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MEMORANDUM

TO: MEMBERS,
Redistricting Task Force

CC: MAYOR EDWIN M. LEE
MEMBERS, Board of Supervisors
MEMBERS, Elections Commission
JOHN ARNTZ, Director, Department of Elections

FROM: JON GIVNER *JG*
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Deputy City Attorneys

DATE: August 16, 2011

RE: Legal Requirements for Redistricting

In this memorandum, we provide an overview of the legal requirements that govern the redrawing of supervisorial district lines by the Redistricting Task Force ("Task Force"). While this memorandum presents a general discussion of these issues, the City Attorney's Office will be available to provide you with additional information you may need about these requirements throughout the coming year.

SUMMARY

The Task Force must adhere to three main principles that the United States Constitution (the "Constitution"), the Federal Voting Rights Act (the "VRA"), and the San Francisco Charter (the "Charter") have established. First, the Constitution and the Charter require the Task Force to draw districts that are equal in population. Second, the VRA prohibits the Task Force from drawing district lines that dilute the voting power of racial and language minorities. Although the Task Force may take race into account for the purpose of complying with the VRA, the Constitution prohibits the Task Force from considering race as the *predominant* factor when redrawing district lines, absent compelling governmental interests and a narrowly tailored means of serving those interests. Third and finally, the Charter requires the Task Force to consider communities of interest and use adjusted census figures when drawing district lines.

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BACKGROUND

On March 8, 2011, the United States Census Bureau released its 2010 decennial census data for California. According to this data, San Francisco's population is 805,235, an increase of 28,502 people (or 3.7%) from the 2000 census count of 776,733 people.

But the population increase was not uniform across all of the City's supervisorial districts. After his review of the Census Bureau's data, on May 9, 2011, John Arntz, Director of the Department of Elections, notified the Board of Supervisors that due to these population variations between districts, the City's supervisorial district lines did not comply with applicable legal requirements and would need to be redrawn. Upon receiving this notification, as required by the Charter, the Board of Supervisors promptly convened the Task Force to carry out the required redistricting. The Elections Commission, the Board of Supervisors, and the Mayor made their respective appointments to the Task Force, and the Task Force will hold its first meeting on August 16, 2011.

DISCUSSION

The Charter vests the Task Force with the responsibility of redrawing supervisorial district boundaries by April 15, 2012. *See* S.F. Charter § 13.110(d). While performing this responsibility, the Task Force must comply with the legal requirements established by the Constitution, the VRA, and the Charter.

The Charter requires supervisorial district lines to conform to various legal requirements. These requirements include the legal principles mandated by the Constitution and the VRA. The Charter also imposes additional requirements. Specifically, the Charter provides:

Districts must conform to all legal requirements, including the requirement that they be equal in population. Population variations between districts should be limited to 1 percent from the statistical mean unless additional variations, limited to 5 percent of the statistical mean, are necessary to prevent dividing or diluting the voting power of minorities and/or to keep recognized neighborhoods intact; provided, however, that the redistricting provided for herein shall conform to the rule of one person, one vote, and shall reflect communities of interest within the city and county. Census data, at the census block level, as released by the United States Census

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Bureau, statistically adjusted by the Bureau to correct the unadjusted census counts for any measured undercount or overcount of any subset of the population according to the bureau's Accuracy and Coverage Evaluation or other sampling method, shall be used in any analysis of population requirements and application of the rule of one person one vote. In the event such adjusted census data, at the census block level, are not released by the Bureau, population data, at the census block level, adjusted by the California Department of Finance for any measured undercount or overcount may be used.

Id.

A. Equal in Population – The Rule of One Person One Vote

The Equal Protection Clause of the Fourteenth Amendment to the Constitution requires "substantial equality of population among the various [local legislative] districts." *See Reynolds v. Sims*, 377 U.S. 533, 579 (1964). In other words, local legislative districts must substantially comply with the rule of one person, one vote. Over the years, the United States Supreme Court has established that a local redistricting plan complies with this constitutional requirement if the population variance between the largest and smallest districts is less than ten percent. *See, e.g., Brown v. Thomson*, 462 U.S. 835, 842 (1983). If the difference in population between the largest and smallest districts is more than ten percent, then the redistricting plan would likely violate the Equal Protection Clause.

