

**PROPOSED CITY COUNCIL RESPONSE TO GRAND JURY REPORT  
“CITY OF SAN DIEGO 2010 REDISTRICTING COMMISSION”**

Pursuant to California Penal Code section 933.05(a), (b), and (c), the City of San Diego provides the following responses to the findings and recommendations included in the Grand Jury Report referenced above. Background information and clarifications to some facts presented in the Grand Jury Report are also included in this response.

**Background**

The Redistricting Commission of the City of San Diego (Redistricting Commission) is vested with sole and exclusive authority to adopt plans that specify the boundaries of districts for the San Diego City Council. San Diego City Charter sections 5 and 5.1 were enacted by the voters in 1992 to create an independent Redistricting Commission to draw City Council districts in compliance with the law.

**Appointments to the Redistricting Commission**

The process of appointing citizens to the Redistricting Commission is governed by City Charter section 5.1 and can be summarized as follows:

1. The City Clerk solicits nominations for appointments to the seven-member Redistricting Commission. The clerk distributes to the news media the announcement of a 30-day nomination period that begins on July 1 of the year a decennial census is taken. Individuals or organizations may nominate individuals for appointment to the Redistricting Commission during those dates.
2. Upon the close of the nomination period, the City Clerk transmits the names and information regarding all nominees to the Presiding Judge.

There are several ways the members of the Redistricting Commission may then be appointed:

1. Section 5.1 first states that the Presiding Judge of the “Municipal Court, San Diego Judicial District,” will make the appointments. (Note: The Municipal Court no longer exists as a separate entity.)
2. In the event that the Presiding Judge declines to make the appointments, the appointments “shall be made by a Municipal Court Judge selected by vote of the Judges of the Municipal Court, San Diego Judicial District.” (As stated above, the Municipal Court no longer exists as a separate entity.)
3. In the event that the Judges of the Municipal Court decline to act, the Commission “shall be appointed by a panel of three retired Superior Court Judges drawn at random by the City Manager in a fashion described by Penal Code sections 900(a) and 902.”
4. In the event that all of the preceding individuals decline to act, the Commission shall be appointed by a majority vote of the City Council.

The Presiding Judge (or other appointing authority, as detailed in section 5.1) must appoint the seven members of the Commission by November 1. The Commissioners are to represent geographic, social and ethnic diversity, and, in the judgment of the Presiding Judge (or other appointing authority), have a high degree of competency to carry out the Commission's responsibilities. Within 60 days after Commission members are appointed, the Commission must adopt a budget and submit it to the Presiding Judge (or other appointing authority) for approval. If approved, it is forwarded to the City Council for consideration.

Commission members serve until the redistricting plan becomes effective and any and all legal and referendum challenges have been resolved.

If a vacancy occurs on the Commission after it is constituted, the Presiding Judge (or other appointing authority) must fill the position within seven calendar days, using the same procedure and criteria as the original appointments. Any vacancy must be filled by someone in the same pool of individuals who were given consideration for appointment when the Commission was constituted.

Presiding Judges in both 2000 and 2010 informed the City Attorney's Office that an active Presiding Judge could not serve as the Appointing Authority: The Ethics Committee of the California Judges Association informally opined that an active judge could *not* act as the Appointing Authority because of ethics rules, despite the Charter's language. However, the Ethics Committee also opined that *retired* judges could sit as the Appointing Authority for the Redistricting Commission as long as they did not have a temporary assignment in any way related to the same subject.

Thus, in both 2000 and 2010, the Presiding Judge of the Superior Court gathered a list of retired Superior Court judges who expressed an interest in potentially serving on the three-member nominating panel. The Presiding Judge gave this list to the City Attorney's Office, which then provided the list of retired judges to the City Clerk, who oversaw the random selection of the judges to sit as the Appointing Authority.

In 2010, the City's Chief Operating Officer, Jay Goldstone (See discussion on City Manager below), randomly drew out of a hat the names of the retired judges provided by the Presiding Judge, in a public meeting attended by the City Clerk's Office and City Attorney's Office. The first three judges whose names were drawn became the Appointing Authority and agreed to serve. The Appointing Authority was provided with the applications and police background checks for each applicant, and studied them before the public meeting in which Commissioners were selected. On the date of the public hearing to select Commissioners, one of the three judges had a family emergency that prevented her from attending. The remaining two judges asked the City Attorney's Office whether they could proceed. After receiving the opinion that they represented a quorum of the three-judge panel and could proceed, the two judges held the public hearing and made the appointments.

