

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: August 9, 2011

TO: Honorable Mayor, City Council, and City Clerk

FROM: City Attorney

SUBJECT: Effect of the Redistricting Commission's Adoption of a Final Plan for Council District Boundaries

INTRODUCTION

The City of San Diego 2010 Redistricting Commission (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 Charter sections 5 and 5.1 were enacted by the voters in 1992 to create an independent Redistricting Commission to draw districts that comply with redistricting laws, the U.S. Constitution, and the federal Voting Rights Act of 1965. The City's population of 1,301,617 is to be divided into districts of approximately equal population. This year, the Commission was also given the extraordinary task of drawing a new 9th Council District, as directed by City voters in 2010. This is the first expansion of the City Council since 1963.

On July 21, 2011, the seven-member Commission voted 5-2 to adopt a Preliminary Redistricting Plan (Preliminary Plan). The Commission will hold several more hearings before it is scheduled to adopt a Final Redistricting Plan on August 25, 2011 (Final Plan). The Commission may make changes to the Preliminary Plan or may adopt it as is.

Our Office has received numerous legal questions from Council offices and the public regarding the potential effect of the Commission's adoption of a Final Plan. Many questions involve issues related to when the new 9th Council District will take effect and who will represent the voters of that district. This memorandum will discuss these legal implications of the Commission's adoption of a Final Plan. Our Office plans to issue additional legal opinions to address other questions after a Final Plan is approved.

QUESTIONS PRESENTED

1. Assuming the Commission approves the Final Plan on August 25, 2011, who will Councilmembers represent after the Final Plan takes effect, potentially as soon as September 24, 2011?
2. How will the Final Plan impact the 2012 primary and general elections for members to represent Council Districts 1, 3, 5, 7, and 9?
3. What will happen if a Councilmember no longer lives in his or her district once the Final Plan's new boundaries go into effect?

DISCUSSION

1. The Eight Councilmembers Will Represent Their Current Districts Until December 3, 2012, When the New 9th District Councilmember is Sworn In and Qualified to Serve.

Charter section 5.1 governs redistricting and states in relevant part:

Upon approval of the final plan, the Commission shall adjust the boundaries of any or all of the Council districts of the City pursuant to the final plan. Said final redistricting plan shall be effective thirty (30) days after adoption and shall be subject to the right of referendum in the same manner as are ordinances of the City Council. If rejected by referendum, the same Commission shall create a new plan pursuant to the criteria set forth in Sections 5 and 5.1 (emphasis added).

After the Commission votes to approve the Final Plan, the document will be filed with the City Clerk. As set forth in Charter section 5.1, this document will become "effective" in 30 days, barring any referendum.¹ Absent a referendum, this means the legal document will be final at that time.

The reference to the effectiveness of the plan within 30 days has caused confusion, as some have interpreted it to mean that Councilmembers will begin representing their new districts at that time. Significantly, however, the boundary lines in the Final Plan will not reflect what neighborhoods and boundaries the Councilmembers represent until the new 9th District Councilmember is sworn in and takes office in December 2012. In fact, the Charter directs that the eight current Councilmembers will continue to represent their Districts, as presently drawn, until that time. Charter sections 270(a), 10, and 12 direct that there will not be a 9th District Councilmember until after the municipal elections in 2012.

¹ This memorandum does not address the issue of a referendum regarding the Redistricting Plan. If sufficient signatures are gathered for a referendum on the Final Plan, our office will issue a memorandum providing additional legal guidance.

As City Attorney John Witt opined in 1990 in Opinion 90-3: “It is significant that the Charter does not require holding special elections immediately following redistricting. Read as a whole, the Charter contemplates that the new district boundaries become applicable to the next regularly scheduled election process.” We agree with this conclusion. To change the boundaries for representation purposes before the next election cycle could create havoc. Charter section 270(a) reinforces this conclusion by explaining the transition from eight to nine council seats:

The Council shall be composed of nine council members elected by district. The ninth councilmember shall be elected at the next municipal primary and general elections following the redistricting occurring after the 2010 national decennial census. Until the ninth councilmember is elected and qualified, the Council shall be composed of eight council members elected by district.

Charter § 270(a).

Thus, the eight Councilmembers “elected by district” will continue to represent their current districts until the ninth councilmember is sworn in on December 3, 2012.

If one were to conclude that Council district boundaries changed for purposes of representation prior to the 2012 elections, this would result in a vacancy in the new 9th Council District and arguably would require a special election. (See Charter section 12(h).) Yet Charter section 270(a) states that the 9th Council District seat is to be filled in the 2012 municipal elections. This is further confirmed by Charter sections 10 and 12, which specify that the 9th Council District seat is to be filled at the next municipal primary and general elections following the 2010 redistricting. The only reasonable conclusion is that the boundaries officially change for purposes of representation after the 2012 elections.

