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MEMORANDUM

April 19, 2012

TO: Charter Review Commission

FROM: Randall K. Gaylord

RE: Constitutionality of Proposed System for Electing Council Members

You have asked about the legality of the Charter Review Commission's proposed system of electing three members of the San Juan County Council by conducting primary (nominating) elections at-large and general elections at-large combined with a qualification requirement that candidates and council members reside within unequal-sized, "whole island" "residency districts."[1]

This proposed nomination and election system is authorized for three-member county commissioners pursuant to state statute for non-charter code counties comprised of islands and with a population of less than 35,000 (RCW 36. 32.040 and RCW 36. 32.020). It is the same system that was used in San Juan County at the time the charter was adopted, and it is the system that was proposed by the Board of Freeholders and adopted by the voters in the "Basic Charter" in November 2005. Specifically, you have asked whether the "one-person-one-vote" rule is offended if the residency districts are of unequal size.

The Supreme Court has found, repeatedly, that election systems with unequal residency districts for officials elected at-large do not constitute per se violations of the "one-person, one-vote" principle. However, the actual operation of such a plan may provide the basis for a constitutional challenge.

[1] The proposed residency districts and estimated sizes are as follows: San Juan Island and neighboring small islands (population 7,662; registered voters: 5,572); Orcas Island and neighboring small islands (population 5,354; registered voters 3,763); Lopez Island and Shaw Island and neighboring small islands (population 2,753; registered voters 2,104).

One person, one vote is a well-established principle of constitutional law. At least on three occasions, the Supreme Court has ruled that the one-person, one-vote requirement of the Fourteenth Amendment is not violated by an at-large election plan for a governmental unit that requires those elected to be residents of subdivisions within the unit. Dallas County v. Reese, 421 U.S. 477 (1975) (county commission); Dusch v. Davis, 387 U.S. 112 (1967) (municipal council); Forston v. Dorsey, 379 U.S. 433 (1965) (state senate). At-large voting schemes with each representative resident of different nominating districts within the entire district has been approved within the context of school board elections. Baker v. Regional High School District No. 5, 432 F.Supp. 535 (D. Conn. 1977).

In upholding a plan which required those elected from multi-member districts to be residents of different subdistricts, *Forston* spoke broadly in favor of the subdistrict residency requirement:

> The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator.

379 U.S. at 438. In *Dusch*, the Supreme Court made it clear that residence requirements are valid even when established for subdistricts of substantially, unequal population. 387 U.S. at 659. Dallas County, rejected the "theoretical presumption" that elected officials "will represent the districts in which they reside rather than the electorate which chooses them." 421 U.S. at 481. The Court emphasized that a different conclusion could be reached on review of the outcome of the plan, rather than its expectations. Id, at 480.

An at-large system, where every voter gets to vote for every representative who is making the decisions in government, does provide mathematical perfection. However, lack of mathematical precision in representation or the fact that some group is under represented is not automatic cause for the invalidation of a voting scheme. Nevertheless, if it can be shown that an at-large system does result in the dilution of the voting strength of a segment of the voting population in practice; a suit is possible. *See* Rogers v. Lodge, 458 U.S. 613.

At-large voting schemes and multi-member districts tend to minimize the voting strength of any minority group within the district by allowing the majority to elect all the representatives of the district. Rogers v. Lodge, 458 U.S. 613, 616 (1982). While multi-member districts have been criticized for their "winner-take-all aspects, their tendency to submerge minorities and to over-represent the winning party," Whitcomb v. Chavis, 403 U.S. 124, 158-59 (1971), the Supreme Court has held that they are not unconstitutional per se. Mobile v. Bolden, 446 U.S. 55, 66 (1980); White v. Regester, 412 U.S. 755, 765 (1973); Whitcomb v. Chavis, 403 U.S. at 142.

To prevail in a vote-dilution case in an at-large scheme, the plaintiff must demonstrate:

(1) the existence of a discriminatory purpose either in the enactment of an election scheme or its maintenance, and 2) a differential impact on the voting power of a minority protected by the Fourteenth or Fifteenth Amendments. Id. at 618-19; Mobile v. Bolden, 446 U.S. 55, 66 (1980).

