

To: Members of the Charter Review Committee for the City of Gresham
From: Professors Todd Lochner and Ellen Seljan
Date: March 06, 2022
Re: Memorandum on Electoral Systems

Introduction

The purpose of this memorandum is two-fold. First, it is designed to provide relevant background information and briefly describe several types of voting systems for the CRC to consider. Second, we hope that this brief summary will assist the CRC in narrowing its focus for future discussion—of the options we discuss, which are you interested in evaluating further, and which are not of interest to the CRC? We focus on four issues: first, the size of the city council; second, the question of at-large versus ward-based elections; third, alternative voting mechanisms such as ranked choice voting (sometimes labeled “instant runoff voting”), multi-member proportional ranked choice voting, and cumulative voting; finally, legal issues regarding districting. Before doing so, we offer some background information.

We begin with national data. In 2019, the International City/County Management Association (ICMA) conducted a survey of local governments.¹ First, it found that council size varied: including the Chief Executive Officer if the CEO sits on the council, 12% had councils of four or fewer members, 39% had councils of five members, 13% had councils of six members, 26% had councils of seven members, and 10% had councils of eight or more. Second, it found that 68% of council members were selected by at-large elections, 18% were selected by ward/district elections, and 14% were selected by a mixed combination of the two. Third, although results varied a small amount by selection method, almost two-thirds of councilors serve four-year terms, with 81% of systems using staggered elections. Finally, 91% do not use term limits.

Closer to home, we compare Gresham’s city council structure to several other Oregon cities of roughly similar population, excluding Portland due both to its size and its significantly different political structure.²

¹ <https://icma.org/sites/default/files/2018%20Municipal%20Form%20of%20Government%20Survey%20Report.pdf>

² This summary does not include mayors who also sit on the city council. Population data from https://www.oregon-demographics.com/cities_by_population. City council data found on the respective city’s website, with any ambiguities resolved by phoning and/or emailing city government officials.

City	Population	Seats	Term Length	At-Large	Ward, City-wide Vote	Ward, Ward-only Vote
Eugene	176654	8	4			x
Salem	175534	8	4			x
Gresham	114247	6	4	x		
Hillsboro	106447	6	4		x	
Bend	99178	6	4	x		
Beaverton	97494	6	4	x		
Medford	85824	8	4			x
Springfield	61851	6	4		x	

Although these cities varied in how they selected their city councilors, all employed four-year terms, and all the city councils were composed of either six or eight members. We would be happy to provide more Oregon cities for comparison, though we would caution about comparing Gresham to cities that are substantially different in population (given that it can be more difficult to effectively run certain types of electoral systems in very small cities). Finally, we tally the total number of candidates for Gresham City Council elections for all elections since 2010.³

Election Type	Year	Council Seat	# Candidates	Total Candidates Per Election Year
General	2020	1	2	
General	2020	3	5	
General	2020	5	4	11
General	2018	2	2	
General	2018	4	6	
General	2018	6	1	9
General	2016	1	2	
General	2016	3	1	
General	2016	5	2	5
General	2014	2	2	
General	2014	4	2	
General	2014	6	1	5
General	2012	1	2	
General	2012	3	4	

³ <https://www.multco.us/elections/results-and-history-multnomah-county-elections>

General	2012	5	2	8
General	2010	2	2	
General	2010	4	1	
General	2010	6	2	5
Av. candidates per seat			2.4	

I. Size of city council

There is no “correct” size for a city council. It should be large enough to adequately represent the interests of the community, while small enough to be logistically and administratively efficient. As noted, Gresham’s present city council is consistent with other Oregon cities of its size, though increasing its size to eight members would not make it unusual. If the CRC is considering altering the size of the city council, it may wish to reflect on the following questions:

- What are the budgetary implications for increasing the council’s size (salaries, administrative support, etc.)?
- To what extent would increasing the council’s size facilitate the representation of a greater diversity of interests?
- Would one be required to increase or maintain the council’s size if one opted for some of the alternative electoral systems described below?
- To what extent would a larger city council facilitate or impede the ability of councilors to interact with their constituents?
- To what extent would increasing its size create logistical difficulties for the council or impede communication?
- If one were to increase the council’s size, would there be enough candidates interested in running to facilitate competitive elections?

II. At-large versus ward/district elections

Although most American cities employ at-large elections, Oregon cities of comparable size to Gresham employ both systems in equal measure. We begin by discussing at-large elections.

Supporters of at-large elections suggest that because city councilors legislate for the entire city, it is only appropriate that all city voters take part in their election. Based on this normative belief, supporters claim that councilors elected from at-large systems in fact are better at considering the diverse and multifaceted interests of the community. These supporters may be concerned that ward systems could create a parochial mindset that sacrifices the good of the city for the interests of the ward itself, thus increasing the risk of political polarization.

