



CITY OF BEND

M E M O R A N D U M

To: City Council; City Manager
From: Mary A. Winters, City Attorney;
Elizabeth Oshel, Associate City Attorney
Re: Drawing Voting Districts
Date: June 6, 2017

QUESTION

What are the legal requirements for drawing voting districts in the city of Bend?

ANSWER

The City is bound by the U.S. Constitution, federal Voting Rights Act, and Oregon law in determining how to draw any wards or districts for election of city councilors. Cities may set their own rules for electing their city councils, and drawing districts, because Art. XI, § 2 of the Oregon constitution gives the legal voters of every city power to enact and adopt their own charters, through the home rule provisions of the Oregon Constitution. The City must follow the Oregon Secretary of State's directive in creating or redrawing voting districts. Traditional principles of districting such as equal population, compactness, and contiguity should be the primary considerations. The racial composition of districts should be considered only if necessary to comply with the Voting Rights Act.

1. Principles of Districting and Oregon State Law

Traditional districting principles should be used to draw voting districts. First, districts must be drawn with the goal of equal population. An equal population goal "is a background rule" underlying all other considerations in drawing electoral maps.

Alabama Legislative Black Caucus v. Alabama, ___ US ___, 125 SCt 1257, 1271 (2015). In addition to equal population, traditional principles of districting include: Compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation. *Miller v. Johnson*, 515 US 900, 916 (1995).

After the 2010 census, in accordance with ORS 246.410, the Oregon Secretary of State issued a directive that any city that fixes or modifies electoral districts must follow. The directive mirrors ORS 188.010's requirements for state districts, and requires that each electoral district, as nearly as practicable, be contiguous, utilize existing geographic or political boundaries, not divide communities of common interest, be connected by transportation links, and be of equal population. No district shall be drawn for the purpose of favoring any political party, incumbent elected, official or other person. Finally, no district shall be drawn the purpose of diluting the voting strength of any language or ethnic minority group. Office of the Secretary of State, *Directive of the Secretary of State*, 2011-2 (June 1, 2011). See also, League of Oregon Cities, *Redistricting After the Census 20*, July 2011, available at: <http://www.orcities.org/MemberServices/AZIndex/tabid/810/itemid/389/language/en-US/Default.aspx>.¹

2. Districting Styles

Currently, Bend elects all seven councilmembers through a city-wide election, essentially all at-large seats. Alternate means of electing councilmembers include a ward system (representatives elected from each ward), or a combination (some at-large seats and some ward-elected seats). In a ward system, ward councilors could be elected by a city-wide vote (each ward has a dedicated councilor position, but all voters in the city can vote for each position), or by a ward vote (only voters within a ward could vote for the councilor from that ward). Each ward could also have one or more councilors elected from it.

¹ The City of Bend is currently divided into 15 precincts. While precincts are "existing political boundaries", they are not required to have equal populations and should not be automatically followed for drawing ward boundaries. Precincts may not have more than 10,000 people in them, and are used, in part, for political party organization. ORS 241.010 and ORS 248.015. The County Clerk did tell our City Recorder that wards should potentially be considered along precinct lines, although more research is needed.

Whether to switch to a ward system, either in its entirety or in combination with some at-large positions, is a political choice. One of the concerns driving the council to look at a ward system is whether a lack of representation by councilors living on the east side of Bend has resulted in councilors that disfavor the eastside, or under-representation of eastside concerns and desires.

In an at-large system, the preferences of the overall majority of voters will prevail. “[A]t-large voting schemes may operate to minimize or cancel out the voting strength of [minorities in] the voting population,” because “where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.” *Thornburg v. Gingles*, 478 U.S. 30, 47-48 (internal quotations and citations omitted). These majority-minority splits may derive from racial, ethnic, political, or geographic distinctions. “Originally, at-large elections were [intended] to eliminate the influence of geographically based politicians” and elect councilors “who could gain support from city wide interests and who were not guilty of ‘partial’ ward view.” John Rehfuss, *Ward Electoral Systems in Oregon Cities 2*, <http://www.orcities.org/Portals/17/a-z/wards.rehfuss.pdf> (Sept 2003). The ward system “recognizes smaller, more homogenous districts within a larger area.” *Id.* at 9. In larger cities, “there are a number of advantages that wards have over at large elections.” *Id.* at 3. Using a combination of wards and at-large positions “might result in a substantial part of the council from one geographic area.” *Id.* at 13. This could defeat the reason a ward system is being discussed in Bend; however, every city has unique situations, voting patterns and reasons people run for elected office.