Citizens of a county have broad authority to specify the size of the legislative body. Whenever that size is reduced there will be some dilution of minority interests in one area of the county or another. This fact by itself does not affect the conclusion that the voting system is constitutional.

This office has been legal advisor to the Board of Freeholders and also to the Charter Review Commission. At the time the basic charter was proposed in 2005 and during this year's review of the Charter there has been no evidence presented to us as of now that the at-large election/whole island residency district scheme was proposed or is being considered for a discriminatory purpose nor, that it will have a discriminatory impact on a protected class.

In summary, an election plan, such as that being recommended by the Charter Review Commission with a nominating district residency requirement for council members elected at-large, is not unconstitutional per se. Without findings that there was intentional discrimination in the enactment of, or in the continued maintenance of the plan, and that the plan has a demonstrable impact on a protected class within the County, no unconstitutionality is shown.

Our advice is consistent with that of the Washington State Attorney General when the San Juan County voting system was reviewed at the request of Prosecuting Attorney Fred Canavor in 1990. A copy of the formal opinion issued by the Attorney General's Office is attached.

If you have any questions about this matter, please do not hesitate to contact us.

Wash. AGO 1990 NO. 6, 1990 WL 505772 (Wash.A.G.)

*1 Office of the Attorney General
State of Washington

AGO 1990 No. 6

June 12, 1990

COUNTY COMMISSIONERS—COUNTIES—OFFICES AND OFFICERS—DISTRICTS—ELECTIONS

1. In Board of Estimate v. Morris the United States Supreme Court struck down a voting system in which borough presidents, who were voting members of the Board of Estimates, were elected by the voters of each borough and the boroughs varied greatly in population.

2. In San Juan County commissioners reside in commissioner districts that vary in population, however, the primary and general elections are conducted among voters of the county at large, not merely among the voters of the commissioner district. The United States Supreme Court has approved such at large voting systems, even where the candidates were required to reside in districts that varied in population. Board of Estimate v. Morris does not cast doubt on the validity of these decision.

3. The United States Supreme Court has struck down at large voting systems on grounds that they impermissible diluted the electoral strength of racial or other political minorities in the at large district. This is a factual question. At present we are unaware of any facts tending to show this to be the case in San Juan County.

Honorable Frederick C. Canavor, Jr.
Prosecuting Attorney
San Juan County
P.O. Box 760
Friday Harbor, WA 98250

Dear Mr. Canavor:

You have asked for our opinion on a question we have paraphrased as follows:

> Is the current scheme of county commissioner elections in San Juan County constitutional in light of the United States Supreme Court decision in Board of Estimate v. Morris, 489 U.S. ___, 103 L. Ed. 2d 717, 109 S. Ct. 1433 (1989)?

BRIEF ANSWER

Board of Estimate v. Morris concerned a factual pattern very different from that presented in San Juan County, and does not appear to alter or overrule prior United States Supreme Court cases permitting election systems such as that currently in use in San Juan County. Thus, neither state nor federal courts of last resort have invalidated election schemes of the type used in San Juan County. The system used in San Juan County could be challenged if it were shown to dilute the voting strength of a racial or other political minority.

HISTORICAL BACKGROUND

San Juan County is a county consisting entirely of several dozen islands, located in the northwest part of the state and near the International Boundary Line with Canada. Three of the islands — San Juan Island, Orcas Island, and Lopez Island — have more than one thousand residents each. Several other islands have permanent populations of a

hundred or fewer (in some cases, only one or two families occupy an island), and there are a number of islands and islets which have no permanent population.

Like all other counties in Washington that have not opted to enact a county charter pursuant to article 11, section 4, of the state constitution, San Juan County is governed by a board of three commissioners. RCW 36.32.010. A series of statutes codified in chapter 36.32 RCW establish the number and the manner of election of these commissioners.

