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Opinion No. 05-124

Election of Aldermen under Mayor-Aldermanic Charter

QUESTIONS

1. Whether a municipality that adopted the mayor-aldermanic charter set forth in Tenn. Code Ann. §§ 6-2-101, *et seq.*, before June 31, 1991, is authorized to follow a system for the election of aldermen from multiple wards under which each alderman must be a resident of the particular ward he or she is designated to represent, but is elected by the voters of the entire municipality at-large?

2. If the answer to the first question is "yes," whether the one person/one vote requirement of the federal constitution applies so that such a municipality must ensure through periodic redistricting that each ward is of substantially equal population?

OPINIONS

1. Yes.

2. It is our opinion that the federal constitution would not require such a municipality to periodically redistrict its wards so that each ward is of substantially equal population.

ANALYSIS

1. Currently pending in the Tennessee General Assembly is Senate Bill 976/House Bill 1622 relative to requiring all members who are elected from districts of municipal legislative bodies to be elected from districts of substantially equal population. The request indicates that this legislation was written to address certain issues within the town of Spring Hill. A question has now arisen as to the legality under state law of the current system for electing aldermen in Spring Hill. It is our understanding that while each alderman must be a resident of the particular ward he or she is designated to represent, the aldermen are elected at-large by all qualified voters of Spring Hill.

This method of electing aldermen was apparently established under the authority of Spring Hill's private act charter, Chapter 406 of the 1909 Private Acts, as amended. In 1987, Spring Hill adopted a mayor-aldermanic charter pursuant to the general law. Section 6-1-304 of the general law then in effect provided that:

> When the adoption has been made and the secretary's certificate registered, then such town or city shall have all the powers, rights, privileges, and benefits of corporations organized under part 2 of this chapter, with the new charter, and *the former charter shall be deemed and held forever renounced and surrendered.*

(Emphasis added). Pursuant to this statute, Spring Hill's former private act charter, including the relevant provisions authorizing the method of electing aldermen, was renounced and surrendered. As such, we do not think that Spring Hill's former private act charter may provide any authority for the method of electing aldermen. Rather, any such authority must be found, if at all, in Spring Hill's 1987 charter and the general law with respect to the mayor-aldermanic form of municipal government.

Unfortunately, the general law in effect at the time Spring Hill adopted its mayor-aldermanic charter did not expressly address the issue of whether aldermen were to be elected by wards or at-large. The general law contained the following provisions with respect to municipal elections:

> 6-1-401. Election of officers. — (a) The officers of each municipality, unless otherwise provided, shall consist of a mayor, two (2) aldermen for each ward, one half (1/2) of the aldermen to be elected on organization for one (1) year, and the other half for two (2) years.
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> (b) Any municipality may in lieu of having two (2) aldermen for each ward provide by ordinance for a particular number of aldermen for the municipality to be eligible for and elected to such office without regard to ward residence; provided, such ordinance shall continue any incumbent alderman in office for the remainder of the term for which such alderman was selected, and shall be adopted on final passage by a two-thirds (2/3) vote of the legislative body.
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> (e)(1) A municipality that consists of one (1) ward may by ordinance provide for the election of four (4) aldermen.
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> 6-1-402. Residence requirements for officers. — No person shall be eligible for the office of mayor or alderman unless he shall have resided within the municipality or ward, respectively, for at least one (1) year next preceding the election; provided residence in a ward shall not be required for any official elected without regard to ward residence. Residence within any area annexed in a year preceding an election shall be counted in meeting this requirement.

Section 6-1-403(a) further provided, in part, that "any officer removing from his ward (except where such official is elected without regard to ward residence) or municipality during his

term of office shall be presumed to have vacated his office, and the same shall be declared vacant, and filled as provided in § 6-1-405."

While these statutes require aldermen to be residents of one of the municipality's wards, they do not require that aldermen be elected only by the qualified voters in that ward. As such, it would appear that these statutes use wards in multi-ward municipalities merely as the basis of residence for candidates for aldermen, and not for voting or representation. This interpretation is supported by the provisions of § 6-1-401(b), which allow a municipality to "provide by ordinance for a particular number of aldermen for the municipality to be eligible for and elected to such office *without regard to ward residence*." (Emphasis added).