Critics of at-large elections argue that in cities with pronounced political divisions that persist over time, at-large elections may disproportionately amplify the political power of the majority group. (When we use the terms “majority” and “minority” in this memorandum, we are referring simply to the mathematical concept—given two groups, the larger one is the majority, the smaller is the minority. Political minorities may be characterized by partisan affiliation, race, political interests, or any other descriptive characteristic.) For example, assume that there are two groups in a city, Group A, which enjoys 60% popular support, and Group B, which enjoys 40% popular support. Assuming these preferences persist over time in every election, and that the city uses plurality voting rather than proportional voting—as do the vast majority of American cities—Group A’s preferred candidates would win every election and control 100% of the city council. While some may view this as democracy in action—the candidates who received the most popular support always won—critics of at-large elections would view these results as fundamentally unfair. These critics also would point to the historical use of at-large elections in the United States, particularly in Southern states, to minimize the political power of African Americans and other racial minorities.⁴

Of course, how a particular at-large system operates in practice depends on a number of related rules and policies. The example above assumed that at-large elections took place within a framework that apportioned the city council into single-winner “positions” or “seats,” as is true of Gresham and many such systems in Oregon. One can also have what’s known as a “top-three” or “top-two” (or “top-any number”) system in which voters choose from a slate of candidates. For example, Lake Oswego employs a “top-three” model in which all council candidates run in a single pool. Each voter gets to cast three votes, and the three candidates with the most votes win. This arrangement *might* yield different outcomes than a single-winner system, but if the majority of voters all prefer the same three candidates, the outcome would look like the single-winner example described above. The point is that a “top-three” at-large system *might* have different outcomes from Gresham’s current system, but it would depend on the specifics of other voting aggregation policies (such as cumulative voting or proportional RCV, discussed below).

In contrast to an at-large system, a ward or district system (we use these terms interchangeably) divides the city into separate wards, with each ward having a council representation. Often each ward has a single representative, but some cities such as Hillsboro have multiple representatives from each ward. Usually candidates must reside in the ward that they wish to represent. Oregon cities differ as to whom may vote in these ward elections. In Salem, only voters who live in that ward may vote in the ward election, whereas Springfield holds a city-wide election for each ward position.

There are many different ways to configure a ward system, but its supporters would suggest the following advantages. First, ward systems provide better representation for a diversity of interests. As we all know, the makeup of a city sometimes can change with geography; perhaps some parts of a city are more affluent than others, or perhaps some parts of a city are very closely tied to a particular industry. These regional variations in interests may not be given adequate due in an at-large election where the majority controls the entire city council.

⁴ See, e.g., Guinier, Lani. *Tyranny of the Majority: Fundamental Fairness in Representative Democracy*. Free Press, USA, 1995.

Second, proponents of ward systems suggest that they create a stronger bond between councilors and their constituents. Not only are voters more likely to know their councilor, the councilor is more likely to know the specific needs of the ward. Third, proponents of ward systems suggest that they help to minimize campaign costs. It can be much cheaper to have to campaign in only one section of town rather than the entire town.

Opponents of ward systems suggest that by focusing the councilor's attention on their own ward, the councilor will not be as attentive to the needs of the city as a whole. If true, this might lead to increased tension and gridlock on the council itself. Second, a ward system by definition requires the city to be districted. Opponents might worry that the districting process itself may create political or legal problems. What if the districting body cannot agree on districts? What if the districting process opens the city up to lawsuits? (See Section Four below, though in fairness it also is possible that retaining an at-large scheme may, under certain conditions, also create legal problems.) Third, opponents of a ward system might be concerned that there are not enough candidates in each ward to assure competitive elections.

We expect that the CRC will have many questions about these issues. Instead of highlighting such questions here, we instead would emphasize a fundamentally important point: ward systems make sense *mainly* to the extent that there are politically-relevant distinctions that are geographically-based. Two examples demonstrate this point. Imagine a city called Laconia which has a very wealthy Northern section and a less affluent Western section. If one were concerned that the at-large system of government in Laconia was not adequately representing the interests of less affluent Westerners, it might make sense to adopt a ward system to ensure that Westerners have representation on the city council. But next imagine that left-handed people in Laconia believe that their political views are being ignored by the city. If left-handed people are scattered equally throughout all parts of Laconia, then even if one grants that they should have more political power, a ward system would not be an effective means of achieving that goal because one cannot create a geographic division to help solve the problem. Of course, there are other reasons besides political representation to have a ward system; maybe a city simply wants to reduce the costs of campaigning and thinks a ward system will help. When thinking about whether a ward system makes sense, one should have a good idea of what the wards are designed to accomplish—after all, the answer to this question will affect how district lines are drawn.

III. Alternative voting mechanisms

Deciding whether to have an at-large or ward system is one important consideration when creating an electoral system, but there are other types of rules that one might wish to consider as well. In reality, there are many different types of rules that matter. We don't want to discuss all of them here (though we would be happy to conduct further investigation should the CRC desire), but it is our understanding that you wanted some discussion of a few options.

