

REDISTRICTING – A MUNICIPAL PERSPECTIVE

As a result of the 2020 federal census, many Colorado municipalities must redraw municipal ward and district boundaries. Municipal redistricting is impacted by constitutional doctrines, judicially imposed requirements, election regulations and local legislation. Much of this material has not changed since the last census in 2010, but recently, the Colorado Legislature adopted several new statutes addressing redistricting, which are discussed below.

Constitutional Doctrines

The first constitutional doctrine governing redistricting is usually referred to as "one person – one vote." *Reynolds v. Sims*, 377 U.S. 533 (1964). The concept arises out of the Equal Protection Clause of the U.S. Constitution, and requires that districts be drawn so that "as nearly as is practicable one [person's] vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). Simply put, voting districts should be as equal in population as possible, though mathematical precision is not required. *Reynolds*, 377 U.S. at 577.

The second constitutional mandate is racial equality – minority voting strength cannot be purposely diluted by a redistricting plan. As a general rule, "minority voting strength is impermissibly diluted when large concentrations of minority population are ... fragmented and disbursed." *Carstens v. Lamm*, 543 F.Supp. 68, 85-86 (D.Colo. 1982).

Non-Constitutional Considerations

In addition to the constitutional constraints, state and federal courts have adopted several non-constitutional requirements that must be considered during the redistricting process.

The first is compactness. The goal is to determine the smallest circle into which the district can be circumscribed and compare the ratio of the area of the district inside the circle to the area of the circle itself. *Id.* at 87 (quoting *American Bar Assoc. Special Committee on Election Law*

and Voter Participation, Congressional Redistricting 13 (1981)). The closer these figures come to a one to one ratio, the more compact the district. However, in any dispute between compactness and population equality, population equality takes precedence. *Allen v. Board of County Comm'rs of Lincoln County*, 497 P.2d 1026, 1028 (Colo. 1972). In other words, if districts need to be substantially different in size to achieve equal population, compactness is not required.

The second requirement is contiguity, which dictates that no part of one district may be completely separate from any other part of the same district. *Carstens*, 543 F.Supp. at 87.

The next judicial consideration is the preservation of county and municipal boundaries, but this is inapplicable to municipal redistricting, because there are no internal boundaries to preserve within municipalities.

The final requirement imposed by the courts is preservation of communities of interest. Communities of interest are "distinctive units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status or trade." *Id.* at 91. In Colorado, community of interest considerations may also include agricultural or industrial identity, water issues, transportation concerns, and comparison of growth rates. Colo. Const. Art. V § 47(3).

Political Gerrymandering

The third facet of redistricting law is political gerrymandering. Unconstitutional political gerrymandering occurs when redistricting improperly divides a group of voters who share a common ethnic, racial or religious background, and "their common interests are strong enough to be manifested in political action." *Karcher v. Daggett*, 462 U.S. 725, 750 (1983) (Stevens, J., concurring) (citations omitted). A violation requires, at a minimum, a "recognized protectable

group" of voters with "homogenous interests." *Kawamoto v. Okata*, 868 P.2d 1183, 1188 (Haw. 1994).

Judicial Review

A reviewing court's role in redistricting proceedings is *sui generis*, meaning that the scope of judicial review is narrow: to measure the redistricting plan against constitutional standards. *In Re Apportionment of Colorado General Assembly*, 332 P.3d 108 (Colo. 2011) (citing *In re Reapportionment of Colorado General Assembly*, 828 P.2d 185, 189 (Colo. 1992), and *In re Reapportionment of Colorado General Assembly*, 647 P.2d 191, 194 n.6 (Colo. 1982)); accord *Kallenberger v. Buchanan*, 649 P.2d 314, 318 (Colo. 1982). This is true, because reapportionment is primarily the responsibility of the legislative body, rather than the judiciary. *Wise v. Lipscomb*, 434 U.S. 1329, 1332 (1977). The test for a reviewing court is not whether a better redistricting plan could have been designed, but rather whether the plan passes constitutional muster. *In re Pennsylvania Congressional Districts Reapportionment Cases*, 567 F.Supp. 1507, 1517 (M.D. Pa. 1982), *aff'd Simon v. Davis*, 463 U.S. 1219 (1983).

In a Colorado case decided after the 2011 redistricting, the Colorado Supreme Court established additional standards for redistricting in Colorado. In *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012), the court ruled that "when tough redistricting choices must be made," it is generally more important to preserve county boundaries in rural areas, whereas municipal boundaries should often take precedence in the urbanized portions of the state. *Id.* at 971. However, this opinion was based partly on C.R.S. § 2-1-102, which was repealed by the Colorado Legislature in 2020 (see below). As such, it is unclear whether this new consideration is still valid.