This interpretation is further supported by later legislative changes to the mayor-aldermanic charter. In 1991, the General Assembly repealed virtually all of the existing general law on mayor-aldermanic charters and adopted new provisions. Under the new general law, there are separate provisions for the election of the Mayor and Board of Aldermen for municipalities incorporating after June 30, 1991, and for municipalities that incorporated before June 30, 1991, under the prior general law. With respect to municipalities incorporating after June 30, 1991, Tenn. Code Ann. § 6-3-101 provides, in part, as follows:

> (a) Any municipality incorporating under this charter after June 30, 1991, shall have at least one (1) ward but not more than eight (8) wards. Any municipality having a population of less than five thousand (5,000) shall, upon incorporation, have one (1) ward, and its board shall consist of a mayor and *two (2) aldermen elected at large*. Any municipality having a population of more than five thousand (5,000) shall, upon incorporation, have two (2) wards, and its board shall consist of a *mayor to be elected at large and two (2) aldermen elected from each ward*. . . . Any municipality that incorporated under this charter after June 30, 1991, and that has a population of less than five thousand (5,000) and has only one (1) ward, may by ordinance increase the number of aldermen to a maximum of four (4) without increasing the number of wards.
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> (b) Any municipality incorporated after June 30, 1991, may increase or reduce the number of wards, except that municipalities having a population of more than five thousand (5,000) shall not reduce the number of wards below two (2). The board of any municipality having between one (1) and four (4) wards shall consist of a *mayor elected at large and two aldermen elected from each ward*, except that municipalities having more than one (1) ward may reduce the number of aldermen from each ward from two (2) to one (1). The board of any municipality having between five (5) and eight (8) wards shall consist of a *mayor elected at large and one (1) alderman elected from each ward*.

> (c) All increases and reductions in the number of wards and aldermen under this section shall be accomplished only by ordinance passed by a two-third (2/3) vote of the entire membership to which the board is entitled. The ordinance shall:
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> * * * *
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> (5) *In the case of a ward that has been abolished, provide that any alderman whose term extends past the life of a ward shall serve as an alderman at large for the remainder of the term.*

(Emphasis added). Thus, for municipalities incorporated after June 30, 1991, the General Assembly has specifically declared whether aldermen are to be "elected at-large" or "elected from each ward" based upon the population of the municipality. No such similar express declaration exists, however, with respect to the election of aldermen for municipalities incorporated before June 30, 1991. There, the statute only provides, in part, as follows:

> A municipality incorporated under chapters 1 and 2 of this title, on or before June 30, 1991, may, by ordinance, establish wards, increase or decrease the number of wards, increase or decrease the number of aldermen to no fewer than two (2) and no more than eight (8) in accordance with § 6-3-101.

Tenn. Code Ann. § 6-3-102(a)(1). This statute merely *authorizes* pre-June 30, 1991, municipalities to increase or decrease the number of wards and/or aldermen by ordinance in accordance with the provisions of § 6-3-101, *i.e.*, the ordinance must be approved by a 2/3 vote of the entire board and meet the other requirements of subsection (c). The statute does not, however, mandate that these municipalities comply with the other provisions of § 6-3-101 as to how aldermen are to be elected. Moreover, the fact that the General Assembly used the permissive term "may" with respect to pre-June 30, 1991, municipalities, as opposed to the mandatory term "shall" with respect to post-June 30, 1991, municipalities, further supports an interpretation that municipalities incorporated under the mayor-aldermanic charter general law before June 30, 1991, and with a population in excess of five thousand, are not required to elect their aldermen "from each ward."[1] According to the certified results of the 2004 federal census, Spring Hill's population is 13,697. As such, it is our opinion that Spring Hill is not required to have its aldermen elected by the voters from the ward that they represent.