But the Charter requires a stricter adherence to the rule of one person, one vote. The Task Force must generally limit population variations between districts to one percent from the statistical mean. *See* S.F. Charter § 13.110(d). The statistical mean is the population of each district if San Francisco's population were evenly divided among its 11 districts. The Charter also authorizes the Task Force to draw districts with population variations up to five percent of the statistical mean "if *necessary* to prevent dividing or diluting the voting power of minorities and/or to keep recognized neighborhoods intact." *See id.* (emphasis added).

According to the Department of Elections, 2010 census figures show that San Francisco has a total population of 805,235 people. With 11 districts, San Francisco would have a mean population per district of approximately 73,203 people. Accordingly, the population of a district may increase or decrease by 732 people (1% of the mean), resulting in districts with populations between 72,471 and 73,935 people. Additional variations up to five percent of the statistical

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mean would allow a district's population to increase or decrease by 3,660 people where either of the conditions apply, resulting in districts with populations between 69,543 and 76,863 people. Creating districts that varied by more than five percent would violate the Charter.

B. The Federal Voting Rights Act

The VRA protects the voting power of racial and language minorities. Specifically, the VRA prohibits governments from imposing or applying: (1) voting qualifications; (2) prerequisites to voting; or (3) standards, practices, or procedures that result in the denial or abridgement of the right to vote on account of race or color or because a person is a member of a language minority group. *See* 42 U.S.C. § 1973(a). A violation of the VRA occurs if "based on the totality of the circumstances," a court concludes that there is a dilution of the voting power of racial or language minorities. *See id.* § 1973(b).

The United States Supreme Court has established a two-step analysis to determine whether a redistricting plan violates the VRA. First, the plaintiff must establish the following three conditions:

1. the minority group is sufficiently large and geographically compact to constitute a majority in a single member district;
2. the minority group is politically cohesive; and
3. in the absence of special circumstances, bloc voting by the white majority usually defeats the minority group's preferred candidate.

See Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986); *see also Growe v. Emison*, 507 U.S. 25, 40-41 (1993) (applying preconditions to single member districts).

Second, if these three conditions are satisfied, the court will determine whether under the totality of the circumstances, the enactment of the redistricting plan caused a dilution of the voting power of racial or language minorities. *See Thornburg*, 478 U.S. at 36-37 (discussing non-exclusive list of relevant circumstances).

Dilution of the voting power of a racial or language minority can occur when district lines are drawn in a manner that either fractures the minority group into several districts or packs the minority group into a few districts. *See Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993). Fracturing occurs when members of a minority group are spread among as many districts as possible, keeping them a political minority in every district, rather than permitting them to

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concentrate their strength enough to elect representatives in some districts. *See id.* at 153. Packing occurs when district lines are drawn so that the members of a minority group are concentrated into as few districts as possible. *See id.* at 153-54. This unlawful practice allows the minority group to elect representatives from those few districts, but it restricts the group's political power because its votes cannot be used to elect representatives in other districts in proportion to the group's numbers as a whole. *See id.*

The Task Force must take into account the City's racial and language and minority populations to determine if a challenger to the redrawn lines could satisfy the three conditions described above. Also, the Task Force must remain mindful of the City's racial and language minority populations when redrawing supervisorial district lines to avoid fracturing and packing.

C. Racial Gerrymandering And The Equal Protection Clause

Although the VRA requires that jurisdictions redrawing district lines be conscious of race, the Equal Protection Clause of the Fourteenth Amendment generally precludes consideration of race as a predominant or overriding factor in redistricting. *See Miller v. Johnson*, 515 U.S. 900, 920 (1995). Redistricting is a relatively unique governmental task because the Task Force must be "*aware*" of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (emphasis in original). But if the Task Force considers race as the predominant, overriding factor in redrawing district lines, the redistricting plan will be subject to strict scrutiny, and a court is likely to strike it down as unconstitutional. *See, e.g., Miller*, 515 U.S. at 920.

