IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

LATASHA HOLLOWAY, **Plaintiff,** **v.** **CITY OF VIRGINIA BEACH, VIRGINIA,** **Defendant.**	**Civil Action No. 2:18-CV-69**

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

NOW COMES the City of Virginia Beach, by counsel, and for its Memorandum of Law in Support of Motion to Dismiss, respectfully sets forth the following:

Factual and Procedural Background

Latasha Holloway ("Holloway"), *pro se*, filed a Motion for Leave to file *in forma pauperis* along with a Complaint against the City of Virginia Beach (the "City") alleging violations of the Voting Rights Act of 1965, 42 U.S.C. 1983, the Americans with Disabilities Act, the Voting Accessibility for the Elderly and Handicapped Act of 1984, and the First, Fourteenth, and Fifteen Amendments to the United States Constitution on November 20, 2017, in the Alexandria Division of this Honorable Court. ECF No. 1. The Alexandria Division of this Court, *sua sponte*, ordered this matter transferred to the Norfolk Division pursuant 28 U.S.C. 1391(b)(2) and Local Civil Rule 3(c) for further consideration. ECF No. 3. Thereafter, this Court granted Holloway's motion to proceed *in forma pauperis* and filed Holloway's Complaint with an instruction to the Clerk of Court to prepare a waiver of service to the City. ECF No. 4. Prior to any responsive pleadings by the Defendant, the Court considered Holloway's motion to

appoint counsel, a motion for an interlocutory appeal as to the motion to appoint counsel, and a motion to stay the proceedings pending the interlocutory appeal. See ECF Nos. 6, 10. The Court denied without prejudice the Motion for Appointment of Counsel, denied the Motion for an Interlocutory Appeal, and deferred the Motion to Stay pending this responsive pleading by the City. ECF No. 11.

The City, having waived service of process, now moves to dismiss the Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that Holloway fails to state a claim upon which relief can be granted.

Holloway's Complaint discloses neither her race, nor age, nor whether she suffers from a disability. Holloway avers only that she is a resident of the City of Virginia Beach and that she is a registered voter in the City. ECF No. 5, Complaint ¶ 3. The Complaint sets forth six separate counts. Holloway's primary contention is that the current "at-large" voting method employed by the City violates the specific requirements of the Voting Rights Act by diluting the votes of African-American citizens.[1] Holloway also claims that elderly and disabled persons are deprived of "accessible or alternate polling places in elections." ECF No. 5, Complaint ¶ 10. Each count of her Complaint consists of a single, conclusory statement beneath the heading, and each is devoid of any supporting facts.

Holloway seeks several forms of declaratory and injunctive relief ostensibly intended to cure the supposed violations that she alleges in the six separate counts of her Complaint. ECF No. 5, Complaint ¶ 11. Holloway does not offer any proposal for a ward or single member district system that would satisfy the requirements of the Voting Rights Act as part of her

[1] It should be noted that in 1998 this Court addressed the merits of a vote-dilution claim against the City of Virginia Beach as it relates to the use of an at-large voting system. See generally Lincoln v. City of Virginia Beach, No. 2:97cv756 (E.D.V.A. Dec. 29, 1997) (opinion attached hereto as Exhibit "A").

demand for injunctive relief. Nor does Holloway explain in what regard the City deprives elderly or disabled citizens access to polling places. Instead, Holloway merely demands that the current at-large voting system be replaced with a system of wards or single-member districts and that the City be ordered to comply with "Title II of the Americans with Disabilities Act (ADA), and the Voting Accessibility for the Elderly and Handicapped Act of 1984 (VAEHA) and laws." ECF No. 5, Complaint ¶ 11(B)(2-4).

Standard of Review

According to Federal Rule of Civil Procedure 8(a)(2), "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Pro. 8(a)(2). Rule 8(a)(2) requires the complaint "to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" The Supreme Court of the United States has defined this pleading standard, holding that the complaint must contain "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Moreover, the Court held that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

The Supreme Court also has held that a complaint must allege more than a "sheer possibility that the defendant has acted unlawfully," to survive a motion to dismiss for failure to state a claim upon which relief can be granted. Id. Although a sufficiently pleaded complaint does not "require 'detailed factual allegations,'" it does require facts which are more than "'merely consistent with' a defendant's liability" in order to cross "the line between possibility and plausibility of 'entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557). The basis

for the plaintiff's entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Although courts are required to "take all the factual allegations in [a] complaint as true, [they] are not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986).