Accordingly, we conclude that Councilmembers will continue to represent the people and territory of their current districts until December 3, 2012, when the new 9th District Councilmember is sworn in and qualified to serve the new district. Any other conclusion would leave a new Council District without a representative and disenfranchise those citizens, violating constitutional and Charter requirements of fair and effective representation for all.

2. The New Districts in the Commission’s Final Plan Will Be Used for the 2012 Primary and General Elections for Councilmembers to Represent Districts 1, 3, 5, 7 and 9.

Charter section 5.1 states that the Commission,

. . . shall adopt plans that redistrict the City into nine (9) Council districts designated by numbers 1 to 9 inclusive. Those districts shall be used for all elections of Council members, including their recall, and for filling any vacancy in the office of member of the

Council, subsequent to the effective date of this Section (and until new districts are established).

Thus, the boundaries in the Final Plan must be used for the five City Council elections to be held in 2012 – for Council Districts 1, 3, 5, 7, and 9.

If a candidate wishes to run for City Council in any of those districts, the candidate must be a registered voter of the district in which he or she wishes to serve for at least 30 days prior to the date he or she files nomination papers. SDMC § 27.0119(b)(2). The candidate must be a resident and a registered voter of that district at the time of assuming the office on December 3, 2012. SDMC § 27.0119(b)(1). (*See also*, Charter section 7, which states in part, “Elective Officers Residency Requirement: An elective officer of the City shall be a resident and elector of the City. In addition, every Councilmember shall be an actual resident and elector of the district.”)

Candidates must collect nominating signatures of 100 registered voters of the newly drawn Council District from which the nomination is sought; those voters must have been registered in that district for at least 30 days prior to signing the petition. SDMC § 27.0210(b). The first day to obtain nomination papers from the City Clerk for the 2012 elections is February 8, 2012. SDMC § 27.0204.

3. The Final Plan Cannot Operate to Remove Any Councilmember from Office in the Middle of a Term, Even if the Councilmember No Longer Lives in the District to Which He or She Was Elected.

Charter section 5.1 states in relevant part:

No change in the boundary or location of any district by redistricting as herein provided shall operate to abolish or terminate the term of office of any member of the Council prior to the expiration of the term of office for which such member was elected.

Additionally, Charter section 7 states:

Elective Officers Residency Requirement:

Any Council member who moves from the district of which the Council member was a resident at the time of taking office forfeits the office, but no Council member shall forfeit the office as a result of redistricting.

The Redistricting Commission’s Final Plan thus cannot operate to affect who serves on the City Council in the middle of his or her term, even if the Plan’s new district boundaries mean the Councilmember no longer lives in the district he or she was elected to serve. This is true even if a Councilmember is not up for re-election until 2014. Thus, if a Councilmember from

District 2, 4, 6, or 8 does not live within the new boundaries of his or her district, the Councilmember still may continue to serve the district until after the 2014 election, when a Councilmember is sworn in for the next term. If the Councilmember wishes to run for a subsequent term, he or she must move, become a registered voter within the new district boundaries, and later also reside within that district in order to serve.

Finally, the Charter also contains an obscure provision in section 12(g) that states the following:

(g) Upon any redistricting pursuant to the provisions of this Charter, incumbent Council members will continue to represent the district in which they reside, unless as a result of such redistricting more than one incumbent Council member resides within any one district, in which case the City Council may determine by lot which Council member shall represent each district.

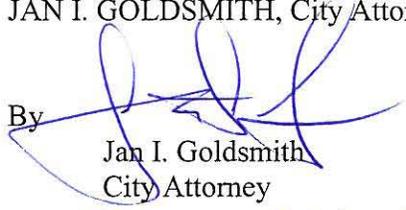
It is premature for our Office to address this provision, as it may not apply. Moreover, we note the use of the term "may" regarding the use of lots to decide who will represent a Council district. If this scenario arises after a Final Plan is filed, our Office will provide additional direction to the Council.

CONCLUSION

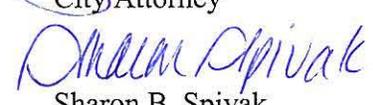
Our Office will continue advising the City Council about the ramifications of the redistricting process as additional issues arise, including any potential referendum. We confirm here, however, that the Charter intended for the new district boundaries to take effect after the new 9th District Councilmember is sworn in and represents the new district. This opinion ensures compliance with the constitutional requirement of fair representation. It ensures there will be sufficient time for the Council offices to transition to the new map and provide representation in different district boundaries. Our Office is committed to providing guidance throughout the process to ensure a smooth transition.

JAN I. GOLDSMITH, City Attorney

By


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City Attorney

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cc: Andrea Tevlin, Independent Budget Analyst