New Colorado Statutes

In its 2020 session, the Colorado Legislature passed the Colorado Accurate Residence for Redistricting Act, which reassigns prisoners to their last known residence in Colorado prior to incarceration. If the last known residence is outside of Colorado or the last known residence is unknown, the prisoners are counted for purposes of redistricting at the correctional facility.

In addition, the Colorado Legislature adopted Senate Bill 20-186 ("SB 186"), a comprehensive overhaul of state redistricting requirements. While the process of redistricting was previously referred to as "reapportionment" in Colorado, SB 186 updated the term to "redistricting." So, the two independent state commissions charged with redistricting are now named the "Independent Congressional Redistricting Commission" and the "Independent Legislative Redistricting Commission", rather than the previous "Reapportionment Commission."

More importantly, however, SB 186 repealed C.R.S. § 2-1-102, entitled "Neutral criteria for judicial determinations of congressional districts." This is the statute that enacted all of the redistricting considerations outlined here. It is unclear why this statute was repealed, but its repeal does not affect any constitutional mandates or requirements imposed by case law.

Municipal Ward and Precinct Boundaries

There are three boundary classifications involved in municipal redistricting: general election precincts; municipal election precincts; and wards.

1. General Election Precincts

A general election precinct is "an area with established boundaries within a political subdivision used to establish election districts." C.R.S. § 1-1-104(30). General election precincts are established by each county clerk, with approval of the county commissioners. C.R.S. § 1-5-

101(1). The number of county precincts depends on whether the county uses paper ballots, voting machines or electronic voting. C.R.S. § 1-5-101(2) and (3).

General election precinct boundaries must be redrawn to comply with state reapportionment and the federal census. C.R.S. § 1-5-101(1). Each board of county commissioners "shall redraw the general election precincts in such county to ensure that no general election precinct is contained within more than one state representative, state senatorial, or congressional district." C.R.S. § 2-2-506(1)(a).

2. *Municipal Election Precincts*

The creation of municipal election precincts is mandated by the Municipal Election Code: "The governing body of each municipality shall divide the municipality into as many election precincts for municipal elections as it deems expedient for the convenience of electors" C.R.S. § 31-10-502(1)(a). There must be a relationship between municipal precinct boundaries and general precinct boundaries: "Municipal election precincts shall consist of one or more whole general election precincts wherever practicable, and clerks and governing bodies shall cooperate with the county clerk and recorder and board of county commissioners ... to accomplish this purpose." C.R.S. § 31-10-502(1)(a)(part). In other words, municipalities should wait for counties to redraw general election precinct boundaries before adopting municipal precinct boundaries.

Under the Uniform Election Code, changes in precinct boundaries for nonpartisan elections (including municipal elections) must be completed at least 25 days before the election. C.R.S. § 1-5-104(1) and (4). Under the Municipal Election Code, changes in precinct boundaries must be completed at least 90 days before the election. C.R.S. § 31-10-502(2)(a).

3. *Wards*

Pursuant to C.R.S. § 31-1-101(14), a ward is "a district, the boundaries of which have been established pursuant to section 31-2-104 or 31-4-104, from which a member of the governing body of a city or town is elected." Each statutory city must be divided into wards. C.R.S. § 31-4-104. On the contrary, there is no requirement that statutory towns be divided into wards. Clearly, if there are no wards, municipal redistricting is not an issue. However, statutory towns may be divided into wards upon incorporation. C.R.S. § 31-2-104(1).

Ward boundaries may not be changed more than once in 6 years unless "necessary to conform to constitutional apportionment requirements." C.R.S. § 31-4-104. Further, ward boundaries may be changed only by majority vote of all members elected to the governing body. *Id.* It is unclear what happens if a vote to change ward boundaries fails, but that change is necessary to comply with federal redistricting requirements.

Home rule municipalities may be divided into wards or districts if the home rule charter so provides. Some home rule municipalities in Colorado have both "at large" councilmembers as well as councilmembers from wards. If this is the case, redistricting will be required.

Under the Municipal Election Code, no municipal election precinct can be located within more than one ward, and each ward must contain at least one municipal election precinct. C.R.S. § 31-10-502(1)(a). Ward boundary changes must be completed 90 days before an election. C.R.S. § 31-10-502(2)(a). The Uniform Election Code does not address modifications to ward boundaries.

Map

Once new precinct and ward boundaries are established, the precinct and ward map must be amended. Under the Municipal Election Code, changes in municipal election precincts and wards must be reported to the county clerk, with a corrected map, as soon as possible after the changes are made. C.R.S. § 31-10-502(2)(b). Under the Uniform Election Code, changes in

election precincts for nonpartisan elections must be reported to the county clerk within 10 days, and a corrected map must be transmitted to the county clerk as soon as possible. C.R.S. § 1-5-104(2).