A. Ranked choice voting—the basics

Most of us are probably used to a system where in a given election, we cast one vote in favor of the candidate on the ballot we most prefer. It's a very simple and straightforward choice,

easy to understand, and we shouldn't underestimate the merits of this simplicity. But this style of voting does have potential downsides as well. One potential problem is what we will call "satisficing." Imagine that there are five candidates running for a city council seat (A, B, C, D, and E). You really love Candidate D, but recognize that she just doesn't have the numbers to win the election. Fearing that you will "waste your vote" by voting for Candidate D, you vote for Candidate B, who, while not your favorite candidate, is "OK" and has a good shot at winning. Your vote for B is "satisficing" because it is not an accurate reflection of your true preference. A system called Ranked Choice Voting (RCV) is designed to help minimize this problem.

RCV has become increasingly popular in the United States. It's currently been adopted by 52 distinct governments in the United States, although more than half of these programs have yet to experience a ranked choice election because they are so new. The vast majority of RCV systems (49 out of 52) have been adopted at the municipal level; for example, Utah uses RCV in twenty different municipalities, more than any other state. Among the municipalities, ranked choice voting is used to fill a variety of office positions, including the mayor, city councils, school boards, and the sheriff's office. When it comes to council seats, sometimes RCV is used for single-member district elections, while other times (about 19 municipalities) it is used for sequential multi-member elections. (Included in this count are cities that use a mix of single-post and multi-member elections.)⁵ RCV has important implications for election administrators, voters, candidates, and principals of representation. We discuss each in turn.

Adopting ranked choice voting would have a significant impact on election administration. As with any new system of voting, it would require a proactive information campaign to alert voters on this new voting technique—ballots would look a little different than what most voters have seen before. Most cities that have adopted RCV raise awareness through multiple communication channels, including the production of websites and videos. When it comes to Election Day, tallying votes is probably going to take longer if you use a RCV system. It probably would be a good idea for voters to know beforehand that the time between when ballots are due and the announcement of election results will be extended—considerably so if a recount is necessary. Additional publicity, the design of new ballots, and vote tallying will cost money, though in some municipalities this has been offset by the fact that you no longer have to run primary elections.⁶

How will voters likely respond to a RCV system? As previously stated, RCV lessens the need for satisficing, allowing voters to highly rank their top preferences without considering viability in terms of winning. Some voters may believe that this system is easy to understand and very useful, while others may find it too challenging to collect information and assess lots of different candidates. Not surprisingly, critics and supporters of RCV disagree in their evaluations of whether voters find RCV easy to use. Survey research and exit polls have generally found the proportion of voters who deem ranking candidates "simple" or "easy" ranges roughly from

⁵ Data on prevalence of RCV compiled from: https://www.fairvote.org/where_is_ranked_choice_voting_used

⁶ Drutman, Lee. *Breaking the two-party doom loop: The case for multiparty democracy in America*. Oxford University Press, USA, 2020, pp. 182-183.

eighty to ninety percent of respondents. However, older voters are more likely to find this method of voting more challenging.⁷ National surveys generally find support for RCV is high in theory, though most voters would prefer to maintain their status quo election methods when paired head-to-head; voters like the concept of RCV but prefer to stick with what they know.⁸ Political scientists are not certain whether RCV increases voter turnout in municipal elections, though some research shows higher levels of youth turnout.⁹

RCV has potentially important implications for the number of candidates and campaign messaging. Theoretically, RCV could increase the number of candidates by allaying fears of an additional candidate acting as a “spoiler.” A reduced need for “gatekeeping” may open doors for a wider array of candidates, potentially increasing candidate diversity. Additionally, because candidates may strategically want to ally themselves with other favored candidates, RCV is often associated with more positive campaign messaging. This positivity has been cited as a second reason why RCV may attract more women and racially diverse candidates. Researchers have documented this effect as well as an overall increase in the number of candidates.¹⁰

Theoretically, RCV is better suited to satisfy the “majoritarian principle” of elections, that the winner is supported by a majority of its voters. This is particularly true in comparison to elections governed by plurality rule with more than two candidates, as is relatively common in Gresham city council elections. By eliminating candidates with minimal support, and transferring the vote of that candidate to a voter’s second ranked preference, the winner of the election will receive a majority of votes tallied.

Critics of RCV, however, note the distinction between majority support among votes tallied and majority support overall is quite significant. These outcomes can diverge due to “ballot exhaustion”, which occurs when a ballot is cast for ranked preferences eliminated in tallying. High levels of ballot exhaustion have been documented in the 2011 election for the mayor of San Francisco (27%) and the 2021 Democratic primary election for the Mayor of New York (estimated at nearly 15% exhaustion). Critics of RCV warn that ballot exhaustion is problematic both for voter morale and because the elected candidate will not receive majority support from the overall electorate.

Although RCV is theoretically designed to cure problems associated with vote-splitting spoiling outcomes, there will still be cases in which this occurs and is viewed publicly as “unfair.” This occurred, for example, in the 2009 Burlington, Vermont mayoral election, leading

⁷ Coll, Joseph A. "Demographic disparities using ranked-choice voting? Ranking difficulty, under-voting, and the 2020 Democratic primary." *Politics and Governance* 9, no. 2 (2021): 293-305.

