



EILEEN M. BLACKWOOD, Esq.
City Attorney

EUGENE M. BERGMAN, Esq.
Sr. Assistant City Attorney

KIMBERLEE J. STURTEVANT, Esq.
Assistant City Attorney

RICHARD W. HAESLER, JR., Esq.

Assistant City Attorney

GREGG M. MEYER, Esq.

Assistant City Attorney

CITY OF BURLINGTON, VERMONT
OFFICE OF
THE CITY ATTORNEY
AND
CORPORATION COUNSEL

149 CHURCH ST.
BURLINGTON, VT 05401-8489
(802) 865-7121
(TTY) (802) 865-7142
FAX (802) 865-7123

To: Redistricting Committee
From: City Attorney's Office
Re: Questions Raised
Date: May 8, 2013

Our office was asked to provide the following advice to the committee on several questions so the issues can be discussed at its May 14, 2013 public session.

(1) Under what circumstances is a deviation of greater than 10% allowable?

A plan with more than a 10% deviation is seen as *prima facie* discriminatory as a matter of law. Voinovich v. Quilter, 507 U.S. 146, 161-62 (1993). Once a plan is shown to exceed 10%, the City would have to have a rational policy to justify the deviation, explain how the plan reasonably advances the policy, and demonstrate that the deviation does not exceed the constitutional limits requiring substantial compliance with the goal of population equality. Mahan v. Howell, 410 U.S. 315, 328 (1973); Chapman v. Meier, 420 U.S. 1, 22 (1975). The City must show that the deviation is the "minimum necessary" to accomplish the policy. Martin v. Venables, 401 F. Supp. 611, 620 (D. Conn. 1975). The U.S. Supreme Court has specifically warned against plans that favor particular geographic areas or political interests or which necessarily favor less populous districts over more highly populated ones. Abate v. Mundt, 403 U.S. 182, 185-86 (1971).

We have found no court decision that upholds a municipal deviation greater than 10% and our office cannot see a circumstance in Burlington under which the City could bear its burden to justify more than a 10% deviation.

Several municipal cases are illustrative. Cohen v. Maloney, 410 F. Supp. 1147 (D. Del. 1976) (18.3% deviation rejected despite argument that districts conformed to neighborhood areas and natural borders created by a river); Martin v. Venables, 401 F. Supp. 611 (D. Conn. 1975) (15% deviation due to districts allowing for population growth rejected because town can either start with appropriate deviation and leave it unchanged for a reasonable period of time or can reapportion more frequently to reflect growth); Regensburger v. City of Bowling Green, Ohio, 278 F.3d 588 (6th Cir. 2002) (college town districts based on natural geographic divisions and adjustments for student population rejected).

The approved deviations over 10% involved state redistricting and were in large part based on the long tradition of not splitting up cities or counties into the different legislative districts. None involved local redistricting. Mahan v. Howell, 410 U.S. 315 (1973) (16% deviation upheld because it was based on maintaining the tradition of keeping cities and counties together for state redistricting purposes); Brown v. Thomson, 462 U.S. 835 (1983) (keeping counties together and having at least 1 representative combined with plan's providing for compact districts of contiguous territory justified state legislative deviation over 10%); Abate v. Mundt, 403 U.S. 182, 183-187 (1971) (11.9% deviation in a county legislature's representation upheld because of the combination of maintaining the integrity of existing counties with the need for county representation that reflects historic intergovernmental coordination, overlap and close cooperation between the county and each of its constituent towns).

(2) Can differing voter turnout rates in different wards be considered in the redistricting process?

No, population not voter turnout is what is reviewed for constitutional compliance. To be constitutional, electoral districts must have substantially equal populations as is practicable. Reynolds v. Sims, 377 U.S. 533 (1964); Gaffney v. Cummings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973).

(3) Are students who are legal residents of other towns or states considered residents of Burlington for purposes of redistricting?

Yes. The constitutional requirements set by the U.S. Supreme Court are based on the population living in an area being redistricted. Reynolds v. Sims, 377 U.S. 533 (1964); Gaffney v. Cummings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973). Students are no different than other people who are living in the city but who are intending to be here for a short period of time and may even consider themselves to be residents of another state.

(4) Under what circumstances can residents of developments that were occupied after the 2010 census be counted?

The City can update the US Census if the count is accurate and takes into account all new developments in the city. Farnum v. Burns, 548 F. Supp. 769 (D. R.I. 1982) (reapportionment more frequent than decennially based on population shifts is permissible); Black Political Task Force v. Connolly, 679 F. Supp. 1109 (D. Ma. 1988) (can use change in habitable housing stock if thoroughly documented and applied in a systematic manner).