City of Sacramento
City Council

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Meeting Date: **1/18/2011** **Report Type:** Staff/Discussion

Title: Council Redistricting Process

Report ID: 2011-00044

Location: Citywide

Recommendation: (1) Adopt a Resolution establishing the Council Redistricting Project and transferring $160,000 from Admin Contingency to the Council Redistricting Project (I07000700), and (2) Approve the process, timeline, and criteria for council district boundary line modifications as a result of the 2010 Census.

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Presenter: Scot Mende, New Growth Manager, (916) 808-4756, Community Development Department; Maria MacGunigal, IT/GIS Manager, (916) 808-7998, Department of Information Technology

Department: Community Development Dept / Information Technology
Division: New Growth
Dept ID: 21001223

Attachments:

1-Description/Analysis
2-Background
3-2001 Process
4-Council Legal Memo
5-Resolution

City Attorney Review
Approved as to Form
Matthew Ruyak
1/13/2011 12:18:13 PM

City Treasurer Review
Prior Council Financial Policy Approval or Outside City Treasurer Scope
Janelle Gray
1/12/2011 9:17:28 AM

Approvals/Acknowledgements

Department Director or Designee: Max Fernandez - 1/13/2011 9:48:50 AM

Assistant City Manager: Cassandra Jennings - 1/13/2011 11:19:26 AM

Title

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Description/Analysis

Issue: As directed by the City of Sacramento Charter, the City must reapportion (redistrict) City Council district boundaries every ten years following the U.S. Census. Districts must be as equal in population as is practicable. The 2010 Census data will be released on or about April 1, 2011. The City Charter provides that the Council shall commence and complete the redistricting process within six months of the release of the Census "block data" figures. The Sacramento County Registrar of Voters has requested that the City submit reapportioned Council District boundary lines by September 2011 for the June 2012 election.

Policy Considerations: Section 23 of the City Charter provides that "Council districts shall be as nearly equal in population as required under the Federal and State Constitutions." In setting district boundaries, consideration must be given to the following factors:

- Topography
- Geography
- Cohesiveness
- Continuity
- Integrity and compactness of territory
- Community of interests of the districts
- Existing neighborhoods
- Community boundaries

Staff recommends that the Council and community consider these factors when developing and selecting new district boundaries. It is also recommended that Council establish a participatory process that includes the community in the redistricting process. In reviewing redistricting boundaries it is also recommended that the City Council solicit two types of submittals: 1) general comments on the redistricting criteria, or 2) actual boundary plans and supporting statistics. All proposed plans should strive for an equal distribution of population between districts and be consistent with the City Charter provisions.

In addition, staff explored other approaches for redistricting including 1) an independent panel and 2) a citizen advisory committee. At the State level and in some California jurisdictions such as San Francisco and San Diego independent citizens' panels are used to redistrict council districts in the redistricting process. While this may be a viable approach worth further consideration, staff sees an independent panel as a longer term option since it would require a Charter amendment and would likely extend the time beyond the redistricting completion date in Fall 2011. At present, the City of Sacramento's Charter specifically requires the City Council to adopt an ordinance modifying district boundaries. However, a Citizen Advisory Committee could be formed to advise the City Council. A Citizen Advisory Committee approach would not require charter amendment. Currently, Modesto has a Citizen's Districting Commission that recommends a plan to the City Council for final approval. The establishment of a Citizen Advisory Committee for the City of Sacramento redistricting process will require additional financial and staff resources and time to complete the process.

Environmental Considerations:

California Environmental Quality Act (CEQA): The subject of this report is not, in itself, a project. The subject of this report does not involve a project which requires compliance with the CEQA, inasmuch as it does not involve an activity which may cause a direct or indirect change in the environment (Public Resources Code Section 21065).

Sustainability Considerations: The proposed redistricting process will allow for broad public participation through electronic means – thereby reducing the need for participants to travel to meetings.

Commission/Committee Action: Not applicable.

Rationale for Recommendation: The proposed redistricting process provides for broad civic engagement consistent with the City's culture of open and transparent government.

