MUNICIPALITY OF ANCHORAGE
OFFICE OF ASSEMBLY COUNSEL
MEMORANDUM

To: Assembly Reapportionment Committee
From: Dean T. Gates, Assembly Counsel DTG
Date: February 9, 2022
Subject: **Legal criteria for reapportionment of election district boundaries.**

QUESTION PRESENTED

The Assembly Reapportionment Committee requested clear legal definitions for each of the criteria for new election district boundaries in the reapportionment process as established by law.

DISCUSSION

Standard of review.

It is important to note the standards of review a court will take when a reapportionment plan is challenged. The court's review is meant to ensure the Assembly did not exceed its authority, to determine if the plan is reasonable and not arbitrary, is constitutional, and drawn to the standards of the Charter § 4.01. The court may not substitute its judgment as to the sagacity of a plan, as the wisdom of a plan is not a subject for review.[1] Reapportionment is a decidedly political process. A court will not lightly interfere, according deference to the Assembly.[2] The court's limited review of a reapportionment plan is to assure compliance with all constitutional guarantees.[3]

U.S. Constitution

In the context of voting rights in reapportionment, the Equal Protection Clause of the federal constitution has two basic principles.

1. "One person, one vote" is the right to an equally weighted vote. This is met when a reapportionment plan has a total variance under 10%, considered a minor deviation. It is then presumptively constitutional.

2. "Fair and effective representation" is the right to group effectiveness or an equally powerful vote. This is violated only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this political context a violation requires proof of purposeful discrimination and that a group of voters is being "consistently and substantially

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1 *See, e.g., In re 2011 Redistricting Cases,* 294 P.3d 1032, 1037 (Alaska 2012); *and Braun v. Borough,* 193 P.3d 719 (Alaska 2008).
2 *Braun v. Borough,* 193 P.3d 719, 726 (Alaska 2008).
3 *Id.* at 729.

> excluded from the political process [and] denied political effectiveness over a period of more than one election."[4] The reapportionment drafters cannot intentionally discriminate against a borough or any other politically salient class of voters by invidiously minimizing that class's right to an equally effective vote.[5]

Alaska Constitution

Deviation permissible: First, it is necessary to clarify the legal rules applicable to reapportionment proposals with total deviations that exceed 5% and those that exceed 10%. The equal protection clause of the Alaska Constitution imposes a stricter standard than its federal counterpart. While a total deviation is presumptively constitutional under the federal Equal Protection analysis, the stricter Alaska application tends to disfavor a district with more than 5% variance (as opposed to total variance of the plan) and requires a hard look at whether the purpose of over or under populating a district and is to fit one of the constitutional goals or criteria. This evaluation may compare to considered alternatives that had a population under the 5% mark. The difference is one of degree and context; at the 5% deviation for a single district it will receive a hard look at whether the boundaries could be more compact or adjusted on without compromising the constitutional requirements, while exceeding the federal constitution's 10% threshold for the whole plan's total deviation is presumptively unconstitutional and requires a compelling justification.

In *Kenai Peninsula Borough v. State,* the Alaska Supreme Court was reviewing the 1984 state legislative reapportionment plan and it was undisputed that the Reapportionment Board deliberately fashioned the reapportionment plan to prevent another "Anchorage" seat.[6] Once a discriminatory intent is shown, "redistricting will be held illegitimate unless that redistricting effects a greater proportionality of representation."[7] Because the Board's intent in *Kenai* was facially discriminatory, and because its effect was to create greater disproportion, the court held that the redistricting plan violated the equal protection clause of the Alaska Constitution.[8]

Anchorage Municipal Charter

The Anchorage Municipal Charter § 4.01 states in pertinent part (emphasis added): "Election districts, if established, shall be formed of ***compact*** and ***contiguous*** *territory containing* ***as nearly as practicable a relatively integrated socioeconomic area***."[9]

Interpreting these same requirements contained in Alaska Constitution Art VI § 6, the

4 *Braun v. Borough,* 193 P.3d at 729.
5 *Id.* at 730, citing *Kenai Peninsula Borough v. State.*
6 *Kenai Peninsula Borough v. State,* 743 P.2d 1352, 1370 (Alaska 1987).
7 *Id*. at 1372.
8 *Id.*.
9 Similar requirements are established for Alaska house districts by the Alaska Constitution, Art. VI § 6 ("Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area."). Case law interpreting this provision of state statute are therefore relevant.

Alaska Supreme Court recognized that the requirements of contiguity, compactness and socio-economic integration were incorporated by the framers of the reapportionment provisions to prevent gerrymandering.[10] Gerrymandering is the dividing of an area into political units "in an unnatural way with the purpose of bestowing advantages on some and thus disadvantaging others."[11] The constitutional requirements help to ensure that the election district boundaries fall along natural or logical lines rather than political or other lines.[12]

Case law and other legal resources have described how to interpret each of the three terms.

