SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

CITY OF BERKELEY,

Petitioner/Plaintiff,

v.

TIM DUPUIS, in his official capacity as Registrar of Voters of the County of Alameda, and MARK NUMAINVILLE, in his official capacity as City Clerk of the City of Berkeley,

Respondent/Defendant.

MAX ANDERSON, JESSE ARREGUIN, STEFAN ELGSTRAND, PAUL KEALOHA BLAKE, MATTHEW LEWIS, STEPHANIE MIYASHIRO, PHOEBE SORGEN, ALEJANDRO SOTO-VIGIL, and KRISS WORTHINGTON,

Real Parties in Interest.

Case No. RG14720117

ORDER GRANTING PETITION FOR WRIT OF MANDATE AND DENYING COMPLAINT FOR DECLARATORY RELIEF

The Petition for Writ of Mandate and Complaint for Declaratory Relief ("Petition") by Petitioner/Plaintiff City of Berkeley ("City") came on regularly for hearing on April 29, 2014, at 1:30 p.m. in Department 31 of the above-entitled court, the Honorable Evelio Grillo presiding. The City appeared by counsel Margaret Prinzing. Respondent/Defendant Tim Dupuis, in his official capacity of Registrar of Voters of the County in Alameda ("Dupuis"), appeared by counsel Raymond Lara. There was no appearance by Respondent/Defendant Mark Numainville, in his official capacity as City Clerk of the City of Berkeley ("Numainville"). Real Parties in Interest Stefan Elgstrand and Kriss Worthington appeared by counsel Richard C. Miadich. Real Parties in Interest Jesse Arreguin, Alejandro C. Soto-Vigil, Max Anderson and Stephanie Miyashiro appeared in propria persona.

The court has considered all of the papers filed in connection with the Petition, and the arguments at the hearings and, good cause appearing, hereby GRANTS the Petition for Writ of Mandate and DENIES the Complaint for Declaratory Relief, as follows:

ISSUE

The issue in this matter is what boundaries are to be used in City Council elections for the City of Berkeley in the upcoming November 4, 2014 election. The City seeks a writ prohibiting Dupuis and Numainville from using the 2002 plan as boundaries and instead directing them to use the redistricting plan adopted on December 17, 2013 by the City Council in Ordinance 7,320-N.S.

BACKGROUND

In 2008, Berkeley voters amended the City Charter, Article V, section 9, to give the City Council until December 31st of the third year following the decennial census to adopt new council districts. Thus, after the 2010 census, the City initiated the decennial redistricting process in 2011 so that new council districts could be adopted by December 31, 2013.

On January 17, 2012, the City Council[1] voted to defer submission of a new redistricting plan until the voters considered a Charter amendment establishing new redistricting criteria, Measure R, at the November 2012 election. Measure R eliminated the requirement that any adjustments to City Council districts must preserve 1986-era boundaries to the extent possible, and instead provided that the City Council ensure that districts continue to be as nearly equal in population as may be according to the census, taking into consideration various factors.[2] The Berkeley voters approved Measure R, by a margin of 65.92% to 34.08%. As such, Article V, Section 9, of the City Charter was amended to reflect this change in redistricting criteria.

The City Council then approved a redistricting process and timeline that required the public and Council members to submit all redistricting proposals to the City Clerk by March 15, 2013. (See City's 1st Request for Judicial Notice ("City's 1st RJN"), Exh. 2, p.23.) The City Clerk received seven plans from members of the public by the deadline. (See City's 1st RJN, Exh.2, p.16.) The plans were from: (1) Alfred Twu, (2) Berkeley Neighborhoods Council, (3) Berkeley Student District Campaign ("BSDC"), (4) Eric Panzer – Edge Simplicity Plan, (5) Eric Panzer – Idealized Plan, (6) Kristin Hunziker, and (7) Alejandro Soto-Vigil – Jurisdictional Plan. (*Id.*) The BSDC plan was introduced on March 13, 2013, and created a district composed of 86% of residents between the ages of 18-29, i.e. student aged residents.

The City Manager, City Attorney, City Clerk and Information Technology Departments then provided an analysis of all Charter-compliant plans on May 7, 2013. (*Id.*) After presentations, public comment and discussion, the City Council focused on the BSDC plan and the Eric Panzer – Edge Simplicity Plan, at the following meeting on July 2, 2013. The United Student District Amendment plan

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[1] The current City Council members are Mayor Tom Bates, Linda Maio (District 1), Darryl Moore (District 2), Max Anderson (District 3), Jesse Arreguin (District 4), Laurie Capitelli (District 5), Susan Wengraf (District 6), Kriss Worthington (District 7) and Gordon Wozniak (District 8).

[2] These factors include topography, geography, cohesiveness, contiguity, integrity and compactness of territory of the districts, as well as existing communities of interest as defined in California Constitution Article XXI, section 2(d)(4).

("USDA plan") was also introduced at the City Council meeting on July 2, 2013, which was after the deadline for submitting redistricting proposals had passed. Proponents of the USDA plan contend that it is simply an amendment to the BSDC as it creates a district composed of 90.3% student aged residents, and achieves the goal of a united campus district by adding Northside blocks into District 7 that would include three student dorms (Foothill, Bowles and Stern), eleven coops, the International House and private apartments largely occupied by undergraduates, graduate students, and other residents that were left out of the BSDC plan. Proponents of the BSDC plan however, contend that including these Northside residents results in the exclusion of some Southside residents.

On December 3, 2013, the City Council voted 6-2 (one abstention) for preliminary approval of Ordinance 7,320-N.S. ("Ordinance"), which adopted the BSDC plan. The City Council voted by a 4-3 majority (with two abstentions) to reject the USDA plan. On December 17, 2013, the City Council voted 6-3 to give its final approval to the Ordinance.

Immediately following the approval of Ordinance 7,320-N.S., opponents of the BSDC plan, including Anderson, Arreguin and Worthington, the three City Council members that voted against the Ordinance, and the remaining real parties in interest, began circulating a referendum petition challenging the Ordinance. On February 3, 2014, Dupuis certified the sufficiency of the referendum petition, and on February 4, 2014, Numainville also certified it. (City's 1st RJN, Exh. 7, pp.125-126.)

At the next City Council meeting on February 25, 2014, Numainville presented the petition to the City Council, which triggered the City Council's duty under the City Charter to reconsider the Ordinance and repeal it, or submit the referendum to the electorate if it declined to repeal the Ordinance. (City Charter, Art. XIV, § 93.) Referendum supporters urged the City Council to repeal the Ordinance and forge a new compromise plan. (Metzker Decl., ¶ 11.) Several members of the public objected to placing the referendum on the June ballot because most students leave the area during the summer and would not be able to participate in the election. (Metzker Decl., ¶ 12.) Berkeley Mayor Tom Bates offered a motion to hold over the question until the next City Council meeting on March 11, 2014, to

give the City Council more time to consider a new compromise proposal and to gather information concerning the legal ramifications of placing the referendum on the ballot. (Metzker Decl., ¶ 13; City's 1st RJN, Exh. 7, p.122.) The City Council approved the motion. (See City's 1st RJN, Exh. 7, p.122.) Continuing the vote to March 11, 2014 however, caused the City Council to miss the March 7, 2014 deadline for being able to place the referendum on the June 2014 ballot.

