Bickerstaff
Heath Delgado Acosta LLP

October 5, 2021

Mayor Don Warren and City Council Members
City Hall
212 N Bonner Ave,
Tyler, TX 75702

Re: *Initial Assessment considering 2020 Census data*

Dear Mayor Warren and City Council Members:

This is the Initial Assessment letter for the City of Tyler. Our review of the recently released 2020 Census population and demographic data for the City shows that the City's councilmember districts are sufficiently out of population balance that you should redistrict. We are prepared to meet with the City Council on October 13, 2021 to review the Initial Assessment and to advise the City Council on how to proceed to redistrict the City councilmember districts to bring them into population balance for use in the 2022 election cycle.

This letter presents a brief overview of basic redistricting principles to assist you in preparing for our presentation on the Initial Assessment. We also set out in the attachments (Attachment H) suggested posting language for the meeting at which the Initial Assessment will be presented. Note that this posting language includes agenda items for the adoption of redistricting criteria and guidelines. These are matters that should be addressed early in the redistricting process to enable us to proceed efficiently. We will be working with you to develop the appropriate language for your adoption of redistricting criteria and guidelines.

In redistricting the councilmember districts, the City will need to be aware of the legal standards that apply. We will review these principles in detail with the City Council at the presentation on the Initial Assessment. There are three basic legal principles that govern the redistricting process: (i) the "one person-one vote" (equal population) principle; (ii) the non-discrimination standard of Section 2 of the Voting Rights Act; and (iii) the *Shaw v. Reno* limitations on the use of race as a factor in redistricting. These principles are discussed in detail in the attachments to this letter, which we urge you to read and review carefully.

The process we have outlined for the redistricting process and the policies and procedures that we are recommending the Council adopt will ensure that the City adheres to these important legal principles and that the rights of protected minority voters in the political subdivision are accorded due weight and consideration.

The "One Person – One Vote" Requirement: Why You Should Redistrict

The "one person-one vote" requirement of the United States Constitution requires that members of an elected body be chosen from districts of substantially equal population and applies to

city councils. Exact equality of population is not required, but a "total maximum deviation" of no more than ten percent in total population between the most populated and the least populated city councilmember districts based on the most recent census should be achieved. This maximum deviation of ten percent constitutes a rebuttable presumption of compliance with the one person-one vote requirement. If a city's councilmember districts do not fall within the ten percent maximum deviation, the city is at substantial risk of being sued for violation of one person-one vote standards.

The population and demographics of all the current City councilmember districts are presented in here and in Attachment A.

The tables in Attachment A show that the total population of the City on April 1, 2020, was 105,917 persons. This represents an increase in population from 96,900 persons on April 1, 2010, or approximately 9.30 percent. The ideal City councilmember district should now contain 17,653 persons (total population / 6 single-member districts).

Councilmember district 5 has the largest population, which is approximately 9.01 percent above the size of the ideal district (or 1,590 people). District 3 has the smallest population, which is approximately 8.10 percent below the size of the ideal district (or 1,430 people). The total maximum deviation between the six existing councilmember districts for the City, therefore, is 17 percent. This total maximum deviation exceeds the standard of ten percent that generally has been recognized by the courts as the maximum permissible deviation. Accordingly, the City should redistrict to bring its City councilmember districts within the ten percent range permitted by law.

Section 2 of the Voting Rights Act: Avoiding discrimination claims

Section 2 of the federal Voting Rights Act prohibits any voting standard, practice, or procedure – including new redistricting plans – that have the effect of discriminating against a protected minority group. The principles of Section 2's nondiscrimination mandate are discussed in Attachment C.

The data in the Population Tables in Attachment A as well as the data in the maps in Attachment B, which show the geographic distribution of the primary minority groups in the City, will also be important in assessing the potential for Voting Rights Act Section 2 liability. (See Attachment C for a discussion of Section 2.)

Shaw v Reno: Additional equal protection considerations

As noted above, in order to comply with Section 2, the City must consider race when drawing districts. The 1993 Supreme Court case *Shaw v. Reno*, however, limits how and when race can be a factor in the districting decisions. Thus, local governments must walk a legal tightrope, where the competing legal standards must all be met. The *Shaw v. Reno* standard requires that there be a showing that (1) the race-based factors were used in furtherance of a "compelling state interest" and (2) their application be "narrowly tailored," that is, they must be used only to the minimum

extent necessary to accomplish the compelling state interest. (*Shaw v. Reno* is discussed in Attachment C.) We will guide the City through proper application of this principle.

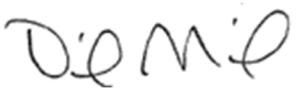
Adoption of redistricting criteria and public participation guidelines

At the presentation of the Initial Assessment we will recommend certain "traditional" redistricting criteria that the City may require all redistricting plans to follow. These criteria generally track the legal principles that the courts and the Department of Justice have found to be appropriate elements in sound redistricting plans. We will also recommend certain public participation guidelines that the City may wish to adopt to ensure fair and adequate public participation in the redistricting process, and that any comments or proposed plans submitted by members of the public are written, clear, and complete, and the submitter provides contact information.

Once redistricting guidelines and criteria are adopted and the City Council gives instructions about how it would like plans to be developed considering this Initial Assessment and the applicable legal standards, we can begin to assist the City in the development of plans for consideration.

We hope this Initial Assessment discussion is helpful to you and that it will guide the City Council as it executes the redistricting process. We look forward to meeting with the Council to review this Initial Assessment and to answer any questions you may have concerning any aspect of that process. Please feel free to call me in the interim as we prepare for the presentation and let me know if there is any additional information you may require.

Sincerely,



David Méndez

Encl.

ATTACHMENT A

INITIAL ASSESSMENT POPULATION TABLES

Plan Name: City of Tyler Council Districts - 2021 Initial Assessment

Bickerstaff Heath Delgado Acosta LLP

Demographics Report - Summary 2020 Census Total Population

Plan Last Edited on: 9/24/2021 10:21:31 AM

District	Persons	Ideal Size	Deviation	Hispanic % of Total Population	Non-Hispanic White % of Total Population	Non-Hispanic Black % of Total Population	Non-Hispanic Asian % of Total Population	Non-Hispanic Other % of Total Population
1	17,955	17,653	1.71%	9.85%	70.77%	11.02%	4.20%	4.16%
2	17,228	17,653	-2.41%	32.01%	26.71%	37.27%	1.65%	2.37%
3	16,223	17,653	-8.10%	41.75%	8.31%	47.01%	0.35%	2.54%
4	16,954	17,653	-3.96%	33.77%	44.34%	16.55%	1.46%	3.88%
5	19,243	17,653	9.01%	13.05%	58.67%	18.58%	4.70%	4.99%
6	18,314	17,653	3.75%	9.43%	72.43%	9.27%	4.03%	4.84%

Ideal Size: 17,653

Total Population: 105,917

Overall Deviation: 17%

Some percentages may be subject to rounding errors.

Plan Name: City of Tyler Council Districts - 2021 Initial Assessment

Bickerstaff Heath Delgado Acosta LLP

Demographics Report - Summary 2020 Census Voting Age Population

Plan Last Edited on: 9/24/2021 10:21:31 AM

District	Total VAP*		Hispanic % of Total VAP	Non-Hispanic Anglo % of Total VAP	Non-Hispanic Black % of Total VAP	Non-Hispanic Asian % of Total VAP	Non-Hispanic Other % of Total VAP
1	14,640		8.70%	73.47%	10.40%	3.89%	3.55%
2	13,177		27.18%	31.22%	37.69%	1.65%	2.25%
3	11,424		36.62%	10.22%	50.17%	0.44%	2.57%
4	13,318		29.36%	49.40%	16.05%	1.55%	3.67%
5	15,303		11.55%	62.16%	17.61%	4.52%	4.15%
6	14,415		8.26%	75.48%	8.49%	3.82%	3.96%

* VAP - Voting Age Population

Some percentages may be subject to rounding errors.