Compact:
'Compact' in the sense used here means having a small perimeter in relation to the area encompassed."[13] The most compact shape is a circle. The compactness inquiry thus looks to the shape of a district. Compact districting should not yield "bizarre designs."[14] Courts will look to the relative compactness of proposed and possible districts in determining whether a district is sufficiently compact.[15]

Odd-shaped districts may well be the natural result of Alaska's irregular geometry. However, "corridors" of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.[16]

In *Carpenter v. Hammond*, the court invalidated the State's 1981 Reapportionment Plan in part because of how House District 2 was drawn. It said:

10 *Hickel v. Se. Conf.*, 846 P.2d 38, 45 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993), *quoting* 3 PACC 1846 (January 11, 1956) ("[The requirements] prohibit[ ] gerrymandering which would have to take place were 40 districts arbitrarily set up by the governor.... [T]he Committee feels that gerrymandering is definitely prevented by these restrictive limits.").
11 *Carpenter v. Hammond*, 667 P.2d 1204, 1220 (Alaska 1983) (Matthews, J., concurring).
12 *Hickel* at 45.
13 *Carpenter*, 667 P.2d at 1218 (Matthews, J., concurring), *quoting* Black's Law Dictionary 351 (4th ed. 1968).
14 *Davenport v. Apportionment Comm'n of New Jersey*, 124 N.J.Super. 30, 304 A.2d 736, 743 (N.J.Super.Ct.App.Div.1973), *quoted in Carpenter*, 667 P.2d at 1218–19 (Matthews, J., concurring).
15 *Carpenter*, 667 P.2d at 1218 (Matthews, J., concurring).
16 *Hickel v. Se. Conf.*, 846 P.2d 38, 45–46 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993).

> "In no sense is District 2 compact. It runs some 700 miles from its southeasternmost to its northwesternmost points. It is shaped roughly like two extended arms, each with a shoulder, connected in the middle not by a head and torso, but by a narrow ligament which threads its way between Districts 3 and 4. The impossibility of considering District 2 to be relatively compact is evident merely from looking at the map."[17]

Courts have generally recognized that absolute or perfect compactness is not required; a certain degree of noncompactness is permissible to accommodate other redistricting requirements.[18]

Contiguous:

Contiguous territory is territory which is bordering or touching. As one commentator has noted, "[a] district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary (i.e., the district is not divided into two or more discrete pieces)."[19] The *Hickel* court recognized that in Alaska with its archipelagos and geographic features, absolute contiguity of land masses in redistricting is impossible. A district can contain open sea, but not without limits. The additional criteria of compactness and relative socioeconomic integration avoids creating districts of coastal communities across the Pacific Rim.[20]

Containing as nearly as practicable a relatively integrated socioeconomic area:

This may be the most amorphous of the criteria. It helps to ensure that a voter is not denied his or her right to an equally powerful vote in a truly representative government where the elected legislators reflect the interests of their electors. The interpretation of a "relatively integrated socioeconomic area" has evolved over the decades.[21]

Election districts were intended to be composed of economically and socially interactive people in a common geographic region.[22] The delegates to Alaska's Constitutional

17 *Carpenter* at 1219.
18 114 A.L.R.5th 311 (Originally published in 2003).
19 Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L.Rev. 77, 84 (1985).
20 *Hickel*, 846 P.2d at 45.
21 In 1974, *Groh v. Egan*, 526 P.2d 863, 890 (Alaska 1974) (Erwin, J., dissenting), explained: this criterium recognizes that "areas of a state differ economically, socially and culturally and that a truly representative government exists only when those areas of the state which share significant common interests are able to elect legislators representing those interests. Thus, the goal of reapportionment should not only be to achieve numerical equality but also to assure representation of those areas of the state having common interests."
22 *Carpenter v. Hammond*, 667 P.2d 1204, 1215 (Alaska 1983)(Compton, J. and Burke, C.J., dissenting in part, on the relatively socio-economic area analysis of Cordova's inclusion with Southeast communities in a house district).; and *Hickel*, 846 P.2d at 46.

