candidacy.

Mr. Kapitan proposes inserting a new sentence into the HRC which expressly forbids an additional candidacy after 3 successive terms (Enclosure 4).

Process for Amending Home Rule Charter

HRC Article 12 defines how the HRC may be amended (Enclosure 5). It refers to state law for the *manner* of modifying it, then provides two methods for initiating that process: (1) a proposal of the Commission*, or (2) a petition bearing signatures by at least 15% of the qualified voters in Cass County who voted for governor in the last general election. I understand from the Auditor's Office that number would be 11,920.

N.D.C.C. §11-09.1-06 (Enclosure 6) describes the *manner* of modifying a HRC. If by petition, the completed petition must be submitted to the Commission. Within 30 days of receipt of a valid petition, or approval of a Commission proposal, the Commission shall publish the proposed

amendment once in the county's official newspaper. At least 60 days after publication, the proposed amendment must be submitted to the voters at the next primary or general election. It is decided by majority vote.

(* The HRC has been amended twice since it was implemented in 1994. In both cases the amendments related to the flood control sales tax and were initiated by the Commission through Resolutions #2010-26 and #2016-20, which were then approved in public votes.)

Cc: Mike Montplaisir, Auditor



Section 3 - Term limitations

After the effective date of this charter, no Commissioner will serve more than three successive four-year terms. A Commissioner elected for a term of less than four years as a result of redistricting or vacancy will be eligible to serve three successive four-year terms.

Section 4 - Disclosure

The provisions of state law applicable to candidates for the state legislature will govern the exercise of filing of campaign contribution statements by all candidates for election.

Section 5 - Recall

The applicable provisions of state law will govern the recall of elected officials.

Article 7

Departments, Offices, Agencies, Boards and Commissions

Section 1 - General Provisions

The Board of County Commissioners may, by ordinance, establish county departments, offices, agencies, boards or commissions in addition to those offices to be filled by election and may prescribe their functions and membership.

Section 2 - Department Directors

The Board of County Commissioners may appoint Department Directors and fix their compensation. Department Directors will be appointed solely on the basis of executive and administrative qualifications to be established by the Board of County Commissioners. Department Directors need not be residents of the county or state at the time of appointment but must reside within the county within 90 days from the time of appointment.

Section 3 - Removal

A Department Director may be suspended by a resolution of the Board of County Commissioners which will set forth the reasons for suspension and proposed removal. A copy of the resolution will be served immediately upon the Department Director who will have five working days in which to reply in writing. Upon request, the Department Director will be afforded a public hearing, which will occur not earlier than ten days nor later than fifteen days after the hearing is requested. After the public hearing, if one is requested, and after full consideration, the Board of County Commissioners may adopt a final resolution of removal. The Department Director will continue to receive full salary until the effective date of a final resolution of removal.

16. CORRESPONDENCE, Received and filed

MOTION, passed

Mr. Peterson moved and Mr. Rasmussen seconded to receive and file correspondence outlined by the secretary as follows: Motion carried.

- Notice of Filing Ten-Year Plan by Nu-Star Pipeline Operating Partnership L.P. for years 2016 through 2026 with the North Dakota Public Service Commission.

17. PUBLIC COMMENT

Jim Kapitan, Cass County Commission District 3 candidate, provided some comments about the Cass County Home Rule Charter regarding term limits for Cass County Commissioners. He believes that Vern Bennett, who is also running for Commission District 3, is in violation of the Home Rule Charter, which states that no commissioner will serve more than three successive four-year terms. Vern Bennett was a Cass County Commissioner from District 2 for three successive four-year terms and moved out of the district.

State's Attorney Birch Burdick has been in contact with Mr. Kapitan and provided his opinion on this issue. He does not agree that Mr. Bennett's candidacy is a violation of the Home Rule Charter. Mr. Peterson asked Mr. Burdick to formalize an opinion and present it to the board. Mr. Burdick agreed to draft a memorandum and attach the emails he and Mr. Kapitan have exchanged regarding this issue.

