

## **Memorandum**

To: Ann Arbor Mayor and City Council  
From: Tom Wieder  
Date: 6/22/11  
From: Ward Boundaries

The City Attorney and City Clerk's Offices have put before you a proposal to redraw the City's ward boundaries, with the new boundaries to take effect after the August 2011 primary, but before the November 2011 election. This Memorandum discusses some of the political and legal issues related to that proposal.

### **Executive Summary**

The current proposal from the City Attorney and City Clerk's Offices to use the existing ward boundaries for the August 2011 primary election, and a newly-drawn set of boundaries for the November 2011 general election, is inherently unfair, unprecedented and probably an unconstitutional denial of Equal Protection. It would result in some individuals who reside in the "new" wards being eligible to vote in the primary elections for those wards, while other residents of those same wards would not be eligible. The proposal, if enacted, is vulnerable to legal challenge by disenfranchised voters, by unsuccessful primary candidates, and others.

The City Clerk states that, because of other legal and practical deadlines regarding the conduct of elections, it is impossible to approve and implement new boundaries for the August primary at this time. The only choices that remain are: 1) Using the existing boundaries for the primary and general elections; or 2) Using the existing boundaries for the primary and new ones for the general.

It is not clear that any redrawing of the ward boundaries is legally required, given the small population variance among the existing wards. Even if it is required, a number of legal theories support postponing the effective date of any redrawing until after the November 2011 election. A successful legal challenge to such a postponement is not likely.

### **Background of the Author**

While some of you know me well and others casually, some of you do not know me at all, except, perhaps, by reputation. In light of that, let me tell you something about myself relevant to this issue. I have been active in Ann Arbor politics since 1971. I have been a precinct worker, precinct captain and ward chair, have run three council campaigns and worked in and contributed to dozens of other city, county, state and federal campaigns. I authored the 1992 charter amendment that moved city elections to November, co-managed the petition drive to get the amendment on the ballot, ran the campaign to pass it and successfully defended it in court.

I have been a member of the ZBA, the City Charter Review Committee and the 1991 Ward Boundary Commission. In that latter capacity, I drew the ward boundaries which, with minor changes made in 2001, are still being used today. I was also involved in the 1972, 1981 and 2001 ward reapportionment efforts.

As an attorney, I have been involved in several election law cases. Most notably, I was the lead attorney in the ACLU-sponsored case challenging the 2008 Michigan Presidential Primary law in Federal District Court. We succeeded in having that law invalidated on the grounds that it violated the Equal Protection Clause of the 14<sup>th</sup> Amendment.

### **Historical and Legal Background of the Issue**

City wards, like Congressional, State Legislative and County Commission districts, must conform to the requirements of “one-person, one-vote.” While it is commonly said that the ward boundaries must be redrawn following each U.S. Census, that is not literally true. If the existing wards comply with one-person, one-vote standards, there is no requirement that they be redrawn.

The Michigan statute that the Attorney and Clerk are concerned about is MCL 117.27a, which provides:

(4) In each such city subject to the provisions of this section the local legislative body, not later than December 1, 1967, shall apportion the wards of the city in accord with this section. In subsequent years, the local legislative body, prior to the next general municipal election occurring not earlier than 4 months following the date of the official release of the census figures of each United States decennial census, shall apportion the wards of the city in accord with this section.

In simple terms, if the census data is available at least four months before the next general election, the wards must be redrawn before that election (assuming that they have to be redrawn, at all). Note that the statute does not say when the redrawn wards would go into effect, just when they must be redrawn.

Following the 1970, 1980 and 1990 censuses, the statute posed no problem. At that time, the city elections were in April, so the census data would have to have been available by December of the census year to trigger redrawing for year “1” of the new decade. The data were never available that soon. The data generally became available in the early part of the year following the census, so there was plenty of time to redraw the wards before the filing deadline for the year “2” election, which wasn’t until December. (For reasons long since forgotten, the 1970 census data were delayed so long that the new wards did not take effect until 1973.)