Plan Name: City of Tyler Council Districts - 2021 Initial Assessment

Bickerstaff Heath Delgado Acosta LLP

Demographics Report - Detailed 2020 Census Total Population

Plan Last Edited on: 9/24/2021 10:21:31 AM

District	Persons	Ideal Size	Deviation	Hispanic	Hispanic % of Total Population	ANGLO	Non-Hispanic Anglo % of Total Population	Black	Black % of Total Population	Asian	Asian % of Total Population	AM Indian Native	IND / NAT % TOT Pop.	Haw Pac. Isl.	HAW/ PAC % of Total Pop.	Other	Other % of Total Pop.	Two or More Races	Two or More Races % Tot Pop
1	17,955	17,653	1.71%	1,768	9.85%	12,707	70.77%	1,979	11.02%	754	4.20%	50	0.28%	15	0.08%	48	0.27%	634	3.53%
2	17,228	17,653	-2.41%	5,515	32.01%	4,602	26.71%	6,421	37.27%	284	1.65%	45	0.26%	0	0.00%	40	0.23%	323	1.87%
3	16,223	17,653	-8.10%	6,773	41.75%	1,348	8.31%	7,627	47.01%	56	0.35%	23	0.14%	1	0.01%	50	0.31%	338	2.08%
4	16,954	17,653	-3.96%	5,726	33.77%	7,518	44.34%	2,806	16.55%	247	1.46%	27	0.16%	6	0.04%	62	0.37%	563	3.32%
5	19,243	17,653	9.01%	2,511	13.05%	11,290	58.67%	3,576	18.58%	905	4.70%	56	0.29%	5	0.03%	73	0.38%	827	4.30%
6	18,314	17,653	3.75%	1,727	9.43%	13,265	72.43%	1,698	9.27%	738	4.03%	53	0.29%	12	0.07%	79	0.43%	742	4.05%

Ideal Size: 17,653

Total Population: 105,917

Overall Deviation: 17%

Some percentages may be subject to rounding errors.

Plan Name: City of Tyler Council Districts - 2021 Initial Assessment

Bickerstaff Heath Delgado Acosta LLP

Demographics Report - Detailed 2020 Census Voting Age Population

Plan Last Edited on: 9/24/2021 10:21:31 AM

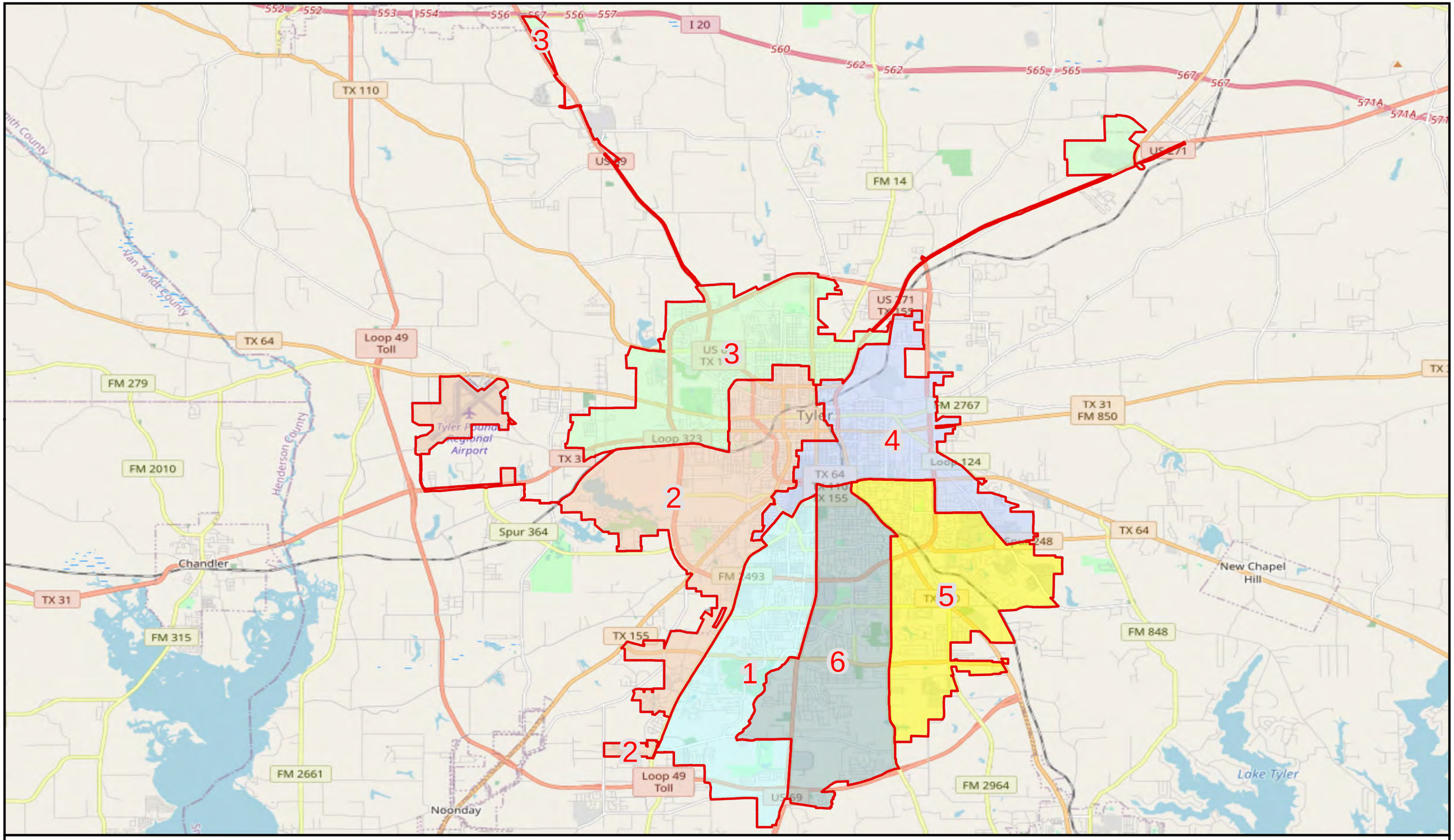
District	Total VAP	Hispanic VAP	% Hispanic VAP	Anglo VAP	% Anglo VAP	Black VAP	% Black VAP	Asian VAP	% Asian VAP	AM IND NATIVE VAP	% AM IND NATIVE VAP	HAW/PAC VAP	% HAW/PAC VAP	Other VAP	% Other VAP	Two or More Races VAP	% Two or more VAP
1	14,640	1,274	8.70%	10,756	73.47%	1,523	10.40%	570	3.89%	41	0.28%	14	0.10%	33	0.23%	431	2.94%
2	13,177	3,582	27.18%	4,114	31.22%	4,967	37.69%	218	1.65%	39	0.30%	0	0.00%	29	0.22%	229	1.74%
3	11,424	4,184	36.62%	1,167	10.22%	5,731	50.17%	50	0.44%	23	0.20%	1	0.01%	33	0.29%	237	2.07%
4	13,318	3,910	29.36%	6,579	49.40%	2,137	16.05%	206	1.55%	23	0.17%	5	0.04%	43	0.32%	418	3.14%
5	15,303	1,768	11.55%	9,513	62.16%	2,695	17.61%	692	4.52%	43	0.28%	1	0.01%	43	0.28%	548	3.58%
6	14,415	1,190	8.26%	10,880	75.48%	1,224	8.49%	550	3.82%	34	0.24%	6	0.04%	64	0.44%	467	3.24%

* VAP - Voting Age Population

Some percentages may be subject to rounding errors.

ATTACHMENT B

MAPS



Legend

Council Districts - Benchmark

City of Tyler Council Districts

1 2 3 4 5 6

0 1 2 4 Miles

City of Tyler Council Districts
2021 Initial Assessment

Data Source: Roads, Water and other features obtained from the 2020 Tiger/line files, U.S. Census Bureau
Created: 9/24/2021