Convention explained the "socio-economic principle" as follows: "[W]here people live together and work together and earn their living together, where people do that, they should be logically grouped that way."[23] Accordingly, the delegates define an integrated socio-economic unit as "an economic unit inhabited by people. … the stress is placed on the canton idea, a group of people living within a geographic unit, socio-economic, following if possible, similar economic pursuits."[24]

To comply with this, the reapportionment plan must provide "sufficient evidence of socio-economic integration of the communities linked by the redistricting, proof of actual interaction and interconnectedness rather than mere homogeneity."[25] A district will be held invalid if "[t]he record is simply devoid of significant social and economic interaction" among the communities within an election district.[26] The Charter language is "relatively integrated" areas. This is not to compare all proposed districts with a hypothetical completely unintegrated area, as if a district including both Quinhagak and Los Angeles had been proposed. "Relatively" means that proposed districts *are compared to* other previously existing and proposed districts as well as principal alternative districts to determine if socio-economic links are sufficient. "Relatively" does not mean "minimally," and it does not weaken the constitutional requirement of integration.[27]

In several decisions the Alaska Supreme Court has identified several specific characteristics that are evidence of socio-economic integration:

- Hoonah and Metlakatla with several other southeastern island communities: service by the state ferry system, daily local air taxi service, a common major economic activity, shared fishing areas, a common interest in the management of state lands, the predominately Native character of the populace, and historical links.[28]

- North Kenai and South Anchorage, District 7 in the State's 1984 plan: geographically proximate, linked by daily airline flights, shared recreational and commercial fishing areas, and were both strongly dependent on Anchorage for transportation, entertainment, news and professional services.[29] Both are linked to the hub of Anchorage, although North Kenai obviously has greater links to Kenai. The court rejected the Kenai Borough's argument to draw "too fine a distinction between the interaction of North Kenai with Anchorage and that of North Kenai with South Anchorage."[30]

23 3 PACC 1836 (January 11, 1956).
24 3 PACC 1873 (January 12, 1956).
25 *Kenai Peninsula Borough,* 743 P.2d at 1363.
26 *Carpenter,* 667 P.2d at 1215.
27 *Hickel*, 846 P.2d 38, 46–47.
28 *Kenai,* 743 P.2d at 1361.
29 *Id*. at 1362–63.
30 *Kenai Peninsula Borough v. State,* 743 P.2d 1352, 1363 (Alaska 1987).

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- Juneau District which included Skagway and Haines: daily ferry service, and many other similarities as with the Kenai and Anchorage communities.

In general:

- **More significant factors**: transportation ties, namely ferry and daily air service, geographical similarities and historical economic links.

- **Less significant** (cannot themselves justify large population variances): patterns of housing, income levels and minority residences in an urban area.[31]

Perhaps the best example of a district that was found not to be a relatively integrated socio-economic area is the 1982 District 2 that included Cordova and other Southeast Alaska communities. The court noted "[t]he question [was] an extremely close one" but despite the deferential standard of review, it was still found violative of the provision.[32]

In 1982, District 2 was composed of the portion of Southeast Alaska between Dixon Entrance and Port Gravina on Prince William Sound that was not contained in Districts 1, 3 and 4. Included within its boundaries were the communities of Cordova, Yakutat, Haines, Skagway, Klukwan, Gustavus, Angoon, Kake, Thorne Bay, Klawock, Craig and Hydaburg.

The superior court's decision, which was overturned, made these findings: that the main economic base of Cordova and the Inside Passage communities is fishing; that the fishermen share many concerns such as port development, water quality, fisheries development, fish processing quality and safety, and forest management; that all the communities in District 2, except Haines and Skagway, are waterlocked ports with no overland connections to other principal communities; that Cordova and the Southeast communities share an interest in the development of the timber industry; and that Cordova is a member of the Southeast Conference, a lobbying organization representing Southeast Alaska communities.

But the justices favored the petitioner's argument that there is insufficient evidence of any social or economic interaction between the residents of Cordova and the other communities. While they do have similarity of interest, the economic and social activity in Cordova was completely separate from that of the Inside Passage communities, as well as physically and economically segregated from the other communities. In this regard, Cordova is more closely integrated with the Prince William Sound communities due to their geographic and social interactions.[33] The court explained *the primary error of the reapportionment board was to equate socio-economic integration with socio-economic*

31 *Groh*, 526 P.2d at 879.
32 *Carpenter v. Hammond*, 667 P.2d 1204, 1207 (Alaska 1983).
33 *Carpenter*, 667 P.2d at 1215.

homogeneity. While Cordova, with its economic dependence on commercial fishing, is in a sense homogeneous with the commercial fishing towns on Prince of Wales Island in southeastern Alaska, 700 miles and two time zones away, it is in no sense correct to say that Cordova is integrated with those communities. By contrast, a fishing community may not be homogeneous with a neighboring community having a different economic base, but the two can be considered to be integrated because of trade, transportation, and social links.[34]