It was, therefore, standard for the year “1” city election to be held using the old boundaries.

The situation in 2001 was somewhat different. By that time, the city elections had been moved to November, so the census data was available more than four months before the election. There was a key difference, however, between that situation and the present one. At that time, the city was able to follow the City Charter provision for the filing of nominating petitions. That provision, Section 13.8(b), required petitions to be filed by the “seventh Monday” before the August city primary. That date was June 25, 2001. Council approved new ward boundaries on June 18, 2001, before the filing deadline.

Since 2001, there has been a relevant change in state election law. Notwithstanding the Charter provision, the city must now use a standard, statewide filing deadline for the August

primary. This year, that date was May 10, 2011.

The census data is not released all at once; the data for different states are released at different times. Michigan was in the last group of states released, on or about March 22, 2011.

Having worked on many of these plans, I can state that the boundary changes in the Clerk's plan could have been designed in no more than a few hours, by hand. Even allowing for some time to process the data and place the numbers on blocks on a map, the plan could have been produced and presented to Council for two readings before the May 10<sup>th</sup> filing deadline. This is not intended as a criticism of the Clerk. This was an entirely new schedule that no one had ever dealt with before. This was an easy thing to miss. Nevertheless, compliance with the law, without resort to conducting the primary and general elections using different boundaries, was possible.

### **Discussion**

#### **What problems are presented by the Attorney/Clerk proposal?**

This is an extreme case of changing the rules in the middle of the game. The "game" is the selection of individuals to represent five designated areas of the city (actually groups of city residents) for the two years beginning this November. If the wards are redrawn for November, those areas of the city are the "new" ones, the ones that exist as of Election Day in November. They are not the areas of the city constituting the present wards. Any legally eligible person who lives in one of those "new" areas, and only such a person, should have been allowed to file a nominating petition to run for Council. Any voter residing in one of those "new" areas, and only those voters, could add a valid signature to a nominating petition. Any voter residing in one of those "new" areas, and only those voters, should be able to vote in the primary. Unfortunately, that is not how things would actually happen.

Changing the ward boundaries after the filing deadline may have deprived someone of the opportunity to run for Council. The proposed boundaries reassign about 1800 people from the First Ward to other wards. In one example of the possible problem, there might have been one or more persons in that group that were interested in serving on City Council, but they didn't want to challenge Councilwoman Sabra Briere. Had they known that they would end up in a different ward, they might have wanted to run in that ward. Of course, they wouldn't have known what that new ward would be, and they wouldn't have been allowed to file a nominating petition to run in that new ward, because it didn't yet exist.

A candidate must file a nominating petition with at least 100 signatures of "registered voters of the ward from which the person seeks to be elected." (Charter Section 13.8(a).) If the wards are redrawn for the November election, the ward "from which the person seeks to be elected" will be the new ward. Since that ward did not exist on May 10<sup>th</sup>, the Clerk could not have checked to see if the candidate had 100 valid signatures from the new ward. The Clerk checked to see if the candidate had 100 signatures from the old ward, which is not the ward "from which the person seeks to be elected" this November. Has the Clerk determined that all of the candidates had 100 valid signatures from their new wards? What happens if one or more of them didn't?

The worst problem with this proposal is how it affects voters' rights to vote in the August

primary for the candidates who seek to represent them as of November. (The numbers used in the following analysis are all approximate. The exact number of residents in any Census block at this time will vary slightly from the count made on Census Day in 2010.)

The Clerk's plan would reassign a total of 1256 people presently in Ward 1 to Wards 2, 3 and 5, all of which have primary contests. None of these people will be allowed to vote in those primaries, because they won't be reassigned to those wards until after the primary. The plan reassigns 564 people from Ward 4 to Ward 3, but none of those people will be able to vote in the Third Ward primary. By contrast, 174 people who presently reside in Ward 3, but will be reassigned to Ward 4 by Election Day in November, will be permitted to vote in the Third Ward primary.

