Sacramento Citizens Advisory Redistricting Committee

Session 1 - April 25, 2011

City of Sacramento 2011 Redistricting

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Related Redistricting Processes

California Citizens Redistricting Commission:

- Proposition 11 (2008) established the Commission for the purposes of drawing Assembly, State Senate, and Board of Equalization.
- Proposition 20 (2010) extended the Commission's role to redraw U.S. congressional districts.
- Composed of 14 members (5 democrats, 5 republicans, 4 decline-to-state / other)
- The Commission will hold 18 input hearings throughout the State, and 10 Commission hearings. All boundaries must be completed by August 15.
- The CCRC must draw lines concerning the 37,253,956 people in California, including:
    - o 80 State Assembly seats
    - o 40 State Senate seats
    - o 53 congress seats
    - o State Board of Equalization has 4 seats

Sacramento County Districts:

- The staff of the County Registrar will be drafting the boundaries for Board of Supervisors, SMUD Wards, school district trustee areas.
- The staff will hold community meetings.
- The staff will present the draft maps to the Board of Supervisors for Board approval.
- The deadline for the County actions is August 15.

Redistricting and Reapportionment:

Reapportionment: The United States Constitution directs Congress to count the total population in a federal census every ten years to determine representation in Congress. The 435 Congressional seats are then reallocated based on states' populations. Equal population is the benchmark for Congressional districts. California is the most populous state and has 53 representatives in the United States House of Representatives.

Redistricting: States and communities must also realign political district boundaries with equal population and comply with the Voting Rights Act. Each elected official should represent approximately the same number of people, maintaining the principal of "one person, one vote".

Redistricting Criteria - Overview

The Council's redistricting process is governed by three fundamental authorities:

    (1) The Sacramento City Charter, specifically sections 22 through 25;
    (2) The California Elections Code; and
    (3) Federal constitutional and statutory requirements, mainly the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and the federal Voting Rights Act (42 U.S.C. § 1973), as interpreted by case law.

City Charter – Article III

- Council districts shall be as nearly equal in population as required under the Federal and State Constitutions
- Topography & Geography,
- Cohesiveness,
- Continuity,
- Integrity and compactness of territory,
- Community of interests of the districts,
- Existing neighborhoods and community boundaries

Voting Rights Act {to be discussed in Session 4}

The federal Voting Rights Act is intended to protect the voting power of certain classes: ethnic/racial/language minority groups. This will be the discussion in a future meeting.

Other Commonly Used Criteria

- Stability – preserve existing lines to the extent possible
- Other jurisdictional and election precinct boundaries
- Political incumbency

Future Potential Growth Areas – courts ruled use only accurate counts – not guesses

Sacramento City Charter
Article III – City Council {excerpts}

§ 20 Powers.

All powers of the city shall be vested in the city council except as otherwise provided in this Charter.

§ 21 Composition.

The legislative body or the city shall be a city council of nine members, consisting of the mayor and eight other members. Each council member other than the mayor shall be nominated and elected by the electors of the district in which such person resides as provided in Article X.

§ 22 Districts.

The city is hereby divided into eight council districts, designed First through Eighth Districts, respectively. Council districts in existence upon the effective date of this Charter shall continue to exist until altered as provided in Section 24. The Title of the office of each member of the council other than the mayor shall bear the number accorded the district of such member.

§ 23 District standards.

Council districts shall be as nearly equal in population as required under the Federal and State Constitutions. In establishing or changing the boundaries of districts, consideration shall be given to the following factors: topography, geography, cohesiveness, continuity, integrity and compactness of territory, community of interests of the districts, existing neighborhoods and community boundaries.

§ 24 Reapportionment of districts.

(a)   Within six months after a regular United States census, the city council shall examine the boundaries of each council district for compliance with the population standard set forth in Section 23 and by ordinance shall modify the boundaries of districts, if necessary, to bring all district boundaries into compliance with said standard. The term a "regular United States census" shall mean a comprehensive population census which is held at regular intervals prescribed by Congress and produces population data equivalent to that described as "Block Data" in the 1970 decennial census.

(b)   For purposes of this section the six-month period shall begin upon the availability or population data equivalent to that described as "Block Data" in the 1970 census.

§ 25 Redistricting.

District boundaries may be changed by ordinance, provided that any such revised district boundaries shall comply with the population standard set forth in Section 23 except that territory annexed or consolidated with the city shall at the time of such annexation or consolidation be added by ordinance to an adjacent district or districts pending the examination of district boundaries as provided in Paragraph (a) of Section 24.

§ 26 Terms of office.

Each member of the city council other than the mayor shall serve for a term of four years and until a successor qualifies.

§ 27 Qualifications of members.

Each member of the council or candidate therefore, other than for the office of mayor, at the date of candidacy and election or appointment, shall be an elector and a resident in such member's district for not less than 30 days preceding the date of candidacy and election or appointment, as the case may be, and must continue to reside in such district during the term of office, except that no boundary change under Section 24 or 25 shall disqualify a member from serving the remainder of the term. The term "elector" means a person who qualifies to vote at either a state election or federal election held in the State of California. "Date of candidacy" shall mean the date of filing nominating papers or equivalent declaration or candidacy.

url: http://www.qcode.us/codes/sacramento/view.php?topic=city_of_sacramento_charter&frames=on

Redistricting Criteria – Discussion & Common Definitions

Equipopulous: Council districts shall be as nearly equal in population as required under the Federal and State Constitutions. The districts should be configured so that they are relatively equal in the total population according to the 2010 federal census.

The "one person, one vote" requirement is that election districts should be nearly equal in their total populations. The definition of "nearly equal" varies by type of jurisdiction. The population of an area is defined by the latest U.S. Census count. Note that children, as well as non-citizens, including undocumented individuals, are to be counted as part of the total population, as long as they were counted in the decennial Census.

For local jurisdictions (i.e. the City), relatively minor deviations from mathematical equality are constitutionally permissible as long as there is substantial equality in population between districts. *As a rule of thumb, under no circumstance should the total deviation between the largest and the smallest district exceed ten percent*.

The term "*ideal population*" means total population divided by number of districts. The term *deviation* (over/under) is population above or below the ideal population. *Absolute deviation* is the number over/under; *relative deviation* is the percentage over/under. *Total Deviation* (*range or divergence*) is the sum of the maximum percentage over and maximum percentage under.

For the U.S. congress, strive for strict population equality; no difference is too small if it could have reasonably been avoided. For local and legislative cases: Total deviation below 10% may not constitute prima facie equal protection violation; above 10% needs strong affirmative defense. However, in Larios v. Cox (2004) the court concluded that even +5% is not a safe harbor. (For example +1% and -9% still totals 10%, but one district was more than 5% over/under). The more deviation, the more potential lawsuit challenge.

Topography & Geography: Council districts should follow – to the extent practical - natural topographic & geographic features – especially insofar as these features define a community and/or restrict access between communities. Examples in Sacramento might include: American River, major drainage (e.g., NEMDC), railways and freeways with limited permeability (i.e., limited crossings). In other areas of California, valleys and ridges more clearly define communities, but Sacramento's low relief renders the topographic criteria less pertinent.

Cohesiveness: Generally refers to geographically and culturally cohesive neighborhoods.