Although a *pro se* complaint is "h[e]ld to less stringent standards than formal pleadings drafted by lawyers," Haines v. Kerner, 404 U.S. 519, 520 (1972), the Supreme Court "ha[s] never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." McNeil v. United States, 508 U.S. 106, 113 (1993). "Thus, while the Court must extend leeway to the pro se Plaintiff, such leeway must be tempered to require the Plaintiff to comply with the Federal Rules of Civil Procedure, specifically . . . Rule 8 of the Federal Rules of Civil Procedure." Davis v. Bacigalupi, 711 F. Supp. 2d 609, 615 (E.D. Va. 2010).

Argument

I. Holloway's Complaint Fails to State a Single Claim Against the City of Virginia Beach That Is Plausible on Its Face.

"The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint . . . ." Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999). Because Holloway's Complaint is devoid of factual support for her allegations, the Complaint lacks facial plausibility and fails to state a claim upon which relief can be granted. As drafted, the Court cannot draw any "reasonable inference that [the City] is liable for the misconduct alleged" because Holloway's Complaint is comprised of nothing more than six conclusory statements labeled as causes of action. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); ECF No. 5, Complaint ¶ 1-6. The "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action"

Holloway offers in the Complaint are wholly insufficient to successfully plead a claim. See Twombly, 550 U.S. 544, 555 (2007). Further, although the Court must take all the factual allegations in the Complaint as true, the Court is free to ignore "a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986).

The City does not contend that Holloway must set forth detailed factual allegations; however, Holloway must set forth some facts to show the cause of action is plausible on its face. See Ashcroft v. Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557). Holloway sets forth only that she has been "a registered voter at all times . . . [and is] a resident of the City of Virginia Beach and of the Commonwealth of Virginia and a citizen of the United States of America." ECF No. 5, Complaint ¶ 3. Holloway does not allege her race, age, disability, or other status that would confer legal standing to Holloway or otherwise place her in a protected class pertinent to showing the plausibility of her claims or justifying the injunctive relief demanded. See ECF No. 5, Complaint ¶ 11.

The First Cause of Action reads in its entirety: "Plaintiff claims injury as direct result of the defendants at large elections to the City Council deprives [sic] the plaintiff and other qualified voters of equal treatment and an opportunity to vote for a candidate of their choice as guaranteed by the Voting Rights Act, 1965, as amended, 42 U.S.C. §1973, *et seq*., 42 U.S.C. §1983, and the First, Fourteenth and Fifteenth Amendments to the United States Constitution while acting under color of state law." The second, third, fourth and fifth causes of action also do no more than recite similar conclusory statements of law; none of them provide factual support for Holloway's claim of vote dilution. Aside from a brief footnote requesting judicial notice be taken of the number of African-Americans that have been elected to the Virginia Beach City Council, Holloway's Complaint offers no factual support for her claims. This footnote is wholly

inadequate to establish a vote dilution claim. Although the extent of minority electoral success is one factor appropriate for consideration in such cases, "nothing in [Section 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b) (formerly codified at 42 USCS § 1973).

The United States Supreme Court has opined that the "essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." Thornburg v. Gingles, 478 U.S. 30, 47, 106 S. Ct. 2752, 2764 (1986); see also Johnson v. DeGrandy, 512 U.S. 997, 114 S. Ct. 2647 (1994). The Court has characterized the evaluation of a vote-dilution claim as "a flexible, fact-intensive test." Gingles, 478 U.S. at 46, 106 S. Ct. at 2764. Moreover, a trial court's "determination is peculiarly dependent upon the facts of each case and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." Id. at 79, 106 S. Ct. at 2781 (internal quotation marks and citation omitted). Holloway fails to offer any facts which would allow this Court to undertake the required fact intensive analysis and these claims of vote dilution must therefore be dismissed.[2]

Several of Holloway's vote-dilution allegations also appear to be unnecessarily duplicative. The second and fourth causes of action, as well as the fifth and third causes of action, allege identical legal conclusions. The only differences between the second and fourth causes of action are the addition of the words "ethnic" and "linguistic," as well as making the

[2] The City also notes that Holloway has not offered any facts establishing the existence of any of the "necessary preconditions" for a plaintiff to state a plausible case of vote dilution in multi-member districts as set forth in Thornburg v. Gingles, 478 U.S. 30, 48-52, 106 S. Ct. 2752, 2765-68 (1986) (holding that certain circumstances are necessary preconditions for multi-member districts to operate to impair minority voters' ability to elect representatives of their choice.).

word "minority" plural. See ECF No. 5, Complaint ¶ 6, 8. Other than those differences, the two causes of action track each other identically. Similarly, the only differences between the third and fifth causes of action are the addition of the words "ethnic" and "linguistic," and otherwise the two causes of action are identical. See ECF No. 5, Complaint ¶ 7, 9.

