

MEMORANDUM

To: Tim Madigan, City Administrator

From: Christopher M. Hood and Robert T. Scott

Date: February 9, 2012

Re: Permissible population variance between municipal wards

VIA EMAIL ONLY

Pursuant to your request, the following memorandum presents our analysis of the extent to which populations may vary between municipal wards and comply with federal and state constitutional and statutory law. This memorandum is intended to inform the consideration of the City Council and its redistricting subcommittee of various options for redistricting the City's wards following the 2010 Census.

Background

City staff has provided the City Council with extensive information on the process for redistricting the City's wards, including several specific redistricting maps for the City Council to consider. Included in the staff report for the February 6, 2012 City Council meeting (staff report) was the State of Minnesota's recommendation that the maximum variance in any given ward from the average ward population be five percent. The City Council previously approved nine principles to guide its ward redistricting process, including that wards must be contiguous and compact, and shall attempt to take into account defined communities of interest. (*See* staff report, Attachment 1.) Attached to the staff report were numerous ward redistricting options that featured maximum deviations in ward population from the average ward population of less than five percent. At the City Council meeting on February 6, 2012, the City Council questioned whether it would be legally defensible for the population of a given ward to vary from the average ward population by more than five percent. This memorandum addresses that question.

Applicable Law

Both federal constitutional and state statutory standards govern redistricting. All applicable legal authority reflects the underlying principle that "all qualified voters have a constitutionally protected right to vote." *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964) (citation omitted).

a. Federal

"[T]he right to vote in an election is protected by the United States Constitution against dilution or debasement." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 54, 90 S.Ct. 791, 794, 25 L.Ed.2d 45 (1970). The one-person, one-vote principle is grounded in the

Equal Protection Clause, *Reynolds v. Sims*, 377 U.S. 533, 560-61, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964), and applies to state and local elections. *Abate v. Mundt*, 403 U.S. 182, 185, 91 S.Ct. 1904, 1906, 29 L.Ed.2d 399 (1971); *Hanlon v. Towey*, 274 Minn. 187, 196, 142 N.W.2d 741, 746 (1966) (holding that equality-of-voting-rights principle embodied in Equal Protection Clause of federal constitution applies to county governments).

Under federal constitutional law, a deviation under 10 percent, as measured by the absolute difference between the most underrepresented and the most overrepresented districts in local government, is considered minor and does not raise constitutional concerns. *Voinovich v. Quilter*, 507 U.S. 146, 161, 113 S.Ct. 1149, 1159, 122 L.Ed.2d 500 (1993) (citing *Brown v. Thomson*, 462 U.S. 835, 842-43, 103 S.Ct. 2690, 2696, 77 L.Ed.2d 214 (1983)). A plan with a maximum population deviation greater than 10 percent, however, may run afoul of constitutional protections and requires justification by the state. *Brown*, 462 U.S. at 843, 103 S.Ct. at 2696.

b. State

Minn. Stat. § 205.84 governs redistricting in cities in Minnesota with wards, and states that “wards shall be as equal in population as practicable and each ward shall be composed of compact, contiguous territory.” *Emphasis added*.

Our research revealed no caselaw interpreting this specific statute governing municipal ward redistricting, but did find cases interpreting nearly identical language in the state’s county redistricting statute, Minn. Stat. § 375.025, subd. 1, which requires, among other things, that “(e)ach district . . . be as *nearly equal in population as possible*.” *Emphasis added*. The county statute additionally imposes an absolute requirement that “(n)o district shall vary in population more than ten percent from the average for all districts in the county, unless the result forces a voting precinct to be split. *Id.*

In *Fay v. St. Louis County Board of Commissioners*, the Minnesota Court of Appeals held that the standards in the county redistricting ordinance requiring that the districts be “as nearly equal in population as possible,” extend beyond the population-deviation standard under federal constitutional law as a different and separate factor from the statute’s maximum permitted population deviation to ensure greater compliance with the one-person, one-vote principle in redistricting. 674 N.W.2d 433, 438 (Minn. Ct. App. 2004). The Court in *Fay* thus held that the St. Louis County Commissioners abused their discretion in adopting a redistricting plan with a maximum 8.12 percent deviation between district population and that of the average district because “there was nothing in the record to show that the commissioners had evaluated the population-equality issue.” *Id.* at 438-39.

