CITY OF AUSTIN – 2012 CHARTER REVISION COMMITTEE

LEGAL PRINCIPLES GOVERNING THE REDISTRICTING PROCESS

There are four basic legal principles that govern the redistricting process: (i) the "one person-one vote" (equal population) principle; (ii) Section 5 of the Voting Rights Act, requiring preclearance and applying a "retrogression" standard to minority group populations in specific districts; (iii) the non-discrimination standard of Section 2 of the Voting Rights Act; and (iv) the *Shaw v. Reno* limitations on the use of race as a factor in redistricting.

The terminology of redistricting is very specialized and includes terms that may not be familiar, so we have included as Attachment A a brief glossary of many of the commonly-used redistricting terms.

The "One Person – One Vote" Requirement: Why You Redistrict

The "one person-one vote" requirement of the United States Constitution requires that members of an elected body be drawn from districts of substantially equal population. This Fourteenth Amendment Equal Protection Clause requirement applies to the single-member districts of "legislative" bodies such as city councils and other entities with single-member districts such as school boards and commissioners courts.

Exact equality of population is not required for local political subdivisions. However, they should strive to create districts that have a total population deviation of no more than ten percent between the most populated district and the least populated district. This ten percent deviation is usually referred to as the "total maximum deviation." It is measured against the "ideal" or target population for the City based on the most recent census. Satisfying the ten percent standard establishes a rebuttable presumption of compliance with the one person-one vote requirement.

A city council of a city which already uses a single-member district plan is therefore required to determine whether the populations of its single-member council districts are within this ten percent balance, based on 2010 Census population data. If the population deviation among the districts exceeds the permissible ten percent total maximum deviation, the city must redistrict, that is, redraw the boundaries of the individual districts so that the total populations of all the new districts collectively are within the permissible ten percent limit. The same consideration of maximum permissible total deviation applies to a new districting plan resulting from a change from an at-large system to a single-member district system. A hypothetical example of how deviation is calculated is given in Attachment B.

The Department of Justice (DOJ) is the federal agency charged with reviewing and approving changes in election law, such as redistricting, under Section 5 of the Voting Rights Act. DOJ will use the Census Bureau's population data for the 2010 Census in its analysis of redistricting plans – the so-called "PL 94-171" data – which the Census Bureau released on February 18, 2011 for Texas. Although several types of population data are provided in the PL 94-171 files, redistricting typically is based upon total population.

Official census data should be used unless a city can show that better data exists. The court cases that have dealt with the question have made it clear that the showing required to justify use of data other than Census data is a very high one – impossibly high at a time so close to the release of new Census data. As a practical matter, therefore, we recommend that cities use the 2010 Census data in their redistricting processes.

In the redistricting process, the City will use a broad spectrum of demographic and administrative information to accomplish the rebalancing of population required by the one person-one vote principle.

Census geography

These district population data are themselves derived from population data based on smaller geographical units. The Census Bureau divides geography into much smaller units called "census blocks." In urban areas, these correspond roughly to city blocks. In more rural areas, census blocks may be quite large. Census blocks are also aggregated into larger sets called "voting tabulation districts" or "VTDs" which often correspond to city election precincts.

For reasons concerning reducing the potential for *Shaw v. Reno*-type liability, discussed below, we recommend using VTDs as the redistricting building blocks where and to the extent feasible. In many cities this may not be feasible. In any event, you should avoid splitting census blocks.

Census racial and ethnic categories

For the 2010 Census, the Census Bureau recognized 126 combinations of racial and ethnic categories and collected, and reported data based on all of them. Many of these categories include very few persons, however, and will not therefore have a significant impact on the redistricting process. Typically, it will be sufficient to use only eight racial and ethnic categories consolidated from the larger set, including Hispanic, non-Hispanic White, non-Hispanic African-American, non-Hispanic Asian, and non-Hispanic Other. This reduced set of categories includes the ones most likely to be important in the redistricting process for the City of Austin.

The 2010 Census listed six racial categories. Individuals were able to choose a single race or any combination of races that might apply. Thus, there are potentially 63 different racial combinations that might occur. Additionally, the Census asks persons to designate whether they are or are not Hispanic. When the Hispanic status response is overlaid on the different possible racial responses, there are 126 possible different combinations. The Census tabulates each one separately.