The implications of this absurd set of facts are significant. The only candidates running in the Second Ward are the two Democrats vying in the primary. Barring a late independent candidate, the primary winner will run unopposed. The persons reassigned to Ward 2 after the primary will have had no say in the election of their new representative.

The Third and Fifth Ward primary winners will have November Republican opponents, but, for many years, winning the Democratic nomination has been tantamount to victory in those wards. The persons reassigned to Wards 3 and 5 after the primary will have had virtually no say in the election of their new representatives.

In 40 years of participating in electoral politics and intensely observing it all over the country, I have never seen two different sets of election boundaries used for the same area in a single election cycle. It absolutely makes no sense, and Ann Arbor should not be the first to try it. The credibility and legitimacy of its elections are at stake.

### **Could someone legally challenge this plan?**

Absolutely. In fact, there are a number of legal challenges that this plan may give rise to.

As already noted, someone who was dissuaded from running for Council, because they were misled about what the wards would look like at the time of the November election, could challenge the entire election. How likely is this? Any answer would be speculation.

Candidates may examine the nominating petitions of opponents to see if an opponent has enough valid signatures from the new ward, not the old one, since it is the new ward which is the one "from which the person seeks to be elected."

The most likely challenge would come from one or more voters who are being denied the opportunity to vote in the primary for the ward to which they will be reassigned before the November election. This is a simple, straightforward denial-of-Equal Protection claim. Voters who live within the boundaries of both the old and new ward will be permitted to vote in the primary. Voters who will live in the new ward, but don't live in the old version of the ward, won't be able to vote in the primary. Both groups of voters will be represented by the person elected in November. This is such an obvious denial of Equal Protection, and would set such a bad precedent, that I hope that it would be challenged, and I would encourage someone to do so. Such voters could seek to enjoin the conduct of the August primary, among other remedies.

If such a challenge is brought, it is likely to be brought under federal civil rights statutes which entitle a successful plaintiff to recover their full attorney fees. This could become quite expensive for the City. In the ACLU case which overturned the Presidential Primary, we recovered \$55,000 in fees from the State of Michigan for a very quick and simple course of litigation.

Losing candidates could also challenge the results of the primary. A losing candidate in Ward 2, 3 or 5 could claim that supporters of their candidacy who will be reassigned to the new ward were denied their right to vote in the primary, affecting the primary outcome. A loser in the Third Ward could argue that voters who were allowed to vote in the primary, but will be reassigned to the Fourth Ward before November, should not have been allowed to vote and may have swayed the outcome. Given Ann Arbor's history of extremely close elections, it is not farfetched to suggest that even a handful of voters voting in the "wrong" ward in the primary could affect an outcome.

### **What will happen if Council doesn't redraw the ward boundaries for the November election?**

Probably, nothing.

There is no agency or authority that checks to see if cities are adjusting their ward boundaries pursuant to the statute. The only way that this issue will be raised is if someone decides to file a lawsuit to force a redrawing.

If the nominating process, the primary and the general election are all conducted using the existing boundaries, there is probably only one kind of legal challenge that could be brought. That challenge would claim that the population disparities among the existing wards violate one-person, one-vote, and that no additional elections should be conducted using them.

It is far from clear that the existing boundaries do violate one-person, one-vote. The population variance from the smallest to the largest of the existing wards is 11%. (The First Ward is 8.02% larger than a perfectly equal "ideal" ward, and the Fifth Ward is 2.98% smaller.) No Michigan appellate court has ever decided what is the allowable population variance for city wards. There are no appellate decisions about ward redistricting.