*2 Prior to 1982, these statutes prescribed an unvarying system in non-charter counties. RCW 36.32.020 (to be discussed at greater length below) required the division of each county into three commissioner districts. RCW 36. 32. 040 provided for the nomination of commissioners by the voters of each commissioner district from among candidates required to be resident in that district. RCW 36.32.050 required that the general election for commissioners be conducted on a county-wide basis. Under this system, commissioners were nominated in primary elections by the electors of the districts where they resided, but the general election was conducted county wide.

Prior to 1970, RCW36.32.020 provided that "[t]he board of county commissioners of each county shall divide their county into three commissioner districts so that each district shall comprise as nearly as possible one-third of the population of the county . . . ." Laws of 1963, ch. 4, § 36.32.020. p. 59 (based on Laws of 1890, p. 317, §§ 1, 2, as amended by Laws of 1893, ch. 39, § 2, p. 63). This statutory requirement of equal population among commissioner districts was largely ignored in many Washington counties before the 1960's, although the state supreme court did strike down unequal commissioner districts in State ex rel. Mason v. Board of County Commissioners, 146 Wash. 449, 263 P. 735 (1928).

In a series of cases beginning in the 1960's, however, the United States Supreme Court articulated a federal constitutional principle, based upon the equal protection clause in the United States Constitution (Amendment 14), requiring legislative districts in federal, state, and local governmental bodies to be equal in population. The first of these landmark cases was Reynolds v. Sims, 377 U.S. 533, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964). A later case, Avery v. Midland County, 390 U.S. 474, 20 L. Ed. 2d 45, 88 S. Ct. 1114 (1968), made this constitutional principle applicable to local governments such as county legislative bodies. As a result of these decisions, county commissioners in Washington, like their counterparts in other states, realized that equality in commissioner districts was a federal constitutional as well as a state statutory requirement.

In 1970, as boards of commissioners across the state were preparing to re-district in response to a new census, the legislature amended RCW 36.32.020 to reflect the special situation faced by commissioners in counties comprised entirely of islands. The 1970 Legislature added the following sentence to RCW 36.32.020:

> The commissioners of any county composed entirely of islands may divide their county into three commissioner districts without regard to population, except that if any single island is included in more than one district, the districts on such island shall comprise, as nearly as possible, equal populations[.]

Laws of 1970, 1st Ex. Sess., ch. 58, § 1, p. 552. The effect of this change was to permit (though not to require) commissioners in Island and San Juan Counties (the only counties consisting only of islands) to ignore population equality as a standard in establishing commissioner districts.

*3 The apparent intent of the Legislature was to permit island counties to establish "whole island" commissioner districts where adherence to strict population equality would otherwise require that islands be divided among two or three districts. By adding the exception in the sentence quoted above, the Legislature allowed the population deviation only where counties employed "whole island" districting schemes, because any system involving the division of an island continued to be subject to a statutory requirement that the districts containing the divided island be equal in population.

As we understand it, both Island County and San Juan County enacted "whole island" commissioner districts, taking advantage of the option given them by the 1970 Legislature. In the case of Island County, the county commissioner districting was challenged on constitutional grounds. The Island County scheme was initially upheld by the state Supreme Court in Story v. Anderson, 91 Wn.2d 667, 588 P.2d 1179, 590 P.2d 1272 (1979). The original holding was that unequal commissioner districts were constitutionally permissible, even though they were used both as a

residency requirement for commissioners and as the basis for the nomination process, so long as the entire county had the opportunity to participate in the general election as provided by RCW 36.32.050.

However, the state Supreme Court subsequently granted reconsideration in this case and reversed itself, invalidating the Island County districting scheme in Story v. Anderson, 93 Wn.2d 546, 611 P.2d 764 (1980). The final decision affirmed a superior court order requiring the commissioners to establish commissioner districts of substantially equal populations.

Because the basis for the second Story opinion was that unequal commissioner districts could not constitutionally be used for the primary election process, the 1982 Legislature reacted to the decision with an attempt to preserve some options for certain counties comprised entirely of islands. RCW 36.32.020 was again amended, and its second sentence currently reads as follows:

> However, the commissioners of any county composed entirely of islands and with a population of less than thirty-five thousand may divide their county into three commissioner districts without regard to population, except that if any single island is included in more than one district, the districts on such islands shall comprise, as nearly as possible, equal populations.