At the March 11, 2014 meeting, the City Council declined to reconsider the USDA plan and instead voted 6-3 to place the referendum on the November 4, 2014 ballot. (City's 1st RJN, Exh. 8, p.156.)

Under Article XIV, section 93 of the City Charter, the qualification of a referendum stays the effective date of the Ordinance until the electorate votes on the referendum. The City Clerk believes that he has a ministerial duty to refrain from using the boundaries in the BSDC plan, also referred to hereinafter as the "City Council-approved plan", for the November 2014 City Council elections, and must instead revert to the City's old 2002 boundaries contained in Ordinance no. 6,679-N.S., which are the only other available City Council-approved boundaries. The City however, contends that the 2002 plan no longer provides equal representation to the voters, and therefore seeks relief by mandate to determine which redistricting plan will define the boundaries of the City Council districts that will be used for the November 2014 election. The Alameda County Registrar of Voters must know which plan to use by no later than April 30, 2014 in order to fulfill its duties in a timely fashion. (See Cornejo Decl. filed April 8, 2014.)

The City filed this Petition on April 3, 2014, and named as Real Parties in Interest the proponents of the referendum in order to give Real Parties in Interest an opportunity to address this issue. On April 7, 2014, this court granted the City's ex parte application for an Order Shortening Time on the Petition and set an expedited briefing schedule. Real Parties in Interest have filed opposition papers in response. The court briefly summarizes the parties' arguments below.

THE CITY'S POSITION

The City claims that use of the 2002 map for the November 2014 election would deprive thousands of Berkeley voters of equal representation. The districts drawn by the 2002 map are over 12 years old and the districts have become malapportioned. The 2002 map also does not comply with the new criteria in the City Charter as approved by Measure R in 2012. The City therefore asks the court to order that the City Clerk use the City Council-approved map for the upcoming election.

The 2002 map was based on redistricting criteria in the City Charter which then provided for the City Council to preserve, to the extent possible, the Council districts established in 1986. (See City's 1st RJN, Exh.1.) However, pursuant to Measure R, voters approved amendment of the City Charter to provide as follows:

> In establishing and modifying district boundaries, the Council shall ensure that the districts continue to be as nearly equal in population as may be according to the census, taking into consideration topography, geography, cohesiveness, contiguity, integrity and compactness of territory of the districts, as well as existing communities interest as defined in California Constitution Article XXI, section 2(d)(4)[3], and shall utilize easily understood district boundaries such as major traffic arteries and geographic boundaries to the extent they are consistent with communities of interest.

(See City's 1st RJN, Exh. 1, pp.1-2.)

The California Supreme Court has held on two occasions that qualification of a referendum does not bar use of a new redistricting map that was approved by the Legislature if the alternative is an old map that deprives citizens of their constitutional right to equal representation. (See *Vandermost v.*

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[3] "Community of interest" is:

> ....a contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation. Examples of such shared interests are those common to an urban area, a rural area, an industrial area, or an agricultural area, and those common to areas in which the people share similar living standards, use the same transportation facilities, have similar work opportunities, or have access to the same media of communication relevant to the election process. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.

(Cal. Const. art. XXI, § 2.)

Bowen (2012) 53 Cal.4th 421; *Assembly v. Deukmejian* (1982) 30 Cal.3d 638.) The Equal Protection Clause requires that redistricting maps distribute populations as evenly as possible across voting districts to ensure that the votes of people who live in one district have the same weight as those who live in another district. (*Reynolds v. Sims* (1964) 377 U.S. 533, 568.) [The] "Equal Protection Clause requires that a State make an honest and good faith effort to construct districts...as nearly of equal population as is practicable." (*Id.* at 577.) The equal protection guarantee of "one person, one vote" applies not only to congressional districting plans and state legislative districting, but also to local government apportionment. (*Board of Estimate of City of New York v. Morris* (1989) 489 U.S. 688, 692-93 ["No distinction between authority exercised by state assemblies, and the general governmental powers delegated by these assemblies to local, elected officials, suffices to insulate the latter from the standard of substantial voter equality."]

Based on the 2010 census, the ideal district population in each of the City of Berkeley's eight City Council Districts is 14,073. The City contends that if the 2002 map is used, it would have a total population deviation of 27.8% and many districts would sharply deviate from the ideal district population. Our Supreme Court has been held that any population deviation over 10 percent is constitutionally suspect, while any deviation exceeding 16.4 percent may be "patently unconstitutional." (See *Vandermost, supra* at 472-474.) In contrast, the City Council-approved map has populations that are within 1 percent of the ideal population of 14,073, and the total population deviation is just 1.5 percent.

The City Council-approved map also complies with the criteria approved by the voters through Measure R. In *Vandermost*, the court refused to use the old maps at issue in that case because they were based on criteria that the voters had since chosen to replace. (*Vandermost, supra* at 448, 476.) Instead, the *Vandermost* court used the new maps that had been drawn to comply with new criteria that the voters added to the Constitution in 2008 through Proposition 11 and in 2010 through Proposition 20. (*Id.*) The

City asserts that for the same reason here, the City Council approved map should be used instead of the 2002 map.

REAL PARTIES WORTHINGTON'S AND ELGSTRAND'S POSITION

Real Parties in Interest Stefan Elgstrand and Kriss Worthington ("Elgstrand and Worthington") urge this court to deny the relief requested by the City, and instead ask that the court consider other alternatives, including using the USDA plan for the November 2014 election, taking steps to adjust the May 30, 2014 date for candidate signature-gathering to commence in order to allow more time for the Registrar to meet his legal obligations and allow the elected City Council to pursue alternate remedies, and keeping the existing lines in place with direction to adopt a new plan by a date certain if the redistricting ordinance is not approved in November.

1. Equitable grounds for denying the City's requested relief

Elgstrand and Worthington claim that the City's requested relief should be denied on equitable grounds because the City could have avoided or minimized the problems that it now asks the court to resolve. The City Charter provides that a duly qualified referendum suspends the effectiveness or operation of the ordinance subject to referendum, and then it is the duty of the City Council to reconsider the ordinance and either repeal it or schedule it for an election at the next occurring regular statewide or general or special municipal election. (City Charter, art. XIV, § 93.) The Registrar found that the referendum at issue here qualified on February 3, 2014. At the City Council meeting on February 11, 2014, the City said it could not consider the referendum because the agenda had already been published. Elgstrand and Worthington contend though, that the Berkeley Municipal Code allows items to be added by the Council as a whole, and the Council could have done so at a special meeting. (See Berkeley Mun. Code § 2.04.020.) Instead, the City Council did not consider this issue until its February 25, 2014 meeting, but then voted to hold the mater over until March 11, 2014. Elgstrand and

Worthington contend that the Council knew that would result in missing the deadline for the June election and force the referendum to be considered in November along with the Council elections in four districts. Further, the City consulted with outside counsel as early as January 2014 and signed a contract for litigation services on February 26, 2014; however, this Petition was not filed until April 3, 2014. The City then sought to expedite the matter to be resolved in less than a month.