Holloway's Sixth Cause of Action reads in its entirety: "The City of Virginia Beach deprives elderly people and people with disabilities basic accessible or alternate polling places in elections in violation of the Voting Rights Act of 1965, as amended 42 U.S.C. §1973, 42 U.S.C. §1983, Title II of the Americans with Disabilities Act (ADA), the Voting Accessibility for the Elderly and Handicapped Act of 1984 (VAEHA), and the First, Fourteenth and Fifteenth Amendments to the United States Constitution while acting under color of state law." See ECF No. 5, Complaint ¶ 7.

Holloway fails, as a primary matter, to state her age or whether she suffers from any disability that falls within the ambit of any of the statutes she cites. Nor does Holloway provide even a scintilla of evidence to support the bare legal conclusion contained therein. Holloway's request for relief highlights the insufficiency of her claim, asking the Court to order Defendants to fully comply with the ADA, the VAEHA, "and laws"—but nowhere explaining in what regard the City failed to comply these acts. Holloway's Sixth Cause of Action therefore must be dismissed.

Conclusion

Holloway's Complaint leaves the Court and the City to guess as to what facts exist, if any, that support her claims and justify her demands for declaratory and injunctive relief. Holloway's Complaint is impermissibly formulaic and devoid of factual assertions that support her alleged causes of action. A close review of Holloway's Complaint, even providing the

appropriate deference to a *pro se* litigant, reveals that the allegations do not combine to state any claims that are plausible on their face and, therefore, fail to meet the basic requirements of Rule 8 of the Federal Rules of Civil Procedure.

For the reasons fully set forth herein, the City of Virginia Beach requests the Court dismiss the Complaint with prejudice and afford the City all other such relief it deems appropriate.

Respectfully Submitted,

CITY OF VIRGINIA BEACH

By:_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of April 2018, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Latasha Holloway is a non-filing user of the CM/ECF system. No other parties require notice.

/s/
Gerald L. Harris

And I hereby further certify that on this same date I have arranged for service of process through a private process server and have mailed the foregoing document along with a copy of the NEF to the following non-filing user:

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/s/
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FILED
DEC 29 1997
CLERK, U.S. DISTRICT COURT

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

CAROLYN LINCOLN
plaintiff,

v.

THE CITY OF VIRGINIA BEACH, et al.
defendant,

CASE NO. 2:97cv756

OPINION AND ORDER

This matter is before the Court on plaintiff's motion for voluntary dismissal, filed November 28, 1997. A hearing was conducted and the Court ruled from the bench on this matter on Monday, December 22, 1997. This opinion will further explain the rationale for the Court's ruling.

Facts

On August 4, 1997, Carolyn Lincoln ("Lincoln") brought suit to challenge the at-large system of electing the eleven members of the Virginia Beach City Council ("City Council"). The primary focus of her complaint is a claim that the City's election structure dilutes the voting strength of "all people of color" within Virginia Beach in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(b). The plaintiff also asserted that the City Council engaged in criminal and contemptuous conduct by allegedly using "illegal and improper"

language in a May 1996 advisory referendum that was conducted to determine whether City voters wished to retain the at-large system.

Virginia Beach uses a modified at-large election system to choose its eleven City Council members, with seven of the members being elected from residence districts, formerly called "boroughs." The Mayor and the remaining three members of the City Council are elected at-large from candidates residing anywhere within the City. This seven-four system has been upheld as valid. See Dusch v. Davis, 387 U.S. 112, 116-17 (1967).

The plaintiff is a member of an unidentified minority race. The plaintiff alleges that only two members of any minority group have been elected to the City Council in the last 35 years, that her minority group is politically cohesive and has been denied the election of its preferred candidates by the majority's use of bloc voting techniques, and that a multi-racial group consisting of all people of color is "sufficiently geographically compact to constitute a majority in a reasonably drawn balanced voting district." The specific remedy requested by the plaintiff is an order requiring Virginia Beach to convert to a "modified ward plan" having a geographically compact district where a majority of the voters would be minority citizens.