If this information is to be usable, it must be combined into a smaller number of categories (of course, having the same overall population total). For purposes of determining the preclearance retrogression benchmark, discussed below, DOJ indicated in a guidance document

issued on January 18, 2001,[1] that it would use the following rules for determining Hispanic and race population numbers from the 2010 Census data, for purposes of performing the retrogression analysis:

- persons who selected "Hispanic" are categorized as Hispanic, no matter what race or races they have designated; all others will be classified as non-Hispanic of one or more races; *e.g.*, Hispanic-White and Hispanic-African-American are both classified as Hispanic;

- persons who did not select "Hispanic" and who designated a single race will be classified as members of that race; *e.g.*, White, African-American, Asian, etc.;

- persons who did not select "Hispanic" and who designated themselves as belonging to a single minority race and as White will be classified as members of the minority race; *e.g.*, Asian+White will be classified as Asian; and

- persons who did not select "Hispanic" and who designated themselves as belonging to more than one minority race will be classified as "other multiple race;" *e.g.*, White+Asian+Hawaiian or African-American+Asian. This category is expected to be small.

We will also consider data called "voting age population" (or "VAP") data. It is similarly classified in 126 racial and ethnic categories, which also can be reduced as a practical matter to eight racial and ethnic categories for districting purposes. This information is provided for the limited purpose of addressing some of the specific legal inquires under the Voting Rights Act that are discussed below. Voting age population is the Census Bureau's count of persons who identified themselves as being eighteen years of age or older at the time the census was taken (*i.e.*, as of April 1, 2010).

In addition to this population and demographic data, the City will have access to additional information that may bear on the redistricting process, such as facility locations, registered voter information, incumbent residence addresses, etc.

Section 5 of the Voting Rights Act – Preclearance

Preclearance required

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires all "covered jurisdictions" identified in the applicable Department of Justice (DOJ) regulations to "preclear" any changes to voting standards, practices, or procedures before they may become legally effective. Texas is a "covered jurisdiction," so all local governments in the state, as well as the State itself, are required to preclear any voting changes, including their redistricting plans. This includes changes to any single-member district lines (including city councilmember district lines), or any single-member district plans that result from conversion from an at-large system.

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[1] *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 42 U.S.C. 1973c, 76 Fed. Reg. 7470 (2011).

Section 5 applies not only to changes in district lines but also to changes in election precincts and in the location of polling places.

Preclearance may be accomplished in either of two ways: by submitting the redistricting plan to DOJ for its examination and preclearance, or by obtaining a declaratory judgment from a special three-judge federal district court in the District of Columbia. Submission to DOJ is by far the most common, and usually substantially faster and less expensive, method chosen for obtaining preclearance.

Discriminatory purpose and retrogressive effect are the preclearance standards

Section 5 review involves a two-pronged analysis. DOJ must determine if the plan has either a discriminatory *purpose* or a retrogressive *effect*. In the 2001 round of redistricting, the purpose inquiry was limited to whether the plan had a *retrogressive* purpose. The 2006 amendments to the Voting Rights Act that renewed Section 5, however, arguably expanded the scope of DOJ's permissible analysis to reach *any* discriminatory purpose. In determining whether a plan was adopted with a discriminatory intent, DOJ may look at evidence such as (1) the impact of the plan, (2) the historical background of the decision, (3) the sequence of events leading up to the decision, (4) whether the decision departs, either procedurally or substantively, from the normal practice, and (5) contemporaneous statements and viewpoints of the decision-makers.

The second prong of the analysis involves retrogressive effect. The issue there is whether the net effect of the new plan would be to unduly reduce minority voters' ability to elect their preferred candidates when the new proposed plan is compared to the prior benchmark plan, to a greater degree than an alternative, fairly drawn plan. In other words, does the new districting plan result in an unnecessarily large reduction of the minority group's ability to elect?