Continuity: The City's Charter uses the term "continuity"; however the redistricting term of art is "contiguity". All districts should be fully contiguous, including districts that span water, but are joined by bridges or ferry routes. Contiguity refers to the appearance of a district and is simple to evaluate. A district is contiguous if all of the lines that create it are connected. A district consisting of two or more unconnected areas is not contiguous. Of course, the degree to which all districts in a particular map are contiguous can be limited by natural boundaries.
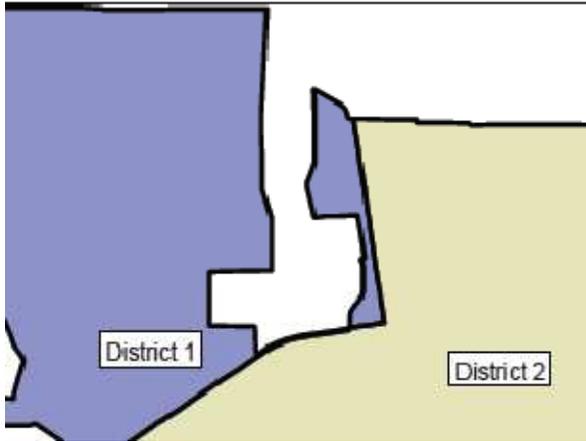
Example of a potential non-contiguous boundary created by preserving Valley View Acres as part of District 1 while the Panhandle is not yet part of the City.
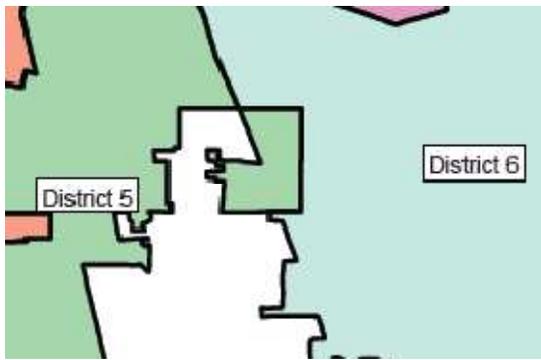
Example of a potential point-contiguous boundary created by the irregular geography of the Fruitridge-Florin Pocket (this would not be unacceptable).
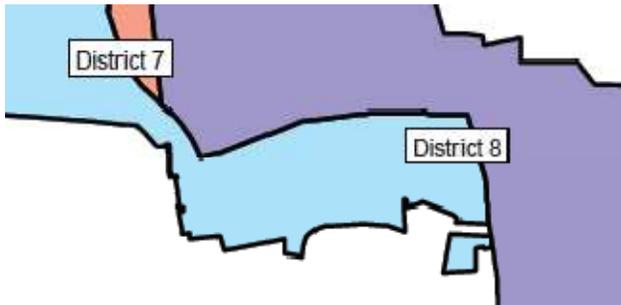
Example of a potential non-contiguous boundary created by the irregular geography of the Valley Hi / North Laguna area.

Compactness

The Report and Recommendations of Special Masters on Reapportionment (1992) defined geographic compactness as a functional relationship – rather than a geometric shape. "A district would not be sufficiently compact if it was so spread out that there was no sense of community, that is, if its members and its representatives could not effectively and efficiently stay in touch with each other; or if it was so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived in the district. Because compactness is a functional concept, the

number and kinds of factors a court should consider may vary with each case, depending on the local geographical, political, and socio-economic characteristics of the jurisdiction being sued."

Compactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. Further, it speaks to relationships that are facilitated by shared interests and by membership in a political community, including a county or city. (Wilson v Eu (1992) 1Cal. 4th 707,719)

One of the "traditional" redistricting principles, low compactness is considered to be a sign of potential gerrymandering by courts, state law and the academic literature. Compactness is a matter of mathematical and philosophical debate. Geographers, mathematicians and political scientists have devised countless measures of compactness, each representing a different conception.

References for Compactness:

> Redistricting the Nation: http://www.redistrictingthenation.com/whatis-compactness.aspx
>
> Barabas & Jerit, "Redistricting Principles and Racial Representation," State and Politics Quarterly¸4 (4), 2004, pp. 415-435.
>
> Altman, "Is Automation the Answer? - The Computational Complexity of Automated Redistricting," Rutgers Computer and Technology Law Journal 23 (1), pp. 81-142, 1997.
>
> National Conference of State Legislatures: http://www.ncsl.org/documents/redistricting/Compactness-March-2010Hofeller.pdf

How is compactness measured?

Compactness also refers to the appearance of a district. Measuring compactness is more complex than continuity because there is no one particular method for measuring compactness. In some cases, the appearance and function of a district may be the appropriate measure of compactness. If an appearance and function analysis is used, those drawing the lines will consider the overall shape of the district, looking to see how tightly drawn the lines are and how smooth the edges are. If the districts drawn are too irregular-looking, it may become a signal to the courts that the lines may have been motivated by a desire to engage in race-based redistricting, which may be held unlawful.

In other cases, a mathematical formula may be the best way to measure compactness. There are various methods for calculating the compactness of a district including looking at how the population is distributed within the district, measuring the borders of the district, or evaluating the area of the district.

Because each measure of compactness captures a slightly different geometric or geographical phenomenon, it is a somewhat arbitrary choice to select a particular compactness metric as the means of accepting or rejecting a single district boundary.

A number of scholars have suggested that compactness measures are best used not as absolute standards against which a single district's shape is judged, but rather as a way to assess the relative merits of various proposed plans. Above all, compactness is most meaningful within the framework of

an institutional redistricting process. Clearly, other important components of the redistricting process, such as aggregation of "communities of interest" are not necessarily well served by examining only compactness.

Compactness can be measured by quantifying the geometric shape of a district relative to a perfectly compact shape (e.g., a circle). Various measurements use simple length and width ratios, or sum the perimeters of all the districts included in a plan, or the extent to which the shape of a district is spread out from its center and those that measure how smooth or contorted the boundaries.

In the City's Redistricting Software, the compactness tests are turned off in the "citizen" role but can be performed by software administrators. The tests are as follows:

- **Polygon Area Test** compares the areas of each district.
- **Reock Test** calculates the ratio of district area to the smallest circle containing the district.
- **Area / Convex Hull Test** determines the ratio of the district population to the population of the minimum enclosing circle for the district.
- **Grofman Test** calculates the district perimeter divided by the square root multiplied by area.
- **Schwartzberg Test** compares the district perimeter to the perimeter of a circle of an equal area to that district.
- **Polsby Popper Test** calculates compactness as 4 times Pi multiplied by the area and divided by the perimeter squared.

Legal Tests of Compactness:
Thornburg v. Gingles (1986) (N.C.) used a compactness test to test violations of Voting Rights Act – § 2.
Section 2 – Gingles Test
- A test to determine the need to create a majority-minority district
- [the minority population must be] "sufficiently large and geographically compact to constitute a MAJORITY in a single-member district"
  - Politically cohesive
  - Racial block voting must be present
  - Additional tests (totality of circumstances)

Shaw v. Reno (North Carolina)
- 1993 Racial Malcompactness Case
- Justice O'Connor's description of the 12th Congressional District as "bizarre"
- Also "we believe that reapportionment is one area in which appearances do matter"
- "One need not use Justice Stewart's classic definition of obscenity – 'I know it when I see it' – as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation"

Miller v. Johnson (1995) (Georgia)
- Presence of malcompactness NOT necessary to find racial gerrymandering (Kennedy, J.)

Bush v. Vera (1996) (Texas)
- "Constitution does not mandate regularity of district shape" [see Shaw I]

Summary of Compactness: More often than not, compactness is defined by the "I know it when I see it" standard. Staff recommends that the Committee not adopt a rigorous test or specific algorithm as the sole means of evaluating compactness.

Community of Interests

In seeking to preserve communities of interest, district line drawers should be careful not to divide populations or communities that have common "needs and interests" reflected in patterns of geography, social interaction, trade, political ties, and common interests. Communities of interest can be identified by referring to the census, demographic studies, surveys or testimony of community activists and civic leaders. A community of interest must be geographically definable and contiguous.

State Definitions (excerpted from Justin Levitt and the Brennan Center for Justice report)

- Kansas: "Social, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation . . . should be considered"
- Alabama: "including but not limited to racial, ethnic, geographic, governmental, regional, social, cultural, partisan, or historic interests; county, municipal, or voting precinct boundaries; and commonality of communications"
- Colorado: "Communities of interest, including ethnic, cultural, economic, trade area, geographic, and demographic factors"
- Montana: "trade areas, geographic location, communication and transportation networks, media markets, Indian reservations, urban and rural interests, social, cultural and economic interests, or occupations and lifestyles"
- California (2008, Proposition 11): "a contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation."