Beginning in 1990 and continuing for a period of almost five years, the City undertook a comprehensive review of the then existing system of electing City Council members. The City sought views from every conceivable interested party as to the best manner to provide representation for the citizens of the City. Based on the 1990 census, the most recent numerical information, Virginia Beach has a total population of 393,069, of which 78.8% are White, 13.7% are Black, 4.1% are Asian and Pacific Islander, 3.1% are Hispanic, 0.3% are American Indian, and 0.1% are other non-Hispanic. In terms of voting age population, the City has 283,182

persons aged 18 or older. Of that number, 80.4% are White, 12.6% are Black, 3.8% are Asian and Pacific Islander, 2.8% are Hispanic, 0.3% are American Indian, and 0.3% are other non-Hispanic. The National Association for the Advancement of Colored People ("NAACP") submitted two plans for consideration during this process. Each plan tried to create the highest minority population possible in one of the districts. One plan consisted of 11 districts and contained a district with a combined minority total population of 46.4% and a voting age population of 43.28%, with a total deviation from ideal district size of 8.3%. The other plan consisted of 13 districts and contained a district with a combined minority total population of 49.1% and a voting age population of 45.72%, with a total deviation from ideal district size of 9.1%. In both the NAACP plans, the "minority district" stretched nearly all the way across the City, and in many instances, the district was only a block wide or came together at a single point.

Procedural History

This action was filed on August 4, 1997. Defendants filed their answer to the Complaint on August 27, 1997. On the same day, the defendants filed a motion to dismiss the plaintiff's claims of criminal and contemptuous conduct arising out of the advisory referendum. The motion was based, in part, on the fact that the Circuit Court of the City of Virginia Beach had specifically approved the language used in the 1996 advisory referendum and had ordered that the ballots contain the disputed language. The plaintiff subsequently filed a response stating she was not seeking a "remedy" for such alleged violations and that she was withdrawing her request for a contempt citation. However, the plaintiff refused to withdraw her accusations. The defendants filed a motion for sanctions on September 25, 1997 based on the plaintiff's failure to withdraw or appropriately correct such accusations.

On October 7, 1997, a pretrial conference was held to establish discovery and other deadlines. During that conference, counsel for both parties agreed to the deadlines established and a trial date of January 5, 1998.

On October 28, 1997, the defendants filed a motion for summary judgment as to the plaintiff's claim that the City's at-large plan violated Section 2 of the Voting Rights Act. The plaintiff failed to file a response to that motion, which was due on November 10, 1997. Two days after the deadline for filing a response, plaintiff's counsel telephoned counsel for the defendants to indicate his intention to file a motion for dismissal without prejudice. Defendants' counsel responded that the defendants would agree to a dismissal of the suit, but not a dismissal without prejudice. In reliance on that notification that dismissal would be sought, the defendants informed the plaintiff by letter that they intended to cease preparations for trial. A motion for voluntary dismissal was filed two weeks later. The defendants represented at the hearing that both sides agreed that the case should be dismissed and the issue submitted to the Court was whether the dismissal should be with or without prejudice. The plaintiff did not question this representation.

Standard of Review/Governing Law

Federal Rule of Civil Procedure 41(a)(2) requires a plaintiff to obtain the permission of the Court before a case is voluntarily dismissed once the adverse party has responded. The decision to grant or deny a voluntary dismissal is "addressed to the sound discretion of the district court." Moore's ¶ 41.40[2], at 41-128. It is well-established that, under appropriate circumstances, a district court has the discretion to require as a condition of granting such a motion that the dismissal be with prejudice. See, e.g., Doyle v. Murray, 938 F.2d 33, 34 (4th Cir.

1991) ("As an initial matter, we note that '[t]he authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot be seriously doubted.") (citations omitted); S.A. Andes v. Versant Corp., 788 F.2d 1033, 1037 (4th Cir. 1986) (Rule 41(a)(2) "at least implicitly, grants a district court power to dismiss with prejudice."); Ratkovich v. Smith Kline, 951 F.2d 155 (7th Cir. 1991) (affirmed dismissal with prejudice). The factors typically considered by a district court in making this decision:

> are essentially the same as those considered in determining whether the dismissal should be permitted at all: (1) the defendant's effort and expense in preparing for trial, (2) the plaintiff's lack of diligence in prosecuting the action, and (3) the sufficiency of plaintiff's explanation in seeking the dismissal. The court may also consider whether the action or claim sought to be voluntarily dismissed is meritorious.