Prof. Rehfuss based his article on surveys of councilors from both at-large and ward-system cities, to see if there were any differences between at-large and ward cities. Among his findings:

- Of cities with ward systems, councilors from large cities (population of more than 40,000) tended to be more likely than councilors from small cities to report the ward system worked as intended, and they also reported greater citizen satisfaction with the ward system. *Id.* at 9.

- Most large cities in Oregon set their ward boundaries based on population alone, realigning boundaries after each census. Some large cities also use neighborhoods in setting boundaries. *Id.* at 11.
- In larger cities, about half of the councilors reported that hyper-local, ward issues were important in city council elections.
- Half of councilors from large cities thought their ward elections were competitive, while the other half thought elections were low-key. *Id.* at 12.

According to Professor Rehfuss, the benefits of a ward system are many. “Ward elections are generally less expensive; ward elections can ensure more minority representation (although certain elections, such as a proportional representation or cumulative voting, have the same effect); ward election brings government closer to the voter and increases accountability; ward elections ensure that all areas of the city are represented; ward elections or mixed systems bring flexibility, such as the ability to promise areas to be annexed their own representatives (assuming population limits are reached); and ward elections decrease the chance that several or most members of the council will be from one area.” *Id.*

Bend’s current charter provides for staggered elections of council members, with the terms of three ending in one election cycle and the terms of the remaining four members ending in the next election cycle, so that no more than four councilmembers are new following any given election. The same system of staggered terms could continue in a ward system. If there is one councilmember from each ward, some portion of the ward seats would be up for election in one general election, with the remaining ward seats up for election in the next general election. Another option is to have two representatives from each ward, with one from each ward up for election in one election cycle and the other up for election in the next election. Hillsboro and Medford use this method of staggering terms, with two councilmembers from each ward on a staggered election basis, so that every ward is electing a new member each election.

3. Equal Population Requirement

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution requires that each district have roughly the same number of people (“one

person one vote”). *Reynolds*, 377 US at 557-561. The U.S. Supreme Court has held that state districts must have substantially equal populations. *Id.* at 568. Because the Fourteenth Amendment applies to states, and cities are creations or subdivisions of the state, local voting districts should also have “substantially equal” populations.

“Substantially equal” population has become generally accepted as no more than a 10% difference between the population of the largest and smallest districts. *Brown v. Thomson*, 462 US 835, 842-843 (1983). See also, Erika Wood and Justin Levitt, *A Citizens Guide to Redistricting* 44, <http://www.brennancenter.org/publication/citizens-guide-redistricting> (2010).²

Redistricting is generally necessary after the decennial federal census, because the new census figures are likely to show the districts are no longer within the required population range, especially with the fast growth Bend is experiencing. *Redistricting After the Census 20*. If existing districts no longer comply with the equal population requirements, the district lines must be redrawn before the next election. *Id.* If the City draws ward districts in 2018 (after a citywide vote on charter amendments), it is likely districts would need to be redrawn after the 2020 census because Bend’s population is growing so quickly.

4. Racial Considerations

The Equal Protection Clause of the 14th Amendment “prevents a State, in the absence of ‘sufficient justification’ from ‘separating its citizens into different voting districts on the basis of race.’” *Cooper v. Harris*, ___ US ___, ___ (2017) (slip op., at 1), quoting *Bethune-Hill v. Virginia State Bd. Of Elections*, 580 US ___, ___ (2017) (slip op., at 6). “Sufficient justification” could be compliance with the Voting Rights Act. *Cooper*, ___ US at ___ (slip op., at 3). In challenging the use of race in drawing district lines, a plaintiff must first show that “race was the predominant factor motivating” the decision to place “a significant number of voters within or without a particular district.” *Miller*, 515 US at 916. Direct evidence of the legislature’s intent to “subordinate” traditional factors of district creation to racial considerations, or circumstantial evidence, including the

² The *Citizens Guide* contains additional helpful practical information on how, where, and by whom district lines should or could be drawn.

district's shape and demographics, may be used to demonstrate motivation. *Id.* If racial considerations predominated over others, a state (or city) must demonstrate the consideration of race in drawing district lines was narrowly tailored to meet a compelling government interest. See, *Bethune-Hill*, 580 US at ___ (slip op., at 13).