2. The City's unclean hands

Elgstrand and Worthington also claim the City has unclean hands because it has violated the Berkeley Charter and the Brown Act. Elgstrand and Worthington argue that the City Council's options, as indicated in its agendas for both February 25, 2014 and March 11, 2014, were to repeal the ordinance or set it for the June 2014 ballot. Instead, the Council-majority voted to defer the matter until it was too late for the June election and instead forced the matter to be considered in the November election.

Elgstrand and Worthington also claim that the Council's actions at the February 25 and March 11, 2014 meetings violated the Brown Act in at least two respects because it considered items that were not described in the agenda. Government Code section 54954.2(a)(1) requires that "[a]t least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session." With one exception, no action or discussion is to be undertaken on any item not appearing on the posted agenda. (Gov. Code § 54954.2(a)(2).)

The first violation they claim is that both agendas stated that the City Council was required to repeal the ordinance or place it on the June 2014 ballot, but the City Council instead voted to place it on the November 2014 ballot, which was action that the public had not been apprised of.

The second claimed violation of the Brown Act is that at the March 11 meeting, the Council considered action that was never described or mentioned on the agenda, in that it voted to retain outside

counsel to file an action in court to determine which district boundaries will be used for the November 4, 2014 election. (See the City's 1st RJN, Exh. 8, p.156.)

The City's unclean hands therefore provide a basis for refusing the City's requested relief. (See *Kendall-Jackson Winery, Ltd. v. Sup. Ct.* (1999) 76 Cal.App.4th 970, 985 [unclean hands "is an equitable rationale for refusing a plaintiff relief where principles of fairness dictate that the plaintiff should not recover, regardless of the merits of his claim."]

3. Laches

Elgstrand and Worthington further assert that laches also precludes the City from its requested relief. Laches may apply where it is established that there was an unreasonable delay in bringing the action and prejudice to defendant as a result of this delay. (See *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 14.) Here, Measure R was adopted in November 2012, and the City adopted a timeline for adopting a redistricting plan but ultimately delayed it until December 17, 2013, the very last possible date for the City to comply with the Charter provision for adopting a redistricting ordinance. The City Council then deferred action on the referendum petition to March 11, 2014, which was a date after the Registrar's March 7, 2014 deadline for the June ballot.

Elgstrand and Worthington also argue the City Council unreasonably delayed in bringing this litigation based on City officials' involvement in the negotiations to hire counsel for this litigation as far back as January 30, 2014, the City's failure to place this matter on the February 25 agenda, its approval of hiring outside counsel at the March 11, 2014 meeting, and the City's waiting almost another month to commence this action. Collectively, these actions prejudiced Real Parties in Interest as well as the public generally because it has prevented the public, Real Parties in Interest and the court, from fully evaluating the merits and considering available alternatives that are consistent with the California

Supreme Court's guidance. Based on the above, Elgstrand and Worthington contend the City should be precluded from the requested relief by the doctrine of laches.

4. The applicable case law requires that the court stay out of the "political thicket."

Elgstrand and Worthington argue that both *Vandermost* and *Assembly* require the court to deny the City's request to use the City Council-approved plan. Vandermost recognized that when a redistricting map proposed by a legislative body is subject to a referendum, the interim plan has the effect of giving an advantage to legislatures elected from those districts. (*Vandermost, supra,* 53 Cal.4th at 470, fn.32.) As Vandermost allowed an interim plan drawn by a non-partisan redistricting commission, and not a legislatively drawn redistricting plan, to go into effect pending a referendum, Elgstrand and Worthington suggest that this court should apply a different analysis when considering a sitting legislative body's attempt to impose its own chosen plan despite the referendum, and the court should avoid being placed squarely into the "political thicket."

5. Other alternative plans

Lastly, Elgstrand and Worthington argue that unlike the courts in *Assembly, Vandermost* and *Legislature v. Reinecke* [Reinecke I] (1972) 6 Cal.3d 595, where the Supreme Courts were faced with limited or unacceptable options, this court has several alternatives it may consider. They contend that the USDA plan has been found to satisfy all legal requirements, was presented to the City Council, and that it meets all of the requirements of the City Charter as well as state and federal equal protection principles, with deviations of less than 1%. (See City's 1st RJN, Exh. 8, pp.208-210.) Further, since one of the objectives of redistricting is to maintain "communities of interest," the USDA plan accomplishes this better than the BSDC plan as it retains the student housing that was excluded from District 7 in the BSDC plan.

Additionally, Elgstrand and Worthington contend that the Minimum Deviation plan meets all legal requirements and could be used as an interim plan for the November election as well.

Finally, Elgstrand and Worthington contend that continued use of the 2002 map for the November election is also a reasonably available alternative in light of the circumstances here. Although the City asserts that it would violate the City Charter and Equal Protection clauses of the State and Federal Constitutions, the City Council previously authorized use of the 2002 map for the purposes of the 2012 City Council elections so that the Council could seek a vote on Measure R. The City has not explained why its actions that were permissible in 2012 are now unlawful in 2014. In fact, the City Charter contemplates the possibility that a redistricting ordinance may not be implemented for several years following its adoption by City Council. (See City Charter, art. V, § 9(c) ["[a]ny such redistricting shall become effective as of the next general election of Councilmembers immediately following the effective date of said ordinance."]) As previously discussed, the City Charter also separately provides that a referendum petition with sufficient signatures suspends the effective date of an ordinance. (City Charter, art. XIV, § 93.) Thus, the ordinance is not effective unless and until it is approved by voters, and the court should delay any implementation of the City Council-approved plan.

REAL PARTY IN INTEREST SORGEN'S POSITION

Real Party in Interest Phoebe Sorgen ("Sorgen") asks that the court, using its equitable powers, order the Registrar to place the referendum on the June 3, 2014 ballot for decision. Then, depending on the outcome, the court would either have nothing further to do with this case or would mandate the City to come up with interim districts.[4]

Alternatively, Ms. Sorgen asks that the court continue to use the 2002 map, asserting that the court must adopt the plan which is most constitutional and least disruptive. (See *Assembly, supra*, 30 Cal.3d at 674.) While she acknowledges that one of the districts may be of constitutional concern, she

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[4] Ms. Sorgen presented no evidence that this would be feasible given the Registrar's statutory deadlines.

asserts that the deviation is minor and not the result of discrimination. As Elgstrand and Worthington also point out, the City used the 2002 map in the 2012 elections with no stated concerns for the constitutionality of the 2002 map. Continuing to use the 2002 map would also cause the least disruption to the Registrar.

Ms. Sorgen states that on information and belief, in 2012, there were 4,300 voters in overpopulated districts (Districts 4, 7 and 8) where the City Council member was not up for election. (Sorgen Decl., 2:9-10.) Ms. Sorgen believes that registered voters in these districts (Districts 4, 7 and 8) might be disenfranchised in the November 2014 election if the City Council-approved map is used. (Id. at 2:11-14.) Thus, Ms. Sorgen concludes it is only fair that these voters should get to vote in the November election using the 2002 map.

Ms. Sorgen also contends that the City Council-approved map does not reach the goal of population equity with little more than de minimis variation. (See *Vandermost, supra*, 53 Cal.4th at 476.) Ms. Sorgen claims there is built in bias granting a partisan advantage to candidates running in some districts. If the City Council was acting in good faith, it would have chosen the Minimal Deviation plan, which has district boundaries that have 90.3 percent students. The City has the burden of showing that the variance between the districts was necessary to achieve some legitimate goal. (See *Karcher v. Daggett* (1993) 462 U.S. 725, 730-731.) However, it cannot meet this goal because the population variation could have been avoided by the using the Minimum Variation map. Similarly, the USDA plan is equally constitutional and avoids the population variation by keeping the student population together at 90.3 percent instead of 86 percent.