DOJ's retrogression benchmark

To determine if retrogression exists, it is necessary to compare a proposed plan against a benchmark plan. Typically, that benchmark plan is the local subdivision's *prior* district boundary plan, but considered using the *new* 2010 Census population and demographic data. DOJ will compare the proposed new redistricting plan as a whole to the benchmark plan as a whole in conducting its retrogression analysis. Where, as in Austin, the prior plan is an at-large plan, the retrogression analysis is different: The benchmark is the at-large plan, and the question DOJ poses in the retrogression analysis is whether the new single-member district plan will materially reduce the relative voting strength of minority voters in the City. In general, and in most instances where there are court decisions or DOJ decisions on such conversions to district systems, the district system affords minority voters a clearly better opportunity to elect candidates of their choice. In Austin, where there is a history of at-large success by minority candidates, the analysis will be more complex.

Voting age population data ("VAP") is the Census Bureau's count of persons who identified themselves as being eighteen years of age or older at the time the census was taken (*i.e.*, as of April 1, 2010). It is a measure of the number of people old enough to vote if they are

otherwise eligible to do so. Since the retrogression inquiry focuses on whether a minority group's overall voting strength has been reduced, and VAP is a more direct measure of voting strength than total population, VAP should be considered in the retrogression analysis, not just total population. Citizen voting age population ("CVAP") data may also be important but may need to be developed.

In combination with a balanced consideration of the other applicable redistricting criteria, the Committee, and ultimately the City Council, will need to consider the how proposed districts affect the ability of minority voters to elect candidates of choice.

Section 2 of the Voting Rights Act – No Discrimination Against Minority Groups

Section 2 of the Voting Rights Act forbids a voting standard, practice or procedure from having the effect of reducing the opportunity of members of a covered minority to participate in the political process and to elect representatives of their choice. In practical terms, this non-discrimination provision prohibits districting practices that, among other things, result in "packing" minorities into a single district in an effort to limit their voting strength. "Fracturing" or "cracking" minority populations into small groups in a number of districts, so that their overall voting strength is diminished, also can be discrimination under Section 2. There is no magic number that designates the threshold of packing or cracking. Each plan must be judged on a case-by-case basis.

Although the Supreme Court made clear in the 1990s that the Department of Justice may not consider Section 2 standards in determining whether to preclear a redistricting plan under Section 5, that does not mean that the Committee or the City Council should ignore Section 2 requirements. They apply to the redistricting plan regardless of whether DOJ may legally consider them in the preclearance analysis. Failure to consider them adequately could risk litigation brought by a member of a protected minority group, or even by DOJ.

The Supreme Court has defined the minimum requirements for a minority plaintiff to bring a Section 2 lawsuit. There is a three-pronged legal test in which the minority plaintiff must show that (1) the minority group's voting age population is numerically large enough and geographically compact enough so that a district with a numerical majority of the minority group can be drawn (a "majority minority" district); (2) the minority group is politically cohesive, that is, it usually votes and acts politically in concert on major issues; and (3) there is "polarized voting" such that the Anglo majority votes usually to defeat candidates of the minority group's preference. *Thornburg v. Gingles*, 478 U.S. 30 (1986). In the federal appellate Fifth Circuit, which includes Texas, the minority population to be considered is *citizen* voting age population. In certain cases, a minority group may assert that Section 2 requires that the City draw a new majority-minority district (a district in which the minority group constitutes a numerical majority in the district), or a certain number of majority-minority districts. The Committee, and the City Council, must be sensitive to these Section 2 standards as a single-member district plan is developed.

In developing district plans, a city must be aware of the location of protected minority populations for the purpose of ensuring that new districts are not fashioned in a way that may be

asserted to have resulted in "packing," or in "fracturing" or "cracking," the minority population for purposes or having effects that are unlawful under Section 2. Thematic maps which depict the locations in the City of Hispanic and African-American population concentrations by VTD or by census block, can useful in addressing this issue. Voting age population (VAP) data is useful in measuring potential electoral strength of minority groups in individual districts.

