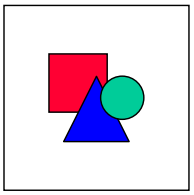

DENNIS J. HERRERA
City Attorney

MEMORANDUM

TO: MEMBERS,
Elections Task Force on Redistricting

FROM: CHAD A. JACOBS,
Deputy City Attorney

DATE: February 15, 2002

RE: Legal Requirements for Redistricting

This memorandum provides an overview of the legal requirements that govern the redrawing of supervisorial district lines by the Elections Task Force on Redistricting ("Task Force"). This memorandum is intended to provide only a general analysis of these requirements. The City Attorney's Office will provide you with additional information that you may request regarding any of these requirements.

SUMMARY

The Task Force must adhere to the legal principles established by the United States Constitution, the Federal Voting Rights Act, and the San Francisco Charter. The United States Constitution and the San Francisco Charter require the Task Force to draw districts that are equal in population. The Federal Voting Rights Act prohibits the Task Force from drawing district lines that dilute the voting power of racial and language minorities. Although race may be taken into account for these purposes, the United States Constitution prohibits the Task Force from considering race as the predominant factor when drawing district lines, absent compelling governmental interests and a narrowly tailored means of serving those interests. Finally, the San Francisco Charter requires the Task Force to consider communities of interest and use adjusted census figures when drawing district lines.

DISCUSSION

The Task Force is responsible for redrawing supervisorial districts by April 15, 2002. *See* S.F. Charter § 13.110(d). While performing this responsibility, the Task Force should remain mindful of the legal principles established by the United States Constitution, the Federal Voting Rights Act and the Charter.

The Charter sets forth the principles regarding supervisorial redistricting in San Francisco by stating that district lines must conform to all legal requirements. These requirements include the legal principles mandated by the United States Constitution ("Constitution") and the Federal Voting Rights Act ("Act"). The Charter also imposes additional requirements that are not otherwise provided for by the Act or the Constitution. Specifically, the Charter provides:

Memorandum

TO: MEMBERS,
Elections Task Force on Redistricting
DATE: March 1, 2002
PAGE: 2
RE: Legal Requirements for Redistricting

> 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 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. S.F. Charter § 13.110(d).

These requirements and how they interact are explained below.

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

The Equal Protection Clause of the 14th 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 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 the one person, one vote requirement if the plan's difference between the largest and smallest districts is less than ten percent. *See*, *e.g.*, *Voinovich v. Quilter*, 507 U.S. 146 (1993). If the difference between the largest and smallest districts varies by more than ten percent, the redistricting plan would violate the Equal Protection Clause.

The Charter, however, requires a stricter adherence to the rule of one person, one vote. Population variations between districts must be limited to one percent from the statistical mean. *See* S.F. Charter § 13.110(d). According to the Department of Elections, 2000 census figures show that San Francisco has a total population of 776,733 people. With eleven districts, the population of each district would be approximately 70,612 people. Accordingly, the population of a district may increase or decrease by 706 people, resulting in districts with a range between 69,906 and 71,318 people. Additional variations up to five percent of the statistical mean are authorized "if necessary to prevent dividing or diluting the voting power of minorities and/or to

keep recognized neighborhoods intact." *See id.*[1] This added variation would allow a district to increase or decrease by 3,531 people where either of the conditions apply, resulting in districts with a range between 67,081 and 74,143 people. Creating districts that varied by more than five percent would violate the Charter.

B. The Federal Voting Rights Act

The Act protects the voting power of racial and language minorities. Specifically, the Act 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 violation of this protection occurs if "based on the totality of the circumstances" it is shown that there is a dilution of the voting power of racial or language minorities. *See id.*

The United States Supreme Court established three preconditions that must be met before a challenger can show a violation of the Act. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). These preconditions are:

1. the minority is sufficiently large and geographically compact to constitute a majority in a single member district;
2. the minority is politically cohesive; and
3. in the absence of special circumstances, bloc voting by the white majority usually defeats the minority's preferred candidate. *See id.*; *see also Growe v. Emison*, 507 U.S. 25, 40-41 (1993) (applying preconditions to single member districts).

Once these three preconditions are satisfied, a court will seek to determine if under the totality of the circumstances the enactment of a redistricting plan caused a dilution of the voting power of racial or language minorities. *See id.* at 36-37.

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. Fracturing occurs when members of a minority group are spread among as many districts as possible, keeping them a minority in every district, rather than permitting them to concentrate their strength enough to elect representatives in some districts. Packing occurs when district lines are drawn so that the members of a minority group are concentrated into as few districts as possible. This allows the minority group to elect

[1] Please see section B below for a discussion about dividing or diluting the voting power of minorities.

representatives from those few districts, but their votes cannot be used to elect representatives in other districts in proportion to their numbers as a whole.

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. In addition, the Task Force must take into account the City's racial and language minority populations to determine if the three preconditions described above could be satisfied if the redrawn lines are later challenged. At its meeting on February 8, 2002, the Task Force adopted as one of the principles it should take into account that districts should not dilute the voting power of racial minorities.[2]

C. Racial Gerrymandering And The Equal Protection Clause

Although the Voting Rights Act requires that the voting power of minorities not be diluted, the Equal Protection Clause of the 14th Amendment to the Constitution generally precludes consideration of race as a predominant factor in redrawing district lines. The Equal Protection Clause prohibits racial gerrymandering absent compelling governmental interests and a narrowly tailored means of serving those interests. *See Shaw v. Reno*, 509 U.S. 630, 640 (1993). Racial gerrymandering occurs when race, rather than traditional districting principles, is the predominant factor considered in drawing a district. *See id.* Racial gerrymandering will subject a redrawn district to strict scrutiny, the most heightened form of judicial review. *See, e.g., Miller v. Johnson*, 515 U.S. 900 (1995). Such judicial review requires the government to demonstrate a "compelling interest" for why the district was drawn with race as the predominant factor considered, and that the district lines were drawn in a fashion that is "narrowly tailored" to serve that compelling interest. *See id.* Most district lines fail to survive review under strict scrutiny. *See, e.g., Shaw*, 509 U.S. at 640; *Miller*, 515 U.S. at 920-927.

