

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor



DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

February 16, 2011

The Honorable President and Members
of the Baltimore City Council
Attn: Karen Randle, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 11-0642 – Mayor's Redistricting Plan

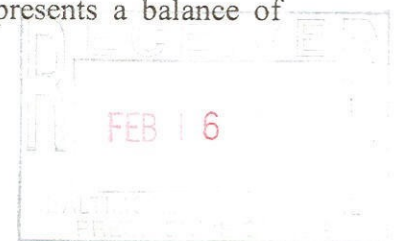
Dear President and Members:

The Law Department has reviewed City Council Bill 11-0642, the Mayor's Redistricting Plan ("the Plan"), which was submitted in accordance with Section 7(b) of Article III of the City Charter. The pertinent considerations are the federal Constitution (namely the Equal Protection clause), the federal Voting Rights Act, the City Charter and various judicial precedents. The requirements of the U.S. Constitution prevail over all other considerations in constructing a redistricting plan. However, once the Plan meets constitutional muster, it then must also comply with the federal laws and the City Charter.

I. EQUAL PROTECTION ANALYSIS

The Supreme Court has recognized that deliberate fashioning of districts on the basis of race raises constitutional concerns and such plans could be subject to strict scrutiny review under the Equal Protection Clause of the Fourteenth Amendment. *See e.g., Easley v. Cromartie*, 532 U.S. 234, 243 (2001). In devising a redistricting plan, Equal Protection requires consideration of the following factors:

- Districts should be equipopulous but deviations of less than 10% are generally acceptable in local government redistricting
- Awareness and consideration of race in the districting process is permissible so long as it is not the predominant factor in the process to the subordination of traditional districting principles
- Districts that have odd shapes or contain a majority of one race are not *per se* unconstitutional unless challengers show that the redistricting plan is unexplainable on grounds other than race
- Compliance with Section 2 of the Voting Rights Act (see further discussion below) is a permissible consideration
- Courts will give deference to the proposed plan as it represents a balance of competing interests



II. THE VOTING RIGHTS ACT

The Voting Rights Act of 1965, as amended and codified in Section 1973 of Title 42 of the United States Code (hereinafter “the Act”), prohibits the dilution of voting power on the basis of race. Balancing this requirement with the Constitutional requirements of racial neutrality is a complex task. The pivotal part of the Act is its Section 2:

- (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
- (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. §1973 (emphasis in original).

A 1982 amendment to Section 2 adopted a results based standard, in effect overruling an earlier Supreme Court decision that a claim of denial of access to the political process by a minority group required a showing of purpose or intent to discriminate. *See Jordan v. City of Greenwood*, 711 F.2d 667, 668-69 (5th Cir. 1983). Thus, the Supreme Court now looks for three preconditions to be met in order to bring a vote dilution case under the Voting Rights Act:

- The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district
- The minority group must be able to show that it is politically cohesive
- The minority must be able to demonstrate that the majority votes sufficiently as a bloc to enable it in the absence of special circumstances, such as the minority candidate running unopposed, usually to defeat the minority preferred candidate

See Thornburg v. Gingles, 478 U.S. 30 (1986) (citing Senate Judiciary Report (accompanied the amendments to the Voting Rights Act in 1982)); *see also Bartlett v. Strickland*, 129 S. Ct. 1231, 1241 (2009).

Once these preconditions are met, however, a vote dilution case will not be successful unless evidence of the circumstances of the local political scene shows that:

- the history of official discrimination in the political subdivision that impacted on the right to vote or participate in the political process
- the extent to which voting is racially polarized
- the extent to which the political subdivision has used voting practices or procedures that may enhance the opportunity for discrimination
- whether members of minority groups have been denied access to candidate slating process
- the extent to which members of minority group have suffered discrimination in other areas which hinder their ability to participate effectively in the political process;
- whether campaigns have been characterized by racial appeals
- the extent to which minority members have been elected to public office
- whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group
- whether the policies underlying the use of a voting qualification, prerequisite to voting, or a standard, practice or procedure are tenuous

These factors, gleaned from various court decisions, are not exclusive, and courts may take other evidence into consideration in evaluating a case of vote dilution. In reviewing the relevant factors, the Supreme Court is concerned that the judiciary maintain appropriate deference to the legislative branch of government in this area. Although the Act places limits upon a legislature's freedom to enact a districting plan, the Supreme Court has emphasized that districting remains essentially a political task entrusted to the legislative branch of government. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Grove v. Emison*, 507 U.S. 25, 34 (1993). A court should not substitute an objectively superior plan for an otherwise constitutional or legally valid plan.

