January 3, 2022

Memo to City Council Staff – Legal Considerations Regarding Redistricting

Redistricting of city council and school board district boundaries is governed by the United States Constitution, federal statutes, Utah statutes, and Salt Lake City Code provisions.

Even though the City Council will not be redistricting the Salt Lake City School District board this year, we have left in the discussion about school board redistricting for future use.

U.S. Constitution

Equal Protection of the Laws

The "one person, one vote" rule is based on the Equal Protection Clause of the Fourteenth Amendment and applies to the City Council and school board districts. It requires substantial equality of population among the districts. Reynolds v. Sims, 377 U.S. 533 (1964)

> *Sometimes there is a push for districts based on number of registered voters, actual voters, persons of voting age, or citizens of voting age. However, most courts have ruled that "population" means "total population." A reason for that is that basing district size on number of voters fails to protect the interests of the many people who reside in a place but don't vote.*

Fifteenth Amendment

The Fifteenth Amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."

Federal Statutes

Discrimination in voting against racial or language minorities is prohibited by the Voting Rights Act of 1965, Section 2 (52 U.S.C.A. § 10301).

> *If race is a motive in the redistricting, the courts will probably subject a plan to strict scrutiny, which is very hard to survive*.

Utah Statutes

City Council

Each City Council district must be of ***substantially equal population*** as the other districts. Utah Code § 10-3-205.5(2)(b)(i). In the redistricting process the Council must make any adjustments in the boundaries of the districts as may be required to ***maintain*** districts of substantially ***equal population***. The Council must do that within six months after the Legislature completes its redistricting process. Utah Code § 10-3-205.5(2)(b)(ii).

> Utah Constitution Art. IX § 1 says: "No later than the annual general session next following the Legislature's receipt of the results of an enumeration made by the authority of the United States, the Legislature shall divide the state into congressional, legislative, and other districts accordingly.

School Board

School board districts must be:

(1) substantially ***equal in population***,

(2) as ***contiguous*** as practicable, and

(3) as ***compact*** as practicable. UCA § 20A-14-201(1)(b).

Contiguous

"Contiguous" means that no portion of a district is not connected to another portion of the district.

Utah Code § 10-1-104(2) defines "contiguous" to mean:

(a) if used to describe an area, continuous, uninterrupted, and without an island of territory not included as part of the area; and
(b) if used to describe an area's relationship to another area, sharing a common boundary.

A court probably would consider that statutory definition to be valid.

Compact

According to Webster's New Collegiate Dictionary (1981), "compact" means "having parts or units closely packed or joined."

Courts in some states define "compact" in terms of physical shape or size, such as having a small perimeter in relation to the area composed, and avoiding bizarre designs, or even in terms of a circle containing the least land area outside the district. 114 ALR 5th 311 § 3[a].

Courts in other states define compactness as referring to closely-united territory, which is conducive to constituent-representative communication. Id. at 3[b].

The following ideas were in a redistricting case in Colorado.

The compactness requirement specifies that the boundaries of each district shall be as short as possible. One of the most accurate ways to measure compactness is to determine the smallest circle into which the district can be circumscribed and to compare the ratio of the area of the district inside the circle to the area of the circle itself. The closer these figures come to a 1 to 1 ratio, the more compact the district will be.

Although there is no federal constitutional standard requiring compact districts, more than half of the states include compactness as a constitutional or statutory criteria for state legislative districting.

A second method of measuring compactness is to compare the aggregate linear distance of the boundaries of each district.

In a practical sense, the compactness of a district will be directly affected by the density and distribution of a state's population. Since population requirements have priority, compactness must often be sacrificed in order to achieve an acceptable range of population deviation. See Carstens v. Lamm, 543 F. Supp. 68, 87 (D. Colo. 1982)

Salt Lake City Code

The City Council districts must be of ***substantially equal population***. The districts must be reapportioned after each federal census to maintain substantially equal populations. City Code § 2.06.010.