In reviewing the various references that discuss community of interest, the following are some commonly used examples of potential shared social and economic characteristics:
- Urban and rural interests
- Income levels
- Educational backgrounds
- age demographics, household size / family size
- group quarters , housing owners vs. renters
- Housing patterns and living conditions (urban, suburban, rural)
- Cultural, religious, and language characteristics
- Employment and economic patterns (How are community residents employed? What is the economic base of the community?)
- Health and environmental conditions
- Policy issues (concerns about crime, education, etc.)
- Social interests
- Communication and transportation networks
- Transportation hubs / centers
- Work opportunities
- Redevelopment areas
- School districts / attendance areas
- Community centers
- Parks / dog parks
- Media markets
- Occupations and lifestyles

Existing Neighborhoods and Community Boundaries as Redistricting Criteria

Defining the concept of neighborhood has been the subject of interest among scholars, urban planners, sociologists and geographers. Definitions can vary based on the types and functions of neighborhoods (Martin, 2002). Neighborhood refers to a place within the larger city where people reside, work, or recreate. In other words, neighborhoods are sites of daily life and social interaction (Martin, 2003). While administrative agencies can set fixed boundaries, individual perception of where their neighborhood begins and ends may likewise shrink or expand depending on context, personal experience and other factors including their socio-economic status, educational attainment and whether they are recent immigrants or not.

Neighborhoods are always subject to redefinition depending on utility, stage of change, function and at times, sometimes even upon the perspective and agenda of the researcher. Nonetheless, there is some agreement that generally, neighborhood is a place that contains residences and is the site of social interaction. (*The Asian Americans Redistricting Project: Legal Background of the "Community of Common Interest" Requirement, UCLA Asian American Studies Center July 2009*)
Neighborhoods are also used by other jurisdictions as a redistricting criterion:
- The State Citizens Redistricting Commission uses the following criteria from Proposition 11 (2008): *Maintain the geographic integrity of any city, county, neighborhood, and "community of interest" in a single district*.
- The City of San Jose's 2001 Redistricting Criteria included: "*Maintain cohesive neighborhoods within Districts and, where possible, keep neighborhood associations within a single District*."

The City Council in past redistricting efforts has utilized neighborhood boundaries as an important consideration in drawing district boundaries. The City's neighborhoods are discussed in greater detail in a subsequent primer (Session 3).

Other Commonly Used Redistricting Criteria

There are other criteria that are neither mandated nor recognized by the Charter, but which may be legitimate interests.

Stability
A permissive criterion is to respect the existing boundaries – to the extent possible – in order to minimize the number of residents who are redrawn into redistricted lines.

Other Jurisdictional and Election Precinct Boundaries
The County Registrar has requested that – to the extent possible – the Council district boundaries consider other boundaries of elected districts. First, these other districts may be viewed as "community of interests". Second, since a precinct often represents a unique intersection of districts (like a Venn Diagram), if "splinter precincts" of less than about 500 residents is created, it is not cost effective to set up a polling place and residents may be required to vote by mail.

<u>Political Incumbency</u>

The City's Charter does not preclude the use of political incumbency as a criterion. Various jurisdictions consider political incumbency differently.

- The State Citizens Redistricting Commission uses the following criteria from Section 2-e of Article XXI of the California Constitution: *The place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party*
- The City of San Jose's 2001 Redistricting Criteria included: *"Avoid unseating current City Council members."*

Future Potential Growth Areas – courts ruled use only accurate counts – not guesses

Prior to the next decennial redistricting process in 2021, the City anticipates greater population increases in new growth areas (e.g., North Natomas, Robla, Delta Shores). In addition, the City anticipates (uninhabited) annexation requests (Greenbriar, Panhandle, Camino Norte) that may substantially increase future population in North Natomas. Because the timing, exact boundaries and populations of these potential growth areas and annexations are not known at this time, the redistricting map can only delineate the City limits as they exist today.

A local government may, in some instances, consider anticipated growth when creating a district. The Supreme Court stated in *Kirkpatrick v. Preisler*:

> "We recognize that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections. Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner." [*Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969); see also *Karcher v. Daggett*, *supra*, 462 U.S. at 741; *Exon v. Tiemann*, 279 F. Supp. 603 (D. Neb. 1967)].

So it possible to give consideration to population shifts and growth. The issue becomes a matter of justification based upon reliable, highly accurate evidence.

Other Redistricting Guides:

The City's website links to the following redistricting guides.

- [A Citizen's Guide to Redistricting](), Brennan Center of Justice at New York University School of Law

- [The Impact of Redistricting in Your Community](), NAACP Legal Defense Fund

- [California's New Redistricting Commission](), Common Cause, January 2011

THE NUMBERS FROM THE U.S. CENSUS

For the 2000 Census, there was a short form (age, sex, ethnicity, rent vs. ownership) and a long form (sampled 1/6 of households) which included income, education, language, citizenship, commute length, etc. For the first time, respondents could check multiple boxes for multi-racial composition.

For the 2010 Decennial Census, only the short form was used. Sample data is now collected through the American Community Survey. The short form data (PL94-171) is the block-level Census data set to be used for redistricting which was provided to the City on March 8, 2011.

There are 5 tables of data available from the 7 questions on the form.

- Occupancy Status (Rental vs. Ownership)
- Race Population (White, African American, American Indian /Alaska Native, Asian, Hawaiian, Pacific Islander, Other)
- Hispanic/Latino Ethnicity
- Race for Population 18 and Over
- Hispanic/Latino Ethnicity for 18 and Over

The American Community Survey (ACS) is an ongoing statistical survey by the U.S. Census Bureau, sent to approximately 250,000 addresses monthly (or 3 million per year). It regularly gathers information previously contained only in the long form of the decennial census. It is the largest survey other than the decennial census that the Census Bureau administers. The data includes fertility, educational status, caregiving, disability status, housing characteristics, commute patterns. This data does not directly relate to redistricting or community of interest. The reporting units for data are for census block group-level population of at least 65,000 people – not applicable to the block level.

While the American Community Survey (ACS) data has replaced the decennial long form, there is a substantially smaller sample size. In each year of samples in Sacramento County, approximately 1% - 1.3% of households are sampled. The samples are 'rolled up' to report data at varying geographies based on population. 1-year ACS is available for geographies of 65,000 or more, 3-year ACS averages are available for geographies of 20,000 or more, and 5-year ACS averages are available for all geographies down to the block group level (the first 5-year ACS average covering 2005-2009 was released in December 2010). An important note, however, is that the 5-year ACS data available at block group level is spotty and not easily available when it does exist; it requires a special download - the Census won't report data that doesn't meet certain levels of accuracy and the margins of error associated with such small sample sizes are large. Census tract level data is much more readily available, and while some of the margins of error associated with this data can also be rather large, they are much more reliable than the block group level data. The ACS data does not directly relate to redistricting or community of interest.

Census: The Residence Rule

The following materials are excerpted from: PL94-171: Appendix G. Residence Rule and Residence Situations for the 2010 Census of the United States.

Planners of the first U.S. decennial census in 1790 established the concept of "usual residence" as the main principle in determining where people were to be counted. This concept has been followed in all subsequent censuses and is the guiding principle for the 2010 Census. Usual residence is defined as the place where a person lives and sleeps most of the time. This place is not necessarily the same as the person's voting residence or legal residence.

Applying the usual residence concept to real living situations means that people will not always be counted at the place where they happen to be staying on Thursday, April 1, 2010 (Census Day). For example, people who are away from their usual residence while on vacation or on a business trip on Census Day should be counted at their usual residence. People who live at more than one residence during the week, month, or year should be counted at the place where they live most of the time. People without a usual residence, however, should be counted where they are staying on Census Day.

The residence rule is used to determine where people should be counted in the United States during the 2010 Census. The rule says:
- Count people at their usual residence, which is the place where they live and sleep most of the time.
- People in certain types of facilities or shelters (i.e., places where groups of people live together) on Census Day should be counted at the facility or shelter.
- People who do not have a usual residence, or cannot determine a usual residence, should be counted where they are on Census Day.