REAL PARTIES IN INTEREST SOTO-VIGIL'S AND ARREGUIN'S POSITION

Real Parties in Interest Soto-Vigil and Arreguin ("Soto-Vigil and Arreguin") also assert that the City is barred from relief based on unclean hands and laches, as is also argued by Real Parties in Interest Elgstrand and Worthington.

Soto-Vigil and Arreguin also urge the court to consider the MAPMINDS or Minimal Deviation maps as an alternative map. The MAPMINDS was presented to the City Council in 2011 and vetted by the City Council as well as discussed in several community forums set by the City Council. It does not violate the "one-person, one vote", and also respects the City's topographic and geographic integrity because it follows long held neighborhood boundaries.

Soto-Vigil and Arreguin also claim that the Minimum Deviation map be considered because it was presented to the City Council in 2014 and is being considered by the City Council. This map is constitutionally compliant because it does not violate the "one-person, one-vote" standard, and it complies with City Charter criteria for compactness with perimeters for all districts totaling 54.10 miles, compared to the BSDC plan which has perimeters for all districts totaling 54.84 miles.

LEGAL ANALYSIS

1. BROWN ACT VIOLATIONS

Real Parties in Interest ask the court to deny the City's requested relief and/or provide equitable relief to them because the City violated the Brown Act. As discussed above, they claim that the City Council's actions at the February 25 and March 11, 2014 meetings violated Government Code section 54945.2 of the Brown Act because it voted on two items that were not described in the agenda. Government Code section 54954.2(a)(1) requires that "[a]t least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session." Subject to enumerated statutory exceptions, not applicable here, no action or discussion is to be undertaken on any item not appearing on the posted agenda. (Gov. Code § 54954.2(a)(2).

The first violation claimed, for the February 25, 2014 and March 11, 2014 agendas, states that the City Council was required to repeal the Ordinance or place it on the November 2014 ballot, but that the City Council instead voted to place it on the November 2014 ballot, an action of which the public was not apprised.

The second claimed violation of the Brown Act is the City Council's taking action at the March 11 meeting that was never described or mentioned in the agenda, namely that the City Council voted to retain outside counsel to file this action to determine which district boundaries will be used for the November 2014 election.

Government Code section 54960.1 requires that as a condition precedent to a Brown Act lawsuit, written demand must be made describing the violation of section 54954.2 within 30 days from the date in which the challenged action was taken, and that within 30 days of receipt of the demand, the City Council shall cure or correct the challenged action and inform the demanding party in writing of its decision. Here, the City was notified on or around April 3, 2014 of the alleged violations. (See Exh. 1, Letter dated April 3, 2014 from Peter Scheer of the First Amendment Coalition to Christine Daniel, City Manager, and Exh. 2, Letter dated April 4, 2014 from Richard Miadich of Olsen, Hagel and Fishburn, to Zach Cowan, City Attorney, attached to Party of Interest Alejandro C. Soto-Vigil Memorandum of Points and Authorities in Opposition of Shortening Time in which to Schedule Hearing an Establish Briefing Schedule filed with the court on April 8, 2014.) Thus, the City had until at least May 3, 2014 to cure or correct the alleged violation, or respond that it did not intend to cure or correct the claimed violation. Stated more plainly, Real Parties in Interest Brown Act claims were not ripe for adjudication when filed.

Based on an April 30, 2014 filing by the City, it now appears that the City has cured or corrected these claimed Brown Act violations. The agenda for the April 29, 2014 City Council meeting included that the City Council would vote whether to repeal the Ordinance or place the referendum on the November ballot, and also included whether the City should hire outside counsel to file this litigation,

and the City Council ratified these actions at its April 29, 2014 meeting. (See City's 3rd Request for Judicial Notice filed April 30, 2014 ("City's 3rd RJN").) Given that section 54960.1 permits time to cure or correct any claimed violation of section 54954.2 and the City now appears to have timely and adequately addressed these issues, the argument that the Brown Act violations preclude the City's requested relief is now moot.[5] (See Gov. Code § 54960.1(e) ["During any action seeking a judicial determination pursuant to subdivision (a) if the court determines, pursuant to a showing by the legislative body that an action alleged to have been taken in violation of Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 has been cured or corrected by a subsequent action of the legislative body, the action filed pursuant to subdivision (a) shall be dismissed with prejudice."])

2. THE INTERIM MAP TO BE USED FOR THE NOVEMBER 2014 ELECTION

When a referendum that is directed at a newly adopted redistricting map qualifies for the ballot, stay of the new redistricting map is triggered and the court has the responsibility of determining which voting district map should be used for the upcoming interim electoral cycle. (See *Vandermost*, *supra*, 53 Cal.4th at 437; *Assembly, supra*, 30 Cal.3d at 657-658; *Reinecke I, supra*, 6 Cal.3d at 601; City Charter, art. XIV, § 93.) In making this determination, the court must consider: (1) what maps are reasonably and practically available, and (2) the pros and cons of each viable map in light of the constitutional scheme and criteria.[6] (*Vandermost, supra* at 437.)

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[5] Real Parties in Interest also assert, and argued at the hearing, that the court should still take into account the claimed Brown Act violations in determining whether to award Real Parties in Interest the equitable relief they seek.

[6] Although the constitutional criteria examined in Vandermost were found in article XXI of the California Constitution, which is not applicable here because this article applies to the Citizens Redistricting Commission, Article V, Section 9, of the Berkeley City Charter sets forth similar criteria for the City Council to consider in determining a redistricting plan and thus the court looks to these criteria as well as the applicable criteria examined in *Vandermost*.

Vandermost and *Assembly* provide guidance to this court in determining which plan to use in an interim election in light of a referendum, and are controlling. Each of these cases is summarized below.

ASSEMBLY V. DEUKMEJIAN (1982) 30 CAL. 3rd 638

In *Assembly,* three referendum petitions were filed challenging the 1981 congressional, Senate and Assembly reapportionment statutes. (*Assembly, supra* at 644.) Mandate proceedings were filed by members of the Assembly, Senate, House of Representatives and other interested parties attacking defects in the referendum petitions and arguing that even if the petitions were valid, the referenda did not stay the implementation of the new reapportionment statutes. (*Id.* at 645.)

The California Supreme Court found that under article II of the California Constitution, the filing of a valid referendum challenging a statute normally stays the implementation of that statute until after a vote of the electorate. (*Id.* at 656.) Nothing excluded reapportionment statutes from the referendum process or application of the stay. (*Id.* at 657.)