There are at least three factors that a court will consider to determine if race was the predominant factor in redrawing a district's lines. First, a court will look to the district's shape and demographics. *See Shaw*, 509 U.S. at 648. Second, a court will examine testimony and correspondence directly stating the legislative motives for drawing the plan. *See Miller*, 515 U.S. at 919. Finally, a court will examine the nature of the redistricting data used by the legislature. *See Bush v. Vera*, 517 U.S. 952, 961 (1996).

The Task Force must strike a balance between considering racial minorities to comply with the Voting Rights Act while making sure not to make these considerations the predominant factor in redrawing district lines in violation of the Equal Protection Clause. As stated by the

[2] Population figures used in these considerations should be based on the voting age population of the City's racial and language minority groups. *See Growe*, 507 U.S. at 39 n.4.

Memorandum

TO: MEMBERS,
Elections Task Force on Redistricting
DATE: March 1, 2002
PAGE: 5
RE: Legal Requirements for Redistricting

United States Supreme Court, "the distinction between being aware of racial considerations and being motivated by them may be difficult to make." *Miller*, 515 U.S. at 915. To protect redrawn supervisorial district lines from a challenge under the Equal Protection Clause, the Task Force must ensure that it does not subordinate "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." *Id.* at 916.

D. Traditional Districting Principles

As discussed above, traditional districting principles should be taken into consideration when drawing district lines. *See, e.g., Miller*, 515 U.S. at 916. Traditional districting principles include:

- 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; *Abrams v. Johnson*, 521 U.S. 74, 98 (1997); *see also* Cal. Gov't Code § 21620 (providing that consideration may be given to topography; geography; cohesiveness, contiguity, integrity and compactness of territory; and communities of interests). 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).

The Task Force has included several of these traditional principles into the pool of principles the Task Force will take into consideration when redrawing supervisorial district lines. The Task Force also added some additional principles that it should take into consideration. Specifically, the Task Force provided that districts should:

- not dilute the voting power of ethnic, political, social and economic minorities; [3]
- be geographically compact and contiguous;
- recognize geographic boundaries in the city;

[3] In creating districts that do not dilute the voting power of minorities, the Task Force decided that "consideration should be given to appropriate data from the latest U.S. Census as well as more recent data on voter registration statistics, voter turnout and voting patterns."

Memorandum

TO: MEMBERS,
Elections Task Force on Redistricting
DATE: March 1, 2002
PAGE: 6
RE: Legal Requirements for Redistricting

- keep distinct neighborhoods, institutions and commercial zones intact;
- adhere to maximum continuity of existing districts; and
- consider propensity to vote.

The Task Force should be mindful that these principles should not necessarily be weighed the same. For example, contiguity and preservation of geographic integrity are important requirements to consider because the California Constitution requires their consideration for state Senate, Assembly, Congressional and Board of Equalization districts. *See* Cal. Const. Art. 21, § 1. Further, courts place great weight on the compactness of a district. *See, e.g., Bush*, 517 U.S. at 977-978. Finally, courts have stated that protecting incumbents should be subordinated to other traditional districting principles. *See, e.g., Abrams*, 521 U.S. at 84.

E. Communities of Interest

Although the Task Force may choose to ignore some of the traditional districting principles, the Charter specifically mandates consideration of one of these principles by requiring that supervisorial district lines "reflect communities of interest within the City and County." *See* S.F. Charter § 13.110(d). As a result, if communities of interest are identified within the City and County, the Task Force must take them into consideration when redrawing supervisorial district lines.

Neither the Charter nor the courts have given the term "communities of interest" an exact definition. One commentator defined the term to include common geography, social, economic or political history, community organization, religious membership, income level or education. *See* Persily, *Color by Numbers: Race, Redistricting and the 2000 Census*, 85 Minn.L.Rev. 899, 942 (2001). These communities may be identified by statistical evidence compiled by the census bureau, state and local government officials, marketing agencies and by anecdotal evidence. *See id.* Mere recitation by the Task Force that a community of interest exists is not sufficient. *See Miller*, 515 U.S. at 919-920. Accordingly, it will be important for the Task Force to pay particular attention to information about communities of interest that may come forward during the redistricting process, including anecdotal evidence produced at public hearings, so that if such communities exist they may be identified and then taken into consideration.

F. 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

such data is not released by the United States Census Bureau, "population data, at the census block level, adjusted by the California Department of Finance for any measured undercount or overcount may be used." *See id.*

In the ordinance creating the Task Force, the Board of Supervisors added that if the adjusted census figures are not released by March 1, 2002, the Task Force shall use the unadjusted census figures already released by the United States Census Bureau. *See* S.F. Board of Supervisors file number 020062. But if the adjusted census figures are released by the United States Census Bureau after March 1, 2002, and that data demonstrates more than a five percent variance from the data used to redraw the district lines, the Task Force will be required to redraw the district lines using the adjusted data by April 15, 2004. *See* S.F. Charter § 13.110(d).

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

C.A.J.

cc: Tammy Haygood, Director of Elections