18. ADJOURNMENT

MOTION, passed

On motion by Mr. Peterson, seconded by Mr. Pawluk and all in favor, the meeting was adjourned at 4:58 PM.

ATTEST:

APPROVED:


Michael Montplaisir – Auditor
Cass County, North Dakota

Mary Scherling, Chairwoman
Cass County Board of Commissioners



MEMORANDUM

TO: Cass County Commissioners

FROM: Birch P. Burdick
Cass County State's Attorney 

DATE: August 1, 2016

RE: Number of Elective Terms for Commissioners

State's Attorney

Birch P. Burdick

Assistant State's Attorneys:

- Mark R. Boening
- Tracy J. Peters
- Leah J. Viste
- Reid A. Brady
- Kara Schmitz Olson
- Gary E. Euren
- Kimberlee J. Hegvik
- Cherie L. Clark
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This is a follow-up to the comments at your July 18th meeting by a current candidate ("JK") for the position of Cass County commissioner ("Commissioner") about how many terms of office are allowed by Cass County's Home Rule Charter ("HRC"). This memorandum formalizes the opinion I shared at that time.

Opinion

Question: May a person run for election as a Commissioner after having completed three successive 4-year terms as a Commissioner, if a period of time separates those three successive terms from a subsequent candidacy?

Opinion: Yes, a person may run again for office as a Commissioner, after having completed three successive 4-year terms as a Commissioner, if a period of time elapses between the successive terms and the new candidacy. The way our commission elective structure is set up, such a candidate would normally have to allow 4 years to pass, if they remained in the same commission district, or 2 years to pass, if they moved into a different commission district. The bases for this opinion are provided below.

Bases for Opinion

According to N.D.C.C. §11-09.1-05, a home rule county has the power of self-government in all matters provided for in N.D.C.C. Chapter §11-09.1. One of those powers is to "[p]rovide for all matters pertaining to county elections, except as to qualifications of electors". N.D.C.C. §11-09.1-05(4).

Cass County's Home Rule Charter, Article 6, Section 3 states, in pertinent part: "... no Commissioner will serve more than three **successive** four-year terms". (emphasis added by me) Exhibit A. In determining what that language means, I consider interpretation

techniques found in statute, court cases and from other sources. For example:

- Words are to be understood in their ordinary sense. N.D.C.C. §1-02-02.
- The word "successive" is defined as: "following in order or uninterrupted sequence; consecutive". Webster's Encyclopedic Unabridged Dictionary of the English Language, 1996.
- When the wording of a statute is clear and free of all ambiguity, the letter of the law is not to be disregarded under the pretext of pursuing its spirit. N.D.C.C. §1-02-05.
- If a statute is ambiguous, a court may consider, among other things, the object sought to be obtained, the legislative history, etc. N.D.C.C. §1-02-39.
- A court must presume the Legislature meant what it said and said all it intended to say. Furthermore, the court must presume the Legislature was not mistaken in expressing its purpose and intent. Estate of Christeson v. Gilstad, 2013 ND 50, §14, 829 N.W.2d 453.
- "Every word, clause, and sentence in a statute is to be given meaning and effect." Fastow v. Burleigh County Water Resource District, 415 N.W.2d 505, 509-510 (N.D. 1987).

For the purposes of interpreting the HRC provision, I substitute the HRC Commission for the Legislature and the HRC for the statutes. With that in mind, I note the following:

- JK's opponent in the 2016 Commission race ("VB") previously served three successive terms as a commissioner. VB was elected in 2002, 2006 and 2010, and left office at the end of his third term in 2014. In the prior three terms, VB represented District 2. VB is now running in District 3. I consider this change in districts as irrelevant to this analysis, other than as related to the election timing.
- I understand JK's position to be that the HRC only allows a commissioner to serve three successive 4-year terms, and then never serve again. If that were correct, then VB would be ineligible to run in 2016, or at any other future time. However, for JK's position to make sense you have to essentially nullify the word "successive", meaning that a person could only serve three 4-year terms, whether successive or not. Let me use an example to make my point. It would make no sense for the HRC provision to ban any term beyond three successive 4-year terms, but otherwise allow a person to serve six 4-year terms so long as there were not three successive terms.
- I consider the HRC Commission intended the word "successive" to have meaning, rather than to be superfluous. If the HRC Commission intended to limit a person to only three terms,

successive or not, it would have said so. Instead, it incorporated the adjective "successive". According to Webster, that would mean consecutive or uninterrupted.

