

May 31,2013

The Initial Eight Independent Citizen Redistricting Commissioners
c/o Office of the Austin City of Auditor
301W. 2nd Street,Suite 2130
Austin, TX 78701

Re:Austinites for Geographic Representation's Memo to the Eight InitialCommissioners

Dear ICRC Commissioners:

First, Austinites for Geographic Representation (AGR) wishes to congratulate each of you on being selected as one of the initial eight Independent Citizen Redistricting Commission (ICRC) members. You are truly participating in a historic process,drawing the first district lines for Austin's new single member district system as part of the first independent commission in Texas. On behalf of AGR (the diverse coalition that drafted,placed on the ballot and supported 10-1plan with an ICRC, we wish respectfully to provide our thoughts on how you might proceed at this time. We believe we have useful insights into the ICRC process because it was drafted at AGR's behest by Steve Bickerstaff,Professor Emeritus of election law at the University of Texas Law School,and myself,Fred Lewis,a 27-year attorney with election law expertise.

This memo makes 4 major points:

- 1) The initial eight commissioners are required to select from the applicant pool the remaining six commissioners to ensure racial, ethnic, gender and geographic diversity.The eight commissioners are also mandated to choose one student commissioner.
- 2) The eight commissioners should select the other six commissioners within 30 days or so,in order to leave the full commission plenty of time for hiring *staff*, holding public hearings, drawing preliminary maps,and approving the final maps by December 1, 2013. The December deadline is necessary to allow sufficient time to fulfill the Voting Rights Act requirement that the final maps be reviewed and pre-cleared by the Department of Justice.
- 3) The full fourteen member commission is required to be independent from the City of Austin Council and staff.

- 4) The full commission is mandated to hire independent support staff, including legal counsel, to ensure that there are no actual or apparent conflicts of interest with the City Council or City staff.

The ICRC's Purpose and Major Duties:

The ICRC's purpose is to draw fair and lawful lines based on specific criteria laid out in the Charter in an open and transparent process free of influence from the City Council or Staff. The City Charter, Article II, Section 3(C), sets out the main responsibilities of the Commission:

- 1) Produce a commission that is "independent from influence by the city council of the City of Austin and is reasonably representative of the City's diversity";
- 2) "Conduct themselves with integrity and fairness";
- 3) "Conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines"; and
- 4) "Draw district lines according to the redistricting criteria specified in this Article."

The Eight Commissioner's First Responsibility Is to Select the Other Six Commissioners to Ensure a Commission that is Diverse and Independent from the City Council:

The City Charter, Article II, Section 3(1)(9), requires the ICRC to be representative of the diversity of Austin. The reason the first eight commissioners are chosen at random, and then eight commissioners choose the remaining six commissioners, is to ensure diversity. While random selection protects the selection process from undue influence or gaming, it can result in a panel that is not sufficiently diverse—which happened in Austin's drawing last week. Since a diverse commission is legally required as well as crucial for public acceptance of the ICRC's district boundaries, the eight randomly selected commissioners must select the remaining six commissioners from the qualified applicant pool to ensure diversity as specified in the City Charter.

The Charter, Article II, Section 3(1)(9) provides in relevant part:

The eight (8) commissioners shall review the remaining names in the pool of applicants and, from the remaining applicants in that pool, shall appoint six (6) applicants to the commission. These six (6) appointees must be approved by at least five (5) affirmative votes among the eight (8) commissioners. These six (6) appointees shall be chosen to ensure that the commission reflects the diversity of the City of Austin, including, but not limited to, racial, ethnic, and gender diversity. However, it is not intended that formulas or specific ratios be applied for this purpose. Applicants shall

also be chosen based on relevant analytical skills and ability to be impartial. As for geographic diversity, for the first redistricting in 2013, the eight (8) commissioners shall appoint the remaining six (6) members to ensure geographic diversity and that at least three (3) commissioners come from each of the four (4) existing Travis County Commissioners districts, to the extent feasible with the remaining six (6) open seats.

This provision requires that:

- 1) The six commissioners shall be chosen from the remaining applicant pool selected by the Applicant Review Panel. The final six commissioners cannot be chosen from the 500 plus initial applicants or any other source.
- 2) The six commissioners shall be selected to reflect Austin's diversity, including racial, ethnic and gender diversity, as well as for analytical skills and ability to be impartial. The eight randomly selected commissioners should choose the remaining six commissioners to balance the full commission so that it reflects the racial and ethnic diversity of Austin. While no quotas are mandated, and relevant analytical skills and impartiality are also required factors, racial and ethnic diversity of the commission is a primary goal. We also believe that the Voting Rights Act requires at least one commissioner be an African-American.
- 3) The six commissioners also shall be selected to ensure geographic diversity and at least three commissioners shall come from each of the four Travis County Commissioners precincts if feasible. The four county commissioner precincts are used because they reflect different geographic sections of the city, and, therefore, provide a proxy for geographic diversity. This requirement is mandatory if it is feasible, i.e., the remaining six commissioners can be dispersed so as to result in three ICRC Commissioners per county commissioner precinct.