⁸ Blais, André, Carolina Plescia, and Semra Sevi. "Choosing to vote as usual." Available at SSRN 3784822 (2021).

⁹ Juelich, Courtney L., and Joseph A. Coll. "Ranked choice voting and youth voter turnout: The roles of campaign civility and candidate contact." *Politics and Governance* 9, no. 2 (2021): 319-331.

¹⁰ Kimball, David C., and Joseph Anthony. "Ranked choice voting: A different way of casting and counting votes." *Changing how America votes* (2018): 100-112.

to significant public backlash and abolition of RCV. It may be that backlashes like this are more likely when expectations have been set that a voting system has been “improved.” Unfortunately, the lack of a perfect voting system means that this expectation can never be truly satisfied in cases.¹¹

B. Multi-member voting

As previously discussed, officials can be elected either at-large or by districts. Within each of these systems, it’s also possible to elect a single member or multiple members in any given contest. Currently, the City of Gresham elects its councilors using a single-member, at-large system, with councilors running for individual seats. In a multi-member framework, the distinction between seats would be discarded and candidates would face off in the same contest but with multiple winners. Let’s use the 2020 Gresham elections as an example. Under the present system, there were three council seats up for election (Seats 1, 3, and 5). Seat One had two candidates, Seat Three had five candidates, and Seat Five had four candidates, for a total of eleven candidates. Under a multi-member approach, “seats” would be abolished, all eleven candidates would run against each other, and three candidates would be selected. Multi-member districts have significant precedent in American politics. In addition to being used in a variety of municipal elections, they are also relatively common for U.S. state legislatures. Currently, ten states elect members in at least one chamber using multi-member districts, accounting for approximately 15% of US state legislatures.¹²

Multi-member elections can occur by allowing voters to cast multiple votes and electing the top vote receivers (as mentioned above, this is the practice in Lake Oswego, and is frequently called a “top-X” system, where X is the number of council members to be elected). In addition to a top-X system, you could use a sequential ranked choice voting method—a system frequently referred to as “proportional ranked choice” or the “Single Transferable Vote.”

Top-X multi-member districts can be significantly affected by the number of candidates running. Consider a top-three election in our fictional city of Laconia, with Party A enjoying about 40% of the popular vote and Party B enjoying about 60% of the popular vote. If there were three candidates for party B and one candidate for Party A, Party B would likely sweep the election. However, if Party B put forward double the number of candidates and Party A did not, this could lead to vote splitting among Party B nominees and result in a successful candidacy from Party A (or even a sweep by Party A if they only fielded 3 candidates and Party B fielded 6). This means that candidates and voters will behave strategically to avoid such spoiler effects, as they do in single-member districts.

¹¹ Besides the “majoritarian principle” there are a variety of other fairness criteria by which political scientists judge electoral systems. For example, one criteria evaluates whether a candidate is preferred head to head against every other candidate but ends up not being the winner of the election. Another criteria evaluates whether candidates with no chance of winning an election can still affect the election outcome. Unfortunately, it is well established that there is no single electoral system that will satisfy all fairness criteria.

¹² https://ballotpedia.org/State_legislative_chambers_that_use_multi-member_districts

Multi-member districts that employ proportional ranked choice tallying methods reduce the need for strategic candidate nominations and voter satisficing. Tallying is conducted in a way that aims to select winners while minimizing “wasted votes.” (This can be a little complicated, so we will describe proportional ranked choice and then provide an example.) Tallying occurs sequentially, either by transferring excess votes of favored candidates to candidates a voter ranks as next favored, or by removing last-place candidates and transferring their votes to next-favored candidates. Votes would be considered to be in excess if they surpass the minimum threshold needed to win an election. For example, in a race electing three councilors with six candidates, any candidate achieving votes above a threshold of 25% would win their election.¹³ Now let’s run an election using proportional ranked choice voting.

Illustration of Proportional Ranked Choice Voting

100 voters electing 3 seats

	Round 1	Round 2	Round 3	Round 4	Round 5	Round 6
Candidate 1 <i>Party A</i>	22	22	22	22	22	40
Candidate 2 <i>Party A</i>	12	12	12	18	18	-
Candidate 3 <i>Party A</i>	6	6	6	-	-	-
Candidate 1 <i>Party B</i>	33	25	25	25	25	25
Candidate 2 <i>Party B</i>	18	26	25	25	25	25
Candidate 3 <i>Party B</i>	9	9	10	10		

In the city of Laconia, let’s assume there are 100 voters; 40% of voters support Party A and 60% of voters support Party B. Within each voting party, 55% of voters have the 1st preference for Candidate 1, 30% of voters have the 1st preference of Candidate 2, and 15% have the 1st preference of Candidate 3. Voters who initially prefer Candidate 3, prefer Candidate 2 over Candidate 1. Voters who initially prefer Candidate 1, prefer Candidate 2 over Candidate 3.

