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CITY OF SEGUIN CITY COUNCIL
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LEGAL PRINCIPLES GOVERNING THE REDISTRICTING PROCESS **AND INITIAL ASSESSMENT**

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 to this Initial Assessment letter 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 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 or county commissioner precincts.

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 10 percent between their most heavily populated district and the least populated district. This 10 percent deviation is usually referred to as the "total maximum deviation." It is measured against the "ideal" or target population for the governmental entity based on the most recent census.

A governing body is therefore required to determine whether the populations of its single-member districts (including county commissioner precincts) are within this 10 percent balance based on 2010 Census population data. If the population deviation among the districts exceeds the permissible 10 percent total maximum deviation, the entity must redistrict, that is, redraw the boundaries of the individual districts so that the total populations of all the new districts are within the permissible 10 percent limit. 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 recently released population data for the 2010 Census in its analysis of redistricting plans – the so-called “PL 94-171” data. 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 the governmental entity 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, likely impossibly high at a time so close to the release of new census data. As a practical matter, therefore, we recommend that entities use the 2010 Census data in their redistricting processes. We have based our redistricting plans on PL 94-171 total population data.

In the redistricting process, each governmental entity will use a broad spectrum of demographic and administrative information to accomplish the rebalancing of population required by the one person-one vote principle. The charts provided to you show not only the total population of the City but also give breakdowns of population by various racial and ethnic categories for the City as a whole and also for each Councilmember district.

Census geography

These single-member 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 county election precincts.

For reasons concerning reducing the potential for *Shaw v. Reno*-type liability, discussed below, we generally recommend using VTDs as the redistricting building blocks where and to the extent feasible. However, for cities the size of the City of Seguin, this may not be feasible.

Census racial and ethnic categories

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 57 different racial combinations that might occur. 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 guidance documents issued on January 18, 2001 and February 9, 2011 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 racial and ethnic categories. This information is provided for the limited purpose of addressing some of the specific legal inquiries 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. It is a measure of the number of people old enough to vote if they are otherwise eligible to do so.

In addition to this population and demographic data, the entity will have access to additional information that may bear on the redistricting process, such as local practices and neighborhoods, geographic boundaries, 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 change, including their redistricting plan. This includes changes to any single-member district lines (including county commissioner precinct lines). Section 5 applies not only to changes in single-member 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.

“Retrogression” as the preclearance standard

The legal standard applied to a preclearance review under Section 5 is whether the new plan has the purpose or the effect of denying or abridging the right to vote on account of

race or color. This Section 5 standard has been called the “retrogression” standard. In effect, it considers whether a minority group has been made worse off by a proposed change in voting standards, practices or procedures, such as a redistricting plan.

The Supreme Court has made clear in *Miller v. Johnson* (one of the *Shaw v. Reno* line of cases) that DOJ is not to apply other standards in addition to this retrogression standard in determining whether to preclear new districting plans, as DOJ did in the 1991 round of redistricting. The inquiry to be conducted by DOJ is thus only whether the new plan has the purpose or effect of causing retrogression with respect to a minority group.

DOJ's retrogression benchmark

To determine if retrogression exists, it is necessary to compare a proposed plan against a benchmark. Typically, that benchmark 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.

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 is not available at this time.) In combination with a balanced consideration of the other applicable redistricting criteria, the entity's governing body will need to consider the effects of any changes to the benchmark measures that its proposed plan produces.

In adjusting the boundaries of districts, the burden will be on the governmental entity to show DOJ that a less retrogressive plan could not reasonably have been drawn. 76 Fed. Reg. 7472. That should be a goal of the redistricting process, while still considering the other redistricting criteria that are adopted.

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. Also, “fracturing” or “cracking” minority populations into small groups in a number of districts, so that their overall voting strength is diminished, 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 has made clear 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 governmental body 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 the minority plaintiff must satisfy: a showing 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"). In the federal appellate Fifth Circuit, which includes Texas, the minority population to be considered is *citizen* voting age population; (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 usually votes to defeat candidates of the minority group's preference. *Thornburg v. Gingles*, 478 U.S. 30 (1986). In certain cases, a minority group may assert that Section 2 requires that the governmental body draw a new majority minority district. The governing body must be sensitive to these Section 2 standards as it redistricts.