52 USC § 10301 (commonly referred to as Section 2 of the Voting Rights Act) requires that no voting qualification of procedure shall be imposed or applied by any political subdivision in a manner that results in a denial or abridgement of the right of any citizen to vote on account of race or color.³ A violation is shown if, based on the totality of the circumstances, the election processes “are not equally open to participation by members of a class of citizens protected” on the basis of race or color, “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.” This provision “applies nationwide to every jurisdiction that must draw lines for election districts required by state or local law.” *Bartlett v. Strickland*, 556 US 1, 18 (2009). Courts test whether the way districts are drawn takes decisive political power away from a cohesive minority voting bloc otherwise at risk for discrimination. See, Justin Levitt, *Loyola Law School, All About Redistricting*, <http://redistricting.lls.edu/where.php> (last accessed May 18, 2017). § 2 was designed to prevent “cracking” (splintering minority populations into separate voting districts to dilute their votes) and “packing” (pushing as many minority voters as possible into a few super-concentrated districts). § 2 applies whether the dilution of minority votes was intentional or an unintended end result of districting. *Id.*

To demonstrate a district's boundaries violate § 2, a challenger must show that:

- A minority group is “sufficiently large and geographically compact” to be **greater than 50%** of the population a potential election district.

³ The Voting Rights Act of 1965 started with a preamble, and does not contain a separate Section 1. Section 3, 52 USC § 10302, provides for the appointment of federal election examiners. Section 4, 52 USC § 10303, suspends the use of literacy tests as a prerequisite to registering to vote. Section 5, 52 USC § 10304, prohibits certain states or political subdivisions from changing any voting requirements or procedures without getting preclearance and demonstrating that the change will have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color. Section 6, 52 USC § 10305, governs the use of observers. Section 7, 52 USC § 10305, eliminates poll taxes. Section 8, 52 USC § 10307, prohibits refusing to count a person's vote, intimidating, threatening, or coercing any person for voting or attempting to vote, falsifying voter information, and voting more than once. Section 9, 52 USC § 10308, sets out the civil and criminal sanctions for violations.

- That the minority group is “politically cohesive” *Cooper*, ___ US at ___ (slip op., at 13).
- That a district’s white majority votes “sufficiently as a bloc” to usually to “defeat the minority’s preferred candidate.” *Cooper*, ___ US at ___ (slip op., at 13), *Strickland*, 478 US at at 19-20, and *Thornburg*, 478 US at 50-51.

There is virtually no possibility of drawing a ward in the City of Bend where a minority population would be greater than 50% of the electors in a district, unless the wards were very small. The City of Bend as a whole has a minority (non-white) population of 8.7%. See, 2010 U.S. Census Data, <https://www.census.gov/quickfacts/table/PST045216/4105800>. The minority populations are clustered around the central districts of Bend, with census tracts 15, 16, and 18 each having nonwhite populations of 13.9%, 13.8% and 11.4% respectively (compare to census tracts 13 and 14, west of the Deschutes River, with minority populations of 5.76% and 4.35%). While Bend does not have a significant nonwhite population overall, what nonwhite population exists is clustered in the central city area, between the Deschutes River and 15th Ave., and Neff Ave. and Reed Market Road. Regardless of this relative concentration of nonwhite minorities, the minority population likely remains below the 50% threshold necessary for a successful § 2 claim, even if census tracts 15, 16 and 18 were grouped together into one voting district.

A district with a minority-minority population could still be protected by § 2, if the minority population votes as a bloc and could align with a nonminority group to elect the candidate of its choice (in what is called a “crossover” district). *Cooper*, ___ US at ___ (slip op. at 16), citing *Strickland*, 556 US at 18-20. In other words, for a “crossover district” § 2 claim to prevail, there must be “effective white bloc-voting” such that there is a possible district in which the minority bloc plus the white bloc, could elect the minority voters’ preferred candidate, and that possibility is thwarted by separating the minority bloc into different districts or separating them from their possible white voting allies. See, *id.*, slip op. at 17.