### The 2010 Redistricting Commission

The 2010 Redistricting Commission convened a total of 45 public hearings, noticed in accordance with the Ralph M. Brown Act and attended by hundreds of people. On August 25, 2011, the Redistricting Commission voted 7-0 to adopt a Final Plan. The Final Plan divides the

City's population of 1,301,617 into nine City Council districts of approximately equal population. The Final Plan complies with the redistricting criteria and legal requirements of San Diego City Charter sections 5 and 5.1; the U.S. Constitution; the federal Voting Rights Act of 1965; and related cases and statutes. The Redistricting Commission considered and relied upon traditional redistricting criteria in drawing and adopting new City Council district boundaries. The Redistricting Commission also added a new Ninth Council District, as directed by the voters of the City of San Diego in a Charter amendment enacted in 2010. The Plan became effective without any legal or referendary challenge.

After the Redistricting Commission completed its work, the Grand Jury inquired about the process. The Grand Jury focused primarily on the process to appoint Commissioners.

### **Clarification of Facts**

*Fact: The City Charter and Municipal Code specify the 30-day nomination period for Redistricting Commissioners begins July 1 in every census year.*

San Diego Municipal Code section 27.1404 specifies 30 calendar days; however, if July 1 is a Saturday, Sunday or holiday, then the nomination period shall commence on the next business day following July 1. Similarly, if the 30th calendar day following the day the nomination period commences falls on a Saturday, Sunday or holiday, then the nomination period shall end on the next business day following the 30th calendar day.

In 2010, the nomination period began July 1. The 30th calendar day following July 1 was July 31, which fell on a Saturday. Consequently, the nomination period ended on Monday, August 2, the next business day. This means that the nomination period in 2010 was 32 days long.

*Fact: The City Clerk may only advertise the nomination period beginning 30 days before July 1.*

San Diego Municipal Code section 27.1405 requires the Clerk to publish a specific notice in the City Official Newspaper no earlier than 30 calendar days before, and no later than 14 calendar days before, the beginning of the nomination period. However, in 2010 the Clerk's outreach regarding the upcoming nomination period and creation of the Redistricting Commission began months before the notice was published.

On January 22, 2010, the Clerk distributed a memo entitled "Preparation for the 2010 Redistricting Commission" to the Mayor and Councilmembers, with a copy to the City Attorney, Independent Budget Analyst (IBA), Chief Operating Officer, Chief Financial Officer, Financial Management Director and the Planning Director. This memo included a timeline for the 2010 process, the pertinent sections of the City Charter, Municipal Code, and the 2000 Redistricting Commission Recommendations for the 2010 Commission.

In February/March 2010, the City Clerk met with staff from the Council President's Office, the City Attorney's Office, the IBA, and the Mayor's Office to answer questions about the 2000 process and discuss potential steps to ensure that the city was ready for the 2010 process.

In mid-April, the Clerk was contacted by Common Cause to present information on redistricting at the group's May 29 meeting; the Clerk complied with the request.

On May 5, the Clerk presented information regarding the Commission and upcoming nomination period to members of the City Council, during a televised public meeting.

During the month of May, staff involved in the nomination process reported seven unsolicited contacts related to redistricting. These contacts were from individuals outside the Clerk's Office.

Also in May 2010, the Clerk developed a brochure for distribution, with the application packet, at community presentations and in the Office of the City Clerk (2nd floor, City Administration Building).

On May 26, 2010, the Clerk was contacted by the San Diego County Young Democrats to make a presentation at their June 28 meeting.

In June 2010, the following steps were taken to publicize the application process:

- Public notice of the Redistricting Commission process was posted on the City's website and published in the City Council Docket (which was set to run through the nomination period);
- Public notice was published in the *San Diego Daily Transcript* (the city's paper of record);
- Application packets were sent to every branch library;
- A news release was sent to 79 media outlets;
- Application packets were mailed to 123 community organizations;
- Application packets were sent to each elected official as well as all individuals who had requested one from the Office of the City Clerk.