Census Oddities & Undercounts

PEOPLE WITHOUT A USUAL RESIDENCE
- People who cannot determine a usual residence: Counted where they are staying on Thursday, April 1, 2010 (Census Day).
- People at soup kitchens and regularly scheduled mobile food vans: Counted at the residence where they live and sleep most of the time. If they do not have a place they live and sleep most of the time, they are counted at the soup kitchen or mobile food van location where they are on Thursday, April 1, 2010 (Census Day).
- People at targeted non-sheltered outdoor locations: Counted at the outdoor location where people experiencing homelessness stay without paying.

STUDENTS
- Boarding school students living away from their parental home while attending boarding school below the college level, including Bureau of Indian Affairs boarding schools: Counted at their parental home rather than at the boarding school.
- College students living at their parental home while attending college: Counted at their parental home. College students living away from their parental home while attending college in the

United States (living either on-campus or off-campus)─Counted at the on-campus or off-campus residence where they live and sleep most of the time.

- College students living away from their parental home while attending college in the United States (living either on-campus or off-campus) but staying at their parental home while on break or vacation: Counted at the on-campus or off-campus residence where they live and sleep most of the time.
- U.S. college students living outside the United States while attending college outside the United States─Not counted in the census.
- Foreign students living in the United States while attending college in the United States (living either on-campus or off-campus)─Counted at the on-campus or off-campus residence where they live and sleep most of the time.

PEOPLE IN SHELTERS
- People in emergency and transitional shelters (with sleeping facilities) on Thursday, April 1, 2010 (Census Day) for people experiencing homelessness: Counted at the shelter.
- People in living quarters for victims of natural disasters: Counted at the residence where they live and sleep most of the time. If they do not have a residence where they live and sleep most of the time, they are counted at the facility.
- People in domestic violence shelters on Thursday, April 1, 2010 (Census Day): Counted at the shelter.

Sacramento Citizens Advisory Redistricting Committee

Glossary of Terms

City of Sacramento 2011 Redistricting

Glossary of Terms

Apportionment
Following each census, the 435 seats in the United States House of Representatives are apportioned to each state based on state population. The larger the state population, the more congressional representatives the state will be apportioned. Apportionment, unlike redistricting, does not involve map drawing.

At-large election system
An at-large election system is one in which all voters can vote for all candidates running for open seats in the jurisdiction. In an at-large election system candidates run in an entire jurisdiction rather than from districts or wards within the area. For example, a city with three open city council positions where all candidates for the three seats run against each other and the top three receiving the most votes citywide are elected is an at-large election system. In at-large election systems, 50% of the voters control 100% of the seats. At-large election systems can have discriminatory effects on minorities where minority and majority voters consistently prefer different candidates and the majority will regularly defeat the choices of minority voters because of their numerical superiority.

Census
The United States Census is a population enumeration conducted every 10 years, the results of which areused to allocate Congressional seats, electoral votes and government program funding. As part of the Census, detailed demographic information is collected and aggregated to a number of geographical levels. This data is used during the redistricting process, both by partisan interests and by redistricting authorities and the courts. The next census day is April 1, 2010. The Census Bureau must deliver population data to the President for apportionment by December 2010 and must deliver redistricting data to the states by March 2011.

Census block
The smallest level of census geography used by the Census Bureau to collect census data. Census blocks are formed by streets, roads, bodies of water, other physical features and legal boundaries shown on Census Bureau maps. Redistricting is based on census block level data.

Census tract
A level of census geography larger than a census block or census block group that usually corresponds to neighborhood boundaries and is composed of census blocks.

Community of interest
A community of interest is a neighborhood or community that would benefit from being maintained in a single district because of shared interests, views or characteristics.

Community of Interest
Although the preservation of "communities of interest" is required by many districting laws, the meaning of the term varies from place to place, if it is defined at all. The term can be taken to mean anything from ethnic groups to those with shared economic interests to users of common infrastructure to those in the same media market. The Brennan Center for Justice provides a helpful summary of some of these uses.

Compactness
One of the "traditional" redistricting principles, low compactness is considered to be a sign of potential gerrymandering by courts, state law and the academic literature. More often than not, though, compactness is ill-defined by the "I know it when I see it" standard. Geographers, mathematicians and political scientists have devised countless measures of compactness, each representing a different conception, and some of these have found their way into law. For a more in-depth discussion of the role of compactness in the redistricting process, read Azavea's white paper, "Redrawing the Map on Redistricting 2010: The National Study."

Contiguity
Like compactness, contiguity is considered one of the "traditional" redistricting principles. Most redistricting statutes mandate that districts be contiguous-- that is, they are a single, unbroken shape. Two areas touching at their corners are typically not considered contiguous. An obvious exception would be the inclusion of islands in a coastal district.

Cracking
A form of dilution occurring when districts are drawn so as to divide a geographically compact minority community into two or more districts. If the minority community is politically cohesive and could elect a preferred candidate if placed in one district but, due to cracking, the minority population is divided into two or more districts where it no longer has any electoral control or influence, the voting strength of the minority population is diluted.

Crossover Districts
A crossover district is one in which minorities do not form a numerical majority but still reliably control the outcome of the election with some non-minority voters crossing over to vote with the minority group.

Deviation
The deviation is any amount of population that is less than or greater than the ideal population of a district. The law allows for some deviation in state and local redistricting plans. However, Congressional districts must not deviate too far from the ideal population. See below for definition of "ideal population."

Dispersion
Dispersion-based measures of compactness, such as the Reock and convex hull measures used on this site, evaluate the extent to which a shape's area is spread out from a central point. A circle is very compact, while a barbell is less compact.

Gerrymandering
Gerrymandering is the process by which district boundaries are drawn to confer an electoral advantage on one group over another. The term is a portmanteau word formed from the surname of Massachusetts Governor Elbridge Gerry and the salamander shape of the district he approved, which appeared in an 1812 cartoon. Gerrymandering can take on many forms.

- **Political**
  A political gerrymander is typically conducted by the majority party to strengthen or maintain their electoral advantage. In a 5-4 decision in Vieth v. Jubelirer the Supreme Court rejected a challenge to politically gerrymandered districts due to a lack of justicable standards, meaning that political gerrymandering can be conducted legally.

- **Sweetheart**
A sweetheart or incumbent gerrymander results from an agreement by both major political parties to draw district boundaries to create safe districts for incumbents. See Fig. 2 in "Packing and Cracking" illustration.

- **Racial**
The term racial gerrymandering initially designated the post-Reconstruction practice which, like poll taxes and literacy tests, was designed to disenfranchise African-Americans. Legislative district boundaries were drawn with the aim of diluting the electoral power of newly registered voters from ethnic minority groups.

Following the passage of the Voting Rights Act of 1965, this practice was prohibited; indeed, in many circumstances, the statute in fact requires the creation of majority-minority districts. The practice of drawing districts that would afford racial and ethnic minorities the opportunity for elected representation has come be known as affirmative gerrymandering or—in a somewhat ironic reversal—racial gerrymandering.

Beyond the requirements of the Voting Rights Act, there are legal limits on drawing districts based on race, particularly for smaller populations. A number of recent Supreme Court rulings—such as Miller v. Johnson, Bush v. Vera and Shaw v. Reno—indicate that in cases where race is the sole or predominant factor, or where the shape of a district cannot be explained on grounds other than race, district boundaries must be held to a strict standard of scrutiny. Absent a compelling government reason for the district's shape, it will be viewed as violating the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

This is likely to remain a contentious issue, particularly as the demographic composition of the country continues to shift and multiple ethnic minority groups share physical space and merit elected representation.

- **Prison**
The one person, one vote principle is distorted by the inclusion of large prison populations in the calculations of district population, despite the fact that inmates are rarely constitutents of the areas where they are incarcerated. In districts that include large, disenfranchised prison populations, the ballots of the remaining voters hold a disproportionate amount of weight.