- My law clerk reviewed the meeting notes of the HRC Commission from 1991 through 1994 (when the HRC passed). The November 14, 1991 meeting notes indicate the HRC Commission added the word "successive" due to input from advisory panel members, but provided no further detail. Exhibit B.
- As JK noted at the meeting, Fargo city commissioners are limited in terms. Fargo Ordinance 2-0106 limits them to three successive 4-year terms, but includes an express provision that a person shall not become eligible to run again until the next regular election following the expiration of their third successive term. Exhibit C. JK's point apparently is that because Cass County's HRC does not incorporate that extra provision, it is not allowed. Although I appreciate that point, I disagree with the conclusion. That provision in Fargo's Home Rule Charter does not appear to me to be an exception to the three successive term limitation, but rather a clarification of when a person could run again. The absence of such language in Cass County's HRC simply leaves us with language which does not preclude eligibility for a subsequent candidacy, without addressing when that candidacy may occur.

During the commission meeting, a question arose as to who was the final authority in interpreting the HRC provision at issue. I previously provided my opinion to JK as a courtesy and for his information, and copied it to the County Auditor as overseer of county elections and the person who puts the names on the general election ballot. I verbally provided my conclusion to you at the July 18th meeting and now formally herein. As to state involvement in interpreting home rule charters, the ND Attorney General said the following relating to a question pertaining to the Richland County Home Rule Charter: "An attorney general's use of the authority to issue opinions on questions of law should be limited to those questions involving state law, or questions having statewide significance. Therefore, I must refer you to the Richland County State's Attorney's Office for any specific questions you have pertaining solely to the meaning of language contained in the Richland County home rule charter." ND Attorney General letter to Sen. Dotzenrod, May 26, 1993. A state's attorney is to give an opinion to "the county" on matters relating to the duties of the respective offices and act as legal adviser to the board of county commissioners. N.D.C.C. §11-16-01(9) and (12). What county officials do with that opinion is essentially up to them – they are not legally bound to follow that opinion. The county auditor is the key county election official. N.D.C.C. 11-13-02(9). If the county auditor determines my opinion is worthy of following, and that both JK's and VB's

names should go on the general election ballot, consistent with the results of the primary election and this opinion, then it appears JK's recourse would be to make his argument through the judicial system in an attempt to get some type of restraining order.

If you have further questions on this topic, please feel free to contact me.

Cc: Cass County Auditor
JK, candidate for Cass County Commission
VB, candidate for Cass County Commission



From Cass County's Home Rule Charter:

"Article 6 Elections

Section 1 - Offices to be Elected

1. The Board of County Commissioners shall consist of five members who shall be elected on a nonpartisan ballot. All of the candidates seeking the office of county commissioner shall be voted upon by the qualified electors of the entire county, but one of the commissioners to be elected must reside in each of the commissioners' districts.

2. The Board of County Commissioners may enact ordinances concerning the organization and structure of elected county offices in accordance with state law.

3. After January 1, 2002, the Board of County Commissioners may, by ordinance, convert the elected offices of the county treasurer, register of deeds, auditor and clerk of court into appointed offices. An ordinance to convert an elected office to an appointed office shall not shorten the term for which the official was elected nor reduce the salary of the official's office for that term.

Section 2 - Qualifications

In addition to any qualifications established by state law for any of the offices to be filled by election, candidates must be qualified electors of the County of Cass and must have been in continuous residence in the county for at least six months prior to filing nomination papers.

Section 3 - Term limitations

After the effective date of this charter, no Commissioner will serve more than three successive four-year terms. A Commissioner elected for a term of less than four years as a result of redistricting or vacancy will be eligible to serve three successive four-year terms.