Moore's ¶ 41.40[10][d], at 41-165 to -166; Doyle, 938 F.2d 34 ("A court must balance: (1) the degree of personal responsibility of the plaintiff, (2) the amount of prejudice caused the defendant, (3) the existence of a 'drawn out history of deliberately proceeding in a dilatory fashion,' and (4) the existence of sanctions less drastic than dismissal.") (citations omitted).

Analysis

A. Failure to Prosecute and Sufficiency of Plaintiff's Explanation

The reason asserted by plaintiff justifying the need for a dismissal is that it was not possible for plaintiff's counsel to prepare properly for trial in light of the discovery and other pretrial deadlines. However, there are several reasons why this is not a valid justification. First, plaintiff's counsel agreed to the schedule and did not voice any problems until the deadlines approached.

Second, plaintiff has not conducted any discovery.[1] Plaintiff has not designated any expert witnesses within the time limit. Further, plaintiff failed to respond to defendants' motion for summary judgment. Finally, defendants allege that the plaintiff did not fully respond to their interrogatories or supplement their responses as promised.[2] Counsel's explanation that he did not prepare for trial in reliance on defendants' assertions that they would stop preparing as of November 12, 1997 is not viable in light of the fact that plaintiff, unlike defendants, had never begun preparations. In fact, the only effort made by plaintiff in pleading form that is visible to the Court is plaintiff's one-half page response to defendants' motion to dismiss[3] and a three page response to defendants' motion for sanctions. In short, during the history of this case, plaintiff has exhibited a total absence of a good faith effort to prepare for trial and the excuse of lack of time to prepare is not sufficient to justify what in essence amounts to a request for a continuance. See Local Rule for the United States District Court for the Eastern District of Virginia 7(F) ("[N]o continuance will be granted other than for good cause . . . .") and Local Rule for the United States District Court for the Eastern District of Virginia 16(B) ("Mere failure on the part of counsel to proceed promptly with the normal processes of discovery shall not constitute good cause for an extension or continuance.")

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[1]The plaintiff has not submitted any interrogatories to the defendants. The plaintiff has not requested the production of any documents. The plaintiff has not noticed or taken any depositions.

[2]The plaintiff answered defendants' interrogatories with assertions that plaintiff was currently investigating facts supporting her allegations and she would provide supplemental responses when facts and documents were obtained. The defendants allege that the plaintiff failed to supplement those responses as requested.

[3]The short answer to the motion to dismiss was filed after plaintiff procured a week extension. The extension was needed because the response to the motion to dismiss was due during the week of plaintiff's counsel's scheduled vacation.

B. Merits of Plaintiff's Claim

It is unlikely that plaintiff could prevail on the merits of her claim. A vote dilution challenge to an at-large system cannot proceed unless the plaintiff first establishes three preconditions. See Thornburg v. Gingles, 478 U.S. 30 (1986). At issue here is the first precondition which requires a showing that the minority population in a locality is sufficiently large and geographically compact to constitute a majority in a single-member district. See id. at 50. The burden of proving the first Gingles precondition rests "squarely on the plaintiff's shoulders." Voinovich v. Quilter, 507 U.S. 146, 155 (1993); see also McGhee v. Granville County, 860 F.2d 110, 117 (4th Cir. 1988) (holding that plaintiffs cannot "'pass the summary judgment threshold'" unless they establish all three Gingles preconditions) (citations omitted).

To meet the first requirement, the plaintiff must demonstrate that, within an overall election plan having not more than eleven equally populated districts, it is possible to create one reasonably compact single-member district in which her minority group will constitute at least a majority of the voting age population. If it cannot be shown that the minority is of substantial size or is insufficiently compact, but instead the "'minority voters' residences are substantially integrated throughout the jurisdiction, the at-large district cannot be blamed for the defeat of minority-supported candidates.'" Gingles, 478 U.S. at 50-51 n. 17 (quotation omitted).

