



COMMONWEALTH of VIRGINIA

Office of the Attorney General

June 22, 2011

Kenneth T. Cuccinelli, II
Attorney General

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Karen T. Mullins, Esquire
County Attorney, Wise County
206 E. Main Street
Wise, Virginia 24293

Dear Ms. Mullins:

I am responding to your request for an official advisory opinion in accordance with § 2.2505 of the *Code of Virginia*.

Issue Presented

You inquire as to the status of voting districts in Wise County in light of the fact that the Wise County Board of Supervisors has not adopted a reapportionment plan following the 2010 decennial census.

Response

It is my opinion that Article VII, § 5 of the Virginia Constitution and § 24.2-304.1 of the Code mandate that the Board take affirmative action to reapportion the magisterial districts for Wise County in this tenth year since the last reapportionment using the most recent decennial population figures. Further, it is my opinion that an action in mandamus lies in favor of any citizen of Wise County to compel the performance by the Board of its duty under Article VII, § 5 and § 24.2-304.1, and that in such an action my Office will review any papers filed to represent the interests of the Commonwealth to work towards an appropriate remedy.

Background

You state that in 2001 the Wise County Board of Supervisors (the "Board") adopted an ordinance setting forth four magisterial districts each electing two supervisors as well as School Board members in Wise County (the "County"). You further state that these districts were precleared by the United States Department of Justice as required by § 5 of the Federal Voting Rights Act of 1965, as amended.¹ Upon review of the 2010 decennial census data, County officials concluded that there had not been sufficient population changes to require the 2001 district boundaries to be redrawn to maintain proportional

¹ Section 5 of the Voting Rights Act requires that any change in state or local election laws or voting practices or procedures, before such change may be implemented, be submitted by jurisdictions covered by the Act to the Department of Justice or a three-judge District Court for the District of Columbia for review and evaluation as to whether it has the purpose or will have the effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. § 1973c.

representation among the four districts. You state, however, that the Board did consider two redistricting plans that would have reunited certain towns divided by the 2001 plan, and that both of these failed on a 4-4 vote. At the same meeting, a motion to readopt or reaffirm the 2001 district boundaries failed on a 1-7 vote of the Board.

Applicable Law and Discussion

The Virginia Constitution provides that if the governing body of a county is elected by district:

[T]he district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. When members are so elected by district, the governing body of any county, city, or town may, in a manner provided by law, increase or diminish the number, and change the boundaries, of districts, and shall in 1971 and every ten years thereafter, and also whenever the boundaries of such districts are changed, reapportion the representation in the governing body among the districts in a manner provided by law. Whenever the governing body of any such unit shall fail to perform the duties so prescribed in the manner herein directed, a suit shall lie on behalf of any citizen thereof to compel performance by the governing body.^[2]

“[E]very word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.”³ The use of the word “shall” in the Constitution or a statute generally indicates that the procedures are intended to be mandatory, rather than permissive or directive.⁴ The language in Article VII, § 5 plainly and unambiguously mandates that the governing body of any county, city or town whose members are elected by district “shall in 1971 and every ten years thereafter . . . reapportion the representation in the governing body among the districts in a manner provided by law.” The term “reapportion” means “to apportion (as a house of representatives) anew . . . to make a new apportionment.”⁵ Thus, in order to satisfy the mandate of Article VII, § 5, the Board must take an affirmative action to reapportion the County’s magisterial districts in this tenth year since the last reapportionment, irrespective of whether the most recent decennial population figures for each of those districts would necessitate any boundary adjustments. Section 24.2-304.1(C) of the *Code of Virginia* imposes the ancillary requirement that the reapportionment be based on “the most recent decennial population figures for such county, city or town from the United States Bureau of the Census”

² VA. CONST. art. VII, § 5.

³ *Lipscomb v. Nuckols*, 161 Va. 936, 945, 172 S.E. 886, 889 (1934) (quoting *Quesinberry v. Hull*, 159 Va. 270, 274-75, 165 S.E. 382, 383 (1932)) (further citation omitted). *See also* 2008 Op. Va. Att’y Gen. 33, 34.

⁴ *See Andrews v. Shepherd*, 201 Va. 412, 414-15, 111 S.E.2d 279, 282 (1959) (“use of the word ‘shall’ in statute indicates legislative intent to impose an imperative duty on the city council to create an additional election district whenever the number of voters in a district exceeds the limit set forth in the statute”); *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (“the word ‘shall’ in a statute generally is used in an imperative or mandatory sense”; trial court erred in eminent domain suit when it failed to comply with statute requiring that it “shall summon nine disinterested freeholders”). *See also* 2008 Op. Va. Att’y Gen. at 34-35 (use of the word “shall” in Article X, § 7-A. of the Virginia Constitution mandates that the General Assembly establish a Lottery Proceeds Fund into which net lottery proceeds are deposited and appropriate such funds to Virginia localities and the school divisions thereof).