The court had upheld the segregating of Cordova from Southeast communities earlier in 1974, as necessary for constitutional compliance although creating an excess deviation, saying: the State had justified a population deviation of greater than 10% with respect to two southeastern Alaska districts on the grounds that the only alternative thereto would be extending a southeastern district to include Cordova. "With reference to the Juneau and Wrangell-Petersburg areas, the Board was confronted with the difficult problem of juggling the more contiguous, compact, relatively integrated socio-economic areas of Southeast Alaska without extending a substantial distance into an unrelated area separated by immense natural barriers. Yakutat, the northwestern-most settlement in Southeast Alaska, which is itself separated by great distance from the other communities in the region, is 225 air miles from the nearest population center in the Southcentral region, Cordova. There are valid considerations both historically and geographically for not endeavoring to span that gap."[35]

Federal law: Voting Rights Act

The purpose of the Voting Rights Act is to protect the voting power of racial minorities: "a reapportionment plan is invalid if it 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' "[36] Since the last time the Anchorage Assembly reapportioned, Sections 4(b) and 5 of the Act were invalidated by the U.S. Supreme Court; preclearance by specified states and voting jurisdictions is no longer required, but the prohibitions of minority vote dilution and discrimination are still in effect.[37] They must be enforced by court action after reapportionment maps are adopted.

Section 2 of the Act declares unlawful any practice, qualification, procedure or prerequisite to voting that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color… ."[38] A violation is established by proof, based on a totality of the circumstances, the political processes leading to nomination or election are not equally open to participation by minorities, or when members of the minority class have less opportunity than other members of the electorate

34 *Id.*
35 In *Groh v. Egan*, 526 P.2d 863 (Alaska 1974).
36 *Kenai Peninsula Borough*, 743 P.2d at 1361 (quoting *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 1363–64, 47 L.Ed.2d 629 (1976)); 42 U.S.C. § 1973c (1988).
37 *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 535, 133 S. Ct. 2612, 2618, 186 L. Ed. 2d 651 (2013).
38 52 U.S.C. § 10301.

to participate in the political process and to elect representatives of their choice.[39] In this analysis the Apportionment Committee should consider the extent to which members of a minority group have been elected historically, as one circumstance. However, the VRA explicitly states it does not "establishe[] a right to have members of a protected class elected in numbers equal to their proportion in the population."[40]

The factors a court may consider to determine whether a reapportionment plan violates Section 2 of the VRA includes: (1) whether minority voting strength is reduced; (2) whether minority concentrations are fragmented among different districts; (3) whether minorities are over-concentrated in one or more districts; (4) whether alternative plans satisfying legitimate governmental interests exist and were considered.

There is no fixed demographic percentage to rely on in making a VRA compliance assessment. Instead, it is a functional analysis of electoral behavior that looks at participation within portions of a population, election history, voting patterns, voter registration and turnout, and other pertinent information. A reapportionment plan that preserves current minority voting strength (not just census population) that existed in former districts where minority groups had sufficient strength to influence the election is most likely to be upheld. Yet, a plan that reduces voting strength in specific districts is not retrogressive if it can be shown those losses are offset by comparative gains of minority voters in other districts in the overall plan. Finally, it is not considered retrogressive when a plan adjusts minority group numbers in specific districts so they reflect the percentage of minorities in the area overall (nor is that required).

While the Alaska Supreme Court has acknowledged the importance of compliance with the VRA, and that reapportioning districts to enhance the voting strength of minorities is permissible, it has required such adjustments in reapportioning to be second in a two-step process, that debuted in *Hickel* and was reiterated emphatically in *In re 2011 Redistricting Cases.* The *Hickel* process, as referred to by the court, requires:

> After receiving the decennial census data, the Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan then must be tested against the Voting Rights Act. A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements.[41]

For this reason, Counsel recommends the Assembly's reapportionment reserve the evaluation of minority voting strength by application of available demographic data to the maps it recommends as a final step, after the Charter and constitutional requirements are first implemented in proposed maps.

39 *Id.*
40 *Id.*
41 *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1034 (Alaska 2012).

Other factors:

The Assembly Members are free to pursue their own policies and goals in recommending reapportionment maps, but such policies may not be pursued at the expense of federal, state, and local requirements. Some of the characteristics may justify adjustments to proposed boundaries, so long as those adjustments do not result in large deviations in substantial equality of population. For example, "respect for neighborhood boundaries is an admirable goal," but "it is not constitutionally required and must give way to other legal requirements."[42]

Last, while the Alaska Constitution Art. VI, sec 6 says that "[d]rainage and other geographic features shall be used in describing boundaries wherever possible," this basis is not required by Charter or otherwise made applicable to Anchorage by law.

42 *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1091 (Alaska 2002).