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MEMORANDUM

VIA EMAIL

TO: Don Larkin, City Attorney

FROM: Tom Willis

DATE: January 10, 2022

RE: Contiguity as Applied to the City's Redistricting Process

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SUMMARY

The City is in the midst of redistricting its city council districts to conform to the 2020 census and comply with the recently-enacted State FAIR MAPS Act. The City has released several draft maps including three by its demographer NDC.

Each of NDC's draft maps splits current District B in order to bring portions of neighboring District D that currently are not contiguous into contiguous districts. Current District B runs through the entire center of the City and is generally bounded by Highway 101 to the North and Monterey and Butterfield Streets to the South. The current architecture puts all of the portions of the City to the north of Highway 101 into one district, District D, even though those portions are not geographically connected; in redistricting terms those portions are not contiguous.

District D consists of four non-contiguous areas: (1) in the south, an area containing Nordstrom and the Jackson Meadows, Jackson Oaks, and Holiday Lake Estates neighborhoods (the South Area); (2) an island containing Live Oak High School; (3) in the north an area containing Mission Ranch and Coyote Creek Estates neighborhoods (the North Area); and (4) an island containing the Math Institute Golf Course. The NDC plans would connect the North and South Areas to the rest of the City in districts that are contiguous. Since the Live Oak School and Golf Course are on islands not connected to any other City land, they cannot be drawn in contiguous districts but in the draft maps have been included in the council districts closest to them.

On December 15, 2021, the City received a letter from Armando Benavides and eight other individuals opposing NDC's draft maps or any draft map that would split current District B into two or more council districts. In addition to arguing that District B is a community of interest that should be kept whole, Mr. Benavides contends that splitting

District B would violate the State FAIR MAPS Act, the California Voting Rights Act, and the federal Voting Rights Act. For the reasons set forth below, we believe those arguments are without merit. Rather, the State FAIR MAPS Act requires districts to be contiguous where possible, meaning that the North and South Areas must be included in districts that are geographically connected with other parts of the City. This will necessitate splitting current District B.

ANALYSIS

I. The State FAIR MAPS Act Requires Contiguous Districts in Morgan Hill

In his letter, Mr. Benavides does not really dispute that current District D is not contiguous, that it's possible to include the North and South Areas of District D in contiguous districts, or that in order to do that current District B must be split.

Instead, he contends that contiguity is only one of four traditional redistricting criteria that the City must consider when drawing districts and that the other three criteria favor keeping Districts B and D as they are.[1] Letter at 4. But even if we assume for present purposes that Mr. Benavides is correct that the three other redistricting criteria support keeping Districts B and D unchanged, the argument still fails as a matter of law and is at odds with the plain text of the State FAIR MAPS Act.

Mr. Benavides is referring to the four redistricting criteria that a city must follow once it has ensured that a plan complies with higher ranked criteria set forth in federal and state constitutional and statutory requirements.[2] The State FAIR MAPS Act states as follows:

> (c) The council shall adopt district boundaries using the following criteria *as set forth in the following order of priority*:
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> (1) To the extent practicable, council districts shall be geographically contiguous. Areas that meet only at the points of adjoining corners are not contiguous. Areas that are separated by water and not connected by a bridge, tunnel, or regular ferry service are not contiguous.

[1] Those other criteria are keeping neighborhoods and communities of interest whole, making districts easily understandable, and making districts compact. *See* Elec. Code § 21601(c)(2)-(4).

[2] Those include equal population, the Equal Protection Clause of the Fourteenth Amendment, and the federal Voting Rights Act. *See* Elec. Code § 21601(a)-(b).

> (2) To the extent practicable, the geographic integrity of any local neighborhood or local community of interest shall be respected in a manner that minimizes its division. A "community of interest" is a population that shares common social or economic interests that should be included within a single district for purposes of its effective and fair representation. Communities of interest do not include relationships with political parties, incumbents, or political candidates.
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> (3) Council district boundaries should be easily identifiable and understandable by residents. To the extent practicable, council districts shall be bounded by natural and artificial barriers, by streets, or by the boundaries of the city.
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> (4) To the extent practicable, and where it does not conflict with the preceding criteria in this subdivision, council districts shall be drawn to encourage geographical compactness in a manner that nearby areas of population are not bypassed in favor of more distant populations.
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> Cal. Elec. Code § 21601 (emphasis added).