⁵ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 973 (10th ed. 1994). *See also* BLACK’S LAW DICTIONARY 1379 (9th ed. 2009) (the term “reapportionment” means “[r]ealignment of a legislative district’s boundaries to reflect changes in population and ensure proportionate representation by elected officials”).

The Constitutional provision applies to those localities that elect members of their governing bodies on a district basis. You report that Wise County previously adopted an ordinance providing for election of its Board by four two-member districts and that the County's 2001 reapportionment was approved by the Department of Justice as required by Section 5 of the Federal Voting Rights Act and was then used for subsequent County elections. I note that, under prior law, the Board's inaction and failure to adopt a reapportionment plan may have resulted in a reversion to at-large elections,⁶ but under current law and after enactment of the Voting Rights Act, such a default position is no longer an option.

In addition to being governed by Constitutional and statutory requirements, local elections are subject to the State Board of Elections, which oversees elections in the Commonwealth and provides guidance to localities in conducting their redistricting and all other election matters.⁷ In a memorandum dated March 25, 2011, the State Board of Elections highly recommended that localities submit their redistricting plans by April 29, 2011. This date was determined to be the final date on which a locality could submit a reapportionment plan for preclearance by the Department of Justice sufficiently in advance of the upcoming deadlines and requirements associated with the 2011 Primary Election. Here, the County failed to adopt a redistricting plan, and therefore did not submit any plan to the Department of Justice. In addition to submission to the Department of Justice, a locality is required to send copies of its local redistricting changes to its local electoral board, the State Board of Elections, and the Division of Legislative Services.⁸

As set forth above, the Board is specifically tasked with reapportioning the districts every ten years. The General Assembly anticipated the possibility that governing bodies might fail to perform this duty and, therefore, consistent with the right conferred by Article VII, § 5 upon citizens to bring suit to compel performance, enacted statutory authorization for a citizen living within an affected district to bring an action before the local circuit court for a writ of mandamus.⁹ This writ of mandamus compels performance of the duty and threatens any individual officer failing to comply with its dictates as being in contempt of court. In such an action, the Attorney General must be notified and "shall review the papers in the civil action and may represent the interests of the Commonwealth in developing an appropriate remedy that is consistent with requirements of law."¹⁰

The State Board of Elections also is authorized to seek a writ of prohibition or mandamus from a circuit court or the Supreme Court of Virginia "for the purpose of ensuring that elections are conducted as provided by law"¹¹ and thereby has the power to ask a court to compel the governing body to carry forth its constitutional and statutory duties in the interest of fair and uniform elections.

⁶ See *Brown v. Saunders*, 159 Va. 28, 47, 166 S.E. 105, 111 (1932) (holding under prior law that, where a reapportionment plan was invalid, nine congressional representatives should be elected at-large); *Wilkins v. Davis*, 205 Va. 803, 813, 139 S.E.2d 849, 856 (1965) (under prior law, until valid reapportionment, only at-large elections may be held for members of Congress from Virginia).

⁷ See VA CODE ANN. §§ 24.2-103 (Supp. 2010) (general powers to oversee elections to ensure they are conducted pursuant to law) and 24.2-306 (2006) (requiring local redistricting plans be submitted to the State Board of Elections).

⁸ Section 24.2-306.

⁹ Sections 24.2-304.4 (2006); VA. CODE ANN. § 15.2-857 (2008).

¹⁰ Sections 24.2-304.5 (2006); 2.2-508 (2008).

¹¹ Section 24.2-103(D).

Conclusion

Accordingly, it is my opinion that Article VII, § 5 of the Virginia Constitution and § 24.2-304.1 of the Code mandate that the Board take affirmative action to reapportion the magisterial districts for Wise County in this tenth year since the last reapportionment using the most recent decennial population figures. Further, it is my opinion that an action in mandamus lies in favor of any citizen of Wise County to compel the performance by the Board of its duty under Article VII, § 5 and § 24.2-304.1, and that in such an action my Office will review any papers filed to represent the interests of the Commonwealth to work towards an appropriate remedy.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized, with "Ken" written in a cursive script and "C II" in a more blocky, bold font.

Kenneth T. Cuccinelli, II
Attorney General