Gingles Factors
The Gingles factors are three preconditions set forth by the U.S. Supreme Court in Thornburg v. Gingles, 478 U.S. 30 (1986), that a minority group must prove to establish a violation of Section 2 of the Voting Rights Act. These preconditions are the following: 1) a minority group must be sufficiently large and geographically compact to comprise a majority of the district; 2) the minority group must be politically cohesive (it must demonstrate a pattern of voting for the same candidates); and, 3) white voters vote sufficiently as a bloc usually to defeat the minority group's preferred candidate.

Ideal population
The ideal population is the number of persons required for each district to have equal population. The ideal population for each district is obtained by taking the total population of the jurisdiction and dividing it by the total number of districts in the jurisdiction. For example, if a

county's population is 10,000 and there are five electoral districts, the ideal population for each district is 2,000.

Influence district
An influence district is one that includes a large number of minority voters but fewer than would allow the minority voters to control the election results when voting as a bloc. Minority voters are sufficient in number in "influence districts" to influence the outcome of the election.

Indentation
Perimeter-area based measures of compactness, like the Polsby-Popper and Schwartzberg measures used on this site, primarily evaluate the indentation of district boundaries. Shapes with a smooth perimeter are more compact, while those with a contorted, squiggly perimeter are less compact.

Minority-coalition district
A minority-coalition district is a type of majority-minority district in which two or more minority groups combine to form a majority in a district. In most jurisdictions, minority-coalition districts are protected under Section 2 of the Voting Rights Act if the requirements set forth in Thornburg v. Gingles are satisfied.

Majority-minority district
A majority-minority district is one in which racial or ethnic minorities comprise a majority (50% plus 1 or more) of the population. A majority-minority district can contain more than one minority group. Thus, a district that is 40% Hispanic and 11% African American is a majority-minority district, but it is not a majority Hispanic district. This is also referred to as a minority coalition district. See definition of minority-coalition district.

Minority opportunity district
A minority opportunity district is one that provides minority voters with an equal opportunity to elect a candidate of their choice regardless of the racial composition of the district.

Minority vote dilution
Minority vote dilution occurs when minority voters are deprived of an equal opportunity to elect a candidate of choice. It is prohibited under the Voting Rights Act of 1965. Examples of minority vote dilution include cracking, packing and the discriminatory effects of at-large election systems.

Multimember district
A district that elects two or more members to office.

Nesting
Nesting is a redistricting policy by which the geographical boundaries of two or more state lower legislative chamber districts are completely contained within the boundaries of a state upper legislative chamber district. This can be achieved either by first designating senate district boundaries and then splitting these into house districts, or by drawing house district boundaries and then consolidating these to form senate districts. Nesting is mandated in full or in part in 12 states.

One-person, one-vote
A constitutional requirement that requires each district to be substantially equal in total population.

Packing
A form of vote dilution prohibited under the Voting Rights Act where a minority group is overconcentrated in a small number of districts. For example, packing can occur when the African American population is concentrated into one district where it makes up 90% of the district, instead of two districts where it could be 50% of each district.

PL 94-171
The federal law that requires the United States Census Bureau to provide states with data for use in redistricting and mandates that states define the census blocks to be used for collecting data.

Political subdivision
A division of a state, such as a county, city or town.

Precinct
An area created by election officials to group voters for assignment to a designated polling place so that an election can be conducted. Precinct boundaries may change several times over the course of a decade.

Preclearance
Preclearance applies to jurisdictions that are covered under Section 5 of the Voting Rights Act. Preclearance refers to the process of seeking review and approval from either the United States Department of Justice or the federal court in the District of Columbia for any voting changes to a Section 5 covered jurisdiction. Redistricting plans in Section 5 covered jurisdictions must also receive preclearance.

Racially polarized voting or racial bloc voting
Racially polarized voting is a pattern of voting along racial lines where voters of the same race support the same candidate who is different from the candidate supported by voters of a different race.

Reapportionment
Reapportionment (referred to as redistribution outside the US) is the process of allocating seats in a legislative body to geographical areas. Reapportionment is particularly important in the case of the U.S. Congress, where the number of seats in the House of Representatives is fixed at 435 and the number of seats allocated to each state is reevaluated following each decennial Census. When the number of seats assigned to a state changes, the state must redistrict.

Redistricting
Redistricting refers to the process by which census data is used to redraw the lines and boundaries of electoral districts within a state to ensure that districts are substantially equal in population. This process affects districts at all levels of government – from local school boards, wards, and city councils to state legislatures and the U.S. House of Representatives.

Retrogression
A voting change to a Section 5 covered jurisdiction that puts minorities in a worse position under the new scheme than under the existing one.

Section 2 (of the Voting Rights Act)
A key provision of the Voting Rights Act that that protects minority voters from practices and procedures that deprive them of an effective vote because of their race, color or membership in a particular language minority group.

Section 5 (of the Voting Rights Act)
A key provision of the Voting Rights Act that prohibits jurisdictions covered by Section 5 from adopting voting changes, including redistricting plans, that worsen the position of minority voters or changes adopted with a discriminatory purpose. See preclearance.

Single-shot voting
Single-shot voting can be described as follows: "Consider a town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting." U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206-207 (1975).

Traditional redistricting principles
Traditional redistricting criteria applied by a state such as compactness, contiguity, respect for political subdivisions, respect for communities of interest, and protection of incumbents.

Undercount
The number of Americans missed in the census.

Voting age population
When evaluating districting plans, analysts may elect to use the voting age population rather than the total population as the basis of comparison to ensure that the principle of one person, one vote is upheld.

Voting Rights Act
The National Voting Rights Act of 1965 was a landmark piece of civil rights legislation that outlawed discriminatory voting practices-- racial gerrymandering among them-- that had been used to disenfranchise African Americans. Crucially, Section 5 of the act requires that jurisdictions with a history of discriminatory practices secure federal preclearance for proposed changes to electoral practices, including the introduction of new district plans. Section 2 prohibits any voting practice or procedure that has a discriminatory result, but in 2009 the Supreme Court ruled that this does not constitute a requirement that authorities draw district lines favorable to minorities when they constitute less than half the population.

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CITY OF SACRAMENTO
CALIFORNIA

January 18, 2011

MEMORANDUM

TO: Mayor and Councilmembers

FROM: Eileen M. Teichert, City Attorney

Matthew D. Ruyak, Supervising Deputy City Attorney MDR

RE: **2011 Redistricting – Legal Principles**
             Matter ID: 10-7141
             Document No.: 156510

ISSUE PRESENTED

What are the rules and requirements that govern Council redistricting?

BRIEF ANSWER

The Council's redistricting process is governed by three fundamental authorities:

(1) The Sacramento City Charter, specifically sections 22 through 25;
(2) The California Elections Code; and
(3) Federal constitutional and statutory requirements, mainly the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and the federal Voting Rights Act (42 U.S.C. § 1973), as interpreted by case law.

The simplified rules for Council redistricting are as follows:

- Council must adopt an ordinance setting district boundaries within six months following the U.S. Census Bureau's release of the population "block data."

- The California Elections Code provides that the City shall hold at least one public hearing on proposals to adjust district boundaries prior to a public hearing at which the council votes to approve or defeat a proposal.

- Each district must be as nearly equal in population as required under the federal and state constitutions. Relatively minor deviations from mathematical equality are constitutionally permissible as long as there is substantial equality in population between districts.

- The City must comply with federal Voting Rights Act requirements; that is, it cannot set boundaries that have the intent or the effect of minority (race, color) vote dilution.

- The City must avoid "racial gerrymandering," which occurs when race is the sole, primary, or predominant basis for redistricting, and there is no constitutionally adequate justification for use of race as a key factor in the redistricting plan.

- Consideration shall be given to the following factors: topography, geography, cohesiveness, continuity integrity and compactness of territory, community of interests of the districts, existing neighborhoods and community boundaries.

DISCUSSION

A.   Introduction

The City's redistricting process is driven by the decennial United States census, which is mandated by the United States Constitution.[1] The City Charter sets a basic requirement for redistricting based upon census data within six months of that data's availability. The Charter requires districts of "nearly equal . . . population," based on enumerated factors. State law contains similar requirements. And the overarching concern is the "one person, one vote" principle of the Equal Protection Clause of the United States Constitution. This is also known as the "equal population" rule. Numerous cases over the years have explained the application of this rule to state and local governments. Additionally, the federal Voting Rights Act adds a layer of complexity: although race may not be the predominant factor in redistricting, boundary decisions cannot have the intent or the effect of minority vote dilution.

