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Thaddeus Hackworth
General Counsel
New York City Districting Commission
253 Broadway, 7th Floor
New York, NY 10007

Dear Mr. Hackworth:

You have asked for our advice on whether the New York City Districting Commission ("Commission") may, consistent with its authority under the City Charter ("Charter"), withdraw a districting plan submitted to the New York City Council ("Council"), if the Council has not accepted or rejected the plan and the three-week period for the Council's consideration of the plan has not expired. For the reasons set forth below, it is our view that the Charter does not bar the Commission from withdrawing the plan in this case.

Section 51 of the City Charter

Chapter 2-A of the Charter sets forth the timetable and procedures with respect to the appointment and operation of the Commission. Subdivisions b and c of §51 set forth the initial procedures relating to the Commission's development and submission of a districting plan to the Council.

The Council has three weeks from the date of submission to review the submitted plan. §51(d). The Council may formally object by adopting a resolution and then returning the plan to the Commission, along with the resolution, a statement of its objections, and copies of any written objections by individual members. §51(c). Subdivisions e and f set forth further procedures applicable in case of formal objection, culminating in submission and effectuation of a final redistricting plan. §51(e), (f), (g), (h). If, following the submission of the plan by the Commission, the Council does not object and the three weeks lapse, the plan is deemed adopted, provided that the Commission files with the City Clerk a copy of the plan accompanied by a

certification signed by at least nine members in relation to compliance with the Charter's criteria for the drawing of districts set forth in §52. §51(d), (g).

Commission and Council Concerns For Additional Public Input

On November 19, 2012, the Commission submitted a districting plan to the Council. In its accompanying cover letter, the Commission noted the desire expressed by members of the public for "additional opportunities for public comment." Letter from NYC Districting Commission Chair Benito Romano to NYC Council Speaker Christine C. Quinn, November 16, 2012. The Commission stated that it had offered a number of opportunities for public comment, including the opportunities to attend and testify at public hearings held between August and October throughout the five boroughs, submit either electronic or hard copies of written testimony or comment, and create and submit alternative plans. The Commission further stated that it had incorporated public comments in the submitted plan "to the extent practicable." However, the Commission noted that "the plan submitted herewith in its current form has not been circulated for public comment," and that it would "welcome such additional public input" and "gladly undertake to solicit public input" in order to "further ensure that the districting plan fairly represents the voters of this diverse and vibrant City."

On November 29, 2012, Speaker Quinn acknowledged receipt of the Commission's submitted plan, and noted the Commission's inability to "maximize public participation through an additional round of hearings due to challenges caused both by the short deadlines set forth in the Charter and by the significant disruption caused by Hurricane Sandy." Letter from NYC Council Speaker Christine C. Quinn to NYC Districting Commission Chair Benito Romano, November 29, 2012. Finding the need for more public participation, Speaker Quinn requested that the Commission withdraw its previously submitted plan in order "to receive additional input from the public," and resubmit a new plan.

On November 30, 2012, Commission Chair Romano responded, reiterating the Commission's – and the public's – "strong preference for additional public input in the development of the districting plan." Letter from NYC Districting Commission Chair Benito Romano to NYC Council Speaker Christine C. Quinn, November 30, 2012. In light of the consensus for more public input, the Chair indicated that if he receives "final confirmation from the Law Department that the Commission may properly proceed in this matter," he would convene the Commission "for the purpose of voting on a resolution to withdraw the plan from the Council's consideration." It should be noted that the three-week Council review period pursuant to Charter §51(d) will not expire until December 10, 2012, and the Chair would withdraw the submission and convene the Commission before that date.

Commission's Authority to Withdraw in View of the Charter and Applicable Case Law

The Charter is silent on the question of whether, once the Commission has submitted a districting plan, it may withdraw that plan from further consideration before the Council has formally objected or the three-week Council review period has lapsed. However, this does not mean that withdrawal is prohibited, particularly if it would further the purposes of the legislative scheme for redistricting.

