Town of Arlington
Legal Department

Douglas W. Heim
Town Counsel

50 Pleasant Street
Arlington, MA 02476
Phone: 781.316.3150
Fax: 781.316.3159
E-mail: dheim@town.arlington.ma.us
Website: www.arlingtonma.gov

To: Select Board, Town Clerk, Town Manager

From: Douglas W. Heim, Town Counsel

Date: November 21, 2021

Re: Criteria for Reprecincting, Local Election Review District Commission, and Voting Rights

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Members of the Board, I write at the request of members to highlight and re-iterate criteria for reprecincting pursuant to G.L. c. 54 sec. 6, following the receipt of the decennial U.S. Census data. In summary, it is the perspective of this Office that the Select Board may weigh the options before it with an eye towards its policy preferences and without anxiety over reversal by the Local Election District Review Commission or other liability.

General Criteria

As the Board will recall, the Select Board is charged with evaluating U.S. Census data and voting upon updates and changes to the Town's voting precincts. As a reminder, the Board votes upon three (3) specific elements within the reprecincting process, each of which are submitted to the Commonwealth's Secretary of State:

1. An official description of the new precincts;
2. An estimate of the number of inhabitants in each precinct; and
3. A map showing the new precincts.

For the purposes of each, c. 54 sec. 6 sets forth straightforward criteria. Precincts must:

- ☐ be "convenient;"
- ☐ consist of compact and contiguous territory;
- ☐ contain no more than 4,000 inhabitants each;
- ☐ contain roughly equal numbers of inhabitants;
- ☐ be bounded by center lines of roads or ways or other clear boundaries to the extent possible; and
- ☐ be designated by numbers or letters.

G.L. c. 54 sec. 6. The requirement for roughly equal numbers of inhabitants in precincts is furthered by federal and state "equal population" requirements derived from the 14th Amendment and Amendment Art. CI to the Massachusetts Constitution – detailing that each precinct's population must be within 5 percent of the average. *See e.g., McClure v. Sec'y of the Commonwealth,* 436 Mass. 614, 617-18 (2002).

Finally, according to the Secretary of State's Office, additional local factors, including existing polling locations, new polling locations, new development, and "communities of interest" may also be considered in compliance with these criteria so long as they are also consistent with federal and state law described in further detail below.

Voting Rights Considerations

In short, redrawn precincts may not "dilute" a specifically defined set of minority groups' votes. However, for reasons further detailed herein, dilution is highly unlikely under the proposals before you. The primary law governing dilution concerns is Section 2 of the Voting Rights Act of 1965, which prohibits any voting practice which "results in a denial or abridgement of the right... to vote on account of race or color" or membership in a language minority group (persons "who are 'American Indian, Asian American, Alaskan Natives or of Spanish heritage.'"). Jurisprudence in Section 2 matters is primarily bifurcated into "intentional" and "unintentional" dilution by either concentrating minority voters into a single or several precincts, wards, or districts (packing) or spreading out minority voters over many districts

(fragmenting). Strong evidence of either could result in rejection of a precinct map by the Local Election District Review Commission, or suit by the Department of Justice.

As noted above, "packing" signifies concentrating high proportional numbers of minority group persons into one or a few precincts, such that their votes cannot elect as many minority group representatives as different precinct maps would allow; while fragmenting spreads minority voters out among many districts. A case for fragmenting or packing can be further evidenced by a showing of discriminatory intent against minority groups as defined by the statute through statements of local officials, but intent is not required for either. The Supreme Court established a baseline, or threshold test for examining dilution cases, inquiring:

1. Whether a minority group is sufficiently large and geographically compact to constitute the majority of voters in a district;
2. Whether the minority group at issue is "politically cohesive;" and
3. Whether or not a majority group votes in a bloc, so as to represent a clear advantage over a minority voting group.

Brnovich v. Democratic National Committee, 141 S. Ct. 2321, 2337 (2021); citing *Thornburg v. Gingles*, 478 U.S. 30 (1986). Only where all three preconditions are present, do dilution cases proceed to further "totality of the circumstances" analysis which provides for further, highly fact-specific inquiries into local voting history and other matters.

Additionally, the Fourteenth Amendment both prohibits malapportionment in total population between "electoral districts" based upon membership in a protected class (*Baker v. Carr*, 369 U.S. 186 (1962) and certain forms of racial gerrymandering in drawing electoral districts. *See e.g., Shaw v. Reno*, 509 U.S. 630 (1993)(re-districting should be race conscious, but "race based" highly irregular boundaries are subject to strict scrutiny).

Here, the compositional demographics of Arlington present a lower risk of meeting the *Gingles* preconditions for dilution from the start. Moreover, neither of the maps presented, especially given the number of precincts relative to population, are likely to significantly alter voting blocs based on membership in a minority group as defined by the Voting Rights Act, or a protected class. If the proposed maps presented more atypical boundaries (which would also run afoul of c. 54 sec. 6), accounted for political party, manifested an obvious attempt limit voting power of a minority group, or there was direct evidence of intentional discrimination against a minority group, additional scrutiny could be afforded by the Local Election District Review

Commission ("LEDRC"). However, there is little evidence that either the modest revisions or more robust revisions would constitute either dilution or create sufficiently irrationally drawn districts to trigger broader equal protection concerns.

Conclusion

Without diminishing the weight of the options which are before you or the substantive arguments in favor of one or the other, the Board is well positioned to make policy choices on local issues without anxiety that it faces liability or a significant likelihood of rejection by the LEDRC.