U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

February 6, 1995

Helen T. McFadden, Esq.
P.O. Box 1114
Kingstree, South Carolina 29556

Dear Ms. McFadden:

This refers to the 1994 redistricting plan for the City of Bennettsville in Marlboro County, South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your responses to our July 18 1994, request for additional information on September 16, November 15, December 6, 1994 and January 14, 1995.

We have carefully considered the information you have provided, as well as information and comments from other interested persons. The black population percentage has grown substantially since the 1980 Census count. According to the 1990 Census, black persons now represent 57.3 percent of the total population, compared to 48.6 percent in 1980. Black persons represent 52.5 percent of the current voting age population. The city is governed by a six-member council and a mayor who has a full vote on the council. The mayor is elected at large. The six councilmembers are elected from single-member districts. Four of the districts have black majorities in voting age population.

Single-member districts are a recent development in Bennettsville, having been first implemented in 1990. They were adopted to settle litigation brought under Section 2 of the Voting Rights Act, 42 U.S.C. 1973, concerning the racially dilutive effect of the city's at-large method of election on black voters, NAACP v. City of Bennettsville, No. 4:89-1655-2, and United States v. City of Bennettsville, No. 4:89-2363-2 (D.S.C. 1989). Prior to the use of single-member districts, no more than one minority person had ever served on the council simultaneously. As a result of the change to the existing method of election, black voters have elected candidates of their choice to three of the four single-member districts with black majorities.

In 1989, when the existing districting plan was drawn to settle the lawsuits, 1980 Census data were used because the 1990 Census data were not yet available. Despite the availability of 1990 Census data in 1994 when the proposed redistricting plan was being drawn, the city chose to use the existing districts under 1980 Census data as the benchmark by which to compare the proposed districts. The appropriate basis for comparison are the conditions existing at the time of the submission, which in this instance is the existing plan using the 1990 Census data, See City of Rome v. United States, 446 U.S. 156, 186 (1980); State of Texas v. United States, 866 F. Supp. 20 (D.D.C. 1994); Procedures for the Administration of Section 5, 28 C.F.R. 51.54(b)(2).

It appears that the city used the 1980 Census data as the benchmark because it creates the appearance that the proposed plan maintains the status quo with regard to District 4. When the black voting age population in proposed District 4 is compared to the black voting age population in existing District 4 under the 1980 Census data, the percentages are nearly identical (58.4 and 58.7 percent, respectively). However, when the black voting age population in proposed District 4 is compared to the black voting age population in existing District 4 under the 1990 Census data, the percentages are significantly different (58.4 and 64.2 percent, respectively).

Under the 1990 Census data, existing District 4 was overpopulated by about 200 persons. Instead of simply transferring the excess population to neighboring districts which were slightly underpopulated, the city chose to completely reconfigure District 4. The result is that the black voting age population is unnecessarily reduced from 64.2 percent to 58.4 percent.

The reduction of the black population percentage in District 4 appears to have been designed to protect the incumbent who currently represents District 4. Given that black voters were unable to elect their candidate of choice in the 1990 election in existing District 4, the reduction in the black percentage in proposed District 4 combined with the apparent lower registration and turnout rates for black persons of voting age, and the substantial reconfiguration of the district, it is unlikely that black voters will have an equal opportunity to elect a candidate of choice in proposed District 4.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); 28 C.F.R. 51.52. The city has not met its burden of showing that, in these circumstances, the reduction of the black percentage in

District 4 will not "lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976). Nor has the city met its burden with regard to showing an absence of racially discriminatory purpose. While protecting incumbency certainly is not in and of itself an inappropriate consideration, it may not be accomplished at the expense of minority voting potential. Garza v. Los Angles County, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); Ketchum v. Byrne, 740 F.2d 1398, 1408-09 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985).

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the 1994 redistricting plan for the City of Bennettsville.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed change has neither a discriminatory purpose nor effect. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the 1994 redistricting plan continues to be legally unenforceable. See Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action that the City of Bennettsville plans to take concerning this matter. If you have any questions, you should call Colleen M. Kane, an attorney in the Voting Section (202-514-6336).

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division