City of Tyler Council District 1
2021 Initial Assessment

Legend

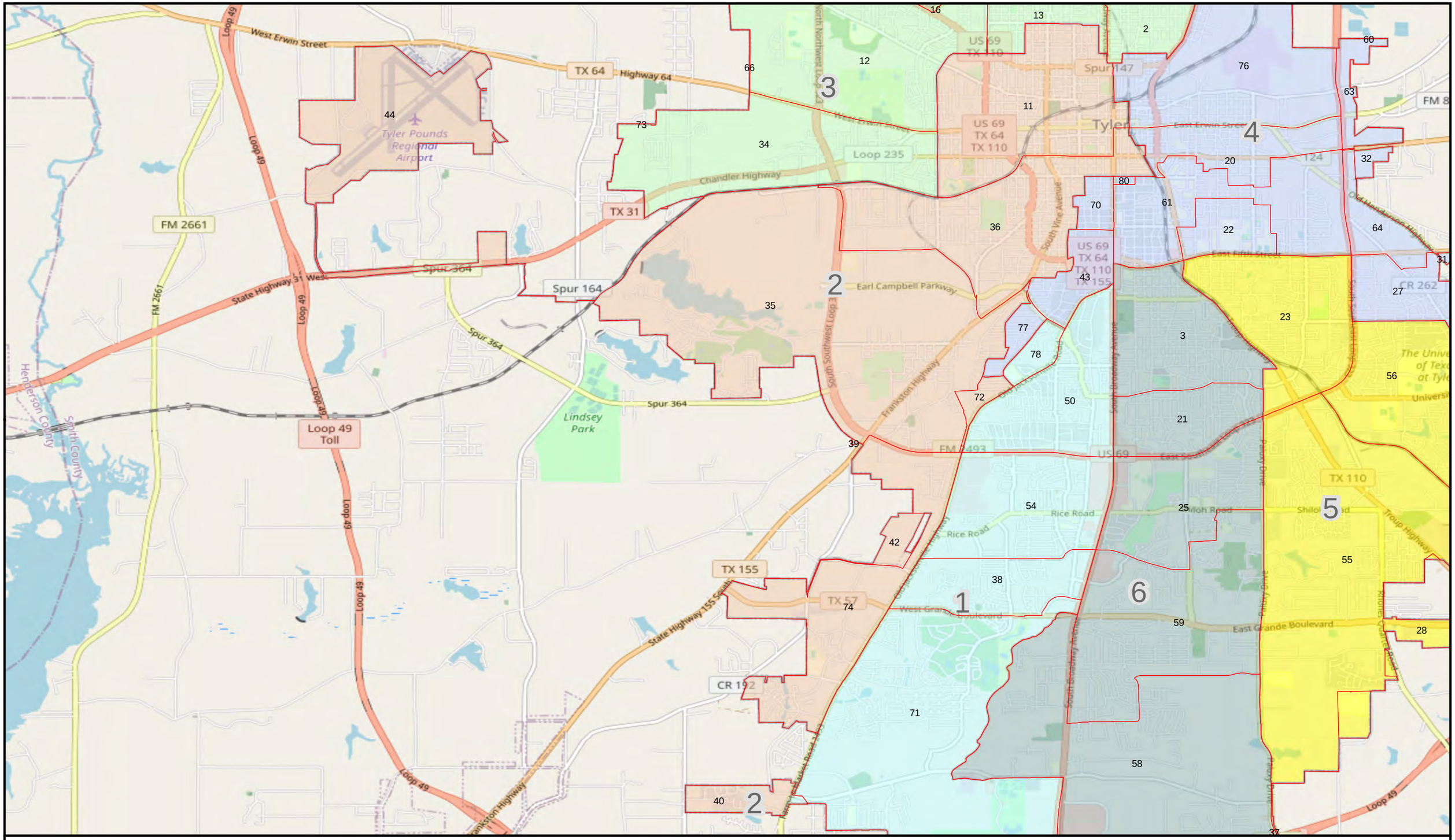
2020_VTDs

City of Tyler Council Districts

1 2 3 4 5 6

0 0.5 1 2 Miles

Data Source: Roads, Water and other features obtained from the 2020 Tiger/line files, U.S. Census Bureau
Created: 9/24/2021



Legend

2020_VTDs

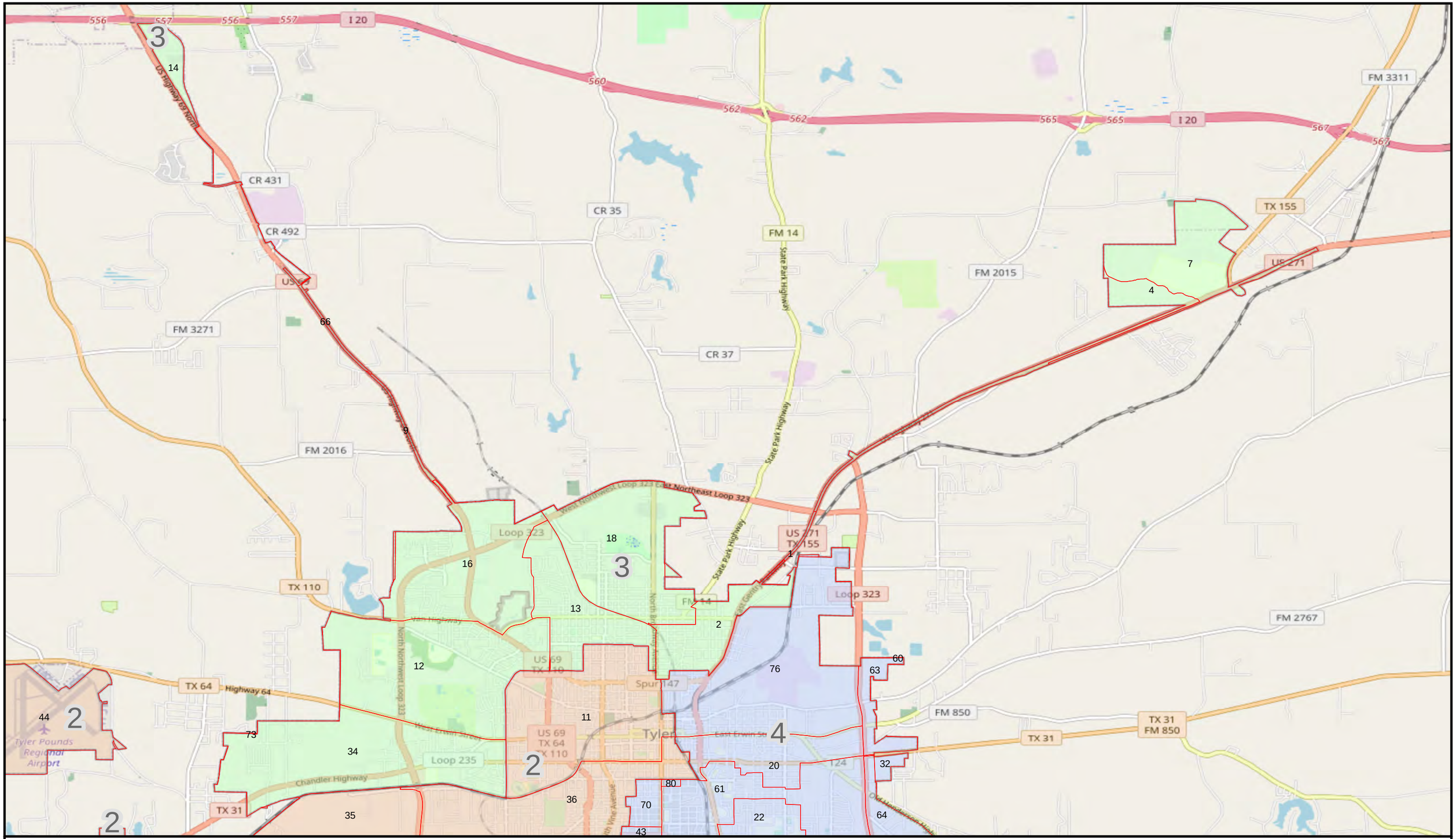
City of Tyler Council Districts

1 2 3 4 5 6

0 0.5 1 2 Miles

City of Tyler Council District 2
2021 Initial Assessment

Data Source: Roads, Water and other features obtained from the 2020 Tiger/line files, U.S. Census Bureau
Created: 9/24/2021