Since Gingles, the courts have developed criteria to determine whether a plaintiff has met this first precondition. Specifically, the case law has defined: 1) what constitutes the "minority" population; 2) what constitutes a "majority" in a district; 3) what population deviation is permitted among districts; 4) what number of districts may be considered in fashioning a plan;

and 5) what the compactness requirement entails. The plaintiff is unlikely to prevail based on any of these criteria.

i. Minority population

For purposes of meeting the first Gingles precondition, Circuit courts differ concerning which minority groups can be considered in determining whether a properly compact single-member district can be established. Some circuits hold that different minority groups may not be joined together and treated as a single group under Section 2. See Nixon v. Kent County, 76 F.3d 1381, 1392 (6th Cir. 1996) (en banc). Other circuits hold that if minority groups are combined, it at least must be established that various minority groups vote in a politically cohesive manner. See League of United Latin American Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 863-64 (5th Cir. 1993) (en banc), cert. denied, 510 U.S. 1071 (1994). Even under the higher standard of allowing consolidation and even when all minority populations in the Virginia Beach area are considered together, it is virtually impossible to draw a district in which minorities would constitute a majority in a single-member district, as exemplified by the NAACP plans submitted to the City.[4] Further, the map the defendants provided, which designates where minority populations are located, clearly shows that it is virtually impossible to draw such a district. See Defendant's Motion for Summary Judgment, Exhibits D-H.

ii. Majority Population

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[4]The plaintiff has not submitted any plan suggesting how a district could be drawn that has a minority population which constitutes the majority of the voting age population. Therefore, the Court relies upon the NAACP's plans which were submitted to the City and are the most supportive of the plaintiff's allegations.

The Gingles precondition also requires that a plaintiff prove that the minority group can constitute at least a majority, i.e. more than 50%, in a single-member district.[5] Further, courts have consistently ruled that the minority population must constitute a majority of the voting age population, rather than merely a majority of the total population. See, e.g. McDaniels v. Mehfoud, 702 F. Supp. 588, 592 (E.D. Va. 1989). In this case, even if one is considering the total minority population, it is not feasible to create a single-member district in which all non-White residents constitute at least a 50% majority, as seen by the NAACP plan.

iii. One Person, One Vote

The Equal Protection Clause of the Fourteenth Amendment requires that election districts in a reapportionment plan be "'of nearly equal population, so that each person's vote may be given equal weight in the election of representatives.'" Voinovich, 507 U.S. at 160-61; Avery v. Midland County, 390 U.S. 474, 479 (1968) (applying equal representation requirement to localities). A total deviation of greater than 10 percent presumptively violates the Equal Protection Clause. See Brown v. Thomson, 462 U.S. 835, 842-43 (1983). This same rule applies equally to this inquiry as a plaintiff must show that a minority representation district can be drawn "in a manner that complies 'with the overriding demands of the Equal Protection Clause.'" Gause v. Brunswick County, 92 F.3d 1178, *4 (4th Cir. 1996) (unpublished disposition) (quoting Sanchez v. Colorado, 861 F. Supp. 1516, 1523 (D. Colo. 1994)). In this

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[5]Some courts have even ruled that minorities must have at least a 65% majority in the electoral district in order to have a reasonable assurance of being able to elect a candidate of their choice. See, e.g., United Jewish Organization v. Carey, 430 U.S. 144, 164 (1977) (plurality opinion); African American Voting Rights Legal Defense Fund v. Villa, 54 F.3d 1345, 1347 n. 4 (8th Cir. 1995); Ketchum v. Bryne, 740 F.2d 1398, 1416 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985).

case, even when the maximum deviation is utilized, it is not feasible to create a district in which the minority population constitutes a majority, again based on the NAACP suggestions. Despite a 8.3% deviation, the 11-district plan has a combined voting age population of only 43.3%. The 13-district plans' deviation is worse with little better result.

iv. Number of single-member districts

A critical variable in determining whether there is a sufficiently large minority population is the number of districts to be included within the election plan. However, the first Gingles precondition cannot be established by proposing a single-member district plan that would increase the existing size of the locality's governing body. See Holder v. Hall, 512 U.S. 874, 878-79 (1994); Concerned Citizens for Equality v. McDonald, 63 F.3d 413, 416 (5th Cir. 1995) (relying on Holder to conclude that "when the existing size of the governmental body precludes a plaintiff from satisfying the first prong of Gingles, that plaintiff may not invoke hypothetical mutations and transfigurations of the existing political structure to circumvent that Gingles prerequisite. Such a use of hypotheticals would nullify the first prong . . . ."); Reed, 914 F. Supp. at 865-67 (holding that plaintiffs cannot insist that the size of the Town Board be increased beyond its current size if necessary to satisfy the first Gingles precondition). Here, there is at best an 11-district system.[6] Yet, even when the City considers an expansion to 13 districts, it would still not be possible to create the required minority district, based on the NAACP plan.

