

Tuesday – July 2, 2019 - 5:00 p.m.

Worksession to Discuss Legal Options regarding Election Districts

Present: Mayor Esther E. Manheimer, Presiding; Vice-Mayor Gwen C. Wisler; Councilman Brian D. Haynes; Councilman Vijay Kapoor; Councilwoman Julie V. Mayfield; Councilwoman Sheneika Smith; Councilman W. Keith Young; City Manager Debra Campbell; City Attorney Brad Branham; and City Clerk Magdalen Burleson

Vice-Mayor Wisler moved to suspend the rules and allow public comment. This motion was seconded by Councilwoman Mayfield and carried unanimously.

City Attorney Branham informed the Council that this presentation is intended to provide information regarding the effect of Senate Bill 813 on our local election system and our legal options for addressing it. In preparation for the presentation, he reviewed the relevant law and consulted with legal and subject matter experts in the field. He is not personally an expert in election law, but does feel competent to address this issue. He will provide details about our legal and legislative options, but will not offer opinions or recommendations about legal strategy. This will allow for the protection of the necessary attorney-client privilege in the future.

City Attorney Branham explained in detail the following presentation, starting off with the following are powers of municipalities in North Carolina. Under the North Carolina Constitution, cities and counties are essentially creatures of the state. Article VII gives the General Assembly the power to “provide for the organization and government and fixing the boundaries of counties, cities and towns.” Municipalities have no inherent powers; they have only such powers as are delegated to them by legislative enactment.

Where we were before Senate Bill 813: (1) All City Council Members elected at large; (2) Elections were nonpartisan with primaries; (3) City Council elections in odd numbered years; and (4) All terms were four years and staggered.

Where we are today: (1) City is divided into 5 Districts’ (2) One Council Member shall be elected from each district, and one and the mayor from the city at-large; (3) Elections will be nonpartisan plurality method with no primary; (4) Elections will be in even numbered years; and (5) All terms remain four years, staggered

This means for City Council elections: (1) The next election for City Council Members will be held in 2020, and then again in 2022. No primaries will be held; (2) 5 Candidates will be elected from the District in which they reside by the voters in those respective Districts; (3) The Mayor and 1 at-large member will be elected from the City as a whole; and (4) No Effect on duration of terms, except for initial extension of 1 year. (* Bill Ratified June 29th, 2018)

Council’s legal options include (1) Do Nothing; (2) Amend City’s Charter; (3) File a Claim Challenging the Law; or (4) Combination of Options.

Council’s legal options include; (1) do nothing; (2) amend City’s Charter; (3) file a claim challenging the law; and (4) combination of options.

Option 1. Do Nothing. By taking no action, the City’s Charter will remain changed by SB 318. This means:

- Next Council elections in 2020
- Plurality Method (No primaries)

- The five districts will remain in effect
- But the City maintains its right to amend its Charter in the future
- City also maintains its right to file a claim until June 2021

Option 2. Amend the Charter. The City may amend its Charter unilaterally (NCGS § 160A-102). By Amending, City may select its own form of government including the following options (NCGS § 160A-101):

- Election of ALL Council Members at large, or
- Elections based upon variety of district formats
- Partisan or nonpartisan
- With or without a primary

No option is provided for a City to opt for elections in odd-numbered years. **Statutory silence on this suggests that such action would like be legally invalid. UNC School of Government agrees that a local act would be needed.*

Two Primary Amendment Options

1. Reinstatement all Council positions to at large elections using the Nonpartisan Primary and Election method. (NCGS § 163A-1618)
 - *This would provide nearest possible return to previous election process. Elections would remain in even years.*
2. Maintain Districts, but reinstate primaries. (NCGS § 163A-1618)
 - *Districts can also be modified to allow for candidates to be nominated in primaries and finally elected by voters within their districts, or from the City at-large. (NCGS § 160A-101 (6),(7))*

Important Considerations

- Any Charter amendment must remain in force for at least two years following the election of any Council Member under the new format. (NCGS § 160A-107)
- Any amendment must be adopted at least 90 days before the first election for any member of Council. (NCGS § 160A-109)
- Council may require the amendment to be subject to a public referendum, but shall be subject to a proper referendum petition. (NCGS § 160A-102)
- Any Charter amendment is subject to potential action by the General Assembly.

Pros

- City can act unilaterally
- Action can address as much or as little as desired
 - *Excluding a change to odd year elections*
- Avoids significant costs of litigation

Cons

- An amendment can be undone by the State

- May result in less goodwill and additional provocation from the Generally Assembly

Option 3 . File a Claim.

Comparing Asheville to other Municipalities that have filed claims against State action regarding local elections....

- City of Greensboro v. Guilford County BOE
 - Districts already existed, but were redrawn by State.
 - State also temporarily removed the right of Greensboro voters for a referendum to change the election format.
 - Court held that the removal of referendum was a violation of the 14th Amendment, because these citizens were stripped of a right which others had without a rational basis.
 - No defense from BOE or State; No ruling on the District issue.

Comparing Asheville to other Municipalities that have filed claims against State action regarding local elections....

- Raleigh Wake Citizens Association v. Wake County BOE
 - Districts also previously existed in this case.
 - State law altered County and School Board districts.
 - Court held this particular redrawing was a violation of the Equal Protection clause of the 14th Amendment (One Person, One Vote doctrine).
 - Population deviations in the new Districts were based upon “illegitimate reapportionment factors.”
 - Districts populations should be within 10% deviation.
 - No racial gerrymandering found.