Financial Considerations: Many of the resources needed for redistricting will be provided by existing staff. However, there will be additional technical staff and resources needed to develop software and provide technical staff to support the process and meet the firm time requirements associated with redistricting. It is estimated that the total cost to support the redistricting effort will not exceed $160,000. A multi-year project will be established as I07000700. The funding will be transferred from the City's General Fund (Fund 1001) Administrative Contingency into the project.

Emerging Small Business Development (ESBD): Not applicable.

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Attachment 1

Council Redistricting Process 2011

Background:

The City of Sacramento must reapportion (redistrict) City Council district boundaries every ten years following the regular U.S. Census. The resulting district boundaries must be balanced in population in accordance with the local, state, and federal rules governing the redistricting process.

The regular U.S. Census is completed every ten years. Although the Census Bureau has released national-level data, the 2010 Census data necessary for local redistricting will not be released until on or about April 1, 2011. The City Charter provides that the Council shall commence and complete the redistricting process within six months of the availability of that data. The Sacramento County Registrar of Voters, however, has requested that the City's process of redistricting be completed by September, in order for the Registrar's Office to prepare maps, district lines, and precinct lines reflecting district changes for the June 2012 primary election schedule.

Following the 1990 and 2000 Census, the City Council held a series of meetings in the community and solicited redistricting proposals from interested parties. Community outreach meetings were held throughout the City to encourage participation and understanding of the redistricting process. Software tools and data were also developed to help interested parties understand, develop, and submit district proposals. See attachment 3 for the summary of the 2000 redistricting process.

Considerations/Issues:

For a full understanding of the redistricting requirements see the attached City Attorney memorandum that addresses the rules governing the reapportionment (redistricting) of Council districts. Section 23 of the City Charter provides that 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. All proposed plans should strive for an equal distribution of population between districts and be consistent with the City Charter provisions.

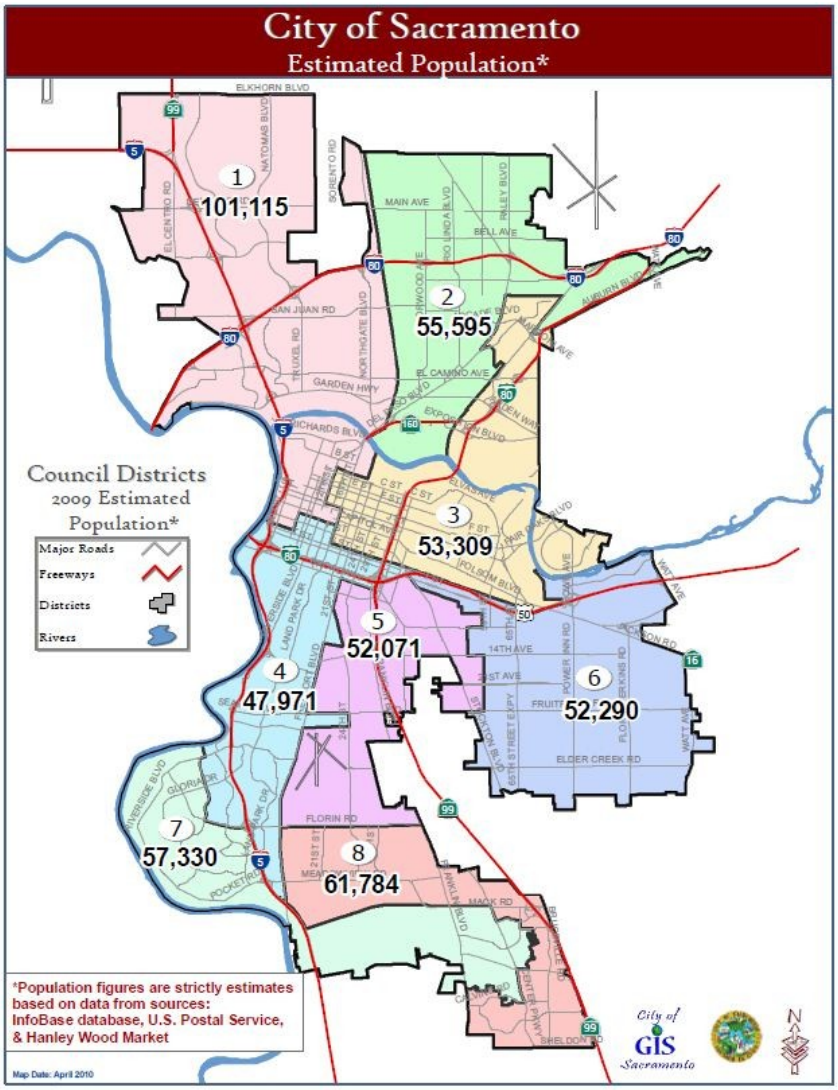
It is anticipated that there will be *significant* changes in population counts from the 2000 Census, particularly in the Natomas area of the City. It is also anticipated that significant changes to existing Council district boundaries will result from this redistricting process to accommodate the large change in population and population distribution. See estimated 2009 table and map below.