In another case interpreting the county redistricting statute, the Court of Appeals held that a Rice County redistricting plan featuring a maximum 9.2 percent deviation between district population and that of the average district violated § 375.025 where numerous alternative plans with lower deviations were considered. *Ziols v. Rice County Board of Commissioners*, 661 N.W.2d 283, 288 (Minn. Ct. App. 2003). The Court in *Ziols* reasoned as follows:

The statute declares that no district shall vary more than 10% from the average population of all of the districts, unless this would result in a precinct being split. Minn.Stat. § 375.025, subd. 1. This does not, however, mean that all population variations less than this 10% are acceptable. (*Citation omitted*). Indeed, the 10% statutory limit and the equal population provision are separate factors in the statute. Minn.Stat. § 375.025, subd. 1. Further, the statute provides that the board “shall” consider equal population. *Id.*; see Minn.Stat. § 645.44, subd. 16 (2002) (stating that “ ‘shall’ is mandatory”). Even though the approved (plan) did not exceed the 10% maximum deviation, it still had to meet the equal population factor.

Id.

The *Ziols* Court labeled population equality “the most important factor” to be considered in redistricting, and faulted the Rice County Commissioners for prioritizing other appropriate considerations at the expense of population equality. *Id.* at 289.

Analysis

Generally, state statute applies a more demanding standard of population equality on municipal ward redistricting than does the federal constitution. While any redistricting plan that minimizes population deviations between its most overrepresented and underrepresented wards to 10 percent or less will comply with federal constitutional requirements (and greater deviations may still be constitutional if justified by a compelling and legitimate interest), the same does not necessarily hold true for the standards imposed by state statute, which requires that wards be *as equal in population as practicable*. The caselaw interpreting the same requirement in the county redistricting statute makes clear that the maximum population deviation allowed by this statute is highly dependent on the unique circumstances of each case.

The five percent maximum variance in population in any ward from the average ward population referenced in the State’s guidance for municipal ward redistricting is roughly equivalent to the federal constitutional threshold of ten percent deviation between the most overrepresented and underrepresented districts. Given that staff has identified numerous ward redistricting options in which the maximum population deviation from the average ward population is less than five percent, we recommend that the City Council not exceed the five percent maximum variance in population in any ward from the average ward population referenced in the State’s guidance.

While it is impossible to glean a clear maximum permissible deviation percentage from the caselaw interpreting the statutory population equality standard, several principles are nevertheless clear and should guide the City Council’s ward redistricting process:

1. Population equality between wards is the most important of the competing factors identified in City Council’s previously adopted guiding principles, and no single other factor should be given greater weight than population equality;

2. Reviewing courts will closely scrutinize a local government's redistricting plan if an alternative(s) exist that would non-trivially reduce the population deviation between districts;
3. If the City Council ultimately decides to adopt a plan with a non-trivially greater population deviation than another proposal, it should make clear findings indicating that it considered population equality and chose the plan with greater deviation because it best satisfied multiple other factors identified in its previously adopted guiding principles.

Conclusion and Recommendation

The extent to which populations in municipal wards may vary from each other is highly dependent on the unique facts and circumstances of each case. The City is required by statute to redistrict its ward boundaries so that wards be *as equal in population as practicable*, but must also take into account additional competing factors. Given that staff has identified numerous ward redistricting options in which the maximum deviation in ward population from the average ward population is less than five percent, we recommend that the City Council not exceed the maximum deviation referenced in the State's guidance. Further, in the event that the City Council ultimately decides to adopt a plan with a non-trivially greater population deviation than another proposal, we recommend that the City Council make clear findings indicating that it considered and gave weight to the population equality issue and chose the plan with greater deviation because it best satisfied multiple other factors identified in the staff report.

If you have any questions about this memorandum or need further assistance, please contact us at your convenience.

CMH-RTS