The court then turned to the issue of which districts were to be used for the 1982 primary and general elections. (*Id.* at 657.) If not for the referenda being filed, the reapportionment statutes would have gone into effect on January 1, 1982. (*Id.*) The court was faced with whether to order continued use of the old districting scheme, which had been in effect since 1973 and no longer met the "one-person, one-vote" requirement embodied in the equal protection clauses of the state and federal Constitutions, or the Legislature's plans that were subject to the referenda. (*Id.* at 657-658.) In making this determination, the court found that it must adopt the plan that best ensures equal protection of the law while minimizing any disruptive impact on the election process. (*Id.* at 665.) "[A]ny decision by this court should recognize the basic rule that reapportionment is primarily a legislative task, undertaken by this court only when circumstances permit no alternative." (*Id.*) The court also noted that in

choosing between an old plan that no longer met equal protection requirements or a new statute passed by the Legislature, "the court cannot be blind to the fact that the Legislature and the Governor have given their assent to the latter plan." (*Id.* at 669.) The court recognized that the redistricting statutes, albeit stayed, were the product of the political give and take of the legislative branch of government, the branch delegated responsibility for reapportionment by federal precedent and by California's Constitution. (*Id.*) Thus, the court concluded that the old plan was unconstitutional and could not be used for the 1982 elections and that use of the 1981 reapportionment statutes was most constitutional and least disruptive. (*Id.* at 674-675.)

VANDERMOST V. BOWEN (2012) 53 CAL.4TH 421

Vandermost involved which map was to be used for statewide primary and general elections in the California elections that were to be held in June and November 2012. (*Vandermost*, *supra* at 435.) A proposed referendum sought to have the voters decide at the November 2012 general elections whether to accept or reject the California State Senate district map that had been certified by the Citizens Redistricting Commission ("Commission"), a new constitutional entity established by the voters to draw voting district boundaries, instead of having the Legislature draw them. (*Id.*) At the time that the writ was pending before the California Supreme Court, County election officials and the Secretary of State were in the process of verifying the petitions to determine whether there were sufficient valid signatures to qualify the proposed referendum for the November 2012 ballot. (*Id.*)

Although it was unclear whether the referendum qualified for the November ballot, the California Supreme Court nevertheless found that the issue was sufficiently ripe for review because if the proposed referendum qualified for the November 2012 ballot and stayed use of the Commission's map, the court had the responsibility of determining which voting map should be used for the interim electoral cycle. (*Id.* at 437.) In determining which map to use, the court considered: (1) which maps

were reasonably and practically available, and (2) the pros and cons of each potentially viable map in light of the constitutional scheme and criteria set out in California Constitution, art. XXI, which had been recently amended in November 2008 and 2010 to remove the task of redistricting from the Legislature and delegate redistricting to the Commission. (*Id.*)

The maps considered in *Vandermost* were an old map adopted by the Legislature in 2001 based on the 2000 census, two alternative maps proposed by the petitioner, and the Commission's map. (*Id.* at 471.) The 2001 map raised equal protection concerns under both federal and state Constitutions under the principle of "one person, one vote." (*Id.*) In *Vandermost*, the Supreme Court established the following standards: (1) legislatively enacted reapportionments containing minor deviations from mathematical equality among state legislative districts do not make out a prima facie case of invidious discrimination under the Fourteenth Amendment (*Id.* at 472), (2) an apportionment plan with a maximum population deviation under 10 percent will be construed as a minor deviation (*Id.*), (3) a plan with larger disparities in population creates a prima facie case of discrimination and must be justified by the state (*Id.*), and (4) deviation of 16.4 percent "may well approach tolerable limits." (*Id.*, citing *Mahan v. Howell* (1973) 410 U.S. 315, 329.) Finding that three of the 2001 Senate districts had population deviations of greater than 10%, the court stated that the 2001 map raised serious constitutional concerns in light of the court's obligation to adopt an alternative interim map to avoid all but de minimis deviations. (*Id.* at 474.) The 2001 map also suffered from the additional problem, in that the redistricting criteria set forth in article XXI, section 2, subdivision (d) of the California Constitution, as amended in 2008 and 2010, were not in effect at the time the Legislature created the 2001 map based on the 2000 census. (*Id.* at 476.) The petitioner in *Vandermost* provided the court with no basis for the court to conclude that it complied with this constitutional criteria on par with other proposed maps. (*Id.* at 477.)

Thus, faced with a choice between a constitutionally deficient "old map" adopted by the Legislature in 2001 based on the 2000 census, and the Commission-certified map that had been drawn in response to the most recent census that complied with "one-person, one-vote" concerns but was subject to the proposed referendum, the California Supreme Court found that the "old map" raised serious constitutional questions in light of the court's obligation to avoid anything but de minimis deviations, and court concluded that the old map did not comply with the required constitutional criteria. (*Id.* at 474-477.) The petitioner also proposed a nesting map for the court's consideration, but the court found that petitioner provided no basis from which the court could determine that the nesting map respected federal and state law at least as much as the other proposed interim maps, including the Commission's map. (*Id.* at 478-482.) The petitioner's proposed model plan map also was insufficient because it would require more time to put into place, and the court found that at the late stage in the schedule of election preparations, there was not adequate time to consider such an undefined new map. (*Id.* at 482-483.)

Thus, after reviewing all of the other proposed alternative maps as well, the California Supreme Court found that the Commission's map was the best of the alternative maps because it was most consistent with the constitutional scheme and criteria in the federal and state Constitutions. (*Id.* at 483-486.) The court recognized that if the proposed referendum qualified for the ballot, the fact of the referendum's qualification would indicate that the Commission map had engendered a significant degree of opposition by those who signed the referendum petition; however, at the same time, the court also recognized the reality of the public not having had a comparable opportunity to scrutinize or address its opinion with regard to the merits of any of the alternative plans proposed by the petitioner. (*Id.* at 483-484.) The Commission map also had survived the petitioner's prior legal challenge that raised federal and state statutory and constitutional challenges. (*Id.* at 484.) The court also considered that, unlike the

proffered alternatives, the Commission map was a product of what generally appeared to have been an open, transparent and nonpartisan redistricting process called for under article XXI. (*Id.*)

In concluding that the Commission map should be used for the interim election, the *Vandermost* court noted that the decision did not mean that the court would always make the same conclusion and that the court could conclude in a future case that the Commission map should not be used as an interim map. It found that the Commission could conceivably draft a number of differently configured district maps and after public comment, and might make a controversial judgment about which map to adopt and certify. (*Id.*) If a referendum then qualified, the court might have before it an alternative map drafted by a nonpartisan entity through an open process and that has been subject to review and comment by the public, hence satisfying most of the procedural safeguards embodied in California Constitution, article XXI. (*Id.*)

THIS COURT'S ANALYSIS OF THE PROPOSED MAPS

In light of the California Supreme Court's standards articulated in *Vandermost* and *Assembly*, this court turns now to address the pros and cons of each map presented by the City and Real Parties in Interest, which are: (1) the 2002 plan, (2) MAPMINDS plan, (3) Minimum Deviation plan, (4) the USDA plan and (5) the BSDC/City Council-approved plan.

When a referendum that is directed at a newly adopted redistricting map qualifies for the ballot, a stay of the new redistricting map is triggered and the court has the responsibility of determining which voting district map should be used for the upcoming interim electoral cycle. (See *Vandermost*, *supra* at 437; *Assembly, supra* at 657-658; *Reinecke I, supra* at 601.) In making this determination, the court must consider: (1) what maps are reasonably and practically available, and (2) the pros and cons of each viable map in light of the constitutional scheme and criteria set out in article XXI of the California Constitution. (*Vandermost*, supra at 437.)