Legend

2020_VTDs

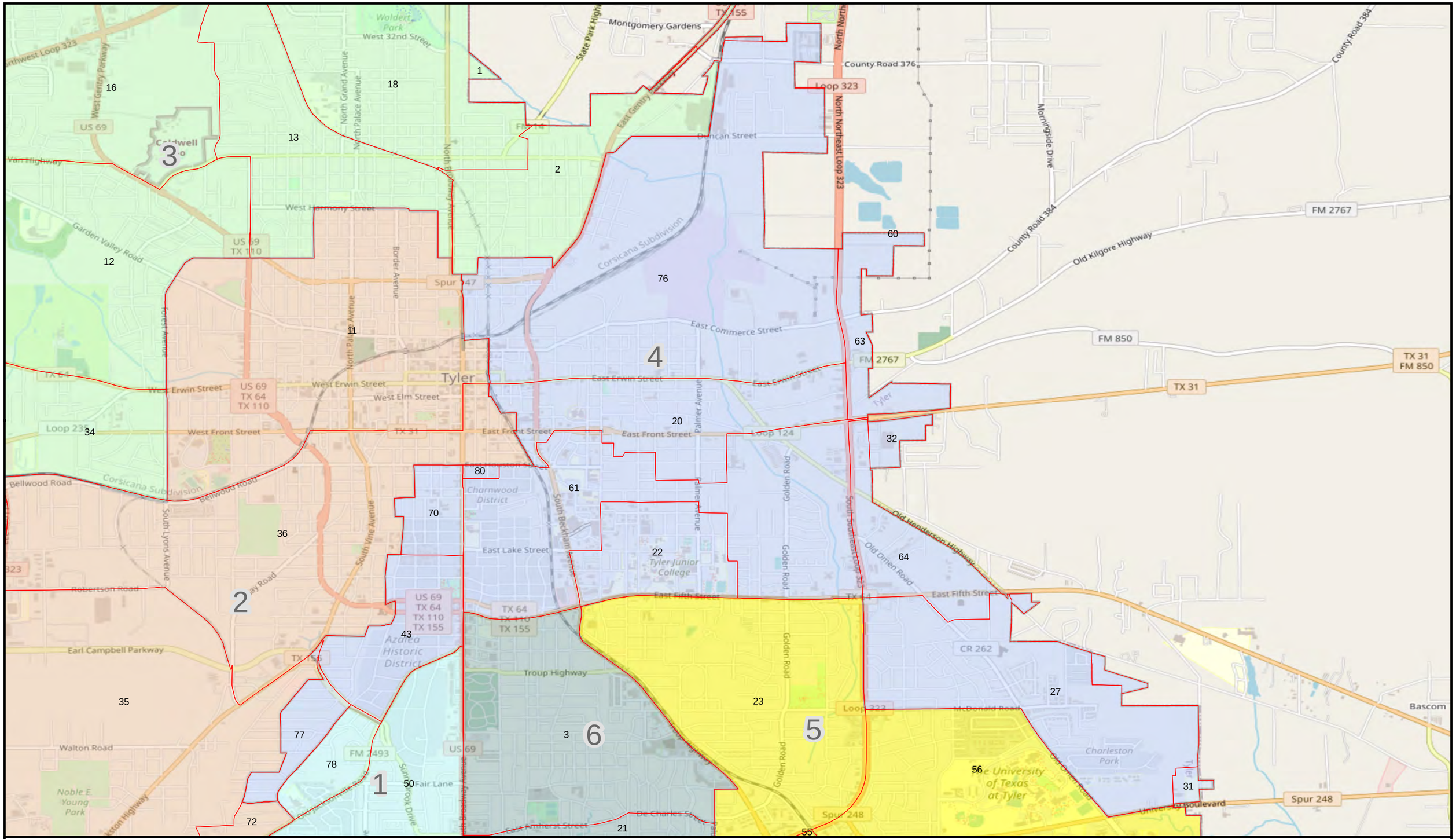
City of Tyler Council Districts

1 2 3 4 5 6

0 0.5 1 2 Miles

City of Tyler Council District 3
2021 Initial Assessment

Data Source: Roads, Water and other features obtained from the 2020 Tiger/line files, U.S. Census Bureau
Created: 9/24/2021



Legend

2020_VTDs

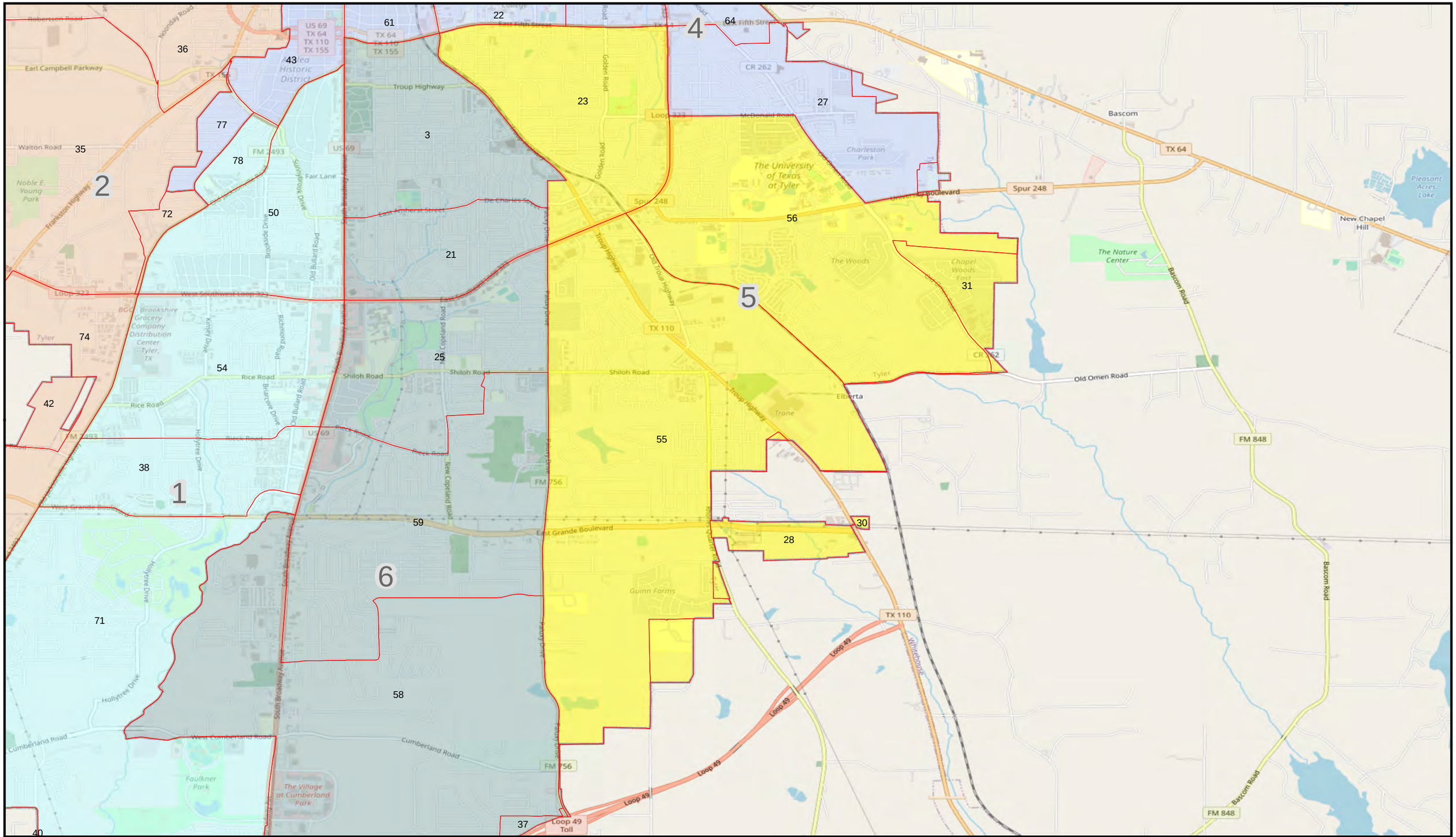
City of Tyler Council Districts

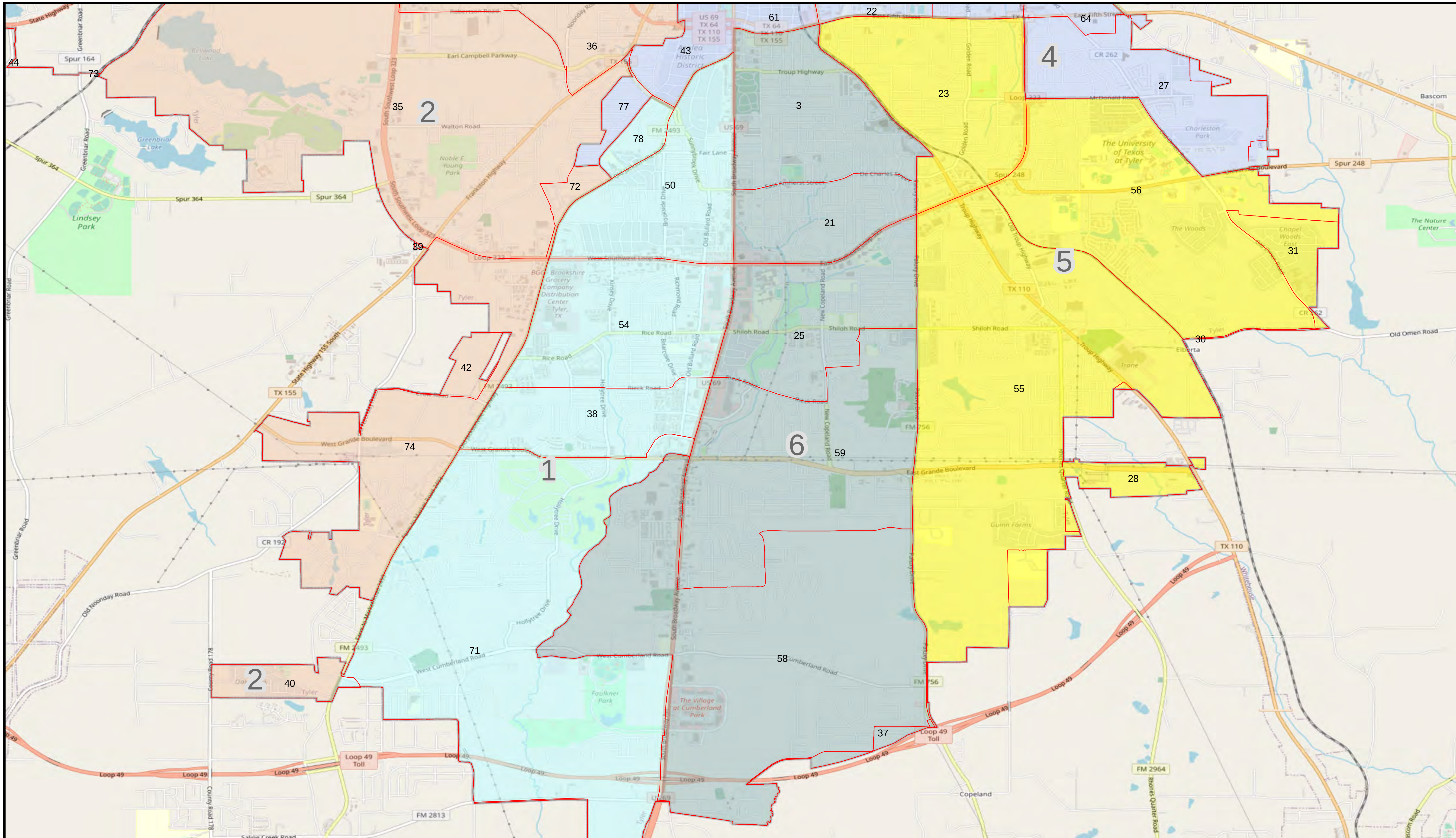
1 2 3 4 5 6

0 0.375 0.75 1.5 Miles

City of Tyler Council District 4
2021 Initial Assessment

Data Source: Roads, Water and other features obtained from the 2020 Tiger/line files, U.S. Census Bureau
Created: 9/24/2021


