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ATTORNEY-CLIENT COMMUNICATION

February 14, 2012

Detroit City Council
1340 Coleman A. Young
Municipal Center
Detroit, Michigan

Re: Whether a Map Created By Data Driven Detroit to Apportion the City Into Council Districts Complies with State and Federal Law

Honorable Council Members:

On February 7, 2012, Your Honorable Body, through Council President *Pro Tem* Gary Brown, requested an opinion as to whether a map created by Data Driven Detroit to Apportion the City of Detroit into Council districts complies with state and federal law. We are now responding to your request.

BACKGROUND

In accordance with the mandates of the 2012 Detroit City Charter, the City Council directed the City Planning Commission (“CPC”) staff to prepare possible maps, which apportion the City into seven (7) districts for the election of seven (7) Council Members and seven (7) members of the Board of Police Commissioners. After consulting with the Law Department, CPC staff created four (4) maps.

After receipt of the maps, the City Council directed that the CPC staff schedule four (4) meetings in different areas of the City of Detroit to receive public comment regarding the four (4) proposed maps. On the date of the first community meeting, February 3, 2012, the Detroit Free Press published a map that was prepared by Data Driven Detroit. At the February 3, 2012 community meeting, a member of Data Driven Detroit provided a copy of the organization’s map to the City Council during public comment. As explained by Data Driven Detroit and the *Detroit Free Press*, the proposed map has been drawn to preserve identifiable neighborhoods.

LAW AND ANALYSIS

I. The Michigan Home Rule City Act and the 2012 Detroit City Charter Require the City Council to Establish Non At-Large Districts for the Election of Seven (7) Council Members and Seven (7) Members of the Board of Police Commissioners.

Section 3-108 of the 2012 Detroit City Charter, *Geographical Basis for Electing Council Members*, provides, in part:



There shall be seven (7) non at-large districts and one (1) at large district established in the City and one (1) member shall be elected from each non at-large district and two (2) members shall be elected from the at-large district.

New district boundaries created within one hundred twenty (120) days of a City Primary Election shall become effective after the General Election.

Section 7-802 of the 2012 Detroit City Charter, *Board of Police Commissioners*, provides, in part, “[t]he Board of Police Commissioners is composed of eleven (11) members, seven of whom shall be elected from each non at-large district.” The Commentary to this section provides that “the election of the majority of Commissioners [shall be] from the seven (7) non at-large geographical districts created under [Section] 3-108.”

Section 27a(1)(a) and (4) of the Michigan Home Rule City Act, MCL 117.27a(1)(a) and (4), provides that the City’s legislative branch is responsible for drawing district boundaries from which its members are “nominated and elected.” MCL 117.27(a)(1)(b). Pursuant to Section 7-802 of the City Charter these same boundaries are to be utilized for election of the Board of Police Commissioners.

II. The Map Which City Council Selects to Establish Non At-Large Districts Must Comport With the Requirements of the 2012 Detroit City Charter, the Michigan Home Rule City Act, Michigan Election Law, and the Federal Voting Rights Act.

a. 2012 Detroit City Charter

Section 3-108 of the 2012 Detroit City Charter, *Geographical Basis for Electing Council Members*, provides, in part:

City Council shall establish district wards that are as nearly of equal population as practicable, contiguous, compact and in accordance with any other criteria permitted by law.

b. Michigan Home Rule City Act and Rules of Statutory Construction.

Section 27a(5) of the Michigan Home Rule City Act, MCL 117.27a(5), provides the criteria, which has been incorporated into Section 3-108 of the 2012 Detroit City Charter. Section 27a(5) requires that the district wards established by City Council be “as nearly of equal populations as is practicable, contiguous, and compact.”



Section 8.3 of the act entitled *Michigan Statutes*, MCL 8.3, provides:

General Rules of Construction.

In the construction of statutes, the rules stated in sections 3a to 3w shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature.

Under this section, the Michigan appellate courts have adopted the statutory rule of construction of “expressio unius est exclusio alterius,” which means “express mention in the statute of one thing implies exclusion of other similar things.” *Greenslait v City of Taylor*, 137 Mich App 536; 358 NW2d 30 (1984); *Duweke v Morang Drive Greenhouses Inc*, 91 Mich App 27; 282 NW2d 823 (1979). Where certain things are specified in a law, intention to exclude all others from operation may be inferred. *Wolverine Steel Co v City of Detroit*, 45 Mich App 671; 207 NW2d 194 (1973). Where the state legislature lists items in a statute, it is the general rule that express mention of one thing implies the exclusion of other similar things. *People v Malik*, 70 Mich App 133; 245 NW2d 434 (1976).

Under this rule of statutory construction, Section 27a(5) of the Michigan Home Rule City Act, being MCL 117.27a (5), contains only three (3) criteria for the apportionment of a home rule city into districts. The criteria are: 1) nearly of equal populations as is practicable; 2) contiguous; and 3) compact. No other criteria are delineated in MCL 117.27a.

c. Michigan Election Law.

On November 20, 2011, the Michigan Secretary of State Bureau of Elections Redistricting Team issued a directive to all city and township clerks, each city and township clerk comply with Qualified Voter File Street Index changes due to redistricting. In order to comply with this mandate,¹ Michigan Election Law requires that the Department of Elections:

- 1) Identify all streets that form a boundary line;
- 2) Merge divided precincts, which are contiguous, with like precincts, that is, those that have the same federal, state, county, community college, school board, and City representation;

¹ The Directive requires that the changes be completed by January 5, 2012. However, due to the special circumstances concerning the City Council’s drawing of districts for the first time in 94 years, the Secretary of State has given the City of Detroit an unofficial extension of time to comply with the Directive.