[6]There is a contention that in actuality only ten districts are at issue because the Mayor, a member of the City Council, needs to be elected City-wide, and therefore, should not count within the mix.

v. Geographic compactness

A final requirement is that the minority district be "geographically compact," the same that is required by the Virginia Constitution. See Va. Const. Art. VII, § 5. As applied by the Supreme Court, the concept of compactness requires more than a showing that land areas are physically contiguous. First, the districts cannot be drawn with "bizarre" or "dramatically irregular" shape. See Shaw v. Reno, 509 U.S. 630, 635, 644, 655-56 (1993); see also Cane v. Worcester County, Maryland, 35 F.3d 921, 927 (4th Cir. 1994) (noting the applicability of Shaw to the first Gingles precondition), cert. denied, 513 U.S. 1148 (1995). Second, although race can be considered, it cannot be the "predominate factor" and may not be substituted for "traditional race-neutral districting principles including, but not limited to, compactness, contiguity, respect for political subdivisions or communities defined by actual shared interest." Miller v. Johnson, 515 U.S. 900, 916 (1995) (emphasis added).

Regardless of which of the two NAACP plans are chosen, those plans would not meet the reasonable compactness requirement. The NAACP minority districts stretch nearly all the way across the City and are only a block wide in places. Further, part of the 11-district plan comes to a single point, thereby straining the contiguity requirement.

C. Prejudice to Defendants

In considering a motion for voluntary dismissal, "Rule 41(a)(2) . . . permits the district court to impose conditions on voluntary dismissal to obviate the prejudice to the defendants which may otherwise result from dismissal without prejudice. In considering a motion for voluntary dismissal, the district court must focus primarily on protecting the interest of the defendant." Davis v. USX Corp., 819 F.2d 1270, 1273 (4th Cir. 1987) (citations omitted). A

dismissal may be denied when it is sought late in the litigation and the defendant has been put to great effort and expense in defending the action. See Moore's ¶ 41.40[7][a], at 41-144.

In this case, the defendants will incur substantial prejudice if this case is dismissed without barring a new action. First, the plaintiff at the December 22 hearing voiced her intention to refile the case within 30 to 180 days and add a new claim. Elections of the new City Council are scheduled for May 1998 and candidates will begin filing their qualifying petitions in January 1998. If this litigation is refiled any time between now and June 1998, the City Council elections will potentially be affected by that pending litigation. Second, the City of Virginia Beach has spent substantial time and money in timely preparing for trial. Substantial portions of that effort will have no value in any subsequent suit; for example, defendants were forced to research and submit a motion to dismiss plaintiff's claims accusing the City Council of criminal and contemptuous conduct only to be told that the plaintiff will not seek any remedy for such claims. Even assuming all portions of the defendants work will be reusable in any subsequent litigation, it may have to be revised and redone to accommodate any new allegations of the plaintiff. For both these reasons, there is substantial prejudice to the defendants.

D. Conclusion

The only factor potentially weighing in favor of the plaintiff is plaintiff's counsel's assertions that the plaintiff had no personal responsibility for any of her counsel's actions.[7] Weighing against the plaintiff is the considerable prejudice to the defendants, the weak merits of the plaintiff's case and plaintiff's counsel's failure to prosecute this case or provide adequate

[7]In fact, the plaintiff wrote the Court a letter asserting that she had no knowledge of her counsel's request to voluntarily dismiss until after such a motion was filed.

explanations for the need for additional time. For those reasons, plaintiff's motion for voluntary dismissal without prejudice is **DENIED** and the case is **DISMISSED WITH PREJUDICE.**

The defendants' motion for sanctions is taken **UNDER ADVISEMENT** to provide counsel for both parties time to file supplemental motions and supporting documents requesting sanctions and specifically addressing what costs should be born by the plaintiff if the motion for sanctions is granted. Defendants supplemental motion and brief is due to the Court 21 days after the date of the December 22, 1997 hearing. Plaintiff's supplemental response is due to the Court 21 days after receipt of defendants' supplemental motion.

The Clerk is **REQUESTED** to send copies of this order to all counsel of record.

It is so **ORDERED.**

Henry Coke Morgan, Jr.
United States District Judge

Norfolk, Virginia
December 29, 1997