III. BALTIMORE CITY CHARTER: Article III, Section 7(a) and (b)

In addition to the requirements of the U.S. Constitution and federal law, a redistricting plan must conform to the requirements of the Baltimore City Charter. *See Reynolds v. Sims*, 377 U.S. 533 (1964)(recognizing the right of political subdivisions to impose additional standards regarding redistricting). Article III, Section 7(a) of the City Charter provides:

The City shall be divided by ordinance into districts for the election of members of the City Council. The criteria in redistricting shall be equality of population, contiguous territory, compactness, natural boundaries, existing council district lines and the standards established by the Supreme Court of the United States.

Equality of population is also a Constitutional requirement and, as explained in previous paragraphs, encompasses apportionment based on census figures and requires as equal as possible numbers among districts with deviations of less than ten percent allowed but may require explanation.

The contiguity requirement was addressed by the Maryland Court of Appeals in *In Re Legislative Districting of the State*, 370 Md. 312 (2002). Contiguity requires that districts consist of adjoining territory, that there be no division between one part of a district's territory and the rest of the district, *i.e.* the parts of the district must be actually touching, adjoining and connected. The Maryland Attorney General has found that a district divided by a body of navigable water, even though the water is not spanned by a bridge or tunnel or ferry, does not violate the contiguity requirement. 2000 Md. A.G. Lexis 16.

Compactness is more complex and can be measured in a variety of ways. The visual appearance of the district is a consideration. Compactness contemplates a close union of territory conducive to constituent-representative communication. *In Re Legislative Districting of the State*, 370 Md. at 316. Consideration is also given to the mix of constitutional and other factors that may make some degree of noncompactness unavoidable. *Id.* at 321. In a March 29, 1971 Opinion of the City Solicitor, the Law Department was asked to review an amended redistricting plan proposed by the City Council. The Law Department noted that one district had been reconfigured so that it nearly encircled another district and therefore failed to comply with the Charter criteria of compactness and consideration of existing district lines. The opinion pointed out that, although the primary Constitutional requirement of equal population must be paramount, the other redistricting plan that was before the Council had complied with the equal population requirement while at the same time satisfying the Charter requirements of compactness and consideration of existing district lines. The Law Department disapproved the plan, finding that, when at all possible, a plan should comply with all constitutional and statutory requirements. Finally, the importance of considering natural boundaries and existing council districts is self-explanatory. These requirements must also be construed in light of the constitutional and other factors that must be part of the process. In the final analysis, all of these requirements are designed to prevent gerrymandering of district lines to serve political or partisan goals. *Id.*

The Plan appears to comply with the Charter requirements, including contiguity and compactness of districts, preservation of communities of interest, including reuniting some communities that were split during the last redistricting, and provides for districts with reasonably equal population without running afoul of the U.S. Constitution or the Voting Rights Act.

The Charter provides the process for preparation and implementation of the plan. Article III, Section 7(b) requires the Mayor to prepare a plan for redistricting "following each census of the United States." "The Mayor shall present the plan to the City Council not later than the first day of February of the first municipal election year following the census. After the Mayor's plan is presented to the City Council, the Council may adopt it or amend it or the City Council may adopt another plan. If no plan has been adopted by the City Council within sixty days after the Mayor's plan is presented, the Mayor's plan shall take effect as the redistricting ordinance." Therefore, this bill will become law on April 1 if a plan has not been adopted prior to that time.

IV. CONCLUSION

In addition to the Constitutional, statutory and Charter requirements, it is indisputable that political considerations and judgments enter into the process when elected officials are crafting redistricting plans. A certain amount of discretion is vested in those officials charged with the duty of drawing district lines. The incorporation of political considerations and judgments does not invalidate a plan but "politics and other non-constitutional considerations 'never' trump constitutional requirements" and City Charter requirements must yield to Constitutional and federal requirements to the extent that there is conflict. The Plan, however, does not appear to be subject to a successful legal challenge. Accordingly, for the reasons stated herein, the Law Department approves City Council Bill 11-0642 for form and legal sufficiency.

Very truly yours, *ecm*

George Nilson

George Nilson
City Solicitor

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