Section 4 - Disclosure

The provisions of state law applicable to candidates for the state legislature will govern the exercise of filing of campaign contribution statements by all candidates for election.

Section 5 - Recall

The applicable provisions of state law will govern the recall of elected officials."



CASS COUNTY CHARTER COMMISSION MINUTES
NOVEMBER 14, 1991, 1:00 PM

1. MEETING TO ORDER

A meeting of the Cass County Charter Commission was called to order by Chairman John T. Korsmo at 1:00 PM on Thursday, November 14th, 1991, at Old Broadway in downtown Fargo. Four members were present as follows: John T. Korsmo, Carolyn C. Nelson, Joseph A. Nelson and Michael B. Unhjem. Jay R. Lindgren was absent. Also present was Forum reporter DeAnne Hilgers.

2. MINUTES APPROVED

MOTION, passed

Carolyn Nelson moved and Michael Unhjem seconded that the minutes of the previous meetings of November 9th and 12th, 1991, be approved as written. Motion carried.

3. HOME RULE CHARTER REVISIONS

After getting input from the Charter Commission's advisory panel at a meeting held Tuesday evening, November 12th, Charter Commissioners called a meeting to incorporate some of that input into draft #8 of a Cass County Home Rule Charter.

* { Some specific changes made by Charter Commissioners as a result of advisory panel members' input were as follows: to delete the qualifications for sheriff; make no reference to the position of an auditor; limit terms of commissioner to three "successive" four-year terms; and delete a section on acting department director.

Under Article 6, Elections, Mr. Nelson asked that Section 3, which says Commissioners will be elected by districts, be deleted from the home rule charter. It was the consensus of the Charter Commission to remove Section 3 as requested, however, Mr. Korsmo said the current system is the only one that guarantees a rural commissioner.

Mr. Nelson also asked to add the words, "not currently being levied or assessed" after the word taxation in Section 2, Article 9; and this was agreeable with everyone present.

4. PROCEDURE TO FOLLOW AFTER CHARTER IS PRESENTED TO COUNTY COMMISSION

Mr. Unhjem thinks the Charter Commission should recommend the types of material to be prepared and outline a campaign process to follow if the County Commission adopts the draft home rule charter to be voted upon by the citizens of Cass County. Further discussion will follow.

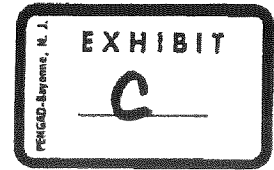
5. ADJOURNMENT

MOTION, passed

On motion by Ms. Nelson and seconded by Mr. Unhjem, the Chairman declared the meeting adjourned about 2:30 PM.

Respectfully submitted,

Joyce Schepp
Commission Secretary



Fargo Ordinance

2-0106. - Limitation on terms.

No member of the board of city commissioners may serve more than three (3) successive four-year terms; provided, that such term limitation shall be subject to the following:

- A. Any member elected to a term of less than four years as a result of a vacancy on the board shall be eligible to serve three additional four-year terms.
- B. Any member who has completed three successive four-year terms shall not be eligible for re-election until the next regular election following the expiration of such member's third successive term.
- C. Any member who has served in the capacity of mayor, as well as city commissioner, may not serve more than four (4) successive four-year terms.
- D. This ordinance shall not apply to any member of the board whose first election as either mayor or commissioner occurred prior to April of 1992.

Source: 2416 (1988), 2620 (1992).

4

RECEIVED
CASS COUNTY COMMISSION

JAN 18 2018

received from
Jim Kapitanas
an agenda item

CASS COUNTY TERM LIMITATIONS

The Home rule charter as adopted reads:

Section 3 – Term Limitations

After the effective date of this charter, no Commissioner will serve more than three successive four-year terms. A Commissioner elected for a term of less than four years as a result of redistricting or vacancy will be eligible to serve three successive four-year terms.