Shaw v. Reno Standards – Avoid Using Race as the Predominant Redistricting Factor

In the past, local government redistricting had to satisfy both the Section 5 non-retrogression standard and the Section 2 non-discrimination standard, but, until the 2000 round of redistricting, the *Shaw v. Reno* standard had not yet come into play. The *Shaw* standard applies now as well. While satisfying Section 5 and Section 2 standards requires the City to explicitly consider race to comply with these standards, *Shaw* places strict limits on the manner and degree in which race may be a factor. In effect, therefore, the City must walk a legal tightrope, where the competing legal standards must all be met.

In the *Shaw v. Reno* line of cases that began in 1993, the Supreme Court applied the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution to redistricting plans. Where racial considerations predominate in the redistricting process to the subordination of traditional (non-race-based) factors, the use of race-based factors is subject to the "strict scrutiny" test. To pass this test requires that there be a showing that (1) the race-based factors were used in furtherance of a "compelling state interest" and (2) their application be "narrowly tailored," that is, they must be used only to the minimum extent necessary to accomplish the compelling state interest.

Complying with Voting Rights Act Sections 2 and 5 are compelling state interests. Thus, the following principles emerge in the post-*Shaw* environment to guide the redistricting process:

- race may be considered;

- but race may not be the predominant factor in the redistricting process to the subordination of traditional redistricting principles;

- 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;

- if race is the predominant consideration, the plan may still be constitutional if it is "narrowly tailored" to address compelling governmental interest such as compliance with the Voting Rights Act; and

- for a plan to be narrowly tailored, it will use race no more than is necessary to address the compelling governmental interest.

The better course, if possible under the circumstances, is that racial considerations not predominate to the subordination of traditional redistricting criteria, so that the difficult strict scrutiny test is avoided. If there are Section 2 or 5 concerns, this may not be possible.

Adherence to the *Shaw v. Reno* standards will be an important consideration during the redistricting process. One way to minimize the potential for *Shaw v. Reno* liability is to adopt redistricting criteria that include traditional redistricting principles and that do not elevate race-based factors to predominance.

Adoption of Redistricting Criteria

Adoption of appropriate redistricting criteria – and adherence to them during the redistricting process – is potentially critical to the ultimate defensibility of an adopted redistricting plan. Traditional redistricting criteria that the City Council might wish to consider adopting include, for example:

- use of geographically identifiable boundaries;

- using whole voting precincts, where possible and feasible; or, where not feasible, being sure that the plan lends itself to the creation of reasonable and efficient voting precincts; and avoiding splitting census blocks;

- maintaining communities of interest (*e.g.*, traditional neighborhoods);

- adopting districts of approximately equal size (population);

- drawing districts that are compact and contiguous;

- keeping existing representatives in their districts; and

- narrowly tailoring to comply with the Voting Rights Act.

These criteria were the ones adopted by the City Council, and they should be carefully considered and then be followed to the greatest degree possible by the Committee.

Requirements for Plans and Comments Submitted by the Public

The City Council also adopted a resolution requiring any plans proposed by the public or the Committee must meet: (1) any plan submitted for consideration must be a complete plan, that is, it must be a plan that includes configurations for all councilmenber districts and not just a selected one or several. This is important because, although it may be possible to draw a particular district in a particular way if it is considered only by itself, that configuration may have unacceptable consequences on other districts and make it difficult or impossible for an overall plan to comply with the applicable legal standards; (2) any plan submitted for consideration must follow the adopted redistricting criteria, and be based on 2010 Census Data; (3) any plan submitted must be accompanied by certain specified population and demographic

data, based on 2011 Census data, for the City as a whole and for each single-member council district; (4) any person proposing a plan must provide complete contact information, and; (5) any plans must be submitted by a stated deadline. These requirements will ensure that the plan proposed is one the City can reproduce and analyze.

ATTACHMENT A

GLOSSARY

GLOSSARY

Census blocks, census block groups, census VTDs, census tracts – Geographic areas of various sizes recommended by the states and used by the Census Bureau for the collection and presentation of data.

Citizen voting age population (CVAP) – Persons 18 and above who are citizens. This is a better measure of voting strength than VAP; however, the relevant citizenship data will need to be developed.

Compactness – Having the minimum distance between all parts of a constituency.

Contiguity – All parts of a district being connected at some point with the rest of the district.

Cracking – The fragmentation of a minority group among different districts so that it is a majority in none. Also known as "fracturing."