1
2
3
4
5
6
Earl Campbell Parkway
Walton Road
Noble E. Young Park
Frankston Highway
Robertson Road
Noonday Road
US 69
TX 64
TX 110
TX 155
Troup Highway
Golden Road
Loop 323
McDonald Road
CR 262
Charleston Park
The University of Texas at Tyler
Spur 248
Bascom
TX 64
Pleasant Acres Lake
New Chapel Hill
The Nature Center
Bascom Road
The Woods
Chapel Woods East
Old Troup Highway
TX 110
Shiloh Road
Rice Road
Brookshire Grocery Company Distribution Center - Tyler, TX
Tyler
Elberta
Trone
Old Omen Road
FM 848
East Grande Boulevard
Guinn Farms
Whitehouse
Loop 49
Loop 49 Toll
FM 756
Cumberland Road
West Cumberland Road
Faulkner Park
The Village at Cumberland Park
Holly Tree Drive
South Broadway Avenue
Fair Lane
East Fifth Street
East Southwest Loop 323
Old Bullard Road
Briarcrest Drive
Kinsley Drive
Richmond Road
New Copeland Road
Fairfield Drive
Rhone Quarter Drive
Fairway Drive
Fairway Circle
Brookside Drive
Sunnybrook Drive
Be Charles Street
East Amherst Street
Loop 323
FM 2493
Troup Highway
Golden Road
Shiloh Road
Rice Road
Rieck Road
East Grande Boulevard
Cumberland Road
Bascom Road
FM 848
TX 110
Loop 49
Loop 49 Toll
Whitehouse
Old Omen Road
Spur 248
Bascom Road
Pleasant Acres Lake
New Chapel Hill
Tyler
Elberta
Trone
Guinn Farms
Faulkner Park
The Village at Cumberland Park
Holly Tree Drive
Cumberland Road
West Cumberland Road
Rice Road
Rieck Road
Shiloh Road
Troup Highway
Golden Road
Old Troup Highway
Fairway Drive
Fairway Circle
Rhone Quarter Drive
New Copeland Road
Briarcrest Drive
Kinsley Drive
Richmond Road
Old Bullard Road
Brookside Drive
Sunnybrook Drive
Be Charles Street
East Amherst Street
East Southwest Loop 323
Loop 323
FM 2493
US 69
TX 64
TX 110
TX 155
Fair Lane
East Fifth Street
McDonald Road
CR 262
Charleston Park
The University of Texas at Tyler
Spur 248
Bascom
TX 64
Pleasant Acres Lake
New Chapel Hill
The Nature Center
Bascom Road
The Woods
Chapel Woods East
Old Troup Highway
TX 110
Shiloh Road
Rice Road
Brookshire Grocery Company Distribution Center - Tyler, TX
Tyler
Elberta
Trone
Old Omen Road
FM 848
East Grande Boulevard
Guinn Farms
Whitehouse
Loop 49
Loop 49 Toll
FM 756
Cumberland Road
West Cumberland Road
Faulkner Park
The Village at Cumberland Park
Holly Tree Drive
South Broadway Avenue
Fair Lane
East Fifth Street
East Southwest Loop 323
Old Bullard Road
Briarcrest Drive
Kinsley Drive
Richmond Road
New Copeland Road
Fairfield Drive
Rhone Quarter Drive
Fairway Drive
Fairway Circle
Brookside Drive
Sunnybrook Drive
Be Charles Street
East Amherst Street
Loop 323
FM 2493
US 69
TX 64
TX 110
TX 155
Fair Lane
36
43
61
22
64
77
78
35
3
23
27
72
50
21
56
74
54
25
31
42
38
55
59
30
28
71
58
37
40
Legend
2020_VTDs
City of Tyler Council Districts
1
2
3
4
5
6
0
0.45
0.9
1.8
Miles
City of Tyler Council District 5
2021 Initial Assessment
© 2021 Bickerstaff Heath Delgado Acosta LLP
Data Source: Roads, Water and other features obtained from the 2020 Tiger/line files, U.S. Census Bureau
Created: 9/24/2021



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2020_VTDs

City of Tyler Council Districts

1 2 3 4 5 6

0 0.5 1 2 Miles

City of Tyler Council District 6
2021 Initial Assessment

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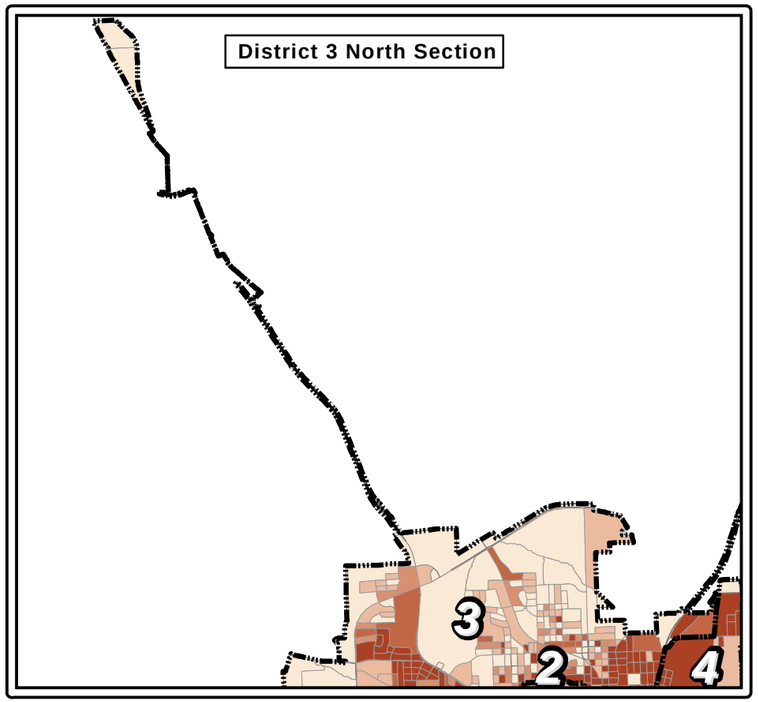
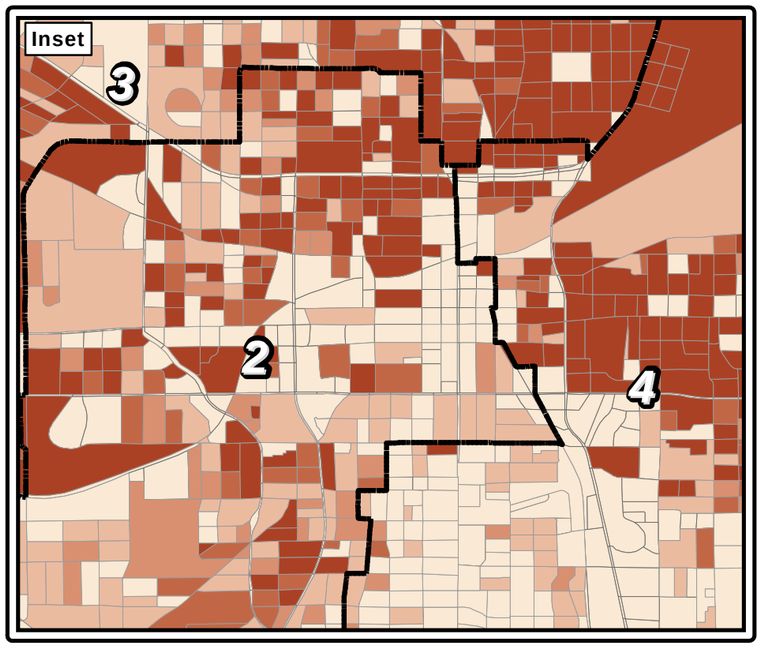
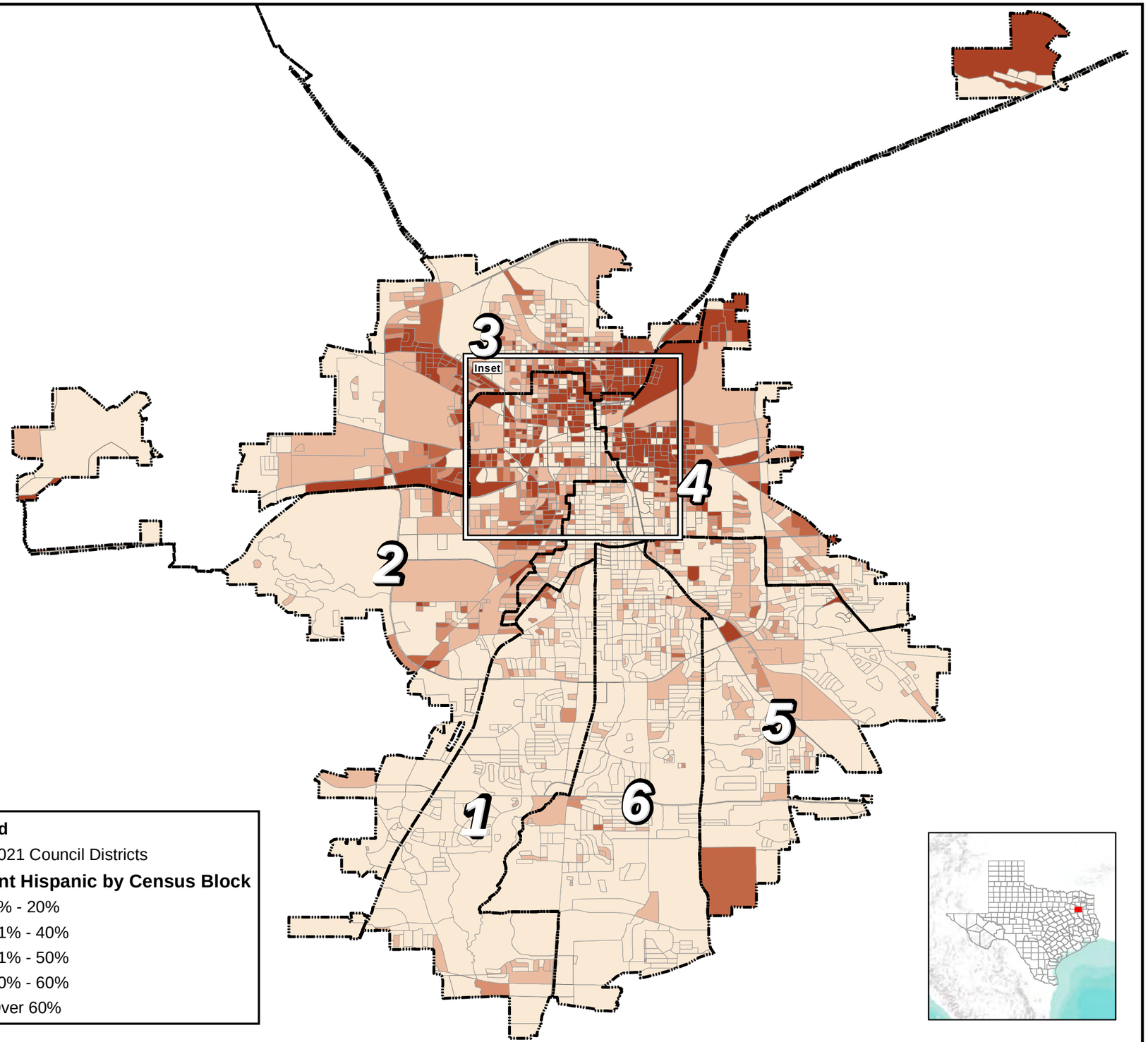
Created: 9/24/2021