The California Supreme Court has found that factors the court must look to in making this determination are: (1) the equal protection principal of one-person, one vote, (2) equitable considerations such as the potential disruption of the election process, and (3) that reapportionment is primarily a legislative task only to be undertaken by the court when circumstances permit no alternative. (*Assembly, supra* at 665.) The court is "to fairly evaluate the pros and cons of all the potential alternative redistricting maps in relation to the constitutional scheme and criteria in order to determine which should be used in the upcoming elections...."[7] (*Vandermost, supra* at 471.) The stay of a challenged redistricting map does not preclude the court from considering and evaluating to whether to use it in the upcoming interim election. (*Id.* at 470.)

Although the *Vandermost* court examined the redistricting criteria for the Citizens Redistricting Commission, as set out in article XXI of the California Constitution[8], the City Charter, as amended by

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[7] The City Charter also sets forth criteria for redistricting, and these factors are analogous to, and in some respects, identical, the facts set forth in *Vandermost* and *Assembly*. (See City Charter, art. V, § 9.)

[8] Subdivision (d) of article XXI, set forth the factors for the Citizens Redistricting Commission to consider, as follows:

> (d) The commission shall establish single-member districts for the Senate, Assembly, Congress, and State Board of Equalization pursuant to a mapping process using the following criteria as set forth in the following order of priority:
>
> (1) Districts shall comply with the United States Constitution. Congressional districts shall achieve population equality as nearly as is practicable, and Senatorial, Assembly, and State Board of Equalization districts shall have reasonably equal population with other districts for the same office, except where deviation is required to comply with the federal Voting Rights Act or allowable by law.
>
> (2) Districts shall comply with the federal Voting Rights Act (42 U.S.C. Sec. 1971 and following).
>
> (3) Districts shall be geographically contiguous.
>
> (4) The geographic integrity of any city, county, city and county, local neighborhood, or local community of interest shall be respected in a manner that minimizes their division to the extent possible without violating the requirements of any of the preceding subdivisions. A community of interest is a contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation. Examples of such shared interests are those common to an urban area, a rural area, an industrial area, or an agricultural area, and those common to areas in which the people share similar living standards, use the same transportation facilities, have similar work opportunities, or have access to the same media of communication

Measure R, sets forth similar factors to be considered by the City Council when determining a redistricting plan. Specifically, Measure R provides that the City Council shall consider topography, geography, cohesiveness, contiguity, integrity and compactness of territory of the districts, as well as existing communities of interest as defined in California Constitution Article XXI, section 2(d)(4). Similarly, Elections Code section 21620 also provides that in establishing boundaries for a district that a council consider: (1) topography, (2) geography, (3) cohesiveness, contiguity, integrity, and compactness of territory, and (4) community of interest of the districts.[9]

> relevant to the election process. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.
>
> (5) To the extent practicable, and where this does not conflict with the criteria above, districts shall be drawn to encourage geographical compactness such that nearby areas of population are not bypassed for more distant population.
>
> (6) To the extent practicable, and where this does not conflict with the criteria above, each Senate district shall be comprised of two whole, complete, and adjacent Assembly districts, and each Board of Equalization district shall be comprised of 10 whole, complete, and adjacent Senate districts.

(Cal. Const. art. XXI, § 2(d).)

[9] Elections Code section 21620 states:

> If the members of the governing body of a chartered city are nominated or elected "by districts" or "from districts," as defined in Section 34871 of the Government Code, upon the initial establishment thereof, the districts shall be as nearly equal in population as may be according to the latest federal decennial census or, if the city's charter so provides, according to the federal mid-decade census or the official census of the city, as provided for pursuant to Chapter 17 (commencing with Section 40200) of Part 2 of Division 3 of Title 4 of the Government Code, as the case may be. After the initial establishment of the districts, the districts shall continue to be as nearly equal in population as may be according to the latest federal decennial census or, if authorized by the charter of the city, according to the federal mid-decade census. The districts shall comply with the applicable provisions of the federal Voting Rights Act of 1965, Section 1973 of Title 42 of the United States Code, as amended. In establishing the boundaries of the districts, the council may give consideration to the following factors: (1) topography, (2) geography, (3) cohesiveness, contiguity, integrity, and compactness of territory, and (4) community of interest of the districts.

(Elec. Code, § 21620.)

2002 MAP

Real Parties in Interest urge that the court continue to use the 2002 map for the November election because it would be the least disruptive to the Registrar and the election process. Although they acknowledge that this map raises constitutional concerns, they point out that the City used the 2002 map for the 2012 election, with no stated concerns for the constitutionality of the 2002 map.

The 2002 map however, is based on districts that were drawn in accordance with 1986 boundaries and prior to the passage of Measure R. More importantly, the 2002 map raises a serious equal protection concern. The U.S. Supreme Court has held that an apportionment of seats in the two houses of the Alabama Legislature were invalid under the Equal Protection Cause because the apportionment was not based on the population. (See *Reynolds, supra,* 377 U.S. at 568 ["We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."] A court must focus on ascertaining whether there has been any discrimination against citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. (*Id.* at 561.) A citizen's right to vote is effectively diluted where a state provides that the votes of citizens in one district are given more weight than the votes of citizens in another district of the state, and run counter the fundamental idea of a democratic government. (*Id.* at 563.) The U.S. Supreme Court concluded that "the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators." (*Id.* at 566.)

In this case, the 2002 map, when compared to the ideal population following the 2010 census, contains population deviations that render it constitutionally suspect. It shows population deviations of 10.89 percent in District 4 and 18.12 percent in District 7, as follows:

District	Ideal Population	Actual Population	Numerical Deviation	Percentage Deviation

1	14,073	13,080	-993	-7.06
2	14,073	13,381	-692	-4.90
3	14,073	13,024	-1,049	-7.45
4	14,073	15,605	1,532	10.89
5	14,073	12,709	-1,364	-9.69
6	14,073	12,883	-1,190	-8.46
7	14,073	16,623	2,550	18.12
8	14,073	15,275	1,202	8.54

Based on the analysis provided in *Vandermost*, the population deviation set forth in the 2002 map is not de minimis and thus the court here similarly cannot conclude that the 2002 map should be used here where such serious equal protection concerns exist. Furthermore, the 2002 map is based on 1986 boundaries, and thus was not drawn to comply with the criteria passed by the voters through Measure R. No evidence has been presented to the court from which it can conclude that the 2002 map meets these criteria at least as well as the other proposed maps.

MAPMINDS PLAN

Real Parties in Interest Soto-Vigil and Arreguin also propose use of the MAPMINDS plan for the November election. The MAPMINDS plan was presented to the City Council in 2011, and was discussed at that time with the community and by the City Council. The MAPMINDS plan does not on its face appear to raise any equal protection concerns, as it has a de minimis population variation. Further, Real Parties in Interest claim that it preserves topographic and geographic integrity because it follows long held neighborhood boundaries and preserves communities of interest, preventing the

fracturing of Willard, North Shattuck Bateman and Halcyon neighborhoods. (See Soto-Vigil's and Arreguin's Opposition, pp.20-21.)