¹³ The three winning candidates would receive just above 25% of the vote each, and the maximal losing candidate would come in shy just below 25%. This is the “threshold of representation” we talk about in footnote 18, as well as the concept of “threshold of exclusion.”

Vote tallying for the election would proceed as following:

Following Round 1, **Candidate 1, Party B is elected**, and their excess votes will be transferred to the next preferred candidates (here, Candidate 2, Party B)

Following Round 2, **Candidate 2, Party B is elected**, and their the excess votes will be transferred to the next preferred candidates (here, Candidate 3, Party B)

Following Round 3, Candidate 3 of Party A is eliminated and their votes are transferred to Party A, Candidate 2.

Following Round 4, Candidate 3 of Party B is eliminated. If this candidate's voters were unwilling to even rank members of the other party, these ballots would be exhausted. Alternatively, votes could be transferred to the most-preferred candidate in Party A. This preference could be pivotal to which member of party A is elected.

Following Round 5, the excess votes of Candidate 2, Party A will be transferred to the next preferred candidates, **Candidate 1, Party A, who is elected**.

So we've demonstrated an election using proportional ranked choice voting. Why might one want to use this system? Supporters of the system note that this method of tallying has been shown to be more likely to result in election outcomes that are proportional to preferences. Put simply, this is a very good system for translating voters' preferences into actual representation. Furthermore, social science evidence demonstrates conclusively that states with multi-member districts have greater female representation than those with single-member districts,¹⁴ while states that move away from multi-member elections see a decrease in female representation.¹⁵

Less clear cut is the evidence on how multi-member districts affect racial representation. Here, we once again return to the importance of context when evaluating any political institution. It is entirely possible that the same political system can have opposite consequences based on the community for which it is employed. Multi-member districts were commonly used in the Jim Crow South, and, not surprisingly, were associated with diminished racial representation in that context. However, recent research on Maryland's state legislature, which has both single-member and multi-member races, suggests that multi-member districts may increase the racial diversity

¹⁴ Matland, Richard E., and Deborah Dwight Brown. "District magnitude's effect on female representation in US state legislatures." *Legislative Studies Quarterly* (1992): 469-492.

¹⁵ King, James D. "Single-member districts and the representation of women in American state legislatures: the effects of electoral system change." *State Politics & Policy Quarterly* 2, no. 2 (2002): 161-175. Why does this occur? Supporters of multi-member districts theorize that a desire for gender diversity becomes more salient when selecting multiple candidates simultaneously, prompting voters to vote for women more often than they would in head-to-head matchups. Anticipating this, women candidates are more likely to run or be nominated.

of the candidate pool but have no effect, either in favor or detrimentally, on the likelihood of voting for racial minorities.¹⁶

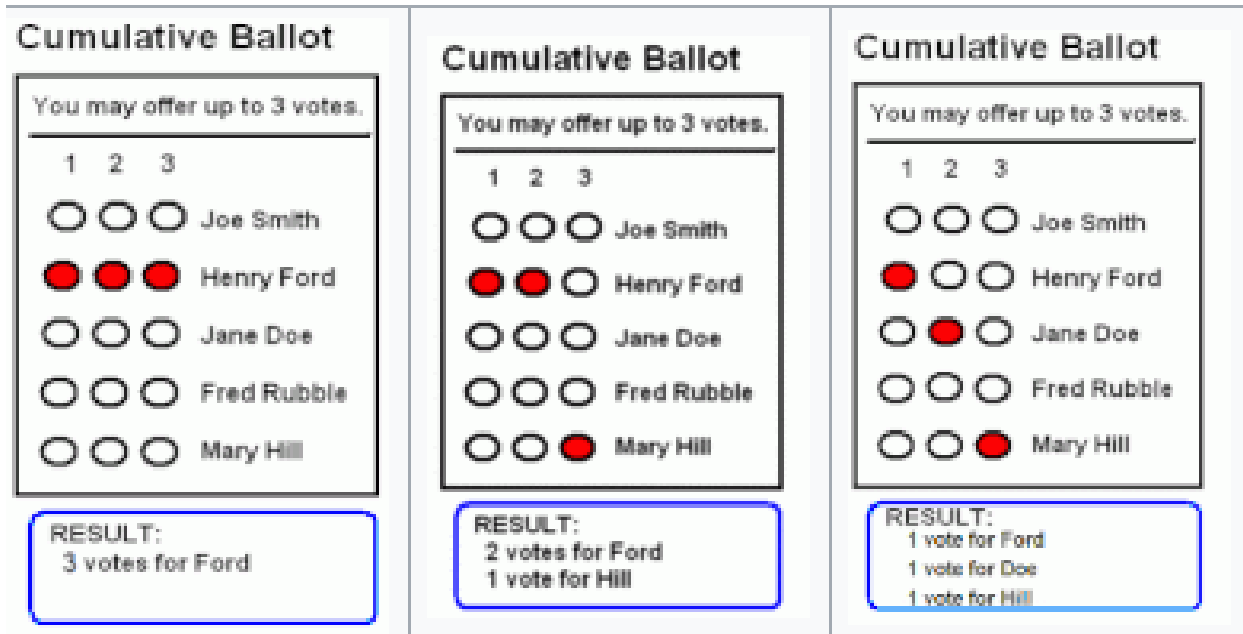
Opponents of proportional ranked choice voting argue that it is a complex system, and some voters may not understand it. Again, maybe voter education could help solve this problem, maybe not. A second objection to this process is that the tallying of votes can take much longer than the typical single-member style election. Maybe election results will be known quickly, but it is also very possible that it could take several days to determine who won.