Legend

2021 Council Districts

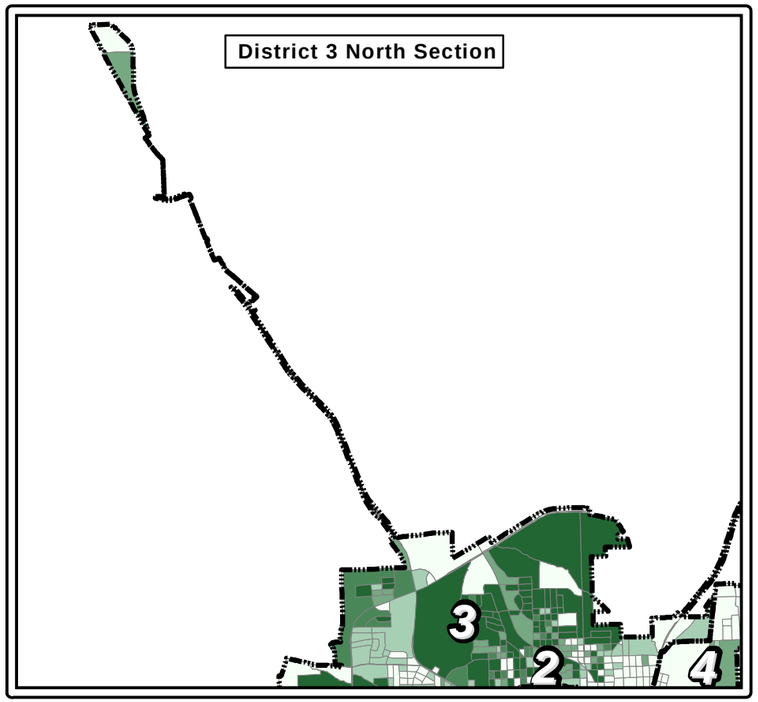
Percent Hispanic by Census Block

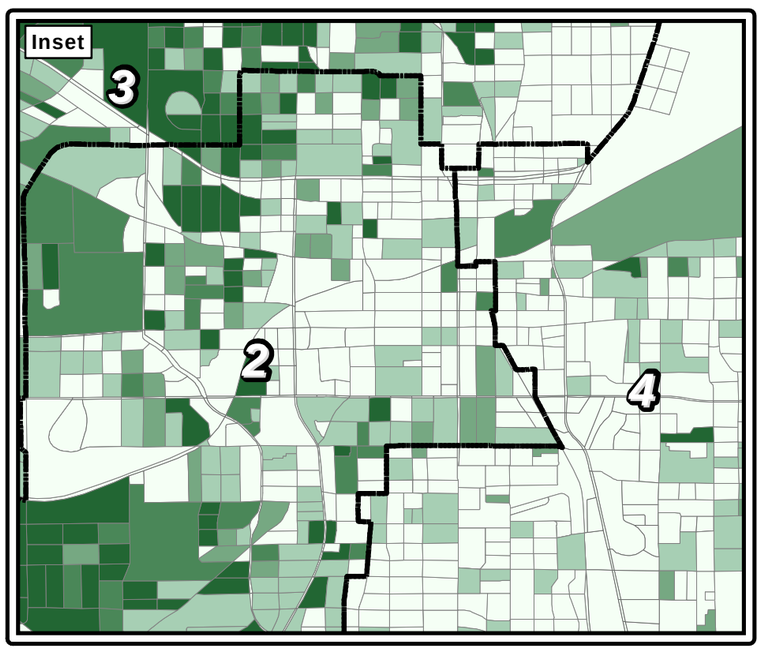
- 0% - 20%
- 21% - 40%
- 41% - 50%
- 50% - 60%
- Over 60%