To determine if Bend could be exposed to such a § 2 “crossover” district challenge, data would need to be collected that shows the voting history of a going back four to five council elections. The data would be assessed to determine if the relative

concentration of minorities in the central city area voted consistently in city council elections as a bloc, or if there were any other geographically compact minority voting blocs. The city should determine if any of those geographically compact minority voting blocs could constitute the majority in any hypothetical ward. If there is no conceivable ward that would have a more than 50% minority voters, the city should determine if any minority voting bloc could combine with a geographically close white voting bloc to elect the minority group's preferred candidate in any hypothetical ward. If not, there would not be potential § 2 liability under either a majority-minority district or a crossover district theory. If the minority bloc and the contiguous white block could constitute a majority of a conceivable ward, the minority population and the aligned white population should be collected into one "crossover" ward. Splitting the minority population into two wards, or separating the minority vote from the allied white voting block could subject the City to a § 2 challenge.

5. Who Should Draw the Lines?

City council can draw inspiration from the ways other entities draw their districts. In most states, the legislature draws district lines itself. *Citizen's Guide*, at 20. In 22 states, commissions appointed by the legislature draw the lines, with their recommendations in some way overseen or approved by, the legislature. The states' advisory committees differ, with some comprised exclusively of elected officials who are elected from the districts whose boundaries they are creating, and others including members of the public. Other states use commissions to draw district lines only if the legislature cannot agree on appropriate lines. *Id.* at 20-21. Oregon uses such a "backup" commission, where the Secretary of State draws the legislative districts if the legislature cannot agree. Or Const Art IV § 6. Where the legislature approves the proposed lines, either a simple or super majority can be used to win approval. *Citizen's Guide*, at 27.

The City could appoint a citizen committee to make recommendations on ward boundary lines, have city staff recommend ward boundary lines, or hire an outside expert to recommend boundary lines.

6. Council pay

The Charter could be amended to allow councilmember pay to be set by ordinance. Conflict of interest rules dictate that council may not vote to set the pay of current councilmembers. ORS 244.120. However, council can set the pay of the councilmembers who will be elected at the next election, including the mayor's pay. A potential conflict of interest exists for current councilmembers who are eligible to run for another term, or who may run for mayor. Councilmembers would have to disclose that possibility or intention to run for a position whose pay was being established. If the Charter is amended to allow councilmember pay to be set by ordinance, the Charter should provide that the current pay would apply to the end of any sitting member's term. If the charter is amended to be silent on pay, current council would serve without pay, because council cannot pass an ordinance setting its own pay.

7. Making the switch

The new Charter will have to establish how and when to make the switch from the current process of seven at-large seats to ward elected seats. One option is to gradually shift to a ward system by amending the charter to phase out the at-large councilors and then elect the ward councilors all at once.⁴ The benefit to this phase out of the existing at-large council would be that no councilmember is deprived of the full term for which they were elected. However, the voters could amend the charter to terminate the term of current councilors and make a clean switch to a ward system at the following election. Current councilors do have a property interest in the terms for which they were elected under the current city charter, protected by the due process clause of the 14th Amendment of the U.S. Constitution. However, following a proper charter amendment process, the voters can cut short that property interest. See, *Brown v. Perkins*, 709 FSupp 633, 634-635 (ND Ill, Eastern Division, 1989).

⁴ For example, if the charter is amended in 2018, it could provide for electing the next at-large councilors to two year terms. Positions 1, 2, 3, and 4 would be up for election in 2020. The charter could provide that those seats would be for two year terms, expiring after the 2022 election. Then, in 2022, when Positions 5, 6, and 7 were up for election also, the ward system could begin. To create a staggered election of ward councilors, half the ward councilors elected in 2022 could be elected to 2 year terms, with all following terms being four years.

8. Conclusion

The City's primary considerations when drawing ward boundaries should be compactness, contiguity, utilizing existing geographic or political boundaries, not dividing communities of common interest, and equal population. The City may not draw a district for the purpose of favoring an incumbent or any other person. The City may not draw a district for the purpose of diluting the voting strength of any language or ethnic minority group. The city should consider the race of the electors only to determine if there are any minority voting blocs that could make up more than 50% of a potential ward, and if not, if there are minority voting blocs that could team up with a cohesive white voting bloc to elect the minority voting bloc's preferred candidate. If the latter is possible, the city should consider creating such a "crossover district" so as to avoid separating the minority voting bloc's votes between districts and thereby diluting the minority group's votes in possible violation of § 2 of the Voting Rights Act.