C. Cumulative voting

A second potential problem of conventional voting relates to intensity of preference. (Note, this intensity of preference problem is more applicable in multi-member election systems like Lake Oswego's.) Imagine that you are in a multi-member Top-X election where ten candidates are running for three seats and you get three votes. You absolutely love Candidate Nine and want more than anything for him to win. You also like Candidates Three and Six, though not nearly as much. Under conventional voting rules you get to cast three votes for three candidates, and vote for Candidates Nine, Three, and Six. But your votes here do not accurately convey your intensity of preference because all three of your choices get exactly the same support of one vote, even though you strongly preferred Candidate Nine. Indeed, it is theoretically possible that your votes for Candidates Three and Six may be the final vote they need to beat Candidate Nine! A system called cumulative voting is designed to allow voters to more accurately reflect their intensity of preference.

Let's stick with Lake Oswego's system where candidates run against each other for three seats, and each voter can cast a single vote for three different candidates. Cumulative voting alters this procedure by giving each voter as many votes as there are seats, and allowing voters to cast all their votes for a single candidate if they wish (this process usually is termed "plumping"). In the hypothetical above, you would be allowed to cast all three of your votes for Candidate Nine, which more accurately conveys your true preferences. There are many different ways to structure a ballot for cumulative voting, but here is one example:

¹⁶ Herrnson, Paul S., Stella M. Rouse, and Jeffrey A. Taylor. "The Impact of Electoral Arrangements on Minority Representation: District Magnitude and the Election of African American State Legislators." *Election Law Journal: Rules, Politics, and Policy* 19, no. 1 (2020): 64-78.



Source: https://en.wikipedia.org/wiki/Cumulative_voting

One need not cast all your votes for the same candidate; you can divide them up however you prefer. Supporters of cumulative voting suggest that this ability to ensure that your vote more closely aligns with your true preferences is one of its greatest assets.

Supporters of cumulative voting also suggest that it can provide better representation of minority political interests.¹⁷ For example, assume that there is a minority political interest that has about 30% support in the community. If those citizens plump all their votes for their preferred candidate, odds are very good that this candidate will win, ensuring some minority representation on the council. That said, there are mathematical limits to this argument. If there are only three seats, and voters only get three votes to apportion as they wish, a political minority with only 10% support probably would not get elected even if those citizens plumped all their votes.¹⁸ Finally, supporters of cumulative voting might note that because this system makes the most sense in multi-candidate contests, one would probably use it only for at-large elections (basically, adopt a system like Lake Oswego’s but add cumulative voting). Thus there is no need to create wards, and no need to district the city.

Opponents of cumulative voting would voice at least three concerns. First, very few American elections have used cumulative voting, so it could be confusing for many voters. There

¹⁷ Guinier, Lani. *Tyranny of the Majority: Fundamental Fairness in Representative Democracy*. Free Press, USA, 1995.

¹⁸ Political scientists have a term “threshold of representation” to refer to the minimum percentage of votes one needs in order to win a given election. This threshold will vary by how many seats are available in the election. The larger the number of seats (and consequently, the number of votes each voter gets), the lower the threshold of representation. For example, under a CV election for a six-seat city council, the threshold of representation is about 15% of voters. See Bowler, S., T. Donovan, and D. Brockington. *Electoral Reform and Minority Representation: Local Experiments with Alternative Elections*. Ohio State University Press, 2003.

could be the risk of spoiled ballots if voters filled out the ballot incorrectly. Perhaps an educational outreach program could mitigate this risk. Second, opponents worry that cumulative voting may balkanize political institutions and lead to more contentious politics.¹⁹ For example, go back to the fictional city of Laconia, and assume that about two-thirds of the voters favor the Green Party and one-third favor the Libertarians. Under an at-large system is it likely that the Greens would control every city council seat. Under a system of cumulative voting, it might turn out that Libertarian candidates have two seats on the city council—but are then routinely outvoted by the four Green Party members. Libertarian voters now have representation (seats on the city council), but they never win on policy outcomes. In reality, of course, things are much more complex than this basic description. Merely creating a system of cumulative voting could work to reorient voters' preferences, creating incentives for the Greens and Libertarians to work more closely. Indeed, social science research confirms that altering an electoral system will alter the behavior of both politicians and their constituents, as discussed above. Third, critics of CV note that it has a higher potential for “wasted votes” than some types of RCV schemes. For example, assume the voter who we described earlier (the one who really wanted Candidate Nine to win) casts all her votes for Candidate Nine but it turns out that Candidate Nine would have won even without those votes. Under the CV system those votes are “wasted” whereas under some types of RCV systems the voter's votes would have gone to another candidate.