Laws of 1982, ch. 226, § 4, p. 949. The 1982 Legislature made another change, adding a second subsection to RCW 36.32.040 which reads as follows:

> (2) Where the commissioners of a county composed entirely of islands with a population of less than thirty-five thousand have chosen to divide the county into unequal-sized commissioner districts pursuant to the exception provided in RCW 36.32.020, the qualified electors of the entire county shall nominate from among their own number who reside within a commissioner district, candidates for the office of county commissioner of such commissioner district to be voted for at the following general election. Such candidates shall be nominated in the same manner as candidates for other county offices are nominated in all other respects.

*4 Laws of 1982, ch. 226, § 5, p. 950.

This 1982 legislation, which remains unchanged to the present, preserves an option for counties comprised entirely of islands and with a population of less than thirty-five thousand. (At present, the option is available only to San Juan County, because Island County has exceeded thirty-five thousand in population since the 1980 census.) In such counties, the commissioners continue to have the option of creating unequal-sized commissioner districts, but the primary as well as the general election in such a county will be conducted among the voters of the county at large, not merely among the voters of the commissioner district.

The material you supplied in connection with your opinion request, along with other material supplied by one of the county commissioners, makes it clear that San Juan County continues to exercise the option afforded by RCW 36.32.020 and .040 of having each commissioner district comprised of "whole islands" with the three districts unequal in population. By virtue of the 1982 amendments, residency in the commissioner district continues to be a requirement for election as county commissioner, but the election is conducted among the county voters at large both in the primary and the general election. [FN1]

ANALYSIS

1. THE EFFECT OF BOARD OF ESTIMATE V. MORRIS

Your specific question is whether the San Juan County commissioner districting system is constitutional after Board of Estimate v. Morris.Our basic answer to your question is yes, because the facts considered by the Supreme Court in Morris are very different from those presented in San Juan County.

The Board of Estimate is a part of the governmental structure of the City of New York, created by the charter establishing New York in 1897. Under the city charter, as most recently amended in 1986, the board consisted of the three city-wide elected officials (mayor, comptroller, and city council president) each casting two votes, and the elected presidents of the city's five boroughs, each casting one vote. The borough presidents were elected by the voters of each borough, and the boroughs varied greatly in population.

The city charter assigned to the Board of Estimate various responsibilities, including the management of certain city property, the granting of certain city contracts, zoning authority, and shared authority with the city council to modify and approve budgets proposed by the mayor. This particular system was invalidated by the United States Supreme Court in the Morris for it violated the equal population standard for legislative districts.

The major difference between the New York City Board of Estimate and San Juan County is that, under the New York City scheme, the five borough presidents were nominated and elected not by the voters of the whole city but by the voters of their respective boroughs, which varied widely in population. Much of the Morris opinion discusses whether the unique mixed system employed in the Board of Estimate, where six votes were cast by officers elected by the city at large and five by officers elected from districts of unequal size, resulted in unequal voting strength. The United States Supreme Court eventually upheld a lower court finding of fact that the Board of Estimate scheme did result in unequal representation. It therefore necessarily followed from the reasoning of the "one person, one vote" cases that the Board of Estimate scheme could not pass constitutional muster.

***5** However, there is nothing in the Morris case indicating that the New York City scheme would have been invalid even if it had provided for nomination and election of borough presidents on a city-wide basis, though preserving the requirement that they reside in their respective boroughs. That fact pattern would have been somewhat similar to the San Juan County situation, but it was not discussed because it was not before the Court. As noted below, previous Supreme Court cases have generally upheld such systems, and the Morris opinion does not overrule, question, or even discuss those earlier cases.