In June/July 2010, presentations were provided to any community group requesting one, including the Asian Pacific American Coalition, the Human Resources Commission, the League of Women Voters, and, as noted earlier, Common Cause (May 2010) and the Young Democrats.

In addition, the Clerk used social media such as LinkedIn and Twitter to get out the word about the application period and upcoming deadlines.

Members of the public had an opportunity to be, and were, aware of the upcoming creation of the Redistricting Commission, even prior to the official publication of the notice required by San Diego Municipal Code section 27.1405.

*Fact: The City Clerk received only 52 applications, of which 50 were accepted.*

San Diego Municipal Code section 27.1407 directs the Clerk to accept as filed those nomination papers which the Clerk determines to be in substantial compliance with Municipal Code requirements; and to not accept those nomination papers which are not in substantial compliance. In 2010, the Clerk received 52 applications, of which 51 were accepted. Of these, one was later withdrawn by the applicant, leaving 50 applications.

Based on the number of applications received for potential appointment to other City boards and commissions, and given the level of detail required by the application form for the Redistricting Commission, the Clerk appreciates that 52 applications were received for this single entity.

In June 2010, more than 40 boards and commissions were active in the City of San Diego. Members of the public who wish to apply for a seat on any of these entities do so by printing and mailing an application form to the Clerk's Office, or by applying online through the Clerk's website. In Fiscal Year (FY) 2008, the Clerk's staff processed a total of 54 applications for all appointments. In FY 2009, the number of applications rose to 111, but it declined to 58 in FY 2010 (not including the Redistricting Commission applications). In FY 2011, 35 applications were received, in addition to the 52 submitted for potential appointment to the Redistricting Commission. As of June 2012, with one month remaining in FY 2012, 40 applications for all boards and commissions had been received for that fiscal year.

Consequently, during the 32-day nominating period for the Redistricting Commission, the Clerk received almost the same number of applications for the Redistricting Commission as for all other boards and commissions combined in FY 2008 and again in FY 2010; nearly half the number for all other boards and commissions combined in FY 2009; and well over the number for all other boards and commissions combined in FY 2011.<sup>1</sup>

*Fact: The current Charter establishes an order of precedence for the Appointing Authority for Redistricting Commissioners: (1) Presiding Judge of the Municipal Court, then (2) a Municipal Judge selected by a vote of the Judges of the Municipal Court, then (3) three retired Superior Court Judges drawn at random by the City Manager.*

The Fact as reflected in the Grand Jury's Report is incomplete. The order established by the Charter is as follows: (1) the Presiding Judge of the Municipal Court; (2) a Municipal Court Judge selected by vote of the Judges of the Municipal Court; (3) **a panel of** three retired Superior Court Judges drawn at random by the City Manager; and (4) the City Council, by majority vote.

It is important to note that in (3) the words "**a panel of**" were left out of the Grand Jury's Fact and these words are critical. It is not three "separate" judges who are appointed, but "a panel of" judges that is required by the Charter. The "panel" is an entity. Thus, a quorum of the panel is sufficient to conduct Appointing Authority business. Two judges may hold meetings.

*Fact: In 2000, the Court determined it would be unethical for sitting judges to serve.*

It was not the Court, but an ethics committee that made the determination. In August 2000, Superior Court Presiding Judge Wayne Peterson informed the Mayor and City Council that he had been advised by the Ethics Committee of the California Judges Association that, in its unanimous opinion, his serving as Appointing Authority for the San Diego Redistricting Commission would violate the Code of Judicial Ethics. He thus declined to serve. In 2010, the Presiding Judge of the Superior Court declined to serve after making a similar inquiry and receiving the same opinion.

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<sup>1</sup> It should be noted that in FY 2007, some 262 timely applications for potential appointment to the new Independent Rates Oversight Committee (IROC) were received in a span of five weeks (April-May, 2007). This was far out of the norm for City boards and commissions. IROC is an eleven-member advisory body nominated by the Mayor and confirmed by the City Council, representing all ratepayer classes and a set of defined professional disciplines. Ratepayers were provided information about the new entity and an application form in their water billing notice. The application form was also on the City's website, and the Mayor asked City Councilmembers to refer candidates for consideration. The Clerk used similar outreach strategies regarding the Redistricting Commission, but did not include an application form and information in water billing notices.