Admittedly, we cannot be absolutely certain whether CV always achieves these goals in practice, given that the U.S. does not have a lot of experience with this system of voting in political elections. The Illinois state legislature used cumulative voting throughout much of the 20th century. Some local governments in the U.S. adopted systems of cumulative voting in response to Voting Rights Act litigation, such as Alamogordo, New Mexico and Chilton County, Alabama. Since 1987, at least nineteen localities adopted CV for either city council or school board elections, mostly in Alabama and Texas.²⁰ However, the available evidence does suggest some reason for optimism. Research from 2003 concluded that CV correlates to increased minority electoral success, more competitive elections, and higher voter turnout.²¹ Again, this is not a guarantee that Gresham would see similar results, but rather suggestive evidence of the real-world effects of a cumulative voting system.

¹⁹ Guinier admits this theoretical possibility, but argues that the advantages of cumulative voting outweigh its disadvantages.

²⁰ Bowler, S., T. Donovan, and D. Brockington. *Electoral Reform and Minority Representation: Local Experiments with Alternative Elections*. Ohio State University Press, 2003.

²¹ *Id.*

IV. Legal obligations for districting

Because the CRC is contemplating the possibility of creating a ward system, we turn now to a discussion of the state and federal law relating to the districting process. **We begin with a very important point: As per our written contract with the City of Gresham, neither Professor Lochner nor Professor Seljan offer legal advice. While we provide an academic analysis of case law in this memorandum, legal questions about either federal or state law should be directed to an attorney licensed to practice law in the State of Oregon.**

When dividing a city into districts, one should consider traditional districting principles. These include the “one person, one vote” standard (discussed below), compactness, contiguity, communities of interest (whether some sections of the city have distinct interests from others), and possibly incumbency protection. One cannot form districts based on race unless doing so is necessary to comply with the Voting Rights Act (more on this in a bit).

Federal constitutional and statutory law place three main requirements on districting: compliance with the “one person, one vote” principle, compliance with the Voting Rights Act, and a prohibition on racial gerrymandering. The Supreme Court recently held that the federal constitution does not prohibit partisan gerrymanders (where district lines are drawn with the purpose of advantaging a particular party),²² and its decision in *Shelby County v. Holder* had the practical effect of nullifying Section Five preclearance requirements of the Voting Rights Act.²³

As to the first requirement, the federal constitution requires that almost all political subdivisions adhere to the “one person, one vote” principle. That is, districts should have substantially equal populations.²⁴ Unlike districts for federal elections (which require almost perfect mathematical equality), state and municipal districts can have some small degree of population variation. Some cases suggest that population deviations up to 10% between districts are permissible, though the Supreme Court has found smaller deviations to violate the Equal Protection Clause if the reasons for such deviation are “illegitimate.”²⁵ When defining “population” for the purposes of districting, almost every political entity takes the term to mean “people” rather than “voters.” The Supreme Court in *Evenwel v. Abbott* affirmed this view, holding that districting based on census population, rather than citizens of voting age (also known as “citizen voting age population” or “CVAP”) is permissible.²⁶ It is precisely because of

²² *Rucho v. Common Cause*, 588 U.S. ____ (2019) specifically held that partisan gerrymander claims are nonjusticiable political questions.

²³ 570 U.S. 529 (2013). We have no reason to believe that Section Five preclearance requirements would have applied to the City of Gresham in any event, so this point is moot.

²⁴ *Reynolds v. Sims*, 377 U.S. 533 (1964).

²⁵ See *Gaffney v. Cummings*, 412 U.S. 735 (1973), but see *Harris v. Arizona Independent Redistricting Commission*, 136 S.Ct. 1301 (2016).

²⁶ 136 S.Ct. 1120 (2016). The Court declined to answer the question whether it would be permissible for districts to be drawn based on CVAP.

this constitutional requirement that political districts usually are redrawn following the decennial federal census. Particularly for fast-growing cities, population changes over a decade may have put the prior district lines out of compliance with the legal rule.

The second requirement is that districts must comply with the Voting Rights Act. Because Section Five of the Voting Rights Act is irrelevant to the City of Gresham, the main concern would be that districts comply with Section Two. Section Two provides that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.”²⁷ If a class of voters, based on race, is given “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”²⁸ Section Two is violated. Lawyers and judges simplify this language by saying that Section Two prohibits *racial vote dilution*. Vote dilution can happen in different ways. For example, it can occur if a city tries to place all of its racial minority voters into one district. This is called “packing.” To use the example of our fictional city of Laconia, assume that African-Americans make up about 30% of the city with an eight-member city council. If Laconia creates a district that is 99% African American voters, leaving the other seven districts majority White, that may very well be seen as a packing form of vote dilution. But vote dilution can also occur by “cracking.” This would happen if Laconia created eight districts in which Black voters were only 30% of the population. If Black voters failed to elect their preferred candidates in all eight districts, it might well be seen as a cracking form of vote dilution.