Estimated 2009 Population Projections

Population figures are strictly *estimates* based on sources below

Council District	2000 Census Pop	Estimated 2009 Pop*	Difference	% Change	% Variance**
1	47,670	101,115	*53,445*	*112.1*	*68.0*
2	51,800	55,595	3,795	7.3	-7.6
3	51,087	53,309	2,222	4.3	-11.4
4	47,807	47,971	164	.3	-20.3
5	50,233	52,071	1,838	3.7	-13.5
6	50,542	52,290	1,748	3.5	-13.1
7	53,824	57,330	3,506	6.5	-4.7
8	54,055	61,784	7,729	14.3	2.7
Total Population	407,018	481,465	74,447		
Target Mean	50,877	60,183	9,306		

*Source: InfoBase database, U.S. Postal Service, & Hanley Wood Market Intelligence
**Deviation from target mean



Given the anticipated significance of change to existing districts, the process further warrants a substantive effort to insure clear communication, encourage participation, and provide tools and information to facilitate understanding throughout the process.

City staff has prepared a redistricting website to facilitate information sharing. The site is located on the City's public website at the following link:

www.cityofsacramento.org/redistricting/

This site is designed to provide general information, updates, and access to relevant redistricting data. This site includes a high level description of redistricting, maps, and links to downloadable geographic (GIS) data such as 2009 population estimates. This website will continue to expand and will include more information, maps, and data as they become available.

Proposed Timeline 2011:

To complete redistricting following the 2010 Census, staff proposes the following process:

Council Approval of Redistricting Process

- January/February 2011 City Council Meeting - approval of principles, process, and timeline

Community Education

- February 7, 2011: NSA 4 Community Education Meeting on Process
- February 9, 2011: NSA 2 Community Education Meeting on Process
- February 16, 2011: NSA 3 Community Education Meeting on Process
- February 28, 2011: NSA 1 Community Education Meeting on Process
- In addition to community meetings, the City will develop a website to distribute redistricting information, notify the public through Press Releases, and leverage community contacts through Neighborhood Services staff to get information in a timely manner.

Census Data, Tools, and Community Outreach/Training

- April 2011: Census Data Released
- April 2011: Community meetings to distribute data and information
- May 2011: Community meeting to answer technical/logistical questions
- May 2011: Community Council district boundary proposals due to Planning Department

Receive and Analyze

- June 2011: Council meeting to select proposals for analysis
- June - July 2011: Staff Analysis of Council-selected proposals

Adopt New Boundaries

- July-August 2011: Council meetings to discuss and approve boundaries
- September 2011: Council adopts ordinance setting district boundaries

Legal & Technical Issues:

See attachment 3 for more detail from the City Attorney's Office. The following represents a summary of the City Attorney's memorandum.

- 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.

Future Population Changes:

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 annexation requests in currently uninhabited areas (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 is not known at this time, staff recommends the Council adopt one redistricting map delineating the City limits as they exist today.

The City Charter provides for reexamination of Council District boundaries "following the annexation, detachment, or consolidation" of population. "If, upon reexamination, the City Council finds that the population of any council districts have varied so that the districts no longer meet the criteria... the City Council shall, within 60 days ...by ordinance or resolution, adjust the boundaries of.... council districts." Staff recommends the Council revisit the issue of equal council district population succeeding a major annexation.

Additional Considerations – Other Approaches for Redistricting:

At the State level, an independent citizen's panel has been formed to redraw district boundaries. At least two large California cities (San Diego and San Francisco) use independent citizens' panels. However, the City of Sacramento's Charter specifically requires the City Council to adopt an ordinance modifying district boundaries; using an independent panel to redistrict council districts would require a charter amendment.