Fact: The position of City Manager was eliminated in 2008.

In November 2004, San Diego voters approved Proposition F, which added Article XV to the City Charter, changing the City's Council-Manager form of governance to a Mayor-Council ("Strong Mayor") form of governance on a five-year trial basis. The trial period began January 1, 2006 and ended December 31, 2010. San Diego voters made permanent the new Strong Mayor Form of Governance by approving Proposition D on June 8, 2010.

Under the Mayor-Council form of governance, Charter section 265(b) provides for the Mayor to exercise the authority, power and responsibilities formally conferred upon the City Manager as described in section 260, along with additional rights, powers and duties set forth in that section.

Fact: The 2010 Appointing Authority approved Redistricting Commissioners by a two vote quorum.

This is correct. A two-judge quorum of the three-judge Appointing Authority made the appointments at a public hearing. It is also important to note, however, that the entire Appointing Authority participated in the process up until that Council hearing and thereafter. The full panel participated in the preparation and vetting of applicants, review of their background materials and police investigative checks, and in public hearings related to the Commission's budget. Due to last-minute and unforeseen circumstances, one member of the Appointing Authority panel was unable to attend the publicly noticed appointment meeting. The City Attorney confirmed that the appointment process could proceed, as a quorum of the panel was present to conduct business.

Fact: The Charter does not provide for an alternate in the event a member of the appointing authority is unavailable.

This is correct, but may not be significant. There is nothing in the Charter that indicates that all three members of a three-judge panel must be present to conduct business at a meeting. As with other public boards and commissions, a quorum of the panel may conduct business. Moreover, this "fact" does not consider whether it would be wise for an alternate to fill in for a given meeting when someone was absent, or whether this would require the resignation of a member and replacement by another member for all purposes. As stated above, there was a significant time period during which the appointed judges reviewed the applications and background materials, so it would not have been prudent for someone to step in at the last minute to replace an absent judge.

## **Findings**

**Finding 01:** *The number of nominees for Redistricting Commissioner is limited by the short June-July announcement and nominating window.*

**Proposed City Council Response:** *Partially disagree.* Based on responses to the facts above, the number of nominees for Redistricting Commissioner does not appear to be constrained by current requirements of the Charter and Municipal Code. It is possible that extending the amount of time to solicit applicants could increase the number, but not certain.

***Finding 02: Many residents are on vacation in June and July.***

**Proposed City Council Response:** *Partially disagree* and this may be immaterial given that publicity about the upcoming appointment process began much earlier in the year and the application may be accessed online and filled out earlier. Application materials were available online and thus could be accessed by potential applicants from other locations, even if on vacation. The redistricting process is widely publicized, providing ample time to submit materials by the deadline.

***Finding 03: The Charter is not current as to the structure and ethical constraints of the San Diego Court system and City Government.***

**Proposed City Council Response:** *Agree*, but this may not be of great significance. The Charter is not “current” in many of its sections, but the redistricting sections of the Charter provide alternatives. While it is correct there is no longer a “Municipal Court,” the Charter provides for alternatives so someone else can perform the same duties. The “ethical constraints” cited by Presiding Judges were offered in informal opinions of a sitting judicial ethics committee. Here, too, however, the Charter provides for replacements if a judge declines to serve.

***Finding 04: The 2010 Redistricting Commission process could have been subject to challenge because only two members of the three-judge panel were available.***

**Proposed City Council Response:** *Disagree*. The two judges who made the appointments formed a quorum of a three-judge panel. Moreover, it is speculative to consider what might lead to a “challenge” and whether the challenge would have merit.

***Finding 05: The City took no action on the recommendations made by the 2000 Redistricting Commission with regard to office needs and support staff.***

**Proposed City Council Response:** *Partially disagree*. The City was aware of the 2000 Redistricting Commission’s recommendations. On June 14, 2010, the Council approved the City’s FY 2011 budget, which included \$500,000 for the Redistricting Commission. The Assistant Chief Operating Officer assigned a Supervising Management Analyst from his office to be the City staff liaison to work with the Redistricting Commission. The analyst attended the Appointing Authority meeting to meet with the Commissioners from the day they were appointed, was responsible for securing and setting up office space and served as a daily liaison between the Commission and City departments. The City Attorney’s Office also worked for approximately 18 months as a liaison between the Redistricting Commission and City departments, assisting the Commission’s Chief of Staff on a daily basis and coordinating with many other City departments to meet the Commission’s needs.

