CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511

Date: June 6, 2011

MEMORANDUM

TO: Brian Grady, Redistricting Coordinator

FROM: Michael P. May, City Attorney
Roger A. Allen, Assistant City Attorney

RE: Retrogression Concerns Regarding Draft City Redistricting Plans

Isadore Knox, Jr., Director of the Dane County Office of Equal Opportunity has raised concerns that proposed changes to the boundaries of aldermanic districts 13 and 14 would result in dilution of minority voter strength in one or both districts. Mr. Knox asserts that this dilution of influence would amount to "retrogression" in violation of Section 5 of the Voting Rights Act.

Section 5 of the Act is inapplicable to the City of Madison. Under Section 5 certain jurisdictions (designated when the Act was created or subsequently determined to have violated provisions of Section 2 of the Act) must pre-clear any proposed voting changes, including redistricting plans, through the US Department of Justice or the US District Court for the District of Columbia. A Section 5 jurisdiction seeking changes to its districts must establish that such changes will not have the effect of discriminating against protected minorities or have discriminatory retrogressive effect. Since Section 5 is remedial, that is to say that it is explicitly a remedy for past violations and a prophylactic measure to prevent future violations, the Department of Justice does indeed examine a proposed redistricting plan to determine whether it has retrogressive effect.

> A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters' effective exercise of the electoral franchise when compared to the benchmark plan. "Guidance Concerning Redistricting under Section 5 of the Voting Rights Act (Notice)," Federal Register 76:27 (February 9, 2011) p. 7471 (citations omitted).

This analysis focuses on whether the minority group's ability to elect their preferred candidates existed in the approved plan and whether that ability continues to exist or has been impaired under the proposed plan. *Id.* at 7471. The analysis attempts to ensure that the proposed plan is fee of discriminatory purpose. Even under Section 5 analysis, sometimes retrogression is simply unavoidable (as may be the case in population shifts) and thus, permissible. *Id.* at 7472.

The City of Madison is not subject to the Section 5 preclearance procedures. Instead, the City establishes its redistricting plan pursuant to Section 2 of the Voting Rights Act. Under Section 2, the City may not enact any voting plan that discriminates against minority voters. However, retrogression is not an issue that determines the outcome of a challenge to a Section 2 plan. See *Holder v. Hall*, 512. U.S. 874, 884, 114 S.Ct. 2581, 2587-88 (1994). Furthermore, establishing that a proposed redistricting plan has retrogressive effect does not establish a Section 2 violation. *Id.*

Setting aside Mr. Knox's reference to Section 5 retrogressive effect analysis, Section 2 does prohibit diluting the strength of the minority communities vote. Section 2 prohibits any political subdivision from enacting, imposing or enforcing any "…voting qualification or prerequisite to voting or standard, practice or procedure…in a manner which results in the denial or abridgement of the right to vote on account of race or color." 42 U.S.C. §1973(a).

In the case of *Thornburg v. Gingles*, 478. U.S. 30 (1986) the Supreme Court devised a two-phase test for determining whether a voting rights violation had occurred that merited a compelling interest for considering race as a factor in redistricting. Subsequent court decisions have established that proof of a Section 2 vote dilution claim requires proof that all of the *Gingles* factors are present and that under the totality of the circumstances the minority group has less opportunity to participate effectively in the electoral process than the majority group. *Abrams v. Johnson*, 521 U.S. 74, 90-91, 117 S.Ct. 1925, 1936 (1997).

The first phase of the *Gingles* test is composed of three preconditions that must be met: 1. The minority population must be large enough and geographically compact so as to constitute a majority in the district; 2. The minority group must be politically cohesive; and 3. The majority (in the absence of special circumstances) usually votes as a bloc to defeat the minority's preferred candidate.

If and only if, these preconditions are satisfied, then the second phase of the *Gingles* analysis involves a determination of whether, under a totality of the circumstances, the minority group has less opportunity to participate effectively in the electoral process than the majority group. Under this totality of the circumstances analysis, the court may way the following factors:

> [1] the history of voting-related discrimination in the State or political subdivision;
> [2] the extent to which voting in the elections of the State or political subdivision is racially polarized;
> [3] the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group[;]
> [4] the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the electoral process;
> [5] the use of overt or subtle racial appeals in political campaigns;
> [6] the extent to which members of the minority group have been elected

> to pubic office in the jurisdiction[;]
> [7] evidence demonstrating that elected officials are unresponsive to the to the particularized needs of the members of the minority group[;]
> [8] [evidence] that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous[;]
> [9] whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area[.]
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> *Fairley v. Hattiesburg, Mississippi*, 584 F.3d 660, 672 (5th Cir. 2009); quoting *LULAC v. Perry*, 548 U.S. 399, 426 S.Ct. 2594, 126 S.Ct. 2594 (2006) (citing *Gingles*, 478 U.S. at 44-45, 106 S.Ct. 2752)

The various minority communities in Madison enjoy broad geographical representation, thus the first of the *Gingles* factors, that of a geographically concentrated and compact minority community may not be satisfied. However, even if it were, minority groups in Madison have been well represented in elected office and because of their limited numbers, must have enjoyed substantial support from majority community members. Thus, neither the second nor the third *Gingles* factors have been satisfied. Since these preconditions have not been met, there is no need to neither consider nor address the totality of the circumstances test.

Finally, federal law does not require a comparison of the relative merits of two minority influence districts against a single majority minority district. There is no obligation under the Voting Rights Act to maximize the influence of minority voters. *Gonzalez v. City of Aurora, Illinois*, 535 F.3d 594 (7th Cir. 2008), see also *Davis v. Johnson*, 521 U.S. 74, 117 S.Ct. 1925 (1997). However, Wis. Stats.§ 5.15(1)(a)2. states that redistricting plans should consider the enhancement of racial or language majority group's participation in the electoral process and such group's ability to elect candidates of their choosing. A majority-minority district accomplishes this goal far better than would two minority influence districts.

The Common Council has directed that the Redistricting Committee rely upon traditional redistricting factors that are consonant with both Section 2 compliance and Wis. Stats. §5.15(1)(a)2.compliance. The purpose of Section 2 is to ensure that minorities enjoy equal access to the electoral process regardless of any past motivations from which electoral processes or districts had arisen, See S. Rep. No. 417, 97th Cong.2nd Sess. 2, at page 16 (1982), whereas the purpose of Section 5 is remedial, to eliminate past practices that have discriminated against minority voters.

Conclusion

The VRA Section 5 concerns raised regarding a proposed redistricting plan are inapplicable. The City of Madison is not subject to Section 5 and does not have to pre-clear its plan through the US DOJ or the Federal Courts. The City's proposed plan is subject to the requirements of VRA Section 2. There is no evidence that the proposed plan fails to comply with Section 2 requirements.

Applying the *Gingles* test to the voting history of Madison, it is unlikely that Madison has a compelling need to use race as a factor in its redistricting efforts. Setting aside the first question of whether the City's minority population now composes a "large and geographically compact majority" in a redrawn council district, there is no evidence of either political cohesiveness of such a group nor is there evidence of bloc voting by the White majority to defeat that group's preferred candidates. Indeed, the evidence is to the contrary. The Madison area enjoys a rich diversity of racial composition both its general population and in its elected officials. Therefore, it is unlikely that Madison has a compelling reason that would permit the use of race as a factor in its redistricting decisions under Section 2 analysis. Thus, the City should continue to focus on the traditional redistricting factors established by the Common Council.