There are at least three factors that a court will consider to determine if race was the predominant factor in redrawing district lines. First, a court will look to the district's shape and demographics. *See Shaw*, 509 U.S. at 647-48. Second, a court will examine testimony and correspondence stating the legislative motives for drawing the district boundaries. *See Miller*, 515 U.S. at 919. Third, a court will also examine the nature of the redistricting data used by the legislature. *See Bush v. Vera*, 517 U.S. 952, 961-62 (1996).

To protect its redistricting plan from an Equal Protection challenge, the Task Force must ensure that it follows "traditional race-neutral districting principles" in redrawing supervisorial district boundaries. *See Miller*, 515 U.S. at 916. Traditional districting principles include, but are not limited to:

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- compactness;
- contiguity;
- preservation of political subdivisions and geographical regions;
- preservation of cores of prior districts;
- protection of incumbents from contests with each other; and
- preservation of communities of interest.

See, e.g., Shaw, 509 U.S. at 647; *Miller*, 515 U.S. at 916. The Task Force is not required to take into account each of these principles. But the Task Force should consider at least some of these principles along with the voting power of racial and language minorities. *See Miller*, 515 U.S. at 916; *see also DeWitt v. Wilson*, 856 F. Supp. 1409, 1415 (E.D. Cal. 1994), *summarily aff'd.*, 515 U.S. 1170 (1995).

Lastly, these principles are not necessarily equally important. For example, courts place comparatively greater weight on the compactness of a district, *i.e.*, whether the district boundaries are either irregularly or bizarrely shaped. *See, e.g., Miller*, 515 U.S. at 917; *Shaw*, 509 U.S. at 646-47.

D. Communities of Interest

The Charter additionally requires that the redrawing of supervisorial district lines "reflect communities of interest within the City and County." *See* S.F. Charter § 13.110(d). The Charter does not define "communities of interest," and no court has considered what the term means in the context of the Charter. But courts have examined similar terms in litigation regarding the VRA, and the California Constitution offers its own definition for use in state-level redistricting.

In litigation under the VRA, courts have cited the protection of "communities of interest" as a legitimate, traditional districting principle. *See Miller*, 515 U.S. at 919-20. While the Supreme Court has never conclusively defined this concept, federal courts have described "communities of interest" in various ways:

- as "a common thread" of "political, social, and economic interests," *id.*;
- as an area with common concerns with respect to geography, demography, ethnicity, culture, socio-economic status or trade, *see Smith v. Clark*, 189 F. Supp. 2d 529, 543 (S.D. Miss. 2002);

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- as a place with "common employment, services, religion, economy, country of origin and culture," *Diaz v. Silver*, 978 F. Supp. 96, 124 (E.D.N.Y. 1997); and
- as communities that have compatible political interests, *see Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 690 (D. Ariz. 1992).

Also, the California Constitution provides its own definition of a "community of interest" for state-level redistricting: "A community of interest is 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." Cal. Const., art. 21, § 2(d)(4). Examples of shared interests under the California Constitution's definition include similar living standards or employment opportunities. *See id.*

The Task Force should consider similar factors in determining the existence of communities of interest during the redistricting process. The Task Force may identify communities of interest using statistical evidence, testimony from state and local government officials, marketing data, and anecdotal evidence produced at public hearings.

E. Adjusted Census Figures

The Charter also requires the Task Force to use "[c]ensus data, at the census block level, as released by the United States Census Bureau, statistically adjusted by the Bureau to correct the unadjusted census counts for any measured undercount or overcount of any subset of the population according to the bureau's Accuracy and Coverage Evaluation or other sampling method" in any analysis of a district's population. *See* S.F. Charter § 13.110(d). In addition, if the Census Bureau does not release such data, the Task Force may use "population data, at the census block level, adjusted by the California Department of Finance for any measured undercount or overcount" if such information becomes available. *See id.*

If the Census Bureau releases adjusted census figures for the 2010 census, the Task Force determines that there is an insufficient period of time before April 15, 2012 to account for those adjustments, and that data demonstrates more than a five percent variance from the data initially used to redraw the district lines, the Task Force would be required to redraw the district lines using the adjusted data by April 15, 2014. *See* S.F. Charter § 13.110(d).

Please let us know if you have any questions related to the subject matter of this memorandum or would like any additional background information.