The MAPMINDS plan, as presented in 2011, shows population deviations as follows:

District	Ideal Population	Actual Population	Numerical Deviation	Percentage Deviation
1	14,073	14,072	-1	.01
2	14,073	14,074	1	.01
3	14,073	14,094	21	.15
4	14,073	14,064	-9	.06
5	14,073	14,105	32	.23
6	14,073	14,077	4	.03
7	14,073	14,060	-13	.09
8	14,073	14,034	-39	.28

The MAPMINDS plan however, was presented to the City Council prior to the voters' approval of Measure R. The MAPMINDS plan was found by City Council staff to adhere to 1986 boundaries within two blocks except at the border of District 4 and 6, which had a four block offset. (See City's 2nd RJN, Exh. 6, p.49.) The plan was not reintroduced after Measure R amended the City Charter. Thus, the City points out that City staff have never determined whether it complies with the amended City Charter. Further, there has been no opportunity by the public or the City Council to address any impact on communities of interest or how it compares to other proposed redistricting plans. Thus, while this map does not raise the equal protection concerns that are problematic for the 2002 map, the court has no basis upon which to conclude that this map does or does not comply with the amended City Charter.

Once again, as in *Vandermost*, the court cannot conclude based on the evidence presented that MAPMINDS is the redistricting option that best complies with the constitutional and City Charter

criteria. Though it is correct that, unlike the 2002 plan, the MAPMINDS plan does not raise any equal protection concerns, the fact that MAPMINDS was not raised as a redistricting proposal before the City Council since the Charter was amended and has not been open for public comment, raise other procedural concerns. MAPMINDS has not been analyzed by City staff for compliance with the redistricting criteria set forth in the amended City Charter, unlike the BSDC and USDA plans. The court is therefore left with insufficient evidence to conclude that this is the map that best comports with constitutional and City Charter concerns.

MINIMUM DEVIATION PLAN

The Minimum Deviation plan does not violate the "one-person, one-vote" standard and was submitted to the City Council for consideration in discussing proposed redistricting plans. Real Parties In Interest Soto-Vigil and Arreguin also claim that Minimum Deviation complies with the City Charter criteria for compactness with the total perimeters for all districts at 54.10 miles, compared to the City Council approved plan which has a total perimeter of 54.84 miles. (See Soto-Vigil's and Arreguin's Opposition, p.21.) Real Parties in Interest also claim Minimum Deviation follows major arterials and better protects communities of interest by not dividing neighborhoods and uniting the campus community of interest in one City Council district. (*Id.* at pp.21-22.) The Minimum Deviation plan shows population deviations as follows:

District	Ideal Population	Actual Population	Numerical Deviation	Percentage Deviation
1	14,073	14,045	-28	.20
2	14,073	14,075	2	.01
3	14,073	14,089	16	.11
4	14,073	14,090	17	.12

5	14,073	14,080	7	.05
6	14,073	14,070	-3	.02
7	14,073	14,064	-9	.06
8	14,073	14,067	-6	.04

(See City's 2nd RJN, Exh.1, p.4.)

The City however, contends that this plan has never been analyzed or the numbers verified and that it was not presented to the City Council until this month. (See City's Reply,p.23 and fn.13.) All proposed redistricting maps were to be presented to the City Clerk by March 15, 2013. (See City's 1st RJN, Exh. 2, p.23.) The City Manager, City Attorney, City Clerk and Information Technology Departments were then to undertake a complete review of the plans in the context of the City Charter requirements and applicable state and federal regulations. (See e.g., City's 2nd RJN, Exh.5, p.18.) That did not occur in this case. Moreover, in the case of Minimum Deviation, once again, the City's various communities of interest have not had an opportunity to comment on how the plan affects them. (See *Legislature v. Reinecke* (1973) 9 Cal.3d 166, 167 (Reinecke II) ["Before this court, in the discharge of its duty to insure the electorate equal protection of the laws, undertakes to draft reapportionment plans of its own, it should afford all interested parties an opportunity to be heard."] For these reasons, the lack of verification and analysis and the lack of opportunity for comment, the court rejects the Minimum Deviation plan.

THE USDA MAP

Real Parties in Interest also propose that the court use the USDA map, which they assert would include students from the Northside in District 7. They contend that the USDA plan has been found to satisfy all legal requirements, and it was presented to the City council. It met all of the requirements of

the City Charter as well as state and federal equal protection principles, with deviations of less than 1%. (See City's 1st RJN, Exh. 8, pp.208-210.) Further, since one of the objectives of redistricting is to maintain "communities of interest," the USDA plan accomplishes this better than the BSDC plan as it retains the student housing that was excluded from District 7 in the BSDC plan. The population deviation for the USDA map is as follows:

District	Ideal Population	Actual Population	Numerical Deviation	Percentage Deviation
1	14,073	14,060	-13	-.09
2	14,073	14,114	41	.29
3	14,073	14,105	32	.23
4	14,073	13,957	-116	.82
5	14,073	14,097	24	.17
6	14,073	13,963	-110	.78
7	14,073	14,195	122	.87
8	14,073	14,089	16	.11

(See City's 2nd RJN, Exh.1, p.5.)

The City responds that the USDA map is not superior to the City Council approved plan as it does not keep the student community of interest as a whole. No City Council district could contain all UC students residing in Berkeley given that the City contains approximately 30,000 students, and each City Council district can contain only approximately 14,000 or so residents. (2nd Metzker Decl., ¶10.) Although District 7 would contain more students under the USDA plan, it would also move Southside students out of District 7 in order to move the Northside student districts in. Further, these same Southside students would be moved from District 7 into District 6, thereby having a ripple effect on other districts. Proponents of the City Council approved plan believe that Southside students should stay

together in a single district because they share common issues that differ from Northside students, as the Southside has more crime and needs more economic development than the Northside of campus. (See e.g. 2nd Metzker Decl. ¶ 14.) Other proponents of the City Council approved plan also wanted the City Council to balance the interests of students with other communities of interest in the City, and were concerned that the USDA plan did not adequately consider Citywide interests because it would split the Downtown and North Shattuck neighborhoods, and the Euclid corridor. (See 2nd Metzker Decl., ¶¶ 14-16.) Additionally, proponents of the City Council approved plan argued that it more readily complied with the City Charter's requirement to utilize easily understood district boundaries. (See 2nd Metzker Decl., ¶ 17, Berkeley City Charter, art. V, § 9(c)(1).) In addition, the USCA was twice considered and twice rejected by the City Council, the legislative body charged with reapportionment. For these reasons, the court rejects the USDA alternative.

THE BSDC MAP/CITY COUNCIL-APPROVED PLAN

The BSDC plan does not violate the "one-person, one-vote" standard and therefore does not raise any equal protection concerns. The population deviations for the BSDC plan are as follows:

District	Ideal Population	Actual Population	Numerical Deviation	Percentage Deviation
1	14,073	14,060	-13	-.09
2	14,073	14,026	-47	-.33
3	14,073	14,070	-3	-.02
4	14,073	14,082	9	.06
5	14,073	14,182	109	.77
6	14,073	13,966	-107	-.76

7	14,073	14,079	6	.04
8	14,073	14,115	42	.30

(See City's 2nd RJN, Exh.1, p.2.) Although the MAPMINDS, Minimum Deviation and USDA plan also do not raise any equal protection issues, the court must also consider though, which plan minimizes any disruptive impact on the election process. (See *Assembly, supra,* 30 Cal.3d at 665.) The plans that would most minimize any disruption would be either the 2002 map, which is the map currently in place, or the BSDC map, which was approved by the City Council and is the subject of the referendum. If the referendum passes in November, then the City Council will need to start the redistricting process over and consider alternatives to the BSDC map. However, if the referendum fails in November, then the Ordinance will take effect and the BSDC map will be used for all future elections until the next centennial redistricting process commences.