> *The City Council could amend this, but it could not do so in a way that was inconsistent with state statutes or that violated constitutional requirements.*

Constitutional Requirements and Guiding Principles

> The Equal Protection Clause of the Fourteenth Amendment requires election districts or voting units for local governmental offices to be as equal in population as possible. This requirement is known as the "one person, one vote" rule and applies to all political subdivisions, including cities, counties, towns, and villages. . . .
>
> Whether a particular manner of apportionment runs afoul of the federal Constitution, is . . . determined on a case-by-case basis. Since the one person, one vote rule applies whenever the governing body to which a challenged districting plan pertains exercises general governmental powers over the entire geographical area that the governing body serves, one consideration in determining the question of population equality is to examine the geographic area to which the election or voting district pertains, as well as the nature of the office or position involved. . . .

On the municipal or city level, whether districts for the election of councilmen . . . have been based on population equality has depended on the circumstances presented. . . .

The federal courts currently measure "population equality" according to the total population in each district, but that method is not required. Thus, while population equality could be determined on the basis of voting-age population, a violation of equal protection does not occur because a legislative body chooses not to use that method, or chooses not to base equality on the number of registered voters in each district. . . .

The Equal Protection Clause . . . requires that, where districts exist, their populations be equal so as to give equal weight to each vote cast.

That begs the question: "How equal is equal?" In other words, to what degree may districts deviate from the population equality standard yet satisfy the Equal Protection Clause? There is no fixed percentage that separates the de minimis from the unconstitutional. A useful guideline is that a districting plan with a maximum deviation from population equality (the sum of the percentages by which the most overrepresented district and the most underrepresented district, respectively, deviate from the equality ideal) of less than 10% is likely to pass constitutional muster as a de minimis departure from the one person, one vote rule. Nevertheless, there is no guarantee that any figure, even the reasonably reliable 10%, will ensure constitutionality; courts can require justifications even for deviations of less than 10%, and can reject plans based on those deviations.

The plaintiff bears the burden of proving that the deviation from population equality is substantial. Once the plaintiff meets that burden, the defendant must show either that the deviation is unavoidable, or that it is justified by an effort to effectuate a rational state policy. Courts will tolerate slightly larger deviations for local districting plans than for state or congressional plans because: (1) municipalities need flexibility to meet changing needs; (2) it is desirable to preserve the integrity of political subdivisions; and (3) local districts often have small populations and relatively few officeholders. . . .

The decennial census is the established basis for redrawing district boundaries in order to account for growth and shifts in population. The Equal Protection Clause does not require that states or political subdivisions

> redistrict more frequently than once every 10 years, even when population changes are evident. . . ."
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> 143 A.L.R. Fed. 631 §§ 2[a][b] (1998)

["[T]he "one person, one vote" rule requires substantial equality of population in districts. Reynolds v. Sims, 377 U.S. 533, 579 (1964); Board of Estimate of City of New York v. Morris, 489 U.S. 688, 692-93 (1989).

However, while the Fourteenth Amendment requires states to make an honest and good faith effort to construct legislative districts as nearly of equal population as is practicable, but it doesn't demand mathematical perfection. The Constitution permits deviation when it is justified by legitimate considerations incident to the effectuation of a rational state policy, such as compactness, continuity, maintaining the integrity of political subdivisions, or competitive balance among political parties. Harris v. Arizona Independent Redistricting Commission, 578 U.S. 253, 258 (2016)

> "The supreme court has developed a measure called the "maximum population deviation" to measure disparities in population per legislator in state legislative apportionment cases. The maximum population deviation is calculated by the following steps:
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> > First, the apportionment base, usually the state's population, is divided by the number of legislators in the legislative house under consideration, to arrive at the norm if absolute population equality were achieved.
> >
> > Second, if a district has more persons than the ideal district, the ideal district population is subtracted from the actual district population; the resulting number is then divided by the ideal district population to get the percentage of under-representation.
> >
> > Third, if a district has fewer persons than the ideal district, its population is subtracted from the population of the ideal district; the

> resulting number is then divided by the ideal district population to get the percentage of over-representation.
>
> Finally, when the percentages of under-representation or over-representation have been calculated for all districts (or all legislators in multimember districts), the district that is most over-represented is identified and the district that is most under-represented is identified; these two percentages are then added together to obtain the ***maximum population deviation***."
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> 25 Am Jur 2d Elections § 25 (2021).