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- 3) Ensure that, pursuant to MCL 168.661, merged precincts do not exceed the maximum number of registered voters allowed under law, which is 2,999;
- 4) Print out street index of merged precincts, identify address ranges in the merged precincts, and record new federal, state, county, community college, school board, and City representation;
- 5) Submit new boundaries to Information Technology Services Department GIS Division to create new precinct maps; and
- 6) Review all changes for accuracy.

It is our understanding that the four (4) proposed apportionment plans have been drawn by CPC staff to avoid changing any voter precincts.² However, in the event that City Council selects any plan, which redraws the lines to divide or change any voting precinct, according to the Department of Elections, the implementation of such changes generally takes from four to six weeks. After this process is completed and the revised precincts are approved by the Election Commission, pursuant to Section 517 of Michigan Election Law, MCL 168.517, each voter will be mailed a new voter registration card.

d. Federal Voting Rights Act.

Section 2 of the federal Voting Rights Act, 42 USC 1973, provides:

Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

- (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set

² The Department of Elections is scheduled to print and mail new voter registration cards to each Detroit voter, which will include the notification of their non at-large district, by mid-May 2012. In the event that the district map selected by City Council is challenged beyond mid-May 2012, each affected voter would be required to receive a new voter registration card. Each mass mailing of new voter registration cards will cost the City approximately \$250,000.



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forth in section 1973b (f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. (Emphasis added.)

Unlike other sections in the Voting Rights Act, which apply to designated jurisdictions, this section applies to all states and political subdivisions. In addition, under the Voting Rights Act Amendments of 1975, PL No 94-73, Sec 206, the U.S. Congress extended the section's protections to language minorities.

Among the practices which have given rise to claims under this section are the apportionment of districts. In order to establish a violation of this section, the courts look at the totality of circumstances in determining whether members of a minority group have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Johnson v DeGandy*, 512 US 997; 114 S Ct 2647; 129 L Ed 2d 755 (1994).

There are many cited cases regarding the redistricting of political subdivisions. One example is where a federal court found that a city's election system, with five of eight council members being elected by district and the remaining three being elected at-large violated Section 2 of the Voting Rights Act, 42 USC 1973, because, among other reasons, the City's Hispanic population made up 31% of the City's population and was sufficiently large and geographically compact with most residing in the southern half of the city to constitute a majority in a single district, thereby preventing them from being able to elect candidates of their choosing. *Benavidez v City of Irving, Texas*, 638 F Supp 2d 709 (2009).

The CPC staff has identified two minority groups, which are protected under the Voting Rights Act. They are the Hispanic population in Southwest Detroit and the Asian population north



of Hamtramck. As such, the voting strength of these two minority groups cannot be diluted to provide “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 USC 1973; *Johnson, supra*.

III. Although It Complies With the Requirements of the Federal Voting Rights Act, Because It Was Drawn for the Purpose of Preserving Identifiable Neighborhoods, the Map Prepared By Data Driven Detroit Adds Criterion That Is Not Delineated in the Michigan Home Rule City Act or the 2012 Detroit City Charter and That Would Make the Proposed Map Susceptible to Legal Challenge.

Due to its small size and lack of detail, a cursory review of the map that was prepared by Data Drive Detroit appears to comport with the requirements of the Federal Voting Rights Act. Specifically, it appears from a cursory review of the map that the Hispanic and Asian populations are each contained in one district.

Throughout public comment, staff from Data Driven Detroit and Publis.org have indicated to City Council that the purpose behind the map prepared by Data Driven Detroit is to preserve identifiable neighborhoods. This same sentiment was articulated by the Detroit Free Press on February 3, 2012. “Preserving identifiable neighborhoods” is not a permissible criterion that is delineated under Section 27a(5) of the Michigan Home Rule City Act, MCL 117.27a (5), or under Section 3-108 of the 2012 Detroit City Charter, which only permit apportionment of the City so that Council districts are as nearly of equal populations as is practicable, contiguous, and compact.

The addition of a fourth criteria would violate the Michigan rule of construction that the “express mention in the statute of one thing implies exclusion of other similar things.” *Greenslait, supra; Dueweke, supra; Wolverine Steel Co; supra; Malik, supra*. The preservation of identifiable neighborhoods may be a desirable by-product of apportionment, but a map to apportion the city into seven (7) Council districts may not be drawn for this express purpose.

The map that was prepared by Data Drive Detroit was reviewed by Daniel Baxter, Director of the Department of Elections, with the assistance of Gregory Moots, City Planner, City Planning Commission. According to Mr. Baxter, the Data Driven Detroit map would require that approximately twenty-nine (29) precinct be split. In the event that this map is selected, the implementation of such changes by the Department of Elections and the Information and Technology Services Department will take from four to six weeks.



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CONCLUSION

A cursory review of the map that was prepared by Data Driven Detroit reveals the map does not meet the criteria that is delineated under Section 27a(5) of the Michigan Home Rule City Act, being MCL 117.27a (5), or under Section 3-108 of the 2012 Detroit City Charter. In the event that this map is selected, the City will be subject to a legal challenge for adding an impermissible criterion to the criteria that is delineated under state law and the City Charter.

Even assuming that the proposed map meets state and federal criteria, implementation of changes required to split voting precincts will take the Department of Elections and the Information and Technology Services Department from four to six weeks. As such, the deadline of February 17, 2012, which was recommended by the Law Department to complete this process would have to be extended, at a minimum, to March 16, 2012, or, at a maximum, to March 30, 2012.

If you have any questions regarding this matter, we are available to respond.

Respectfully submitted,

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Assistant Corporation Counsel

Approved:

Krystal A. Crittendon
Corporation Counsel