2. THE CURRENT STATE OF FEDERAL CASE LAW RELATED TO THE SAN JUAN COUNTY SYSTEM

Although the system currently used by San Juan County — commissioner districts of unequal population used for residency alone, while the county as a whole nominates and elects the commissioners — may seem unique, it is a system used for local government elections in a number of states. While this system has never specifically been considered by the Washington State appellate courts, it has been the subject of discussion in federal appellate court cases.

The leading United States Supreme Court case is Dusch v. Davis, 387 U.S. 112, 18 L. Ed. 2d 656, 87 S. Ct. 1554 (1967). This case involved the election system employed when the City of Virginia Beach, Virginia, consolidated with adjoining Princess Anne County in 1963. Princess Anne County had been divided before 1963 into six magisterial districts of varying populations, three of them primarily rural and three primarily urban. Under the scheme adopted for the newly consolidated city, the former territory of the City of Virginia Beach was designated a borough, as was each of the former magisterial districts of Princess Anne County. The system adopted for the new consolidated city included a legislative body of eleven council members, all elected by the voters of the city at large. However, the system also included a residency requirement whereby one council member had to be a resident of each of the seven boroughs, while the four remaining council members had only to be residents of the newly consolidated city.

In upholding this particular scheme, the Supreme Court followed the earlier case of Fortson v. Dorsey, 379 U.S. 433, 13 L. Ed. 2d 401, 85 S. Ct. 498 (1965), which had upheld residence requirements for the election of state senators from a multi-district county. As the Court had observed in Fortson,

> [e]ach district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of the people in his home district; thus, in fact he is the county's and not merely the district's senator.

379 U.S. at 438, quoted in Dusch v. Davis, 387 U.S. at 115.

The reasoning of Dusch v. Davis was upheld as applied to a county in Dallas County v. Reese, 421 U.S. 477, 44 L. Ed. 2d 312, 95 S. Ct. 1706 (1975). In this case, the Supreme Court considered the election system in Dallas County, Alabama.Dallas County was governed by a county commission consisting of five members, all elected by the voters

of the county at large. Four of the commissioners were required to be residents of "residency districts", while the fifth commissioner could live anywhere in the county. The residency districts varied widely in population. Although the Fifth Circuit Court of Appeals had struck down the Dallas County system as unconstitutionally diluting the votes of urban residents of Dallas County, Reese v. Dallas County, 505 F.2d 879 (5th Cir. 1974), the Supreme Court reversed the circuit court, holding that the residency requirement, in and of itself, did not invalidate the system.

***6** Dallas County v. Reese reiterates the Supreme Court's apparent view that an officer represents the population which elects him, not the narrower interests of his neighbors, even where he is required to live in a particular neighborhood. The case was remanded to lower courts for further proceedings, primarily to conclude whether the Dallas County system served to dilute or reduce the voting strength of racial or other political minorities in the county population.

These cases discussed above establish that a requirement of residency in a district alone, even if the districts are of unequal population, does not invalidate a system in which officers subject to that residency requirement are elected by the voters of the area at large.

It must be noted that the Supreme Court has struck down some at large voting schemes. However, these schemes were not struck down because of a residency requirement. They were invalidated because the schemes impermissibly diluted the electoral strength of racial or political minorities in the at large district. See Whitcomb v. Chavis, 403 U.S. 124, 29 L. Ed. 2d 363, 91 S. Ct. 1858 (1971); Rogers v. Lodge, 458 U.S. 613, 73 L. Ed. 2d 1012, 102 S. Ct. 3272 (1982).

The teaching of Dusch v. Davis and Dallas County v. Reese appears to be that election of multiple commissioners at large is constitutional, even if individual commissioners are required to live in commissioner districts which are not substantially equal in population, unless the system can be shown to result in discrimination against a racial or other political minority. We find nothing in Morris to change this teaching.

Whether there are any identifiable racial or other political minorities in San Juan County whose votes are impermissibly diluted by the current system is a factual matter. We are unaware of any facts tending to show this to be the case. Thus it appears that the commissioners may retain the current election system without violating the state and federal constitutions.

We trust the foregoing will be of assistance to you.

Sincerely,
Kenneth O. Eikenberry
Attorney General

James K. Pharris