For example, suppose that a city's population is 100,000 and it has seven city council districts. 100,000 divided by seven is 14,286. That is the "ideal district" population, in that each district would have exactly equal population. Suppose further that one district is reapportioned to have only 14,000 people, and another is reapportioned to have 15,000 people. The first district's deviation from the ideal is -286, which is a 2.0 percent deviation. The second district's deviation is 714, which is a 5.0 percent deviation. The 2.0 percent and 5.0 percent deviations are added together to get a maximum population deviation, which in this case is 7.0 percent.

Though the description above refers to state legislative districts, the principles apply to local government districts.

A rule of thumb is that if a maximum population deviation is ***under ten percent***, the redistricting will be presumed to be valid. On the other hand, if the maximum population deviation ***exceeds ten percent***, the governmental entity must bear the burden of establishing that the deviation is not discriminatory.

There are many sources that attempt to describe guiding principles or factors that may or may not be taken into account in redistricting. One source is the Utah Independent Redistricting Commission. In 2021 the Commission adopted the following "Threshold Criteria and Redistricting Standards":

Contiguous

- No part of a district can be entirely separated from the remainder of the district.

Reasonably Compact

- To the extent practicable, the Commission will submit maps with districts that are reasonably compact. Districts shall avoid odd shapes or contortions that cannot be explained by other legitimate redistricting criteria.

Communities of Interest

- The Commission shall, to the extent practicable, preserve communities of interest. A "community of interest" is defined as a group of people in a contiguous geographic area that share common policy interests, whether cultural, religious, social, economic, or others that do not necessarily coincide with the boundaries of a political subdivision. A community of interest cannot be based on a relationship with a political party, incumbent, or political candidate.

Geographic Boundaries

- The Commission shall, to the extent practicable, follow natural, geographic, or man-made features, boundaries, or barriers when drawing district boundaries. A "geographic boundary" means natural barriers, such as mountain ranges, significant rivers or large lakes, and other bodies of water. A "man-made" feature refers to prominent aspects of the built or human-designed environment, including streets and freeways.

Cores of Prior Districts

- The Commission shall, to the extent practicable, preserve cores of prior districts. In doing so, the Commission will consider district lines as previously drawn. If possible, the Commission will utilize empirical methods of measuring congruence in prior and proposed district boundaries.

Municipalities and Counties

- The Commission will, to the extent practicable, submit maps which minimize the division of municipalities and counties across multiple districts. The term "municipality" is defined in Utah Code § 10-1-104(5). The Commission will, to the extent practicable, rely on quantitative measurements of division.

Boundary Agreement

- The Commission will, to the extent practicable, seek boundary agreement among the map types submitted. Specifically, the Commission will consider the alignment among the boundaries of the districts for the Utah House of Representatives, the Utah State Senate, the Utah State School Board, and the United States Congress.

Purposeful or Undue Favoring

- The Commission will, to the extent practicable, prohibit the purposeful or undue favoring or disfavoring of an incumbent elected official, a candidate or prospective candidate for elected office, or a political party. In so doing, the Commission will consider direct or indirect evidence of intent and, where practicable, quantitative measures. The Commission will not use residential addresses of incumbents, candidates, or prospective candidates in creating its proposed maps.

Issues

Meaning of "Population."