OK, so we know Section Two prohibits vote dilution. How do we know if we are complying with the Voting Rights Act? The answer is complicated, but the basic rule comes from a case called *Thornburg v. Gingles*.²⁹ *Gingles* creates a three-part test to determine if one is *required* to create a “majority-minority district” (i.e., a district in which a majority of the voters are racial minorities). First, it must be shown that a racial minority is *sufficiently large and geographically compact* to constitute a numerical voting majority of a district. Second, it must be shown that minority voters are *politically cohesive*—that is, they consistently vote for the same candidates. Third, it must be shown that *White voters consistently vote as a block* to defeat the candidate preferred by minority voters. There are many nuances that we would be happy to elaborate upon in a different memo if you wish: for example, How cohesive must minority voters be? How consistent must White voters be to constitute “block voting?” What happens if partisan affiliations overlap with race? For right now, we think it makes most sense to focus on the first prong in the *Gingles* test—could Gresham draw a geographically compact majority-minority district? Below are demographic data for Gresham for 2019 broken down by race.

²⁷ 52 U.S.C. Sec. 10301.

²⁸ *Id.*

²⁹ 478 U.S. 30 (1986).

Gresham Census Data, 2019

White:	64%
Hispanic:	21%
Asian:	5%
Black:	5%
Multiracial:	5%
Islander:	1%
Native:	1%

Note: Numbers do not sum to 100% due to rounding.

<https://censusreporter.org/profiles/16000US4131250-gresham-or/>

The important question, if one wanted to create districts, is whether non-White citizens are geographically concentrated or dispersed throughout the City of Gresham. If non-White citizens are geographically concentrated—stated differently, if Gresham is highly racially segregated—a refusal to create a majority-minority district might very well create Section Two problems, assuming the second and third prong of *Gingles* are satisfied. But if Gresham is largely racially integrated, it would be impossible to create a geographically compact majority-minority district. Therefore, the first requirement of *Gingles* is not satisfied, and Section Two compliance is unlikely to be an issue.

Recognizing that *Gingles* determines when majority-minority districts *must* be drawn, what if we simply want to create a majority-minority district even though Section Two doesn't require us to do so? This leads to the third federal requirement for districting: a prohibition on racial gerrymandering. Put simply, if race is the *predominant factor* in how district lines are drawn, it is a racial gerrymander.³⁰ If it is a racial gerrymander, the state must show a compelling state interest that the plan is narrowly tailored to meet, and compliance with Section Two is about the only compelling state interest the Supreme Court now accepts. *Therefore, a city cannot purposely draw district lines based predominantly on race unless they are required to do so to avoid a Section Two violation. Whether this would be true for Gresham depends on the geographic concentration of its racial minority voters.*

Having discussed federal requirements for districting, we turn to a discussion of Oregon State requirements. The Oregon Secretary of State, who oversees state election laws, has created a directive at <https://sos.oregon.gov/elections/Documents/Directive-Redistricting-2021.pdf>. It has some similarities with federal law, but also imposes additional requirements. To quote directly, “Each district or precinct, as nearly as practicable, shall: be contiguous; utilize existing geographic or political boundaries; not divide communities of common interest; and be

³⁰ *Miller v. Johnson*, 515 U.S. 900 (1995). “The plaintiff’s burden is to show, either through the circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.” *Id.* at 916.

connected by transportation links. For districts, be of equal population.” Additionally, “no district shall be drawn for the purpose of diluting the voting strength of any language or ethnic minority group.” (Note that this language focuses on the intent of people creating the districts, not simply the effects of the districts themselves.) Unlike federal law, Oregon’s Secretary of State has held that it is impermissible for districts to be drawn in order to favor a political party or incumbent politicians. Finally, the directive states that

“Each county clerk and any local government, as defined in ORS 174.116, or special government body, as defined in ORS 174.117, that fixes or modifies electoral district boundaries based on population shall, to the greatest extent practicable, consider newly drawn legislative and congressional district boundaries as well as the boundaries of neighboring jurisdictions when drawing districts. When drawing new district boundaries, the Secretary of State recommends close consultation with relevant county clerks for advice on meeting the election administration goals of this directive.”³¹

Conclusion

We hope this memorandum has been helpful in clarifying possible options so that you can narrow the focus of future discussions. Please let us know if we can provide a more detailed analysis of anything we’ve discussed herein. Also, we would be happy to gather data if it would inform your decision; for example, we could survey city councilors in Oregon or elsewhere about their experiences with their respective electoral systems.

³¹ *Id.*