Option 3 - 3 Primary Potential Claims for the City *All Claims arise from the 14 Amendment of the U.S. Constitution, and similar provisions in the North Carolina State Constitution.

A. Equal Protection Claim (ex. Greensboro)

Equal Protection Claim (“General Discrimination”)

- Legal Standard - City must prove that it has been treated differently from others similarly situated as a result of intentional or purposeful discrimination.
- If this is proved, State must show that it had a rational basis for the disparity. (The action is rationaly related to a legitimate government purpose).
- Rational Basis test is a very low bar
- Higher standard (Strict Scrutiny) only applies if a fundamental right or a suspect class is affected.

Projected Legal Costs: \$500,000

B. One Person, One Vote Claim (ex. Wake Co.)

One Person, One Vote Claim (“Diluting the Votes”)

- Legal Standard - Districts with less than **10% population deviation** are presumed valid. If our Districts are within 10%, City must prove that improper or illegitimate considerations predominate the reasons for the new Law.
- This is judged on a preponderance of the evidence standard (More probable than not).
- Courts have said that “attacks on deviations under 10% will succeed only rarely, in unusual cases.”
- Population counts were based on the 2010 Census. Updated figures won’t be available until 2021.

Projected Legal Costs: \$100,000 - \$500,000

C. Racial Gerrymandering/Voting Rights Act Claim

Gerrymandering/Voting Rights Act Claim (“Racial Discrim.”)

- City must show that race was the predominant factor motivating the Districts’ shape and/or demographics.
- In addition, City must prove that the legislature subordinated traditional race-neutral districting principles to racial considerations.
- Once this burden is met, Court will apply Strict Scrutiny.
 - (Law must be narrowly tailored to advance a compelling State interest.)
- Even partisan advantage and political motivation can defeat an allegation of racial gerrymandering.
- The test under the Voting Rights Act (Art. 2) requires that the minority group is sufficiently large and geographically compact to constitute a majority. (Difficult to do Asheville)
- In addition, legal damages under the Voting Rights Act are typical based on results of elections.
- This would be very difficult to prove in advance of an election under the new system
- These cases require very specialized experts to provide necessary evidence.

Projected Legal Costs: \$500,000 - \$2,000,000

Pros

- City can challenge all aspects of the law, including change to even years under a constitutional challenge
- If successful, some changes by the State could be barred from future action. (*Ex. Referendum in Greensboro*)

Cons

- Likely Remedy for all claims is limited to redrawn districts
 - Unless City can determine a constitutional flaw in the legislation itself (not just the districts’ specifics)
- Substantial Legal Cost/No guaranteed outcome
- Election format still subject to future State changes

Option 4. Combination of Options.

- Amending our Charter does not preclude our ability to file a lawsuit.
 - However, it may eliminate most or all of any legal damages rendering a lawsuit

unnecessary.

- Any additional or subsequent action by the legislature would re-vest the City with the same legal options to react.
 - Unless the legislature removed our ability to amend the City's Charter. (*This is what occurred in Greensboro.*)
 - Such action was ruled invalid by Federal Court.
- Filing a lawsuit will not preclude later Charter amendments.

Timing Concerns:

- Amending the Charter requires at least three Council Meetings.
 - Must be completed 90 days prior to election.
 - Amendment is subject to referendum petition
 - Petition requires 10% of registered voters of 5,000 signatures, whichever is less, within 30 days of publication of ordinance adoption.
- There is a 3 year Statute of Limitations for these types of lawsuits (tolls in June 2021), but there may also be a Laches issue. A final decision on any claim could take a very long time, and a stay of the current law is very uncertain.

Final legal considerations:

- The law affecting Asheville is very different from those in Greensboro and Wake County.
- In a lawsuit, the likely remedy in our situation would not be to restore at-large elections, but only to redraw the Districts.
- The City can potentially accomplish more by amending its Charter, with less cost. However, this remains subject to future State action.
- The one element where almost no recourse lies is elections being held in even years.

Throughout the presentation, City Attorney Branham responded to various questions of Council.

Index cards were handed out to members of the audience in order for them to write their questions down regarding the presentation. Communication & Public Information Director Dawa Hitch said that the City of Asheville will create a project page and have this presentation posted, along with all questions written down. City Attorney Branham said that his office will research the questions before the answers are posted on-line, noting that he will not be able to go into strategies. He then responded to several requests raised.

At 7:22 p.m., Mayor Manheimer asked for public comment.

Approximately 14 people urged Council to file a claim against the state because the referendum showed 75% of the residents were opposed to redistricting. They asked Council to reinstate the primary, and begin a Charter amendment.

Approximately five people supported districts and didn't want Council to spend taxpayer dollars on filing a claim against the state.

At 8:36 p.m., Mayor Manheimer closed public comments.

Mayor Manheimer said that City Council will review with the City Attorney future strategic analysis surrounding this issue in an upcoming closed session. Any decision of Council will be voted on in open session with opportunity for public comment.

Councilman Young asked for responses to Council and public questions prior to the next formal meeting on July 23, 2019.

Mayor Manheimer also noted that she spoke with some non-profit groups who take on litigation claims in redistricting cases; however, none were willing to take on Asheville's case.

At 8:39 p.m., Mayor Manheimer adjourned the meeting