As the plain text makes clear, the criteria are to be applied in order of priority and contiguity is the first criterion. Thus, contiguity must be prioritized over all other criteria. Moreover, the requirement of contiguity is mandatory: "council districts shall be geographically contiguous." Thus, section 21601(c) clearly requires all portions of a district to be geographically connected, and that requirement must be satisfied before a city moves on to the other criteria, such as keeping neighborhoods whole or districts compact.

Despite the clear language of Elections Code section 21601, Mr. Benavides argues that the qualifier "to the extent practicable" introduces some flexibility into the contiguity requirement. We disagree. Given the mandatory nature of the requirement, we believe the phrase "to the extent practicable" means that districts must be contiguous if it is possible to do so but the standard also realizes that in some cases it is impossible to make municipal districts contiguous because there may be islands of incorporated areas that are surrounded by other cities or unincorporated areas. That is the case with respect to two incorporated islands of the City: the golf course and Live Oak High School. It is impossible to draw those areas into a contiguous district. Thus, the standard accommodates those situations when contiguity is impossible but nonetheless requires contiguity where is it possible. That is the case for the South and North Areas of the city – it is possible to include them in contiguous districts. Therefore, Elections Code section 21601 requires them to be so drawn.

II. Splitting District B Would Not Violate the California Voting Rights Act

Mr. Benavides next contends that splitting District B could subject the City to liability under the California Voting Rights Act (CVRA). His argument is not that splitting District B by itself would violate the CVRA. Rather he seems to be arguing that the potential plaintiffs who demanded the City convert to district elections under the CVRA agreed to the City's remedial plan of keeping the mayor position at-large, instead of requiring all five council seats to be elected by district elections, in return for an agreement that the City would draw and maintain District B in its current form, namely stretching through the urban center of the City. He implies that if District B were redrawn, those potential plaintiffs could sue the City over the fact that the mayor is elected at-large instead of by-district, and that the CVRA requires all city council seats to be elected by-district.

Mr. Benavides is correct that the CVRA defines an "at large" method of election as, among other systems, "one that combines at-large elections with district-based elections." Cal. Elec. Code § 14027. That could cover an election of an at-large mayor with other council members elected from districts. The CVRA contains no apparent exception for jurisdictions that want to convert to district elections but maintain an at-large mayoral election. Thus, Mr. Benavides finds some support from the text of the CVRA when viewed in isolation.

However, notwithstanding section 14027, there is a provision in the Government Code that supports the position that a general law city can comply with the CVRA by converting to district elections for councilmembers but retaining an at-large election for mayor. Well after the CVRA was adopted in 2002, the Legislature passed legislation that encouraged jurisdictions to move to district elections by limiting their liability from a CVRA challenge if they did so. *See* Cal. Elec. Code § 10010. As part of those changes, the Legislature also passed SB 493 in 2015 that allowed general law cities to transition to district elections without first having to seek voter approval. That provision has been amended twice since then and currently states:

> Notwithstanding Section 34871 or any other law, the legislative body of a city may adopt an ordinance that requires the members of the legislative body to be elected by district or by district with an elective mayor, as described in subdivisions (a) and (c) of Section 34871, without being required to submit the ordinance to the voters for approval. An ordinance adopted pursuant to this section shall comply with the requirements and criteria of Section 21601 or 21621 of the Elections Code, as applicable, and include a declaration that the change in the method of electing members of the legislative body is being made in furtherance of the purposes of the California Voting Rights Act of 2001

> (Chapter 1.5 (commencing with Section 14025) of Division 14 of the Elections Code).
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> Cal. Gov't Code § 34886 (emphasis added).

