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Via Email Only to bmiller@caswellcountync.gov

Bryan Miller, County Manager
Caswell County, North Carolina
144 Court Square
Yanceyville NC 27379

Re: 2020 Proposed County Commission Districts for Caswell County

Dear Mr. Miller,

I have been retained to independently examine and comment on the recently proposed Caswell County Commission Districts and what, if any, legal liability might attach from adopting the districts appearing on the map which have been drafted under the supervision of the county commissioners, a copy of which is attached as Exhibit A.

Currently, Caswell County elects County Commissioners in a mixed district and at large system. Prior to the seven-member county commission system, Caswell County elected all of its commissioners in an at-large system in partisan primaries. This former system was altered as a settlement of a Section 2 Voting Rights Act suit brought by the local N.A.A.C.P. chapter based upon the United States Supreme Court's decision in *Thornburg vs Gingles*, 478 U.S. 30 (1986) which provided a legal framework for dismantling at-large election systems which submerged racial minority communities and allowed a white majority to cancel out their voting strength. I have reviewed the court order which settled this claim.

Prior to 2014, Caswell County was a "covered" county under Section 5 of the Voting Rights Act which required any changes in the election to be precleared by the Justice Department. Section 5 was applicable in 2010 when the last Commission districts were drawn and were required to maintain a certain percentage of minority voting strength to become legally enforced. Section 4 of the VRA, containing the "coverage" formula under which Caswell County was deemed a "covered" jurisdiction was struck down by the United States Supreme Court in *Holder vs Shelby County* . Therefore the requirement that Caswell County maintain a "benchmark" or certain historical percentage of racial minorities in existing minority district plans no longer apply. The comparisons of the 2010 to the 2020 plan were generally used for this retrogression analysis, and still may be used to determine whether a particular plan unnecessarily packs racial minorities into an election structure.

County Commissioners districts are redrawn every decade following the census to insure equal total population distribution among the districts within federal and state equal protection standards. One-person/one-vote means that districts need to be nearly equal in population. "The accepted rule of thumb for local governments is no district should be more than five percent above or below the ideal population of exact equality." UNC School of Government, local redistricting 2021N., see also *Stephenson vs. Bartlett* 357 N.C. 301 (2003).

Legal analysis of the redistricting maps does not end there. Where there are counties in which a sufficiently numerous and geographically compact racial minority lives which could constitute a majority in a fairly drawn district, then a county has to examine its obligations to create election districts in which election opportunities are equally open to all races. Caswell County is clearly such a county and has since the settlement of litigation drawn 2 majority minority districts. The current plan has two districts drawn in which the racial minority (Black or African-American) can compete in primary and general elections. Historically these two districts have been drawn which contain a majority of Black or African American citizens and this "community" has been represented on the board. It is unlikely based on these facts that a complaint under Section 2 of the Voting Rights Act would be successful since minority communities are represented on the board in a rough proportion to their population in the county. *Johnson vs DeGrandy*, 512 U.S. 907 (1994). Furthermore since the choices of the African-American community in Caswell County have been elected county wide, it is unlikely a Section 2 case could be brought today.

The problematic issue for these proposed maps arises the contours of districts under the 14th Amendment in unnecessarily segregating voters in oddly shaped districts by race and whether the maps "abridges" the voting strength of the African American community under the Fifteenth Amendment. Both federal and state law answering these question is currently in flux.

The 15th Amendment prohibits each state from denying or abridging a citizen's right to vote "on account of race, color, or previous condition of servitude." In *Gomillion v Lightfoot* (364 U.S. 339 (1960)) held "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens." *Gomillion* involved the reshaping of the municipality of Tuskegee, Alabama so as to remove most "colored" voters from the municipality.

In *Gomillion*, the line separating the white community from the black community was a 28-sided line which generally separated blacks from whites. Because of its irregular shape and its separation of the races it provided sufficient prima facie evidence of both prohibitory racial intent and racial effects sufficient to state a claim of a violation of the 15th Amendment. This proof of irregular shapes based upon race repeats itself in other measurements. A copy of the irregular shapes segregating white from black voters in *Gomillion* is attached for reference as Exhibit B.

The lines of the proposed districts are on Exhibit A. One can compare the *Gomillion* lines against these lines and draw inferences therefrom.

In the 1990's, after *Gingles vs Thornburg*, the federal Supreme Court decided *Shaw vs Cromatie*, etc. regarding the improper use of race in the creation of Section 2 districts. While the courts have recognized a districting plan can take into account race as a factor in its calculation, it cannot be the predominate motivating factor in drafting a district. It is this line of cases which are problematic for the drafted proposals. The latest US Supreme Court case to examine this in North Carolina was *Covington vs North Carolina*. (See Per Curiam opinion attached as Exhibit C) In *Covington*, 22 state legislative districts were struck down as unconstitutional racial gerrymanders. The map used the creation of the proposed Districts resembles the same lines as used by the legislature in drawing state House and Senate districts.

Covington follows the latest US Supreme Court case to examine this issue in the county was *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 197 L. Ed. 2d 85 (2017). It states the Equal Protection Clause prohibits a state, without sufficient justification, from separating its citizens into different voting districts on the basis of race. *Id.* "Electoral districting is a most difficult subject for legislatures, requiring a delicate balancing of competing considerations. And redistricting differs from other kinds of state decision-making in that the legislature always is aware of race when it draws district lines, just as it is aware of a variety of other demographic factors." *Id.* Plaintiff alleging racial gerrymandering bears the burden to show, either through circumstantial evidence of a **district's shape and demographics** or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To satisfy this burden, the plaintiff must prove that the legislature subordinated traditional race-neutral districting principles to racial considerations. *Id.* (emphasis added). Where a challenger of a voting district succeeds in establishing racial predominance, the **burden shifts to the state to demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest**. *Id.* at 801, 197 L. Ed. 2d at 98 (emphasis added). This proof is similar to the 15th Amendment claims under *Gomillion v. Lightfoot* to prove "abridgement". 364 U.S. 339, 81 S. Ct. 125 (1960). These federal precedents are incorporated into the North Carolina Constitution. *S. S. Kresge Co. v. Davis*, 277 N.C. 654 (1971).

Whether race is a predominate motive in the creation of the two majority black districts in the proposed plan depends upon what showing the county can make that they drafted the districts to achieve a "compelling" interest. In redistricting matters, the avoidance of Section 2 liability is such an interest. Whether other interests will satisfy these criteria is problematic.

In the current map the shapes of districts, is problematic because it is bizarre and tends to follow racial lines separating minority voters from white voters. The county can do this if the division is made to comply with Section 2 of the Voting Rights Act, however I have seen no factual predicate prepared for the County Commission to show majority minority districts are needed to

comply with Section 2. It is my view the County cannot constitutionally use the new proposed maps and should instead use maps employing regularly shaped districts they have on hand from the Piedmont Triad Council. Those Caswell voters who have retained me to examine these maps are prepared to go forward with litigation to challenge these maps in court should they be erroneous adopted by the Board.

Very truly yours,

Robert N. Hunter, Jr.

RNH/pj
Attachments

cc: Brian Ferrell, County Attorney *(Via Email Only)*