In cases involving redistricting of other legislative bodies, Michigan appellate courts have allowed population variances greater than 11%. In the leading case in the area of redistricting the Michigan Legislature, the Michigan Supreme Court declared that the largest allowable variance would be 16.4%. In the leading case in the area of redistricting a County Commission, the Michigan Supreme Court declared that the largest allowable variance would be 11.9%. Given these precedents, it is possible that Michigan courts would not require the current wards to be redrawn at all, let alone for this November's election, especially under these circumstances.

Even if it were clear that the present boundaries must be changed to comply with one-person, one-vote requirements, is it clear that new boundaries must be used for this November's election? The answer is "no." The statute at issue, MCL 117.27a, above, says nothing about when new boundaries must be put into effect. It says only that "the local legislative

body, prior to the next general municipal election ...shall apportion the wards of the city in accord with this section.” If the Council passed an ordinance apportioning the wards two weeks before the election, it would be in compliance with the literal language of the law, but it would be impossible to lawfully conduct the election with those new boundaries.

It is certainly possible that the Legislature intended new wards to be in effect for the next general election, but the statute doesn’t say that. Given the many problems of implementing new wards for November, a court may welcome the opportunity that this unclear drafting would provide to delay the effective date of the apportionment.

Not just anyone could challenge the use of the existing ward boundaries. To make such a claim, the person making it must have “standing” to bring the matter before the court. Just being an Ann Arbor resident or voter isn’t enough. The person would have to show that they would suffer some particular harm. In 1991, Councilman Kurt Zimmer filed a suit challenging the newly-drawn ward boundaries. The court decided that he didn’t have standing and dismissed the case.

About the only individuals who could even theoretically challenge the use of the existing boundaries for the November election are residents of the First Ward. That is the only ward that has a larger population than the “ideal” ward, so its residents are the only ones who could claim that they are slightly “underrepresented” on Council with the current ward boundaries.

Is it likely that a First Ward resident will find this population variance for just one additional Council election of enough concern to hire a lawyer to fight it? This seems quite unlikely. Since there is no contest in that ward this year, there is certainly no campaign-outcome-related motivation to do so.

As previously noted, in every previous decade’s year “1” election, old ward boundaries were used until new ones could be drawn in an orderly fashion. In 1971 (and 1972) the population variance of the old wards was huge, with the largest ward having a population of about 25,000 and the smallest about 15,000. The present variance is trivial and doesn’t justify the bizarre remedy of conducting the primary and general elections under two different ward maps.

There is, at least, one other reason why a suit to force new boundaries for November might well fail, even if a court thought that there was a valid one-person, one-vote argument. There is a principle in the law called “laches.” Stated simply, it says that, if someone has a valid legal claim, but waits too long to bring it, a court may decide that it isn’t fair or appropriate to grant the person’s claim.

In this case, the population data was publicly available three months ago. No one has filed suit yet. Redrawing the boundaries now, or later in the year, for November causes all of the problems described here. Those problems include the possibility of constitutional rights infringements (denial of Equal Protection) at least as profound as any harm caused by using slightly unequal wards for one more election. A court may well decide that, under these circumstances, any claim brought from this time forward just shouldn’t be considered.

Even if all of these hurdles to a successful challenge could be overcome, such a possibility does not support the idea of proceeding with changing the boundaries solely for the November

election. About the only relief that a court could grant would be to order the use of new boundaries for that election. That outcome is identical to what the Attorney and Clerk are proposing to do voluntarily. There is no good reason to undertake this worst case scenario unless required to do so.

### **Conclusion and Recommendation**

It is unfortunate that new ward boundaries were not drawn so that there would be no concern about compliance with the state law, and, at the same time, the entire election process for 2011, from the filing of candidacies through the November election, would be conducted with the same boundaries. That result is now impossible. Of the two options still available, the best one is to do nothing to change the ward boundaries for this election cycle. To do what is proposed is confusing and unfair to voters, and is subject to a possibly costly and embarrassing legal challenge. The proposed change should not go forward at this time.