Government Code section 34871 states that a city's "legislative body may submit to the registered voters an ordinance providing for the election of members of the legislative body in any of the following ways: . . . (c) By districts in four, six, or eight districts, with an elective mayor pursuant to Article 5 (commencing with Section 34900)."

Given that section 34886 allows general law cities to convert to districts to comply with the CVRA but retain an at-large election for mayor "notwithstanding . . . any other law", the section appears to trump Elections Code section 14027. In addition, section 34486 was added by statute in 2015, and amended both in 2017 and 2019, all of which occurred well after the California Voting Rights Act was adopted in 2002. "It is well established that a statute enacted later in time controls over an earlier-enacted statute, and it is equally well established that a specific statute prevails over a statute that is more general." *Cross v. Superior Court*, 11 Cal. App. 5th 305, 322 (2017) (*citing State Dept. of Public Health v. Superior Court*, 60 Cal. 4th 940, 946 (2015)).

Further, at least two CVRA cases that were tried to judgment required the cities to adopt district elections but permitted the jurisdictions to maintain an at-large mayor even though the mayor was a voting member of the council. S*ee Yumori-Kaku v. City of Santa Clara*, 59 Cal. App. 5th 385, 408 (Dec. 30, 2020) (trial court approved district-based elections with a mayor elected at-large; the issue was not, however, addressed in the appellate opinion); *see also Juarequi v. City of Palmdale* (Los Angeles Superior Court Case No. BC483039) (same). Although those courts did not analyze the issue, apparently neither the court nor plaintiffs objected.

III. Splitting District B Would Not Violate the Federal Voting Rights Act

Finally, Mr. Benavides argues that if the City "splits District B in two parts a practice known in Section 2 parlance as 'cracking' when it disproportionately concentrates minority voters – it would run the risk of a Section 2 action in federal court." Letter at 8. Again, we believe the argument is not supported by the facts or law.

Section 2 of the Voting Rights Act provides that no "standard, practice, or procedure shall be imposed or applied . . . in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color" or membership in a language minority group. 52 U.S.C. § 10301. "A violation [of Section 2] is established if, based on the totality of circumstances, it is shown that the political processes . . . are not equally open to participation

by members of a class of citizens protected by subsection (a) of this section 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." *Id.*

The Supreme Court has established a number of elements that a plaintiff must prove to demonstrate that a redistricting plan violates section 2. Initially, a section 2 plaintiff must satisfy the three so-called *Gingles* preconditions. Then, only if those are met, will a court consider whether under the totality of the circumstances, the challenged practice impairs the ability of the minority voters to participate equally in the political process. Courts have, however, stated that it would be a very unusual case in which plaintiffs could establish the existence of the *Gingles* preconditions but fail to establish a violation of section 2 under the totality of the circumstances test. *See NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1007 (2nd Cir 1995).

The three *Gingles* factors are the following:

1. The minority group must be sufficiently large and compact to constitute a majority in a single district;

2. The minority group must be politically cohesive; and

3. The minority group must be able to demonstrate that the majority votes sufficiently in a bloc to enable it to usually defeat the minority's candidate of choice.

Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986).

To meet the first Gingles factor, a minority group must establish it could constitute a majority (50%+1) of the citizen voting age population (CVAP) of a district. *Bartlett v. Strickland*, 556 U.S. 1, 186 (2009); *Romero v. City of Pomona*, 883 F.2d 1418, 1425 (9th Cir. 1989) (requiring CVAP rather than total population to show a majority district under section 2).

Mr. Benavides claims District B in its current form is or should be protected by the VRA. Thus, to state a claim under the VRA, a plaintiff would have to establish that all three *Gingles* are present with respect to District B. But on its face District B does not meet the first *Gingles* factor: no minority group constitutes a majority of CVAP. The relevant CVAP numbers for District B are: 26% Latino, 3% Black, 18% Asian, and 52% White. Moreover, not even a claim that District B should be treated as a coalition district – where more than one minority group prefer the same candidates and have similar voting patterns – would be meritorious since the White population still constitutes a majority of the CVAP.

For this reason, it is clear that the VRA does not require or compel the City to maintain District B in its current form.

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