This memorandum is intended to provide fundamental concepts; it certainly is not exhaustive of all the nuances developed through case law. Furthermore, it is presented before proposed boundaries are known. Concrete application of these concepts must, therefore, await the proposed boundary plan(s).

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1 U.S. Const., art.I, § 2, cl. 3.

B.   The Sacramento City Charter

The Charter establishes the fundamental parameters for redistricting:

(1) The number of districts shall be eight (8).[2]
(2) The districts "shall be as nearly equal in population" as constitutionally required.[3]
(3) In setting district boundaries, the Council must consider:
      a.   Topography
      b.   Geography
      c.   Cohesiveness
      d.   Continuity
      e.   Integrity and compactness of territory
      f.   Communities of interest
      g.   Existing neighborhoods and community boundaries.[4]
(4) Council must adopt an ordinance to change district boundaries.[5]
(5) The ordinance must be adopted within six (6) months of the availability of specified population data from the U.S. census.[6]
(6) Boundaries, once adopted, can be changed by ordinance so long as the "equal in population" standard is maintained.[7]

C.   State Law

Section 21620 of the California Elections Code addresses reapportionment of charter cities where councilmembers are elected by district, and provides for consideration of virtually the same factors found in Section 23 of the City Charter. Section 21620 also recognizes the obligation to comply with the federal Voting Rights Act during the reapportionment process:

> After the initial establishment of the districts, the districts shall continue to be as nearly equal in population as may be according to the latest federal decennial census, or if authorized by the charter of the city, according to the federal mid-decade census. The districts shall comply with the applicable provisions of the federal Voting Rights Act of 1965, Section 1973 of Title 42 of the United States Code, as amended, in establishing the boundaries of the districts, the council may give consideration to the following factors: (1) topography, (2) geography, (3) cohesiveness, contiguity, integrity and compactness of territory, and (4) community of interests in the districts.[8]

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2   Sacramento City Charter ("SCC"), § 22.

3   SCC, § 23.

4   SCC, § 23.

5   SCC, § 24(a).

6   SCC, § 24(a),(b).

7   SCC, § 25. If boundary adjustment is necessitated by annexation or consolidation, the new territory must be joined to the adjacent district until the next federal census. *Id.*

8   Cal. Elec. Code, § 21620.

156510

The Elections Code further provides that "[t]he governing body [of a charter city] shall hold at least one public hearing on any proposal to adjust the boundaries of a district prior to a public hearing at which the council votes to approve or defeat the proposal."[9]

D.   Federal Law

"It is common ground that state [and local] election-law requirements . . . may be superseded by federal law – for instance, the one-person, one-vote principle of the Equal Protection Clause of the United States Constitution."[10]   The Sacramento City Charter explicitly recognizes this obligation, by mandating Council districts be as nearly equal in population as constitutionally required.

1. Equal Representation

The general rule is that the City must make an honest and good faith effort to reapportion City Council districts so that they are as nearly of equal population as is practicable. While the overall goal should be to establish districts that are strictly equal in terms of their population, some divergences from strict population equality are constitutionally permissible so long as they are based on legitimate considerations that are incidental to the effectuation of a rational state policy.   Legitimate considerations, as identified in state law and the City Charter, include the topography, geography, cohesiveness, continuity, integrity and compactness of territory, community of interests of the districts, existing neighborhoods, and community boundaries.[11]   These considerations are often referred to as "traditional" factors in redistricting. Another factor recognized by the courts is avoidance of contests between incumbents.[12]

Almost 50 years ago the United States Supreme Court established an equal population standard applicable to the configuration of electoral districts. In the seminal case of *Reynolds v. Sims*,[13] the Court addressed the redistricting process in the State of Alabama. Alabama had failed to adjust the boundaries of its electoral districts in 60 years, even though demographic shifts during that period had created a large population imbalance between rural and urban districts.   Finding that "equal representation for equal numbers of people" is a fundamental principle of government, the Court held that the Constitution required electoral districts that are equal in population, and declared the state's

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9   Cal. Elec. Code, § 21620.1. Although the Elections Code facially applies to charter cities, it is debatable whether these mandates violate the City's "home-rule" authority under Article XI, section 5 of the California Constitution. We do not opine on that here. In any case, even without these state law provisions the City must meet federal constitutional requirements and Federal Voting Rights Act requirements, and the City's ordinance-adoption process almost always involves at least two hearings.

10   *Bartlett v. Strickland*, -- U.S. -- , 129 S.Ct. 1231, 1239 (2009)(Kennedy, J., citing *Reynolds v. Sims*, 377 U.S. 533 (1964).)

11   Cal. Elec. Code, § 21620; City Charter, § 23. See also *Swann v. Adams*, 385 U.S. 440, 444 (1967) ["Possible justifications . . . [include] such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines."]

12 See *Karcher v. Daggett*, 462 U.S. 725, 741 (1983).

13   377 U.S. 533 (1964).

districting scheme to be unconstitutional. The rule announced in *Reynolds v. Sims* is generally referred to as the "equal population" or "one person, one vote" rule.

Since *Reynolds v. Sims*, the Court has addressed in a series of cases the rule's applicability to federal reapportionment as well as to state and local reapportionment.   These decisions have resulted in one rule of review applicable in the reapportionment of congressional districts and a second, less stringent rule applicable in the reapportionment of state legislatures and local governments.

The standard for reapportionment of congressional districts is that such districts must be equal in population "as nearly as is practicable," with the phrase "as nearly as is practicable" defined to mean "a good faith effort to achieve precise mathematical equality."[14] Only limited population variances which are unavoidable despite good faith efforts to achieve precise equality are permitted.[15] For example, in *Kirkpatrick v. Preisler*, the Supreme Court invalidated a congressional redistricting plan which had a three percent variation. Over the years, even smaller deviations have been rejected by courts.

A less stringent approach is taken with regard to reapportionment at the state and local levels. For local redistricting plans, some divergence from the equal population rule is constitutionally permissible if the disparity is caused by legitimate considerations incidental to the effectuation of a rational state policy.[16] Relatively minor deviations from mathematical equality in state or local electoral districts are constitutionally permissible as long as there is Asubstantial equality@ in population between districts.[17]

There is no bright line rule regarding the permissible amount of population deviation or divergence[18] for a local districting plan. However, a plan should *not* attempt to quantify the amount of permissible deviation by adopting a mathematical yardstick. In *Calderon v. City of Los Angeles*, the California Supreme Court struck down a provision in the Los Angeles City Charter that expressly permitted a ten percent deviation from mathematical equality:

> "The reasons for eschewing [mathematical] formulae are [clear]. First, it is practically impossible, without being arbitrary, to choose a cutoff point at which population deviations suddenly become de minimis. Second, use of such yardsticks encourages drafters of apportionment plans to employ the 'acceptable' variations as a starting point, instead of striving for equality."[19]

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14 *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).
15 *Id*.
16 *Reynolds v. Sims*, *supra*, 377 U.S. at 579; *Abate v. Mundt*, 403 U.S. 182, 185 (1971).
17 See *Reynolds v. Sims*, *supra*, 377 U.S. at 579; *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Regester*, 412 U.S. 755 (1983); *Calderon v. City of Los Angeles*, 4 Cal.3d 251, 267 (1971).
18 "Divergence" as used in this context means the difference between the district most under-represented and the district most over-represented. For example, a 7.1% under-representation in one district and a 4.8% over-representation in another, resulting in an overall divergence of 11.9%.
19 4 Cal.3d at 270; accord *Kirkpatrick v. Preisler*, *supra*, 394 U.S. at 531 ["We see no nonarbitrary way to pick a cutoff point at which population variances suddenly become de minimis. Moreover, to consider a certain range of variances de minimis would encourage legislators to strive for that range rather than for equality as nearly as practicable."]