Thus, other than ordering use of the 2002 map, which the court will not do because of its serious constitutional concerns, the BSDC map is the least disruptive alternative at this point. (See *Assembly, supra* at 676 ["If the new districts are adopted and the referenda pass, there will be *no* disruption whatsoever."]

Real Parties in Interest have not established that the other proposed alternative plans (MAPMINDS, Minimum Deviation and USDA maps) would somehow be less disruptive than using the BSDC map for the November election. Even if the referendum were to pass and a new redistricting plan would need to be developed, there is no evidence to support that one of these plans would be adopted in place of the BSDC plan. The MAPMINDS plan was presented to the City Council in 2011, prior to the passage of Measure R, and therefore it has not been analyzed by the City for compliance with Measure R or presented to the public for discussion since the passage of Measure R. Likewise, the Minimum Deviation plan was only recently presented to the City Council, and therefore has not been through the

proposed redistricting map process either. Although the USDA map was vetted to the City Council and discussed in light of the criteria set forth under Measure R, it was voted on and rejected by the City Council. In contrast, the BSDC map was timely presented to the City Council as a proposal for redistricting in 2013, was analyzed by City staff, presented at City Council meetings for public discussion and thereafter approved by the City Council.

Further, under all of the plans, there will be some deferred voting, absent continued use of the 2002 plan, which the court has already stated it will not order. These issues of the number of deferred voters as well as double-deferred voters appear to be factors that the court may consider in comparing which interim plan to use (see *Vandermost, supra,* 53 Cal.4th at 481), but Real Parties in Interest have not demonstrated that this is a decisive factor that warrants choosing another plan over the BSDC plan. The evidence shows that the City Council requested analysis on the displacement of residents and how that effected their voting cycle between the BSDC plan and the Eric Panzer – Edge Simplicity plan, and using the BSDC plan would result in a change of district for 1,063 voters from 2016 to 2014 (earlier voting) and in a change of district for 5,310 voters from 2014 to 2016 (later voting). (See City's 1st RJN, Exh.2, p.17.) For the remaining 11,078 voters, there would be no change to their election year voting. (*Id.*) It is not clear however, how many voters would be deferred or even double-deferred under the other plans. Thus, given that some deferred voting is inevitable with redistricting, the court is without sufficient evidence to find that this is a factor it must consider in favor of or against one plan or another.

Assembly also noted that "any decision by this court should recognize the basic rule that reapportionment is primarily a legislative task, undertaken by this court only when circumstances permit no alternative." (*Assembly, supra*, 30 Cal.3d at 665.) The California Supreme Court in *Assembly* also drew a distinction between a plan that was approved by the Legislature and the Governor (see *Assembly,*

supra at 669), in comparison to *Reinecke I, supra,* 6 Cal.3d 595, in which the reapportionment bill had been vetoed by the Governor, finding that the legislatively drawn reapportionment plan at issue in *Assembly* had never been rejected by any governmental entity and would be put to a vote of the people. Similarly here, the court must recognize that the City Council, who is responsible for determining a redistricting plan pursuant to the City Charter, has approved the BSDC plan and voted to reject the USDA plan.

Thus, after considering all the maps that have been presented to the court and the standards set forth in *Assembly* and *Vandermost* and the criteria under the Constitutions and City Charter, the court finds that the BSDC map, or the City Council approved plan, is the one that best complies with meeting the mandates of equal protection and minimizing any disruption to the election process. The Minimum Deviation plan has not been adopted because it was presented to the City Council only a month ago, and does not appear to have been vetted through the public process. (See *Vandermost, supra,* 53 Cal.4th at 484 ["If the controversy engenders a referendum that qualifies for the ballot, the court may have before it an alternative map drafted by a nonpartisan entity through an open process and that has been subject to review and comment by the public, hence satisfying most of the procedural safeguards embodied in California Constitution, article XXI."] "[T]he reality that the public has not had a comparable opportunity to scrutinize or express its opinion with regard to the merits of any of the alternative plans proposed by petitioner" is an important factor for the court's consideration. Thus, the court lacks a sufficient basis from which to determine that the Minimum Deviation plan is the best alternative and were the court to adopt Minimum Deviation, it would be inserting itself into the "political thicket" in order to determine otherwise, which trial courts have been cautioned not to do.

Thus, this court is left with considering the BSDC plan and the USDA plan which were both vetted to the City Council and for comment by the public, although in different ways. The BSDC plan was submitted before the deadline for submitting redistricting proposals to the City Clerk. The

USDA plan, which is asserted by Real Parties in Interest to be an amendment to the BSDC plan and therefore the reason why it was not presented to the City Council until July 2013. Both the BSDC and USDA arguably meet the same criteria and have de minimis population variation. Thus, the only difference remaining is that the City Council voted to approve the BSDC plan and reject the USDA plan. Having considered *Assembly* and *Vandermost*, the court declines to go beyond these cases and insert itself into the process of redistricting. Real Parties in Interest ask that the court exercise its equitable powers and do exactly that when faced with the choice between the USDA and BSDC plan, asking it to act as an "equitable arbitrator." While it is regrettable that the City did not come to the court sooner, the court cannot find that laches and unclean hands bar the City from the relief requested. The court cannot conclude from the evidence that the City's decision to hold over the vote on whether to repeal the Ordinance or place the referendum on the ballot, from February 25, 2014 to March 11, 2014 was an unreasonable delay. The Mayor stated that he wanted additional time to discuss this issue, and Real Parties in Interest have not presented any evidence to show otherwise. It also appears that the City Council's decision to adopt the BSDC plan and reject the USDA plan was the result of an open process that has been subject to review and comment from the public.

This court, similar to the court in *Assembly*, takes no position on the political merits of the reapportionment plan or the outcome of the referendum, for this issue will be decided by the voters. (See *Assembly, supra*, 30 Cal.3d at 676.) This court is tasked only with resolving the legal issue of what plan should be used for the November election and in light of its analysis as to the pros and cons for each proposed map, concludes that the BSDC map should be used as the interim map for the November election.

The City's Petition for Writ of Mandate is GRANTED. A writ shall issue prohibiting Respondents Dupuis and Numainville from using the 2002 plan as boundaries for the November 2014 election in the City of Berkeley and directing them to instead use the City Council approved plan, as set

forth in Ordinance 7,320-N.S., for the November 2014 election. The City shall prepare and submit a proposed writ to the court, after submitting to opposing parties for approval as to form, by May 7, 2014.

The City also requests a declaration that the boundaries drawn by the 2002 map raise constitutional questions, fails to comply with the Berkeley City Charter, and that Ordinance 7,320-N.S. be used for City Council elections pending the outcome of a referendum petition against the ordinance. The court finds the City's declaratory relief claim to be moot in light of the writ relief granted.

IT IS SO ORDERED.

DATED: APR 30 2014

Evelio M. Grillo
JUDGE OF THE SUPERIOR COURT