A Citizen Advisory Committee could be formed to advise the City Council. This approach would not require charter amendment. The Committee could receive and formulate viable options for the Council's consideration. The following considerations would have to be taken into account:

- Recruitment, Selection & Training of Committee members
- Council identification of goals, objectives, roles, responsibilities, timeframes
- Staff Resources to facilitate the committee meetings

It is likely that the creation of a Citizen Advisory Committee would require additional resources and time to complete the process.

> **California**: At the State of California level, in 2008 voters approved Proposition 11, which established an independent California Citizens Redistricting Commission to draw the next decade's district lines for the State Legislature. The measure was designed to remove political gerrymandering from the process by taking the redistricting out of the hands of state legislators. Proposition 20, passed in November 2010, extended the redistricting commission's authority to congressional districts.
>
> Eight of the 14 commissioners were selected by a lottery process from a pool of pre-screened finalists and not by the state Legislature or political parties; the remaining six panelists are to be appointed by those first eight commissioners. Arizona and California are the only states that have both an independent selection process and an independent commission; in the other 6 states with an independent commission, the Republicans appoint half the members, and the

Democrats appoint half. In California, the Commission must draw the district lines in conformity with strict, nonpartisan rules designed to create districts of relatively equal population that will provide fair representation for all Californians. The Commission must hold public hearings and accept public comment. After hearing from the public and drawing the maps for the 40 Senate districts, 80 Assembly districts, and four Board of Equalization districts, the Commission must vote on the new maps to be used for the next decade. To approve the new maps, the maps must receive nine "yes" votes from the Commission—three "yes" votes from members registered with the two largest political parties, and three from the other members.

San Diego: Section 5.1 of the City of San Diego Charter creates a seven-member Redistricting Commission, which has sole and exclusive authority to adopt the City's redistricting plan that sets the boundaries of City Council districts. The commission is appointed by the Presiding Judge of the San Diego Superior Court. This year, in response to a vote of the people, the Redistricting Commission will be adding a new Council district and be charged with dividing the City into nine council districts.

San Francisco: The City & County of San Francisco Charter requires the Director of Elections to determine whether the existing supervisorial districts meet the legal requirements established by federal, state, and local law (e.g., be of "equal population"). If the existing supervisorial districts no longer comply with these legal requirements, the Charter requires the Board of Supervisors to convene an Elections Task Force to redraw the supervisorial district lines. The Mayor, the Board of Supervisors, and the Elections Commission each appoint three members. These nine individuals work with City staff and outside consultants to determine how the supervisorial district lines should be redrawn so that the districts comply with the legal requirements established in federal, state, and local law. As part of this process, the Elections Task Force holds multiple community hearings to receive input from the people of San Francisco. Throughout this process and based on community input, the Elections Task Force makes changes to the existing supervisorial district lines. The Elections Task Force must present a final plan outlining the new supervisorial district lines to the Board of Supervisors. The Board of Supervisors may not revise the boundaries established by the Task Force.

Modesto: Modesto's charter establishes a Citizen's Districting Commission, a nine-member body appointed by the city council. The charter sets redistricting criteria and procedural requirements for the commission. The commission recommends a plan to the city council, which must act on the plan. The council cannot alter the plan; rather, it can approve or disapprove it in its entirety. If disapproved, the plan is returned to the commission for a final plan for implementation.