Reliance on the decennial federal census is a constitutionally permissible basis for the apportionment of a legislative body, but it is not the required standard by which substantial population equivalency is to be measured. The Fourteenth Amendment allows apportionment plans to use bases other than population, but only when population figures are unavailable and the figures employed ***substantially approximate those that would have been derived from a census of the entire population***. Accordingly, registered voter figures may be used as the basis for the apportionment of election districts, consistent with the Equal Protection Clause,

only if the results substantially reflect results obtainable by the use of another permissible basis, such as total population. See CJS Const. Law § 1438 (2021).

Parents of School-aged Children?

It has been suggested that the City Council consider measuring "equal population" by the number of ***parents of children in the public schools***, rather than the general population. However, because that is a restriction on voting other than residence, age, or citizenship, courts would apply ***strict scrutiny*** in analyzing the restriction. Strict scrutiny is extremely difficult to satisfy.

The purpose of the one person, one vote rule is to guarantee that "the vote of any citizen is approximately equal in weight to that of any other citizen." Board of Estimate v. Morris, 489 U.S. 688, 701 (1989). Therefore, the rule is intended to protect *voters* and citizens, not just parents.

Courts have struck down attempts to use something other than general population, such as property owners. See City of Herriman v. Bell, 590 F.3d 1176, 1186 (10th Cir. 2010). The court cited examples, including what it described as the "law restricting voting in a school district election to those owning or leasing taxable property or *having children enrolled* in that school district." (Emphasis added.)

The Supreme Court, in Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969), ruled that a law that restricted voting in a school district election to people owning or leasing taxable property or ***having children enrolled in that school district*** was an unconstitutional violation of equal protection.

More recently, the Illinois supreme court struck down a law that denied the vote in school council elections to voters who did not, at the time of the election, have children attending the public schools. Fumarolo v. Chicago Board of Education, 566 N.E.2d 1283, 1300 (Ill. 1990). The court applied strict scrutiny and said that there had been no evidence that voters who do not have children attending the public school have less interest in the candidates to be elected, or that parents with children attending public schools have a special ability to choose school council members. It said it was unreasonable to deny an equal voice to citizens who do not, at the time, have children in the public schools.

Hypothetical Situation

Suppose that a school district with a population of 70,000 contained seven existing voting districts, each containing 10,000 people. Suppose further that there are 35,000 school-aged children in the entire district.

Suppose that District No. 1 contains 2,000 parents of school-aged children and District No. 2 contains 5,000 parents of school-aged children. If it were proposed to redistrict based on number of parents with school-aged children, then District No. 2 would be right at the ideal number. However, the number of parents with such children in No. 1 would have to be increased to get closer to the 5,000 ideal. That would require taking population from other voting districts in order to obtain more such parents for District No. 1.

The result might be that District No. 2 might need only 10,000 in overall population to contain 5,000 parents of school-aged children, whereas District No. 1 might have to grow to 20,000 people in order to contain 5,000 such parents. The elected representation from District No. 2 would be 10,000 to 1, but in District No. 1 would be 20,000 to 1. Such a plan would result in the dilution of the votes of the people in District No. 1.

The Supreme Court has interpreted the Equal Protection Clause to protect an individual's right to equal voting participation in at least two ways: through rejecting overly restrictive voter qualifications ("**vote denial**"), and through rejecting disproportionate voting districts ("**vote dilution**").

* * *

With respect to voter apportionment, the Supreme Court has held that the Equal Protection Clause requires state and local entities to divide electoral districts on the basis of population, so that each person's vote is equally effective. . . . These cases all recognize that the ***collective dilution of many individuals' votes can result in a form of unconstitutional disenfranchisement, even when no one individual is turned away at the ballot box.*** This principle is best recognized by the catch-phrase "one person, one vote." Kirk v. Carpeneti, 623 F.3d 889 (9th Cir. 2010) (Emphasis added.)

In summarizing Kramer, the Supreme Court later said: "The fact that the school district was supported by a property tax did not mean that only those subject to direct assessment felt the effects of the tax burden, and the ***inclusion of parents would not exhaust the class of persons interested in the conduct of local school affairs***. Hill v. Stone, 421 US 289, 295 (1975) (emphasis added).