There is one more selection requirement: the selection of a student commissioner. Section 3(D)(1) provides that "one commission member shall be a student duly enrolled in a community college or university in the City of Austin..." Since a student commissioner was not selected in Austin's initial random selection process, they must be chosen as part of the six commissioners from the remaining applicant pool.

The selection process for the six commissioners is also governed by several requirements. First, it requires 5 of 8 commissioners to agree on the six commissioners chosen. Second, it is subject to state and city open meetings and open records laws. Third, the initial eight commissioners cannot discuss their selection thoughts except in public; they are prohibited from discussing these matters privately with the city council, city staff, or others.

Otherwise, this selection process is flexible. The eight commissioners may rely on the applications already submitted, or request additional information in writing from applicants, receive written public comments, or interview applicants. The commission may select the commissioners individually or select them as a slate, as was done in California (the model for Austin's law). We, however, would note that the full commission has only a limited time to hire staff, host public hearings, and draw preliminary and final maps, so the selection process for the remaining six commissioners is best completed within 30 days.

The Independent Citizens Redistricting Commission Is an Independent Agency with Its Own Staff, Funding and Authority:

The ICRC is an independent municipal agency-- unlike any other City of Austin board or commission. It has its own authority and funding independent from the City Council and City Staff. The ICRC is designed so the citizen commissioners can draw fair and impartial district lines independent of the City of Austin and outside political influence. It is crucial for the ICRC's independence-- and to be free of conflicts of interest-- that the ICRC hire independent staff and not use City staff.

Before discussing the reasons the ICRC should hire independent staff, it is important to note that the ways in which the ICRC is an independent city agency, unlike any other city commission or entity:

- 1) COMMISSIONERS ARE NOT APPOINTED BY COUNCIL Unlike any other City board, the ICRC's 14 commissioners are not appointed by the City Council, but through an independent process designed to exclude all council input and political conflicts of interest.^{iv}
- 2) The ICRC LAW CANNOT BE AMENDED BY COUNCIL Unlike any other city board, the ICRC was adopted by the voters as a charter amendment and cannot be amended by the Council.^v
- 3) ICRC INTERPRETATIONS AND DECISIONS ARE FINAL The ICRC has final authority over the redistricting process and the drawing of the district maps, subject only to the courts.^{vi} The Commissioners are responsible for the interpretation and implementation of the ICRC Charter, not the City or its Legal Department. The Council has no say in the process and does not even have standing in court over ICRC matters.^{vii}
- 4) ICRC HIRES AND FIRES ITS OWN STAFF. The commission decides the hiring and firing of its staff, including lawyers and others.^{viii}

5) THE CITY MUST FUND THE ICRC'S OPERATIONS. The City must fund properly the operational costs of the Commission/x including any legal costs in defending the ICRC's maps.x

6) COUNCIL CANNOT DISCUSS REDISTRICTING WITH ICRC COMMISSIONERS. Council and their staff cannot discuss the commission's business with the ICRC commissioners.xi

The Commission's choice of independent, conflict-free support staff is crucial to the proper drawing of lines and the public's acceptance of the fairness and integrity of the process. The ICRC is required to hire staff without conflicts of interest: "The commission shall apply the conflicts of interest listed in subsection 3(1)(3) to the hiring of staff, legal counsel, and consultants."xii Subsection 1(3) provides that the following have disqualifying conflicts of interests: city employees, persons with professional city contracts, paid political consultants, lobbyists, and large contributors. xiii The City staff, including the City Legal Department and others, have a conflict of interest in that they work for the City-which the ICRC is required to be independent from. We believe the ICRC, when fully constituted, is required to choose attorneys and other staff that is independent of the city and conflict free. This does not include city staff or professionals that contract with the city.

Besides being paid and employed by the City, the City staff's conflicts of interest are demonstrated by the Council's public opposition to the ICRC adopted by the voters. Mayor Leffingwell made clear his opposition to an independent commission not controlled by the Council in a robo-call to voters: "Prop 3 creates a new redistricting commission that could spend millions of tax dollars without any constraints either by city management or by your elected representatives uxiv The Mayor and Council in their competing proposition, Proposition 4, left the drawing of district lines to the Council, proposing orally only an advisory citizen body appointed by them.xv In a number of instances since the voters approved the ICRC, AGR believes City legal staff has attempted to hamstring the City Auditor in properly implementing the Charter, including the Legal Department's interpretations of reimbursable personal expenses for commissioners, the minimal qualification for serving as a commissioner, the selection process of a student commissioner, and other matters.