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Attachment 2

Council Redistricting Process 2001

2001 – CHRONOLOGY OF MEETINGS RELATED TO REDISTRICTING PROCESS

DATE	Location / Time	Topic
02/27/01	City Council - Item 13.2	Approval of principles, process, and timeline
03/08/01	Hart Senior-Center	Community Meeting (NSA 1)
03/12/01	Robertson Center	Community Meeting (NSA 2)
03/13/01	Natomas Service Center	Community Meeting (NSA 2)
03/14/01	Coloma Community Center	Community Meeting (NSA 3)
03/21/01	Pannell Community. Center	Community Meeting (NSA 4)
04/01/01	N/A	CENSUS DATA RELEASED
04/10/01	City Council - Item 13.2	Summarize information gathered in community meetings,-receive additional community-wide testimony, receive released census information Community meeting to distribute information/answer questions; Council directed that 1) the workshop date be changed from May 2 to Saturday, April 28 to allow people from all neighborhoods to work together 2) requested adjusted census data that reflects a more accurate picture of minority populations
04/11/01	Community Meeting & City's web page	*CDs / Info available to public*
05/14/01	N/A	*Community Council District boundary proposals due to Community Development Department*
06/19/01	City Council - Item 13.2	Council meeting to review 4 themes and 13 map proposals for analysis; Council directed staff to further investigate Theme A, to consider specific neighborhood directives of Council, and return July 24, 2001 with staff recommendations.
07/24/01	City Council - Item 13.3	Council meeting to review proposed redistricting boundaries; after testimony, Council directed that the item be continued to August 9
08/09/01	City Council - Item 13.1	Council & community discussion of alternative proposals – closed public testimony, various motions of intent by Council and continued to August 14
08/14/01	City Council - Item 4.1	Council discussion and votes on various motions of intent
08/28/01	City Council - Item 4.3	*Council re-opened the hearing then approved District Boundaries* (Ordinance 2001-034)
10/16/01	City Council - Item 2.29	Council approves minor amendments to previous ordinance (Ordinance 2001-045)

History - Summary of Boundary Adjustments from the 2001 redistricting process

- Applying the 2000 census data to the then-existing council districts resulted in a (pre-redistricting) total deviation across all districts of 34.11%, calculated with the plus (+) 20.99% variation of District 8 and the minus (-) 13.12% variation of District 4.
- The United States Census "Block Data" became available in April 2001. According to said census, the total population of the City of Sacramento for redistricting purposes is 407,018. The target mean population for each district was 50,877.
- The Approved Council District Map resulted in a total deviation across all districts of 13.09%, calculated on the +6.79% of District 8 and -6.30% of District 1.
- The preservation of existing neighborhoods was a major focal point during the deliberations by the City Council. The concern over existing neighborhoods made for difficult policy decisions, as the location, population, and configuration of different neighborhoods within the City made it impossible to satisfy the expressed desires of all of the residents voicing neighborhood concerns during the deliberations and public outreach meetings. The City Council, faced with a constitutional mandate of substantial population equality, arrived at the Approved Council District Map through compromise and reconciliation, but in the end could not avoid the division(s) by political boundaries of some neighborhoods over others.
- Ordinance 2001-034 adopted August 28, 2001; Ordinance 2001-045 adopted October 16, 2001, made minor amendments to previous ordinance.

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Attachment 3

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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).

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.

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

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 "substantial 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 "equal 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 "discriminatory purpose" test. To pass this test, the plaintiffs had to establish that the redistricting jurisdiction "was either motivated by racial considerations or in fact drew the districts on racial lines."[30] In 1980, the Supreme Court established the same "discriminatory purpose" standard for pursuing a claim of wrongful minority vote dilution under the then-existing

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 "discriminatory 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 "not 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 Act after concluding that additional majority-Hispanic Senate districts could have been drawn in Dade

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).

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 "racial 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 grounds other than race is subject to strict scrutiny. Applying this rule in the context of redistricting

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

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 legislature's redistricting calculus. Redistricting legislatures will, for

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

> 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 "equal 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

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Attachment 4

RESOLUTION NO. 2011-

Adopted by the Sacramento City Council

January 18, 2011

ESTABLISHING THE COUNCIL REDISTRICTING PROJECT (I07000700) AND TRANSFERRING THE FUNDS FROM GENERAL FUND ADMINISTRATIVE CONTINGENCY TO I07000700

BACKGROUND

A. The City of Sacramento must reapportion (redistrict) City Council district boundaries every ten years following the U.S. Census. The resulting district boundaries must be balanced in population in accordance with the local, state, and federal rules governing the redistricting process.

B. There will be additional technical staff resources needed to develop software and technical staff to support the process and meet the firm time requirements associated with redistricting. It is estimated that the total cost to support the redistricting effort will not exceed $160,000.

C. Council approval is required to establish all multi-year Capital Improvement Program projects.

BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:

Section 1. The Council Redistricting Project is established as I07000700.

Section 2. Funds in the amount of $160,000 will be transferred from the City's General Fund (Fund 1001) Administrative Contingency to I07000700.