Nonetheless, variances have been upheld. In *Mahan v. Howell*,[20] the Virginia Legislature had fashioned a plan providing a total population variance of 16.4% among house districts. The Supreme Court found that the plan met constitutional standards because the deviations were caused by the attempt of the legislature to fulfill the rational state policy of refraining from splitting political subdivisions between house districts In *Gaffney v. Cummings*,[21] the Court permitted a deviation of 7.83% with no showing of invidious discrimination. In *White v. Regester*,[22] a variation of 9.9% was likewise permitted. In *Abate v. Mundt*,[23] the Court upheld the validity of a county reapportionment plan that contained an 11.9% divergence between the population of the largest district and the population of the smallest district. The Court reasoned as follows:

> "[V]iable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs [Citation], and ... a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. [Citation.] . . . [O]ur statements have reflected the view that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality."[24]

Finally, a local government may, in some instances, consider anticipated growth when creating a district. The Supreme Court stated in *Kirkpatrick v. Preisler*:

> "We recognize that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections. Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner."[25]

So it possible to give consideration to population shifts and growth. The issue becomes a matter of justification based upon reliable, highly accurate evidence.

In short, mere deviation from population equality will not necessarily establish a prima facie case of invidious discrimination. However, in an appropriate case, a sufficiently large deviation in the

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20   410 U.S. 315 (1973).
21   412 U.S. 735 (1973).
22   412 U.S. 755 (1973).
23   403 U.S. 182 (1971).
24   *Id*. at p. 185.
25   *Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969); see also *Karcher v. Daggett*, *supra*, 462 U.S. at 741; *Exon v. Tiemann*, 279 F. Supp. 603 (D. Neb. 1967).

population in districts may establish a prima facie case of discrimination that a local jurisdiction must justify by legitimate state considerations.[26]

As it engages in the reapportionment process, the Council should follow the "equal population" rule, and should have as its goal the establishment of districts that are equal in terms of population. As appropriate, when deviations from strict population equality occur, the reasons for such deviations should be articulated. Generally, in the event of a legal challenge, the City will have the burden of demonstrating that any major divergence from strict population equality is justified by "legitimate state considerations." Minor variations will not establish a prima facie case of invalidity and hence will not require extensive justification on the jurisdiction=s part. While there is no precise rule, variations of ten percent or more generally appear to be treated as major, while those less than ten percent as minor in nature.[27] Regardless of the size of deviation, the rationale for the deviation should be articulated and should be necessary to achieve a legitimate state consideration.

(2) Equal Protection Clause, the Voting Rights Act, and Minority Vote Dilution

In addition to satisfying the Aequal population@ standard discussed above, a redistricting plan must not result in an improper dilution of the voting strength of a minority group. The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution prohibits redistricting that intentionally dilutes the voting strength of a minority group, while the federal Voting Rights Act[28] prohibits redistricting that has either the *intent* or the *effect* of minority vote dilution. A redistricting plan can improperly cancel out or minimize the voting strength of a minority group in various ways. With respect to single-member districting plans (such as the City's), minority group voting strength can be diluted if the plan wastes minority votes by packing more minority voters into a district than is necessary to elect a representative of their choice.   Vote dilution can also occur if a plan splits a geographically compact minority population among two or more districts, thereby reducing the group=s ability to elect a representative in any district.[29]

(a) The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment was historically used by minority voters to attack apportionment plans that diluted minority voting strength. This was not an easy task, since the courts established a Adiscriminatory purpose@ test. To pass this test, the plaintiffs had to establish that the redistricting jurisdiction Awas either motivated by racial considerations or in fact drew the districts on racial lines.@[30] In 1980, the Supreme Court established the same Adiscriminatory purpose@ standard for pursuing a claim of wrongful minority vote dilution under the then-existing

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26 *Gaffney v. Cummings*, *supra*, 412 U.S. at 744.
27   See *Brown v. Thomson*, 462 U.S. 835, 841 (1983) ["Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. (Citations.) A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State."]
28 42 U.S.C. § 1973.
29 See *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Garza v. County of Los Angeles*, 918 F.2d 763 (1990).
30 *Wright v. Rockefeller*, 376 U.S. 52 (1964).

provisions of the Voting Rights Act.[31] Congress responded to this by amending the Voting Rights Act in 1982 to eliminate the Adiscriminatory purpose@ test and instead allow for recovery in situations where the result or effect of reapportionment was minority vote dilution.

(b) The Voting Rights Act

Under the 1982 amendment to the Voting Rights Act, a plaintiff can establish a "Section 2 violation" by showing that, based on all of the circumstances, the electoral process is Anot equally open to participation by the members of a [racial, color, or language minority] in that its members have fewer opportunities than other members of the electorate to participate in the political process and to elect representatives of their choice.@[32]   Thus, the Act can be violated by either intentional discrimination in the drawing of district lines or by facially neutral apportionment schemes that have the effect of diluting minority votes.

The United States Supreme Court has identified three threshold conditions for establishing a Section 2 violation:

1.   The minority group allegedly harmed is sufficiently large and geographically compact to constitute a majority in a single district;

2. The minority group is politically cohesive; and

3. The majority votes sufficiently as a bloc to enable it usually to defeat the minority group's preferred candidate.[33]

These are commonly referred to as the "*Gingles* requirements." Although necessary, satisfying the three *Gingles* requirements is not, by itself, sufficient to establish vote dilution; Section 2 further requires that the "totality of the circumstances" substantiates that a minority group possesses less relative opportunity to elect candidates of its choice.[34] This determination is peculiarly dependent upon the facts of each case and requires a comprehensive canvassing of relevant facts.[35]

Since a Section 2 claim requires a showing of discriminatory effect, a districting plan that creates districts in which a minority group forms an effective majority roughly in proportion to its share of the voting age population will likely survive a challenge even if the three *Gingles* preconditions are present. In *De Grandy*, a group of Hispanic voters claimed that a reapportionment plan for the Florida state legislature unlawfully diluted their voting strength. In the Dade County area, the plan created 9 out of 20 house districts and 3 out of 7 senate districts, figures roughly proportional to the 50% Hispanic share of the population. The district court found a violation of the Voting Rights

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31 *Mobile v. Bolden*, 446 U.S. 55 (1980).
32   42 U.S.C. § 1973.
33 *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).
34 *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 424 (2006).
35 *Gingles*, *supra*, 478 U.S. at 46-47; *Johnson v. DeGrandy*, 512 U.S. 997 (1994).

Act after concluding that additional majority-Hispanic Senate districts could have been drawn in Dade County. On appeal, the Supreme Court reversed, holding that even assuming that the plaintiffs had established all of the *Gingles* factors and there was evidence of discrimination, no violation occurred because the number of majority-Hispanic districts roughly mirrored that group's proportion of the County population.

On the other hand, in *League of United Latin American Citizens v. Perry*,[36] after looking at the "totality of the circumstances," the Supreme Court found Texas' plan violated Section 2 because it diluted the vote of a group (Latinos) that was apparently on the cusp of overcoming prior electoral discrimination. In that case, Texas District 23 had a pre-redistricting Latino citizen voting age population of 57.5%. But the incumbent had been losing Latino support, and had recently captured only 8% of the Latino vote. So the legislature acted to protect the incumbent by shifting 100,000 people from District 23 to another district, and adding voters from counties comprising a largely Anglo, Republican area in central Texas. The Court's approach under the "totality of the circumstances" began with the "proportionality inquiry" discussed in *DeGrandy*, i.e., by comparing the number of districts that were Latino opportunity districts with the group's population percentage. However, the apparent lack of proportionality (16% Latino opportunity districts versus 22% of the population) was only one factor leading to the Court's conclusion. The Court concluded that the legislature had responded to the increasingly politically active and cohesive Latino community – one that was increasingly voting against the incumbent – by dividing that community in one county and sending them into another district that already was a Latino opportunity district. "Even assuming [the plan] provides something close to proportional representation for Latinos, its troubling blend of politics and race – and the resulting vote dilution of a group that was beginning to achieve § 2's goal of overcoming prior electoral discrimination – cannot be sustained."[37]

(3) Gerrymandering

In a series of cases commencing with *Shaw v. Reno*,[38] the Supreme Court has recognized a cause of action under the Fourteenth Amendment for what the Court has referred to as "racial gerrymandering." In these cases, the Supreme Court has applied a strict scrutiny standard to strike down a series of reapportionment plans on the grounds that the plans arbitrarily and discriminatorily used race as the sole, primary, or predominant basis for redistricting, without adequate justification for use of race as the key criteria. Under the theory of Aracial gerrymandering,@ the courts have held unconstitutional redistricting plans which resulted in additional majority-minority districts. There is the potential for tension, if not conflict, between the obligation to avoid minority vote dilution while, at the same time avoiding claims of racial gerrymandering.