Fracturing – *See* "cracking."

Homogeneous district – A voting district with at least 90 percent population being of one minority group or of Anglo population.

Ideal population – The population that an ideal sized district would have for a given jurisdiction. Numerically, the ideal size is calculated by dividing the total population of the political subdivision by the number of seats in the legislative body.

Majority minority district – Term used by the courts for seats where an ethnic minority constitutes a numerical majority of the population.

One person-one vote – U.S. Constitutional standard articulated by the U.S. Supreme Court requiring that all legislative districts should be approximately equal in size.

Packing – A term used when one particular minority group is consolidated into one or a small number of districts, thus reducing its electoral influence in surrounding districts.

Partisan gerrymandering – The deliberate drawing of district boundaries to secure an advantage for one political party.

PL 94-171 – The Public Law that requires the Census Bureau to release population data for redistricting. The data must be released by April 1, 2011, is reported at the block level, and contains information on:
- Total population
- Voting age population
- By Race
- By Hispanic origin

Racial gerrymandering – The deliberate drawing of district boundaries to secure an advantage for one race.

Section 2 of the Voting Rights Act – The part of the federal Voting Rights Act that protects racial and language minorities from discrimination in voting practices by a state or other political subdivision.

Section 5 of the Voting Rights Act – The part of the federal Voting Rights Act that requires certain states and localities (called "covered jurisdictions") to preclear all election law changes with the U.S. Department of Justice ("DOJ") or the federal district court for the District of Columbia before those laws may take effect.

Shaw v. Reno – The first in a line of federal court cases in which the U.S. Supreme Court held that the use of race as a dominant factor in redistricting was subject to a "strict scrutiny" test under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. This case and the line of Supreme Court cases that follows it establishes that race should not be used as a predominant redistricting consideration, but if it is, it must be used only to further a "compelling state interest" recognized by the courts and even then must be used only as minimally necessary to give effect to that compelling state interest ("narrow tailoring").

Spanish surnamed registered voters (SSRV) – The Texas Secretary of State publishes voter registration numbers that show the percentage of registered voters who have Spanish surnames. It is helpful to measure Hispanic potential voting strength, although it is not exact.

Total population – The total number of persons in a geographic area. Total population is generally the measure used to determine if districts are balanced for one person, one vote purposes.

Voting age population (VAP) – The number of persons aged 18 and above. DOJ requires this to be shown in Section 5 submissions. It is used to measure potential voting strength. For example, a district may have 50 percent Hispanic total population but only 45 percent Hispanic voting age population.

Voter tabulation district (VTD) – A voting precinct drawn using census geography. In most instances, especially in urban areas, VTDs and voting precincts will be the same. In rural areas, it is more likely they will not be identical.

ATTACHMENT B

EXAMPLE DEVIATION CALCULATION

Hypothetical Population Deviation Calculation

Consider a hypothetical political subdivision with four districts and a total population of 40,000. The "ideal district" for this political subdivision would have a population of 10,000 (total population / number of districts). This is the target population for each district. The deviation of each district is measured against this ideal size.

Suppose the latest population data reveals that the largest district, District A, has 11,000 inhabitants. The deviation of District A from the ideal is thus 1000 persons, or 10 percent. Suppose also that the smallest district, District D, has 8000 inhabitants; it is underpopulated by 2000 persons compared to the ideal size. It thus has a deviation of –20 percent compared to the ideal size. The *maximum total deviation* is thus 30 percent. Since this is greater than the 10 percent range typically allowed by the courts for one person-one vote purposes, this hypothetical subdivision must redistrict in order to bring its maximum total deviation to within the legally permissible limits.

The following table illustrates this analysis:

District	Ideal district	District total pop.	Difference	Deviation
A	10,000	11,000	1000	+ 10.0 percent
B	10,000	10,750	750	+ 7.5 percent
C	10,000	10,250	250	+ 2.5 percent
D	10,000	8,000	- 2000	- 20.0 percent
Totals:	40,000	40,000	net = 0	net = 0 percent

Total maximum deviation = difference between most populous and least populous districts
= 10 percent - (- 20 percent) = 10 percent + 20 percent = 30 percent.