In considering changes to existing boundaries, a governmental entity must be aware of the location of protected minority populations within its single-member districts for the purpose of ensuring that changes are not made 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. 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

The *Shaw* standard applies now as well as the Section 2 and Section 5 standards. While satisfying Section 5 and Section 2 standards require a local government 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, local governments 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.

A majority of the United States Supreme Court has indicated that compliance with Section 2 of the Voting Rights Act is a "compelling state interest." While the Court has not expressly addressed the question in any case to date, it is reasonable to assume that it would find that satisfying Section 5 of the Voting Rights Act would also be a compelling state interest for strict scrutiny purposes so long as the efforts to comply with Section 5 are consistent with the Court's narrow, retrogression-based interpretation of Section 5.

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
- if a plan is 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.

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 governing body might wish to consider adopting include, for example:

- use of 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
- maintaining communities of interest (*e.g.*, traditional neighborhoods)
- basing the new plan on existing districts;
- adopting districts of approximately equal size;
- drawing districts that are compact and contiguous;
- keeping existing representatives in their districts; and

-- narrow tailoring to comply with the Voting Rights Act.

There may be other criteria that are appropriate for an individual entity's situation, but all criteria adopted should be carefully considered and then be followed to the greatest degree possible. You may wish to include additional criteria, or determine that one or more on that list are not appropriate. We will discuss with you appropriate criteria for your situation.

Requirements for Plans Submitted by the Public

You should also consider imposing the following requirements on any plans proposed by the public for your consideration: (1) Any plan submitted for consideration must be a complete plan, that is, it must be a plan that includes configurations for all commissioner precincts (or other precincts, as applicable) and not just a selected one or several. This is important because, although it may be possible to draw a particular precinct in a particular way if it is considered only by itself, that configuration may have unacceptable consequences on other precincts 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.

INITIAL ASSESSMENT

According to 2010 census data, the total deviation of population among the eight Councilmember Districts exceeds 10% - being a 58.82% population difference between the most populous and least populous of the Councilmember Districts. Therefore, redistricting of Councilmember Districts is necessary to conform with the “one person, one vote” principles of the United States Constitution and to reduce the risk of a legal challenge prior to next year’s elections. In particular, Councilmember District One is overpopulated, containing 25.49% more persons than the ideal population. Conversely, Councilmember District Four is underpopulated (as compared against the ideal district) by 33.33%. Efforts will need to be made during the redistricting process to reduce the total deviation among the respective Councilmember Districts to below 10%.

In addition, five of the eight Councilmember Districts have Hispanic majorities. Efforts will need to be made to preserve the Hispanic voting strength in each of these five Councilmember Districts during the redistricting process.

It may be possible to redistrict the boundaries of only a few of the Councilmember Districts to effectuate a legally defensible and locally acceptable plan, rather than having to make changes to all Councilmember Districts. However, until we engage in the process of drawing new plans, we cannot guarantee this result. During the initial deliberations of the Councilmembers, we can pursue whether it is preferable to alter the boundaries of as few Districts as possible, or whether a more comprehensive approach is warranted. Unfortunately, with a total deviation of 58.82%, it is likely each of the Councilmember Districts will likely change, with the possible exception of District Six which is very close to the ideal population.

We look forward to presenting the initial assessment to the City Council and providing direction to the City throughout the redistricting process.

ATTACHMENT A

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 not be available in time for this redistricting cycle.

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 follow it establish 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. It is available only at the county voting precinct level.

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

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 per district (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:

<u>District</u>	<u>Ideal district</u>	<u>District total pop.</u>	<u>Difference</u>	<u>Deviation</u>
A	10,000	11,000	1000	+10.0
B	10,000	10,750	750	+7.5
C	10,000	10,250	250	+2.5
D	10,000	8,000	- 2000	-20.0
<hr/>				
Totals:	40,000	40,000		30 percent

Total maximum deviation = difference between most populous and least populous districts

= 10 percent + 20 percent = 30 percent.