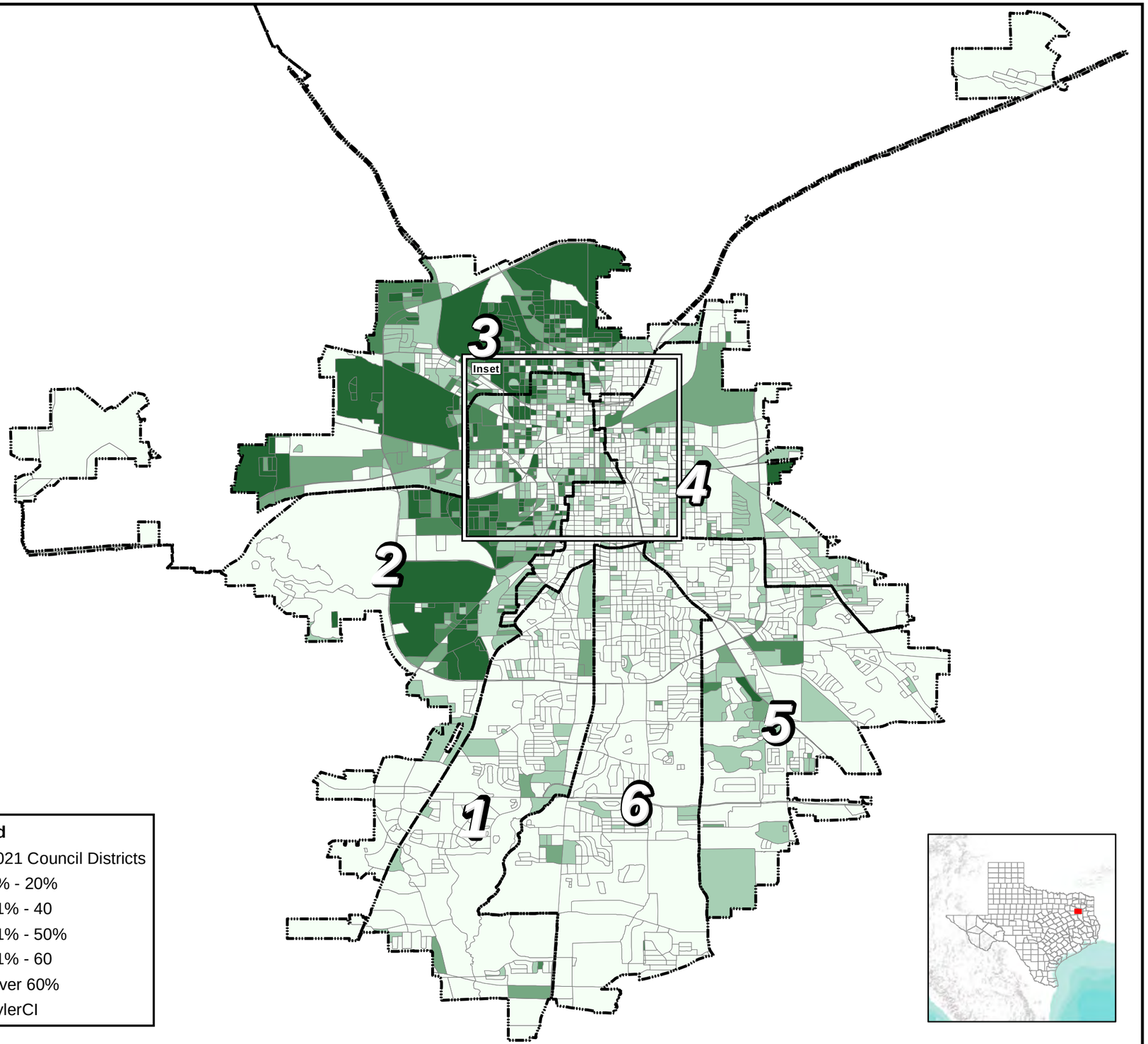
0 1.25 2.5 5 Miles

City of Tyler Council Districts
Percent Hispanic by 2020 Census Block

Data Source: Roads, Water and other features obtained from the 2020 Tiger/line files, U.S. Census Bureau
Created 9/21/2021







Legend

- 2021 Council Districts
- 0% - 20%
- 21% - 40
- 41% - 50%
- 51% - 60
- Over 60%
- TylerCI

0 1.25 2.5 5 Miles

City of Tyler Council Districts
Percent Black by 2020 Census Block

Data Source: Roads, Water and other features obtained from the 2020 Tiger/line files, U.S. Census Bureau
Created 9/21/2021

ATTACHMENT C

LEGAL PRINCIPLES

LEGAL PRINCIPLES GOVERNING THE REDISTRICTING PROCESS

There are three basic legal principles that govern the redistricting process: (i) the "one person-one vote" (equal population) principle; (ii) the non-discrimination standard of Section 2 of the Voting Rights Act; and (iii) the *Shaw v. Reno* limitations on the use of race as a factor in redistricting. In addition, although it will not apply to the 2021 redistricting, Section 5 of the Voting Rights Act, which applied a "retrogression" standard to minority group populations in specific districts, may be helpful as a tool to analyze potential Section 2 issues regarding a proposed new plan.

The terminology of redistricting is very specialized and includes terms that may not be familiar, so we have included as Attachment D to this Initial Assessment letter a brief glossary of many of the commonly-used redistricting terms.

The "One Person – One Vote" Requirement: Why You Redistrict

The "one person-one vote" requirement of the United States Constitution requires that members of an elected body be drawn from districts of substantially equal population. This requirement applies to the single-member districts of "legislative" bodies such as commissioners courts and other entities with single-member districts such as school boards or city councils.

Exact equality of population is not required for local political subdivisions. However, they should strive to create districts that have a total population deviation of no more than 10 percent between their most populated district and the least populated district. This 10 percent deviation is usually referred to as the "total maximum deviation." It is measured against the "ideal" or target population for the governmental entity based on the most recent census. The 10 percent standard is a rebuttable presumption of compliance with the one person-one vote requirement.

A governing body is therefore required to determine whether the populations of its single-member districts (including school board trustee districts) are within this 10 percent balance based on 2020 Census population data. If the population deviation among the districts exceeds the permissible 10 percent total maximum deviation, the entity must redistrict, that is, redraw the boundaries of the individual districts so that the total populations of all the new districts are within the permissible 10 percent limit. A hypothetical example of how deviation is calculated is given in Attachment E.

Generally, redistricting will use the Census Bureau's recently released population data for the 2020 Census in drawing new redistricting plans – the so-called "PL 94-171" data. In any legal challenge to a new plan, it is this data that likely would be applied. Although several types of population data are provided in the PL 94-171 files, redistricting typically is based upon total population.

Official Census data should be used unless the governmental entity can show that better data exists. The court cases that have dealt with the question have made it clear that the showing

required to justify use of data other than Census data is a very high one – impossibly high at a time so close to the release of new Census data. As a practical matter, therefore, we recommend that entities use the 2020 Census data in their redistricting processes. We have based the Initial Assessment on PL 94-171 total population data; the relevant data are summarized in Attachment A.

In the redistricting process, each governmental entity will use a broad spectrum of demographic and administrative information to accomplish the rebalancing of population required by the one person-one vote principle. The charts provided with this report not only show the total population of the entity but also give breakdowns of population by various racial and ethnic categories for the entity as a whole and for each single-member district.

Census geography

These single-member population data are themselves derived from population data based on smaller geographical units. The Census Bureau divides geography into much smaller units called "census blocks." In urban areas, these correspond roughly to city blocks. In more rural areas, census blocks may be quite large. Census blocks are also aggregated into larger sets called "voting tabulation districts" or "VTDs," which often correspond to county election precincts.

For reasons concerning reducing the potential for *Shaw v. Reno*-type liability, discussed below, we recommend using VTDs as the redistricting building blocks where and to the extent feasible. In many counties this may not be feasible.

Census racial and ethnic categories

For the 2020 Census, the Census Bureau recognized over 100 combinations of racial and ethnic categories and collected and reported data based on all of them. Many of these categories include very few persons, however, and will not therefore have a significant impact on the redistricting process. The charts that accompany this report include only eight racial and ethnic categories that were consolidated from the larger set. The entire population of the entity is represented in these charts. These eight categories are the ones most likely to be important in the redistricting process.

The 2020 Census listed 6 racial categories. Individuals were able to choose a single race or any combination of races that might apply. Additionally, the Census asks persons to designate whether they are or are not Hispanic. When the Hispanic status response is overlaid on the different possible racial responses, there are over 100 possible different combinations. The Census tabulates each one separately.

If this information is to be usable, it must be combined into a smaller number of categories (of course, having the same overall population total). For purposes of analyzing Voting Rights Act Section 2 issues, discussed below, DOJ indicated in a guidance document issued on September 1, 2021, that it would use the following rules for determining Hispanic and race population numbers from the 2020 Census data:

- persons who selected "Hispanic" are categorized as Hispanic, no matter what race or races they have designated; all others will be classified as non-Hispanic of one or more races; *e.g.*, Hispanic-White and Hispanic-African-American are both classified as Hispanic;

- persons who did not select "Hispanic" and who designated a single race will be classified as members of that race; *e.g.*, White, African-American, Asian, etc.;

- persons who did not select "Hispanic" and who designated themselves as belonging to a single minority race and as White will be classified as members of the minority race; *e.g.*, Asian+White will be classified as Asian; and

- persons who did not select "Hispanic" and who designated themselves as belonging to more than one minority race will be classified as "other multiple race;" *e.g.*, White+Asian+Hawaiian or African-American+Asian. This category is expected to be small.

We will also consider data called "voting age population" (or "VAP") data. It is similarly classified in eight racial and ethnic categories. This information is provided for the limited purpose of addressing some of the specific legal inquires under the Voting Rights Act that are discussed below. Voting age population is the Census Bureau's count of persons who identified themselves as being eighteen years of age or older at the time the census was taken (*i.e.*, as of April 1, 2020).

In addition to this population and demographic data, the entity will have access to additional information that may bear on the redistricting process, such as county road miles, facility locations, registered voter information, incumbent residence addresses, etc.