We would note that similar election plans have been upheld by the United States Supreme Court. In *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965), the State of Georgia's 1962 Senatorial Reapportionment Act was challenged on the basis that it violated the Equal Protection Clause of the Fourteenth Amendment. Under that plan apportioning the 54 seats in the Georgia senate among the state's 159 counties, 33 of the senatorial districts were established,

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[1] Tenn. Code Ann. § 6-1-102, which was adopted by the General Assembly in 1991 when it substantially revised the general law on mayor-aldermanic charters, provides that "[a]s used in this chapter, "shall" is mandatory and "may" is permissive."

made up of from one to eight counties each, and voters in these districts elected their senators by a district-wide vote. The remaining 21 senatorial districts were allotted in groups of from two to seven among the seven most populous counties, but voters in those districts did not elect a senator by a district-wide vote; instead they joined with the voters of the other districts of the county in electing all of the county's senators by a county-wide vote. The plaintiffs challenged that plan, asserting that the county-wide voting in the seven multi district counties resulted in denying the residents therein a vote "approximately equal in weight to that of voters resident in the single-member constituencies." The Supreme Court rejected this argument and, in upholding the reapportionment plan, stated as follows:

> The statute uses districts in multi district counties merely as the basis of residence for candidates, not for voting or 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.

Id. at 438, 85 S.C. 498, 501.

Subsequently, in *Dusch v. Davis*, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656 (1967), the Supreme Court upheld an election plan for city council under which four members were elected at large without regard to residence, and seven were elected by voters of the entire city, but each one of the seven was required to reside in one of the city 's seven boroughs. The Court noted that the plan makes "no distinction on the basis of race, creed, or economic status or location," and that, just as in the *Fortson* case, the councilman is the city's councilman, not the borough's. It further adopted the following reasoning as the basis for the residency allocation requirements contained in the plan:

> The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area.

Id. at 116, 87 S.Ct. 1554, 1556.

The Supreme Court also upheld an Alabama statute establishing a system for the election of county commissioners in Dallas County, Alabama. *See Dallas County, Alabama v. Reese*, 421 U.S. 477, 95 S.Ct. 1706, 44 L.Ed.2d 312 (1975). That system provided for countywide balloting for each of the four commission members, but required that a member be selected from each of the four residency districts. The constitutional challenge to this system was premised on the fact that the populations of the four districts varied widely, with the result that only one resident of the city of Selma could be a member of the commission, although that city contained about one-half of the county's population. *Id*. at 477-78. The Supreme Court upheld this system relying upon the

principles enunciated in its prior opinions in *Forston* and *Dusch*. The Court did note that such an election plan was not entirely insulated from a constitutional attack, stating:

> As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster.
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> We think it clear, however, that *Dusch* contemplated that a successful attack raising such a constitutional question must be based on findings in a particular case that a plan in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population.

Id. at 480, 95 S.Ct. at 1708 (internal citations omitted).

More recently, the federal courts upheld a plan for the election of representatives to local school councils. Under that plan, each local school council has six parent representatives (parents of students currently enrolled in the school) and two community representatives (residents of the community served by the school). However, each eligible voter is entitled to cast one vote for up to a total of five candidates, irrespective of whether such candidates are parent or community representative candidates. The court upheld the plan under equal protection challenges, concluding that because the entire population elected all members of the council, each member of the council, regardless of that member's residency, must be sensitive to the needs of the population as a whole. *See Pittman v. Chicago Board of Education*, 860 F.Supp. 495, 499-501 (N.D.Ill. 1994), *aff'd*, 64 F.3d 1098 (7th Cir. 1995), *cert. denied*, 517 U.S. 1243, 116 S.Ct. 2497, 135 L.Ed.2d 189 (1996).

In light of these authorities, we believe that Spring Hill's current system for election of aldermen is permissible and would be upheld against any constitutional challenge, absent a showing that the system operates "impermissibly to dilute the voting strength of an identifiable element of the voting population." *See Dallas County, Alabama v. Reese, supra.*

2. Your second question asks whether, if such a system for election of aldermen is authorized, the one person/one vote requirement of the federal constitution applies so that such a municipality must ensure through periodic redistricting that each ward is of substantially equal population. The United States Supreme Court held in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), that, in apportioning districts for election purposes, the Equal Protection Clause requires that there be "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id*. at 579, 84 S.Ct. at 1390. However, under an election system whereby wards in multi-ward municipalities are used as the basis of residence for candidates for aldermen, and not for voting or representation, the need for substantial equality of population among the various wards is not present, as the aldermen are elected by all of the qualified voters of the municipality. Thus, the vote of a resident of one ward is approximately equal in weight to that of any other resident of

the municipality. Accordingly, it is our opinion that the federal constitution would not require such a municipality to periodically redistrict its wards so that each ward is of substantially equal population.

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