Effect on Current Elected Officials

Unfortunately, there is no hard and fast rule as to whether current elected officials are immediately affected by redistricting – it depends on whether the municipality is a statutory town, statutory city, or home rule municipality, and if home rule, it also depends on the charter. Affected municipalities should consult with their attorney for specific direction on this issue.

Common Law

Under common law, qualifications of a candidate for office are determined at the time of the commencement of the term of office. *Cox v. Starkweather*, 260 P.2d 587, 591 (Colo. 1953). Redistricting which would change the residence of an incumbent member of a legislative body does not affect that member's current term of office. *Tomblin v. Bivens*, 149 S.E.2d 284, 292 (W.Va. 1966); accord *Childress County v. Sachse*, 310 S.W.2d 414, 420 (Tex. Civ. App. 1958). Stated another way, candidates carry their residence with them throughout the entire term of office to which they were elected. *Burkhart v. Sine*, 489 S.E.2d 485, 489 (W.Va. 1997).

Statutory Municipalities

Because there is no statute governing residence changes for elected officials of statutory towns, the common law applies. However, for statutory cities: "If any councilman, during the term of his office, removes from or **becomes a nonresident of the ward in which he was elected**, he shall be deemed thereby to vacate his office, effective upon the adoption by the city council of a resolution declaring such vacancy to exist." C.R.S. § 31-4-106 (emphasis added). This means that when a city councilmember moves from a residence located within his ward to a residence

located in a different ward, that councilmember will automatically vacate his office. This represents a stark difference from the common law, and only applies to statutory cities.

Home Rule Municipalities

In the absence of a conflicting charter provision, the common law applies to home rule municipalities. However, many charters contain provisions stating that residency is an ongoing obligation. In other words, if a councilmember lives in District 1, is elected from District 1, but then, as a result of redistricting her home is suddenly located in District 2, she is automatically removed from the council and a vacancy is created. Many home rule charters state that an elected official becomes ineligible to serve if he or she "moves from the district or ward" from which he or she was elected. It is unclear whether the phrase "moves from the district" includes the circumstances where the councilmember does not move, but the district boundaries move.

Procedures

In light of the foregoing, following are suggested procedures to help Colorado municipalities successfully redistrict:

1. Determine whether redistricting is required.
 - a. Find the population of each district in the 2020 federal census.
 - b. Calculate the percentage difference between the smallest district and the largest district.
 - c. The general standard for deviation between the smallest municipal voting district and the largest district is 10%, but a smaller percentage is helpful.
 - d. The final determination should be made by the governing body, considering all relevant circumstances, such as historic population differences and potential growth areas.

2. Appoint an individual or commission to oversee redistricting process.
 - a. Because redistricting is a controversial and politically charged process, a commission, including individuals with different backgrounds or areas of residence within the municipality, is a good choice.
 - b. It is important to accept input from residents in public meetings.
3. Implement criteria. The following are standard, in the order they should be considered:
 - a. One person – one vote (population equality).
 - b. No minority vote dilution or political gerrymandering.
 - c. Coordination with general election precincts.
 - d. Compactness.
 - e. Contiguity.
 - f. Preservation of communities of interest.
4. Establish a timeline.
 - a. Include all commission meeting dates.
 - b. Include the date for submittal of final plan(s), leaving enough time before the next election to adjust precinct boundaries, if necessary.
5. Follow the criteria.
 - a. Keep a record of how each criterion was considered.
 - b. If a consultant is hired, the consultant should have a copy of the criteria, and any report should include specific consideration of each criterion.
 - c. It is helpful to craft alternative plans, because it creates a good record for a reviewing court if a challenge is filed.

6. Present proposed plan(s) to the governing body.
 - a. The plan(s) should include statements as to whether each criterion has been satisfied, factual support, and detailed explanations.
 - b. The plan(s) should be presented at a public hearing, and residents and other interested parties should be given an opportunity to be heard.
 - c. The final plan must be adopted by ordinance, because under Title 31 and many home rule charters, district boundaries may only be changed by ordinance, and because redistricting should be a legislative determination for purposes of judicial review.
7. Determine effect on current elected officials.
 - a. In statutory cities, vacancies are automatically created if any member of the governing body no longer resides in his or her ward as a result of redistricting.
 - b. In other municipalities, the governing body should make a legislative determination as to whether the loss of residence will create an immediate vacancy.

Conclusion

Municipal redistricting involves many legal and practical considerations, and to ensure compliance with constitutional and statutory mandates, municipalities should commence the redistricting process as soon as possible after the 2020 Census is completed and the state and counties complete their redistricting.