Finish Selecting The Remaining Six Commissioners in Thirty Days. We believe the six commissioners must be selected with thirty days so that the final map will be timely in place for November 2014 elections. If the full commission begins in early July, it will have to hire staff, host public meetings, draft preliminary maps, host additional hearings, and approve the final maps. We believe this all should be finished by December 1, 2013 in order to allow sufficient time for the preclearance of the map under the Voting Rights Act by the Department of Justice. It may take around 5 months for preclearance: 30 days or so for the commission's lawyer to draft the preclearance memo and collect the evidentiary support; an initial 60 days for review

by the Department of Justice, which then may ask for additional material, allowing them another 60 days to review before issuing a ruling. While the ICRC's counsel may request an expedited ruling, there is no guarantee it will be granted by the Justice Department. Being cautious, we assume the maps may not be approved under this scenario until early May. Under City election law, candidates can start raising money 180 days before the election, which is in early May 2014, so it is essential the maps be approved and in place no later than by that time.

In conclusion, thank you for your service to the citizens of Austin and to this important democratic process.

Sincerely,

Fred Lewis, Counsel for

Austinites for Geographic Representation

i City of Austin Charter, Article II, Section 3 (1)(9): "These six (6) appointees shall be chosen to ensure that the commission reflects the diversity of the City of Austin, including, but not limited to, racial, ethnic, and gender diversity."

ii City of Austin Charter, Article II, Section 3(K): "(1) The commission shall comply with all state and city requirements for open meetings. (2) The records of the commission and all data considered by the commission are public records that will be made available in a manner that ensures immediate and widespread public access."

iii City of Austin Charter, Article II, Section 3(K)(3): ") Commission members and commission staff may not communicate with or receive communications about redistricting matters from anyone outside of a public hearing. This paragraph does not prohibit communication between commission members, commission staff (which shall exclude staff of any council members), legal counsel, and consultants retained by the commission that is otherwise permitted by state and city open meeting requirements?"

iv City of Austin Charter, Article II, Section (3)(C)(3): "This [commissioner] selection process is designed to produce a commission that is independent from influence by the city council of the City of Austin..."

v The City Charter cannot be amended only by the voter and not the Council. Texas Constitution Article XI, Section 5.

vi City of Austin Charter, Article II, Section 3(G): "The commission shall adopt a final plan for the City of Austin specifically describing the district boundaries for each of the council districts prescribed above... The city council may not change the plan. The plan shall have the force and effect of law."

vii City of Austin Charter, Article II, Section (3) (H): "The commission has the sole legal standing to defend any action regarding a certified final map."

viii City of Austin Charter, Article II, Section (3) (K)(S): "The commission shall hire commission staff, legal counsel, and consultants as needed... The commission shall make hiring, removal, or contracting decisions on staff, legal counsel, and consultants by nine or more affirmative votes."

ix City of Austin Charter, Article II, Section (3)(K)(9): "The council of the City of Austin shall appropriate sufficient funds to meet the operational cost of the commission and the cost of any outreach program to solicit broad public participation in the redistricting process."

x City of Austin Charter, Article II, Section (3)(H): "The city council of the City of Austin shall provide adequate funding to defend any action regarding a certified map. The commission has sole authority to determine whether the city attorney or other legal counsel retained by the commission at its discretion shall represent the commission in defense of a certified final map."

xi City of Austin Charter, Article II, Section (3)(K)(3): "Commission members and commission staff may not communicate with or receive communications about redistricting matters from anyone outside of a public hearing. This paragraph does not prohibit communication between commission members, commission staff (which shall exclude staff of any council members), legal counsel, and consultants retained by the commission that is otherwise permitted by state and city open meeting requirements."

xii City of Austin Charter, Article II, Section 3(K)(S)

xiii City of Austin Charter, Article II, Section 3(1)(3) provides that these conflicts of interest are disqualifying: (A) Within the 5 years immediately preceding the date of application, either the applicant or their spouse, shall have done any of the following: (i) Been appointed to, elected to, or have been a candidate for state or city office. (ii) Served as an officer, employee, or paid consultant of a political party or of the campaign committee of a candidate for elective state, county or city office. (iii) Been a registered state or local lobbyist. (iv) Contributed or bundled one thousand dollars (\$1,000) or more in aggregate to candidates for City of Austin elective office in the last City election; (B) A person who has been, within the three (3) years immediately preceding the date of application: a paid employee of the City of Austin; person performing paid services under a professional or political contract to the City of Austin, to the city council of the City of Austin, or to any member of the city council of the City of Austin; any Controlling Person of any such consultant; or a spouse of any of the foregoing.

xiv From the Austin Bulldog. Ken Martin (November 2, 2012): Please see

http://www.theaustinbulldog.org/index.php?option=com_content&view=article&id=237%253A mayor-my-commission-beats-your-commission&catid=3%253A main-articles&Itemid=

xv Id. "The mayor's proposed committee would only be advisory and the City Council would be able to reject, revise, or adopt the committee's recommendations."