Therefore, the ***City Council, in redistricting, should not interpret "population" to mean only parents of school-aged children.***

Effect of Boundary Changes on Incumbent Officers

School Board

With respect to school boards, statutory guidance exists.

Section 20A-14-201(3)(a) provides that "[r]eapportionment does not affect the right of any school board member to ***complete the term*** for which the member was elected.

Section 20A-14-201(3)(b) contains the following rules regarding school board representation following reapportionment:

> 1. If only one board member whose term extends beyond reapportionment lives within a reapportioned district, that board member shall represent that district.
>
> 2. (a) If ***two or more*** members whose terms extend beyond reapportionment live within a reapportioned district, the members involved shall ***select one member by lot*** to ***represent the district***.
>
> (b) The other members shall serve ***at-large*** for the remainder of their terms.
>
> (c) The at-large board members shall serve in addition to the designated number of board members for the board for the remainder of their terms.

3. If ***no*** board member lives within a district whose term extends beyond reapportionment, the seat shall be treated as ***vacant*** and shall ***filled*** as provided by law.

City Council

In contrast to the school district scenario, Utah lacks a statute that expressly addresses the effect of a redistricting boundary change on incumbent city council members. However, some Utah Code sections indirectly provide guidance.

For example, § 10-3-201(1) says that the officers elected in a city general election shall c***ontinue in office*** for four years except in case of death, resignation, removal, or disqualification from office.

A redistricting change is none of those.

Furthermore, § 10-3-202 provides that each elected officer of a city shall hold office for the term for which he or she is elected unless the office becomes ***vacant*** under § 10-3-301. Section 10-3-301(5) says that a city elected officer must maintain a principal place of residence within the district that the officer represents.

In addition, Subsection 10-3-301(5) provides that an elected officer's office becomes automatically vacant if the officer, during the officer's term of office, establishes a principal place of residence outside the district that the officer represents. This happens only if the officer ***acts affirmatively*** to ***move*** from the state or precinct in the state and has the intent to remain in another state or precinct. See § 20A-2-105(4)(j)(i).

Because a change of district boundaries does not involve the affirmative act of a council member to move from the district, it seems unlikely that his or her residence would change and thus there would be no automatic vacancy.

Because no Utah statutes clearly address the issue, it is likely that the common law would apply. Under the ***common law***, the qualifications of candidates for office are

determined at the time they begin their term of office. ***Redistricting that changes the residence of an incumbent member does not affect that member's current term of office. Candidates carry their residence with them throughout the entire term of office*** to which they were elected. Kendra Carberry, *Redistricting: A Municipal Perspective*, Colorado Lawyer 49, February 2002.

That view is supported by Olsen v. Merrill, 5 P.2d 226 (Utah 1931). In that case a redistricting affected members of the Provo Board of Education. Mr. Olsen and Mr. Startup were school board members. Before the redistricting, Mr. Olsen resided in municipal ward No. 3, and Mr. Startup resided in ward No. 2.

After a redistricting, Mr. Olsen ended up living in ward No. 2 and Mr. Startup resided in ward No. 1. The board of education met to select two new board members to replace Mr. Olsen and Mr. Startup, on the premise that the positions of those men had become vacant.

The Supreme Court disagreed, and ruled that the men were entitled to ***continue to act as members of the board for the remainder of their terms. The redistricting did not render them ineligible to continue as board members***.[1]

Therefore, an ***incumbent*** City Council member will ***not lose his or her office due to redistricting***. That necessarily means that, ***temporarily, more than one Council Member might live in a single district, and that during that time a district might endure with no Council Member*** residing within it.

Boyd Ferguson

Senior City Attorney

[1] The court distinguished situations in which the elected officials served only as representatives of the municipal wards from which they were elected. In contrast, the Provo board members did not serve in a municipal ward office. Instead, each board member, though elected from municipal wards, participated in the management and control of the entire school system without regard to municipal wards.