Council of the City of New York v. Giuliani, 163 Misc. 2d 681 (Sup. Ct., N.Y. Co. 1994), is instructive on the question. In that case, the court determined that a city official granted the power to initiate a proposal under the Charter also has the power to withdraw the proposal – even if the Charter is silent on the matter – after the proposal is submitted to the Council and before the Council acts. The Mayor had submitted to the Council a proposal to modify the budget for Fiscal Year 1995, citing the budget modification procedure of Charter §107(e). On the same day as, but before, the Council’s scheduled vote on the budget modification proposal, the Mayor, acting through the Director of the Office of Management and Budget, sent a letter to the Council withdrawing the proposal. Id. at 684. The Council rejected the withdrawal letter, and then proceeded to amend and adopt the proposal. Id. In the litigation that followed, the Council argued that the Charter did not provide for the withdrawal of a previously submitted budget modification. Id. at 687. The New York Supreme Court dismissed this argument, stating:

Under the New York City Charter it is the Mayor’s power to initiate a budget modification proposal. It follows naturally that it is within the Mayor’s providence to withdraw a budget modification proposal before it is acted upon... Although the City Council argues that the New York City Charter does not provide for the withdrawal of a previously submitted budget modification proposal, there is nothing in the New York City Charter that prohibits its withdrawal... Neither logic nor sound public policy would compel the Legislature to consider a budget modification which has been withdrawn by the Mayor.

Id. at 691. The court also dismissed the Council’s argument that the equitable doctrines of estoppel and laches barred the Mayor’s withdrawal of the budget modification proposal, since the Council had not shown “how it justifiably relied to its detriment upon the Mayor’s proposal or how it was adversely affected by the Mayor’s delay in withdrawing...” Id.

More generally, the deliberative public process, culminating in a well-considered districting plan, would not be impeded by a withdrawal of the plan, if such withdrawal were followed by public review procedures that would ensure resubmission of a plan to the Council for its review within a reasonable timeframe.¹ Indeed, it may be argued that the process

¹ Although withdrawal and resubmission of the districting plan may further lengthen the overall process beyond the time frames set forth in §51 of the Charter, the reasonable extension of these timeframes in furtherance of the broader purpose of Article 2-A does not call into question the legality of the plan, so long as the extended timeframe does not unduly imperil the ability to utilize the new lines in the 2013 election. In this context, the timeframes should be viewed as directory rather than mandatory. See e.g., Matter of Dickinson v. Daines, 15 N.Y.3d 571, 574-575 (2010) (discussing the directory nature of specified timeframes in the context of affirming the validity of the decision by the Department of Health to deny petitioner eligibility for Medicaid benefits, despite decision being issued long after the lapse of the 90-day deadline in DOH regulations); Matter of Grossman v. Rankin, 43 N.Y.2d 493, 501 (1977) (holding as “merely directory” a time limit requiring the State Civil Service Commission to decide within

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contemplated by the drafters of Chapter 2-A of the Charter would be better fulfilled by additional review. The Court of Appeals has recognized that the “tentative nature” of an “administrative determination” – and the submitted plan in this case is necessarily tentative by virtue of the procedures that could follow its submission – renders it “subject to reconsideration by the agency.” Hamptons Hospital & Medical Center, Inc. v. Moore, 52 N.Y.2d 88, 93 (1981) (permitting the Public Health Council to reconsider its determination of public need for a hospital). If the Commission, which is primarily charged with the responsibility critical to local democracy of drawing appropriate district lines, determines that additional public input is necessary for its plan, then it should not “be estopped from discharging the responsibility vested in it by legislative enactment.” Id. at 94.

In light of these considerations, it is our view that the Charter does not bar the Commission from withdrawing the submitted plan in order to afford the public a greater opportunity to comment, where the Council has not acted on the matter and the three-week Council review period has not lapsed. Following the Commission’s resubmission of the plan to the Council, the Council would have a three-week period to review the plan as provided in §51.

Please do not hesitate to contact me with further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen Louis", written over a horizontal line.

Stephen Louis
Chief, Legal Counsel Division

four months of the occurrence of a vacancy whether the position had been properly classified as exempt, because “while the commission should seek to comply in a timely fashion with the guidelines of the statute, it is recognized that delays may occur”).