## **Recommendations**

***12-50: Sponsor an amendment to the City of San Diego Charter Article II, Section 5 and Section 5.1 before the 2020 census to expand the nomination period for Redistricting Commissioners to at least 90 days.***

**Proposed City Council Response: This recommendation requires further analysis.** The City Council agrees that an extended nomination period should be studied. The Grand Jury notes in their report that a reason for extending the nomination period was that “interviewees frequently told the Grand Jury the application window for nominations was too narrow and limiting because it occurred during a summer month when many people are on vacation.” However, as noted above in the “Clarification of Facts” section, in 2010 the City Clerk’s outreach regarding the upcoming nomination period for Redistricting Commission began months before the official notice was published, enabling prospective candidates time to prepare to submit an application during the designated period.

It is also important to note that it is settled law that one legislative body, by its legislative enactments, cannot limit or restrict the power of succeeding boards. This rule is clearly stated by the Supreme Court in *In re Collie*, 38 Cal.2d 396, 398 (1952), as follows: ‘It is the general rule that one legislative body cannot limit or restrict its own power or that of subsequent Legislatures and that the act of one Legislature does not bind its successors.’ (See also *Thompson v. Board of Trustees*, 144 Cal. 281, 283 (1904); *Briare v. Matthews*, 202 Cal. 1, 6 (1927).) Thus, the City Council cannot act to commit a future City Council to place an item on a future ballot.

**12-51: Sponsor an amendment to the City of San Diego Charter Article II, Section 5 and Section 5.1 before the 2020 Census to update the Court’s current structure and require the appointing authority be made up of three retired Superior Court Judges drawn at random by the City Chief Operating Officer.**

**Proposed City Council Response: This recommendation will not be implemented.** The City Attorney has interpreted section 5.1 to provide for successor courts to handle this procedure. In 2010, the names of retired Superior Court judges were drawn at random by the City’s Chief Operating Officer, who assumed that responsibility in the Article. Accordingly, the current version of the Charter was not an impediment to the selection of the panel of three retired judges.

It is also important to note that every other calendar year the City Council’s Rules Committee reviews proposed ballot measures submitted by citizens. As they review the proposed charter amendments submitted by citizens, the Rules Committee weighs the impacts of the proposed ballot measures against the cost of putting a measure on the ballot and the City’s overall financial condition. Due to the City’s recent financial condition, it has been very rare for the Rules Committee to recommend putting a measure on the ballot. However, the Rules Committee has expressed interest in exploring a number of charter changes proposed by citizens, City Boards, and Departments, and possibly integrating these into a comprehensive “clean up” of language throughout the charter. The Grand Jury’s proposed charter changes could be considered by a future Council in the context of an overall “clean up” of the charter but this would be dependent on the City’s financial condition and also weighed against other budget priorities.

**12-52: Modify the San Diego Municipal Code chapter 2, article 7, division 14, Section 27.1401 et seq. to be consistent with the Charter and current Court and City government structure.**

**Proposed City Council Response: This recommendation requires further analysis.** The Council agrees that the Municipal Code should be updated to be consistent with the charter and

will analyze and consider amendments to reflect the changes in the Court and City government structures.

***12-53: Modify the San Diego Municipal Code chapter 2, article 7, division 14, Section 27.1405 to require an alternate be named to the appointing authority if one of the three judges is unable to participate in the Redistricting Commissioner selection process.***

**Proposed City Council Response: This recommendation will not be implemented.** The City does not have any boards or commissions that use alternates. It is often difficult to find volunteers, so requiring a fourth retired judge to be available and informed to step in on short notice could be difficult. Further, the circumstance resulting in the unavailability of the retired judge for the selection of the 2010 Commissioners was highly unusual. Also, there is nothing in the Charter that indicates that all three members of a three-judge panel must be present to conduct business at a meeting. As with other public boards and commissions, a quorum of the panel that is present may conduct business. Nonetheless, the Council may consider an amendment to the Municipal Code to recommend the three-judge panel reschedule any meeting if necessary to ensure all three members can be present unless rescheduling would result in missing Charter deadlines.