Office of the Assistant Attorney General *Washington, D.C. 20530*

July 24, 1989

Michael A. Korb, Jr., Esq.
Assistant City Attorney
2400 Washington Avenue
Newport News, Virginia 23607

Dear Mr. Korb:

This refers to the change in the method of nominating Democratic Party candidates for the city council from primary elections to nominating conventions; Chapter 448 (1968) which provides for staggered terms for electing the city council; and Chapter 631 (1988) which provides for the direct election of the mayor with a four-year term of office, the procedure for filling a mayoral vacancy, a change in the method for staggering city council terms, and a change to nonpartisan elections for the City of Newport News, Virginia, 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 the information to complete your submissions on May 23, 1989.

We have considered carefully the information you have provided, as well as information provided by other interested parties. In that regard, the Attorney General does not interpose any objections to the change in the method of nominating Democratic Party candidates, the adoption of staggered terms, and the change to nonpartisan elections. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of these changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

However, we are unable to reach a similar conclusion with respect to the change in the method of staggering councilmanic terms occasioned by the 1988 charter amendment. This change is a byproduct of the change to a directly elected mayor since, in the amended election system, the mayor will remain as the seventh

member of the council but will be elected in a separate election contest. The election system will change from four regular councilmembers elected at large as a group in one election year and three in the following election year to three elected at large as a group in each election.

In reviewing this change, our analysis indicates an apparent pattern of racially polarized voting in city elections. Though this circumstance, in the context of at-large elections, has a strong tendency to minimize the opportunity of black voters to elect candidates of their choice to office, it appears that several features of the current election system serve to moderate that result, including the use of a plurality vote requirement and the fact that councilmembers are elected as a group without the use of numbered positions or residency districts. Nevertheless, aside from the consistent election of one particular black candidate, the election results indicate that black voters have had only limited success in electing candidates of their choice to office.

In that regard, the two additional blacks who recently gained seats on the city council were elected by only very narrow margins. One finished third when three positions were open and the other finished fourth when four positions were chosen, and both finished ahead of the candidate who placed next below them by relatively few votes. We also note that on several occasions a black candidate finished fourth but was defeated because just three seats were selected in that election year. These circumstances, taken as a whole, indicate that the change from a 4-3 to a 3-3 stagger would diminish the electoral opportunity provided black voters and thus "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976).

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. See Georgia v. United States, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52(a). 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 change from a 4-3 to a 3-3 method of staggering council elections. With respect to the remaining changes occasioned by Chapter 631 (1988), no determination will be made since they are directly related to the objectionable change.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that these changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the effect of the objection by the Attorney General is to make the change in the method of staggering elections legally unenforceable. 28 C.F.R. 51.10.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the City of Newport News plans to take with respect to this matter. If you have any questions, feel free to call Mark A. Posner (202-724-8388), an attorney in the Voting Section.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

FEB 9 1990

Michael A. Korb, Jr., Esq.
Assistant City Attorney
2400 Washington Avenue
Newport News, Virginia 23607

Dear Mr. Korb:

This refers to your request that the Attorney General reconsider the July 24, 1989, objection under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to the change in the method of staggering city council terms for the City of Newport News, Virginia. In addition, we note that there are certain other changes, submitted in conjunction with the staggered terms change, to which the Attorney General was unable to make a determination because they are directly related to the objected-to change, i.e., the direct election of the mayor with a four-year term of office, and the procedure for filling mayoral vacancies. We received your request on November 17, 1989; supplemental information was received November 27, December 14, and December 15, 1989.

We have carefully considered the information you have provided, as well as comments and information provided by other interested parties. As explained in our letter of July 24, 1989, an objection was interposed under Section 5 because the city had not carried its burden of showing that the change from a 4-3 to a 3-3 stagger would not lead to a retrogression in the electoral opportunity of black voters. Our analysis indicated that the loss of the fourth seat would be retrogressive in the context of an at-large election system characterized by racially polarized voting and limited black voter success in electing candidates of their choice to office. In that regard, we particularly focused on the extent to which black candidates have been elected as our review of the election returns indicated that black candidates have been the primary candidates of choice among black voters.

In the reconsideration request, the city contends that we erred in focusing upon the success of black candidates as there have been white candidates elected for whom more than 50 percent of

the black voters have cast one of their available votes. According to the city, these candidates also should be considered "candidates of choice" of black voters and, when viewed from this perspective, there is no difference in black electoral opportunity when three or four seats are open for election.

In the context of challenges brought under Section 2 of the Voting Rights Act, 42 U.S.C. 1973, courts have held that great care must be taken when determining which candidates should be considered "candidates of choice" of minority voters. This is to ensure that the Act is not interpreted to penalize minority voters for exercising their right to utilize votes afforded them by the electoral system when there are fewer "candidates of choice" than votes available but they nevertheless decide to cast a vote for a secondary choice. Thus, in reviewing the electoral success enjoyed by minority voters, it generally is appropriate to discount contests in which no minority candidate participated, especially if minority voter turnout declined in those elections indicating a lower level of interest in the candidates. Campos v. City of Baytown, 840 F.2d 1240, 1245 (5th Cir. 1988); Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496, 503-04 (5th Cir. 1987). In addition, in at-large interracial contests for multiple seats where voters may cast several votes among a group of candidates, if both black and white candidates receive more than 50 percent of the minority vote, it is essential to compare the nature and extent of the support given to the minority and white candidates. Collins v. City of Norfolk, 816 F.2d 932 (4th Cir. 1987) (Collins IV); Collins v. City of Norfolk, 883 F.2d 1232 (4th Cir. 1989) (Collins V).

In Newport News, our reconsideration of the election results confirms that, except perhaps for one white candidate elected in 1980, the other elected white candidates who received majority black voter support may not properly be considered "candidates of choice" of the black voters. The white candidates identified by the city who were elected in 1972 and in the 1976 special election with black voter support ran in contests in which no black candidate participated and which exhibited abnormally low black voter turnout. With respect to those white candidates elected in 1982, 1986, and 1988 with black support, they all received significantly fewer votes among black voters than the black candidates running in the same elections. We also note that our conclusions in these regards are consistent with the information we have received from representatives of the black community about the electoral preferences of black voters in Newport News.

Thus, our analysis continues to indicate that the city has not satisfied its burden under Section 5 of showing that the proposed change lacks a prohibited retrogressive effect. See Beer v. United States, 425 U.S. 130, 141 (1976); Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). Accordingly, on behalf of the Attorney General, I must decline to withdraw the objection to the change in staggered terms for the Newport News City Council. In addition, we continue to be unable to make a determination on the related voting changes set forth above.

Of course, as we previously have advised, Section 5 permits you to seek a declaratory judgment from the United States District Court for the District of Columbia that the change in the method of staggering terms has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. However, unless the objection is withdrawn or a judgment from the District of Columbia Court is obtained, this change (and the related changes which have not been precleared) continue to be unenforceable. See also 28 C.F.R. 51.10.

To enable this Department to meet its responsibility to enforce the Voting Rights Act, please inform us of the course of action the City of Newport News plans to take with respect to this matter. If you have any questions, feel free to call Mark A. Posner (202-724-8388), an attorney in the Voting Section.

Sincerely,

James P. Turner
Acting Assistant Attorney General
Civil Rights Division