To be amended to read:

After the effective date of this charter, no Commissioner will serve more than three successive four-year terms. **After a Commissioner that has served three successive four-year terms, a hiatus or a move to another district will not be allowed.** A Commissioner elected for a term or less than four years as a result of redistricting or vacancy will be eligible to serve three successive four-year terms.

PROPOSED CHANGE TO ARTICLE 6, §3.

This ordinance shall terminate on December 31, 2084 unless rescinded earlier by the Cass County Commission but in no event shall this ordinance be rescinded or modified until all costs of construction and debt, including special assessments for the construction, for the Fargo-Moorhead (FM) Area Diversion Project are retired.

Article 10

Separability Clause

If a court declares that any part of this charter is invalid, the decision will not impair or affect in any manner the validity or enforceability of the remainder of this charter.

Article 11

Succession in Government

Section 1 - Rights of officers and employees preserved

Nothing in this charter, except as specifically provided, will affect or impair the rights, privileges, duties or authority of officers and employees of the county or of any office, department, agency, board or commission existing at the time this charter takes effect.

Section 2 - Continuance of contracts

All contracts entered into by the county prior to the taking effect of this charter will continue in full force and effect.

Section 3 - Pending actions and proceedings

The adoption of this charter will not abate or otherwise affect any action or proceeding, civil or criminal, pending when it takes full effect, brought by or against the county or any office, department, agency or officer.

Section 4 - Resolutions and policies to remain in force

All county resolutions and policies in force at the time this charter takes effect, and not inconsistent with this charter, will continue in force until amended or repealed.

Article 12

Amendments and Repeal

In the manner provided by state law, this charter may be amended or repealed by a proposal of the Board of County Commissioners or by petition bearing signatures of qualified voters at least equal in number to fifteen per cent of the number of electors voting in the county for the office of governor in the last general election.

affect the validity of any other portion of the charter or ordinance or act of a governing body of a home rule county or the eligibility for a refund under section 57-01-02.1. Any taxes imposed under this chapter on farm machinery, farm irrigation equipment, and farm machinery repair parts used exclusively for agricultural purposes, or on alcoholic beverages, which were in effect on December 31, 2005, become gross receipts taxes after December 31, 2005. Ordinances enacted after August 1, 2017, may not allow for the collection and levy of any tax not otherwise specified under this section.

- 5. Provide for county elected and appointed officers and employees, their selection, powers, duties, qualifications, and compensation, and the terms of county appointed officers and employees. However, after adoption of a home rule charter, a county elected office may not be eliminated or combined with another office except upon approval of a majority of the electors of the county voting upon the question at a primary or general election or pursuant to the county officer combination, separation, or redesignation procedures of chapter 11-10.2. A home rule charter may not diminish the term of office for which a current county officer was elected, redesignate that elected office during that term as appointed, or reduce the salary of the office for that term. This subsection does not authorize a county to redesignate the elected offices of sheriff and state's attorney as appointed, except as provided in section 11-10-02.3.
- 6. Provide for all matters pertaining to county elections, except as to qualifications of electors.
- 7. Provide for the adoption, amendment, repeal, initiative, referral, enforcement, and civil and criminal penalties for violation of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare. However, this subsection does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency.
- 8. Lay out or vacate public grounds, and provide through its governing body for the construction, use, operation, designation, and regulation of a county road system.
- 9. Provide for zoning, planning, and subdivision of public or private property within the county limits but outside the zoning authority of any city or organized township.
- 10. Exercise in the conduct of its affairs all powers usually exercised by a corporation.
- 11. Contract with and receive grants from any other governmental entity or agency, with respect to any local, state, or federal program, project, or works.

The people of all counties coming within this chapter have the full right of self-government in all matters within the powers enumerated in this chapter. The statutes of this state, so far as applicable, continue to apply to counties, except as superseded by the charters of the counties or by ordinances passed pursuant to the charters.

11-09.1-05.1. Sales tax revenue transfer to school districts prohibited.

Notwithstanding the provisions of chapters 54-40 and 54-40.3 or any other provision of law, revenue from sales, use, or other excise taxes levied under this chapter may not be transferred to or for the primary benefit of a school district except for payment of bonded indebtedness incurred before April 19, 2007, or for capital construction and associated costs approved by the electors of the county before April 19, 2007.