In *Shaw v. Reno*, the Supreme Court stated that the Equal Protection Clause restricts racial distinctions in the area of voting and reapportionment legislation. It explained that a piece of legislation that contains explicit racial distinctions or that is facially neutral but unexplainable on

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36   548 U.S. 399 (2006).
37   *Id*. at 442.
38   509 U.S. 630 (1993).

grounds other than race is subject to strict scrutiny. Applying this rule in the context of redistricting legislation, the Court stated that a districting plan that segregates voters on the basis of race and disregards traditional districting principles constitutes an unlawful racial gerrymander:

> " [A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."[39]

Citing the extremely irregular shape of the challenged districts, the Supreme Court concluded that the North Carolina districting plan could only be rationally viewed as an effort to segregate the races for purposes of voting without regard for traditional redistricting principles. The district court was instructed to determine whether the plan was narrowly tailored to achieve a compelling governmental objective.

The Supreme Court subsequently explained that the shape of a electoral district merely provides circumstantial evidence of a racial gerrymander. In *Miller v. Johnson*,[40] the Court announced the following framework for a racial gerrymander claim:

> "The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, *a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations*. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can >defeat a claim that a district has been gerrymandered on racial lines= [citation]."[41]

Although race cannot be a predominant factor, the Court recognized that there is a distinction between being aware of racial considerations and being motivated by racial considerations. It explained that "discriminatory purpose" implies the selection of a particular action or course of conduct at least in part because of, not merely in spite of, its adverse effects.

> "The courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a

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39 *Id*. at 647.
40 515 U.S. 900 (1995).
41 *Id*. at 916 (emphasis added).

legislature's redistricting calculus. Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. [citations]."[42]

Even though the challenged district appeared to comply with traditional districting principles, the Supreme Court determined that race was the predominant factor. The plan was thus subject to a strict scrutiny analysis.

A redistricting plan that is based on both racial and political considerations must satisfy the strict scrutiny standard if race has the greater influence. In *Bush v. Vera*,[43] a group of voters attacked a plan creating three majority-minority congressional districts that had received Department of Justice preclearance. A three judge district court panel found that the districts contained highly irregular boundaries that were created without regard for traditional districting criteria. Applying strict scrutiny, the district court panel held that the districts were unconstitutional racial gerrymanders. In a fragmented decision, the Supreme Court affirmed: there was ample evidence to show that racially motivated gerrymandering had a greater influence on the redistricting plan than motives of political gerrymandering.[44] After determining that strict scrutiny applied, the plurality opinion assumed for purposes of its analysis that there is a compelling state interest to comply with Section 2. Applying the *Gingles* preconditions it found that the districts were not narrowly tailored to comply with Section 2 because the dispersion of the minority population prevented the creation of reasonably compact majority-minority districts. The Court explained that Section 2 does not require the creation of non-compact majority-minority districts.[45]

Finally, as mentioned above, in addition to "racial gerrymandering," there is another type of gerrymandering – "political gerrymandering," which may be defined as "the practice of dividing a geographic area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."[46] It is also referred to as "partisan gerrymandering."[47] The Supreme Court recognizes that an equal protection challenge to a political gerrymander presents a justiciable case, yet such a claim has little, if any, chance of success as the justices appear sharply divided on the issue and the Court has yet to articulate any reliable standard for determining an *inappropriate* political gerrymander.[48] Additionally, it is an open question whether such a claim would apply to non-partisan offices such as City councilmembers.

(4) Synthesis and Reconciliation

By now, the reader may rightfully conclude that the redistricting field is complex and confusing. Yet the discussion above, despite its length, only touches upon the scores of redistricting

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42 *Id.*
43 517 U.S. 952 (1996).
44 *Id.* at 969-971.
45 *Id.* at p. 979.
46 Black's Law Dictionary 696 (7th ed. 1999).
47 See *LUCAL v. Perry*, *supra*, 548 U.S. at 673 (Souter, J., concurring in part and dissenting in part).
48 *Id.* at 413-423 (Kennedy, J.).

cases. So here we try to simplify the major principles and reconcile the apparent conflict between constitutional mandates, Voting Rights Act prohibitions, and improper gerrymandering.

The Council, as a redistricting authority, must maneuver between two federal requirements that are, to some extent, in tension with another. On the one hand, a redistricting plan must not abridge or deny a minority group's ability to participate in the electoral process. This requirement contemplates consideration of racial factors. On the other hand, a redistricting plan that forsakes traditional districting principles for racial considerations will be struck down as an unconstitutional racial gerrymander.

A redistricting authority, like the City, faces a potential claim that its redistricting plan results in an impermissible dilution of minority voting strength under the Voting Rights Act. Because of this, Courts have recognized the right of local jurisdictions to take into consideration potential Voting Rights Act claims while engaged in reapportionment, and to take appropriate prophylactic steps to avoid liability. When engaging in the upcoming redistricting process, the Council should be aware of the potential impact of a proposed plan on minority voting strength, and should take appropriate steps to ensure improper minority vote dilution does not occur.

In sum, under federal law, the Council's plan must:

(i)   Comply with "one person, one vote," by creating districts substantially equal in population;
(ii)   Avoid purposeful discrimination against racial minorities;
(iii)   Not subordinate traditional race-neutral principles to racial considerations;
(iv)   Not amount to excessive political gerrymandering; and
(v)   Not have the intent or effect of diluting minority voting strength.

To ensure the Council's plan finds the balance between the Equal Protection Clause and the Voting Rights Act, the following principles provide guidance:

(i)   Race may be considered as one factor among others. As long as the plan does not subordinate traditional criteria to race, there may be created majority-minority districts without coming under strict scrutiny;
(ii)   Majority-minority districts may be required where the three *Gingles* preconditions (compactness, cohesion, white block voting) are satisfied;
(iii)   Bizarrely shaped districts are not unconstitutional per se, but the bizarre shape may be evidence that race was the predominant consideration in the redistricting process;
(iv)   The interest in avoiding Voting Rights Act liability is a compelling governmental interest;
(v)   Therefore, a plan drawn to avoid such liability must be narrowly tailored – that is, a district so drawn must not deviate substantially, for predominately racial reasons, from the sort of district a court would draw to remedy a Voting Rights Act violation.

CONCLUSION

In re-drawing district boundaries based on the 2010 Census figures, the City Council should first ensure that the districts are drawn in a way that complies with the "equal population" rule and other traditional criteria. For purposes of the Αequal population@ rule and the interests that may justify some deviation from strict population equality among districts, the factors identified in the Charter and in Elections Code section 21620 should be considered legitimate interests that will – in an appropriate situation and with adequate findings – justify deviation from strict equality.

The Council should be careful to avoid basing its decisions primarily on racial considerations. However, the Council should review its redistricting plan to ensure that it will not result in the dilution of minority voting strength in violation of the Voting Rights Act. To the extent necessary, the Council could adopt a plan that is narrowly tailored to ensure compliance with the Voting Rights Act.

Additionally, the Council should comply with the procedural and timing provisions of the City Charter and the state Elections Code, by holding multiple public meetings and adopting an ordinance no later than October 1, 2011 (assuming the U.S. Census Bureau provides the necessary data on April 1, 2011, as anticipated).

MDR/mdr