

Shelby County Government

A C Wharton, Jr.
Mayor

Brian L. Kuhn
County Attorney

September 8, 2009

Maura Black Sullivan
Deputy Director
Memphis & Shelby County
Division of Planning and Development
125 N. Main Street, Suite 468
Memphis, TN 38103

Re: *Interim Redistricting of School Board and County Commission*

Dear Maura:

You have inquired about the possibility of redistricting the Shelby County Board of Education and the Shelby County Board of Commissioners prior to the 2010 Census.

It is my opinion that in order to meet Constitutional standards, such an interim redistricting must use the 2000 decennial census numbers for population.

ANALYSIS

Interim or *ad hoc* redistricting between census enumerations is permitted. *Mader v Crowell*, 498 F. Supp 226 (M.D. Tenn. 1980); *White v Crowell*, 434 F. Supp 1119 (W. D. Tenn. 1977). Recently, the U.S. Supreme Court has dealt with an interim redistricting of congressional Districts in *LULAC v Perry*, 126 S. Ct. 2594 (2006), which it permitted.

The *Mader* case is instructive. In that case, two college students brought suit in 1978, challenging the existing redistricting plan for the Tennessee Senate. That plan had gone into effect in 1973, following court action over the initial redistricting plan adopted after the 1970 census. The court found that "plaintiffs are not guilty of laches," because neither had been eligible to vote until the 1976 election and therefore had voted only once prior to bringing suit. Thus, they acted promptly after their rights were violated. Clearly, even eight years after the last census and two years before the next, the Courts have jurisdiction over violations of the equal protection clause.

However, interim plans cannot create greater inequality among districts than existed before without justification *White*, supra at 1123. In *White*, the House engaged in an interim redistricting plan which moved a few precincts between State Representatives. The effect was to increase the gross deviation over the deviation in the existing plan. As the Court noted: "Moreover, following a court-ordered reapportionment based on a decennial census, the Equal Protection Clause requires a State to come forward with substantial justification for the ad hoc reapportionment of isolated legislative districts which reduces compliance with the one-man, one vote dictates of Reynolds." At 1123. See also *Mader v Crowell*, supra at 234.

Generally, the prior census data is used—even, as in *Mader*, where the suit was brought eight years after the census and decided eight years after the census. *Mader*, supra at 233.

Local governments are required to follow the "one person, one vote" standard of *Reynolds v Sims*, 377 U. S. 533 (1964). Reynolds is the touchstone of redistricting law. In that case, the Court held: "...the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."

In *State ex rel Jones v Washington County*, the Court held that the equal protection clause required County Commission Districts to be drawn in accordance with the "one person, one vote standard." 514 S. W. 2d 51 (TN App 1973); see also *Sudekem v Hayes*, 414 F. 2d 41 (6th Cir 1969); *State ex rel Peel v Shelby County*, 564 S.W. 2d 371 (TN App 1976).

Some variance is allowed. The amount of variance allowed increases as the level of government becomes more local. At the Congressional level, no deviation is allowed. *Karcher v Daggett* 462 U.S. 725 (1983). At the legislative level some deviation is allowed. See, e.g. *Mahan v Howell*, 410 U.S. 315 (1973). However, even at the legislative level, it is not unlimited, see *Larios v Cox*, 300 F. Supp 1320 (N. D. Ga. 2004). At local levels, further variance is allowed, but the goal is still "as nearly of equal population as is practicable"

Generally, the results of the federal decennial census are used to redistrict.

The decennial Census is required by the Constitution for purposes of apportionment—that is, distribution of seats in the House of Representatives among the states. *Article I, Section 2, Clause 3 of the U.S. Constitution*.

The results of the Census are also used in redistricting—the process of drawing lines for legislative, congressional, or local government districts.

Other population data may be used, but it must approximate the census data. *Burns v Richardson*, 384 U. S. 73 (1966); *Travis v King*, 552 F. Supp 554 (D. Hi. 1982); *Ellis v Mayor and City Council of Baltimore*, 352 F. 2d 123 (4th Cir 1965). As noted in *Burns*: "...registered

voter figures are an acceptable basis for apportionment only as long as they substantially approximate the results that would be reached under some other type of population-based scheme of apportionment. “ at 98 (Harlan, concurring). In *Garza v County of Los Angeles*, 918 F. 2d 763,(9th Cir. 1990), the Court disallowed the use of voter registration data, because it would not accurately reflect the population. As the Court noted: “... the *Reynolds* Court recognized that the people, including those who are ineligible to vote, form the basis for representative government. Thus population is an appropriate basis for state legislative apportionment. “ 918 F. 2d 763, at 774.

The law appears to be that use of the census data is a safe harbor, while use of any other data must be shown to approximate the results of the census.

In order to achieve population equality, the population basis must also be consistent throughout the area being redistricted. The problem facing Shelby County is that there is no consistent data set except for the 2000 census.

Several municipalities have had a special census in the last decade:

- i. Bartlett, 2006
- ii. Germantown, 2006
- iii. Lakeland, 2007
- iv. Arlington, 2008
- v. Collierville, 2008
- vi. Unincorporated areas—no special census

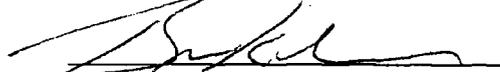
Thus, the population figures would be from different years for different locations within the county: Bartlett 2006, Lakeland 2007, Collierville 2008 and unincorporated areas 2000. This inconsistency is constitutionally suspect.

A census of housing units will not be sufficient. It is not an actual enumeration, like the census; It necessarily involves estimates of population, a technique disfavored by the Courts. *Department of Commerce v. U.S. House of Representatives*, 55, 525 U.S. 316 (1999).

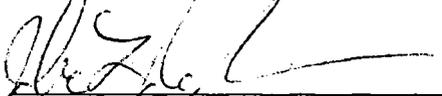
In conclusion, the only way to redistrict on a basis consistent with the constitutional requirements of one person, one vote is to use the 2000 census as the basis of determining population.

September 8, 2009
Page 4

Yours truly,



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Shelby County Attorney



John L. Ryder
Assistant Shelby County Attorney

JLR/jdw

cc: Mayor A C Wharton
Commissioner Deidre Malone
Commissioner Joyce Avery
Commissioner Mike Ritz
Commissioner George S. Flinn, Jr.
Commissioner Mike Carpenter
Commissioner J. W. Gibson, II
Commissioner Henri E. Brooks
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