11-09.1-06. Amendment or repeal.

The home rule charter adopted by any county may be amended or repealed by a proposal by the governing body of the county or by petition of the number of electors provided in section 11-09.1-01, submitted to and ratified by the qualified electors of the county. A petition to amend or repeal a home rule charter must be submitted to the governing body of the county. Within thirty days of receipt of a valid petition or approval of a proposal to amend or repeal a home rule charter, the governing body of the county shall publish any proposed amendment or repeal of a home rule charter once in the official newspaper of the county. At least sixty days after publication, the proposed amendment or repeal must be submitted to a vote of the qualified electors of the county at the next primary or general election. The electors may accept or reject

any amendment or a repeal by a majority vote of qualified electors voting on the question at the election.

11-09.1-07. Commission - Terms of office - Vacancies.

The board of county commissioners shall determine the term of office of the members of the charter commission at the time the members are appointed. The board of county commissioners shall fill any vacancy on the charter commission.

11-09.1-08. Restriction on proposals to amend or repeal.

Repealed by S.L. 1993, ch. 401, § 53.

11-09.1-09. Manner of calling and holding elections.

The elections provided for in this chapter are subject to the laws applicable to other elections of the county. All qualified electors of the county are eligible to vote at the election. The charter commission, for proposals to adopt a home rule charter, or the governing body of the county, for proposals to amend or repeal a home rule charter, shall prescribe the form of ballot so that the voter may signify whether the voter is for or against the proposed home rule charter or the amendment or repeal.

11-09.1-10. Effect of amendment or repeal on salary or term of office.

On the first day of January following repeal of a home rule charter, the county reverts to the form of government of the county immediately preceding adoption of the home rule charter. If positions to which officials were elected under the home rule charter are substantially the same as positions under the form of government to which the county reverts upon repeal, the elected officials shall continue to exercise the authority of their positions for the salary prescribed by the home rule charter until expiration of their terms of office as prescribed by the home rule charter. No amendment of a home rule charter may shorten the term for which any official was elected or reduce the salary of the official's office for that term.

11-09.1-11. General powers preserved.

All powers granted counties by general law are powers of home rule counties.

11-09.1-12. Vested property - Rights of action - Actions saved.

The adoption of any charter or amendment does not destroy any property, action, right of action, claim, or demand of any nature vested in the county. All rights of action, claims, or demands are preserved to the county and to any persons asserting any claims against the county as completely as though the charter or amendment had not been adopted. The adoption of any charter or amendment affects neither the right of the county to collect special assessments previously levied under any law or charter for the purpose of public improvements, nor impairs the obligation of any existing contract to which the county is a party.

11-09.1-13. Enforcement of criminal penalties.

A county that has adopted a home rule charter may impose a penalty for a violation of an ordinance through a citation, a criminal complaint, or an information through the district court in the county where the offense occurred. The penalty for a violation of an ordinance may be an infraction or a class B misdemeanor.

11-09.1-14. Payment of expenses for indigent defense services.

The home rule county must pay for an attorney and those expenses necessary for the adequate defense of an indigent person prosecuted for violation of a home rule county ordinance.

From Commissioner Vern Bennett:

2-20-18

Term Limit Thoughts

A fundamental principle in our system of government is that Voters get to choose their representatives.

Voter choices are restricted when a candidate is barred from being on the ballot.

In what other profession do we force employees into retirement after 12 years with no consideration as to their abilities or effectiveness on the job?

Kicking out popular and competent commissioners simply because their time runs out results in a bad return on the investment. Experience matters.

The most effective method to remove unresponsive and ineffective commissioners is elections not term limits.

I do not favor the taking away of more power from Voters.

In fact if any of the other four commissioners were to run for a fourth term --- I would be proud to support them.

I have not found that Cass County government has a swamp that needs draining.

The home rule charter committee had great vision and wisdom when they employed the word "successive" in section 3 of article 6.

DeerBennett