Section 2 of the Voting Rights Act – No Discrimination Against Minority Groups

Section 2 of the Voting Rights Act, 52 U.S.C. §10301, forbids a voting standard, practice, or procedure from having the effect of reducing the opportunity of members of a covered minority to participate in the political process and to elect representatives of their choice. In practical terms, this non-discrimination provision prohibits districting practices that, among other things, result in "packing" minorities into a single district in an effort to limit their voting strength. Similarly, "fracturing" or "cracking" minority populations into small groups in a number of districts, so that their overall voting strength is diminished, can be discrimination under Section 2. There is no magic number that designates the threshold of packing or cracking. Each plan must be judged on a case-by-case basis. Failure to adhere to such Section 2 standards could invite a challenge in court by a protected minority group or even by the Department of Justice.

In previous redistricting cycles, "preclearance" was required under Section 5 of the Voting Rights Act before a new plan (or any other change of any kind to voting standards, practices or procedures) could be implemented. Section 5 will not apply in the 2021

redistricting cycle, but as we discuss below, the Section 5 "retrogression" standard can be a useful tool to identify potential Section 2 issues with a proposed new plan.

The Supreme Court has defined the minimum requirements for a minority plaintiff to bring a Section 2 lawsuit. There is a three-pronged legal test the minority plaintiff must satisfy – a showing that: (1) the minority group's voting age population is numerically large enough and geographically compact enough so that a district with a numerical majority of the minority group can be drawn (a "majority minority district"); (2) the minority group is politically cohesive, that is, it usually votes and acts politically in concert on major issues; and (3) there is "polarized voting" such that the Anglo majority usually votes to defeat candidates of the minority group's preference. *Thornburg v. Gingles*, 478 U.S. 30 (1986). In the federal appellate Fifth Circuit, which includes Texas, the minority population to be considered is *citizen* voting age population. In certain cases, a minority group may assert that Section 2 requires that the governmental body draw a new majority minority district. The governing body must be sensitive to these Section 2 standards as it redistricts.

In considering changes to existing boundaries, a governmental entity must be aware of the location of protected minority populations within its single-member districts for the purpose of ensuring that changes are not made that may be asserted to have resulted in "packing," or in "fracturing" or "cracking" the minority population for purposes or having effects that are unlawful under Section 2. The thematic maps included in Attachment B depict the locations of Hispanic and African-American (and if applicable, Asian) population concentrations by census block; they are useful in addressing this issue. Voting age population (VAP) data is useful in measuring potential electoral strength of minority groups in individual districts.

Shaw v. Reno **Standards – Avoid Using Race as the Predominant Redistricting Factor**

The modern era of redistricting began in the 1960's when the Supreme Court determined that districting plans were subject to judicial review and that they must conform to one-person, one-vote principles. This was followed in short order by the passage of the Voting Rights Act in 1965, which along with the Fourteenth Amendment, required jurisdictions to ensure that districts were not racially discriminatory. Accordingly, to avoid liability in voting rights suits, governments were highly conscious of race when drawing districts and fashioned districts to reflect racial and ethnic housing patterns.

In 1993, the United States Supreme Court decided *Shaw v. Reno,* a case that contained a district that was so extremely irregular on its face that race was the predominant consideration in its creation to the exclusion of traditional districting principles and without sufficiently compelling justification. The Court held that the district was a racial gerrymander that violated the Equal Protection Clause of the Fourteenth Amendment.

The *Shaw* opinion subjects governmental bodies undertaking the redistricting process to a delicate balancing act. The governmental body must consider race when drawing districts if it is to comply with the requirements of the Voting Rights Act; however, if race is the

predominant consideration in the process, the governmental body may be subject to a racial gerrymandering claim.

Where racial considerations predominate in the redistricting process to the subordination of traditional (non-race-based) factors, the use of race-based factors is subject to the "strict scrutiny" test. To pass this test requires that there be a showing that (1) the race-based factors were used in furtherance of a "compelling state interest" and (2) their application be "narrowly tailored," that is, they must be used only to the minimum extent necessary to accomplish the compelling state interest. Compliance with the anti-discrimination requirements of section 2 of the Voting Rights Act is a compelling state interest.

The following principles have emerged in the post-*Shaw* environment to guide the redistricting process:

- race may be considered;

- but race may not be the predominant factor in the redistricting process to the subordination of traditional redistricting principles;

- bizarrely-shaped districts are not unconstitutional *per se*, but the bizarre shape may be evidence that race was the predominant consideration in the redistricting process;

- if race is the predominant consideration, the plan may still be constitutional if it is "narrowly tailored" to address compelling governmental interest such as compliance with the Voting Rights Act; and

- if a plan is narrowly tailored, it will use race no more than is necessary to address the compelling governmental interest.

While race will almost always be a consideration, he better course, if possible under the circumstances, is that racial considerations not predominate to the subordination of traditional redistricting criteria, so that the difficult strict scrutiny test is avoided.

Adherence to the *Shaw v. Reno* standards will be an important consideration during the redistricting process. One way to minimize the potential for *Shaw v. Reno* liability is to adopt redistricting criteria that include traditional redistricting principles and that do not elevate race-based factors to predominance.

Section 5 of the Voting Rights Act – Preclearance and Retrogression

Preclearance will not be required

In prior redistricting cycles, Section 5 of the Voting Rights Act, 52 U.S.C. § 10304, required all "covered jurisdictions" identified in the applicable Department of Justice (DOJ) regulations to "preclear" any changes to voting standards, practices, or procedures before they

may become legally effective. Texas was a "covered jurisdiction," so all local governments in the state, as well as the State itself, were required to preclear any voting change, including their redistricting plans. This included changes to any single-member district lines (including school board trustee district lines). Section 5 applied not only to changes in single-member district lines, but also to changes in election precincts and in the location of polling places. For counties, Section 5 applied not only to commissioners' precincts, but also to JP and constable precincts, even though these latter are not subject to the one person-one vote requirement (since these are not "representative," *i.e.*, "legislative" officials).

In the 2013 case *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the U.S. Supreme Court invalidated Section 4 of the Voting Rights Act until Congress corrected some deficiencies. This is the section that, in effect, defines which states and local jurisdictions are subject to Section 5 preclearance requirements. Congress has not made the required corrections, so Section 5 will not apply to any jurisdiction this redistricting cycle. Nonetheless, the legal standard applied to preclearance under Section 5, "retrogression", can be useful to identify potential Section 2 discrimination issues in a proposed new districting plan.

Retrogression standard

In past redistricting cycles, Section 5 review involved considering whether a proposed new districting plan had a retrogressive effect. The issue is whether the net effect of the proposed new plan would be to reduce minority voters' ability to elect their preferred candidates when the plan is compared to the prior benchmark plan. In other words, does the new districting plan result in a reduction of the minority group's ability to elect?

To determine if retrogression exists, it is necessary to compare a proposed plan against a benchmark, typically the *prior* district boundary plan, but considered using the *new* 2020 Census population and demographic data.

Voting age population data ("VAP") – the Census count of persons eighteen years of age or older at the time the Census was taken (*i.e.*, as of April 1, 2020). It is a measure of the number of people old enough to vote if they are otherwise eligible to do so. Since the retrogression inquiry focuses on whether a minority group's overall voting strength has been reduced, and VAP is a more direct measure of voting strength than total population, VAP should be considered in the retrogression analysis, not just total population.

In combination with a balanced consideration of the other applicable redistricting criteria, the entity's governing body will need to consider the effects of any changes to the benchmark measures that its proposed plan produces. Because of changes in population and the need to comply with one person-one vote principles, sometimes it may be impossible to avoid drawing a retrogressive plan. But if a proposed new plan is retrogressive, careful consideration should be given before adopting it.

Since retrogression was the test by which redistricting plans were measured under Section 5 of the Act and that section is no longer operative, retrogression is no longer the standard. Nevertheless, a jurisdiction that draws a plan that is retrogressive may increase the

chance that it will be sued under Section 2. Thus, it may be beneficial to avoid retrogression where possible even though the plan will not be required to be submitted to the Department of Justice for Section 5 review under that test.

Adoption of Redistricting Criteria

Adoption of appropriate redistricting criteria – and adherence to them during the redistricting process – is potentially critical to the ultimate defensibility of an adopted redistricting plan. Traditional redistricting criteria that the governing body might wish to consider adopting include, for example:

- use of identifiable boundaries;
- using whole voting precincts, where possible and feasible; or, where not feasible, being sure that the plan lends itself to the creation of reasonable and efficient voting precincts;
- maintaining communities of interest (*e.g.*, traditional neighborhoods);
- basing the new plan on existing districts;
- adopting districts of approximately equal population;
- drawing districts that are compact and contiguous;
- keeping existing representatives in their districts; and
- narrow-tailoring to comply with the Voting Rights Act and *Shaw v. Reno*..

There may be other criteria that are appropriate for an individual entity's situation, but all criteria adopted should be carefully considered and then be followed to the greatest degree possible. A copy of a sample criteria adoption resolution is provided as Attachment F. You may wish to include additional criteria; or determine that one or more on that list are not appropriate. We will discuss with you appropriate criteria for your situation.

Requirements for Plans Submitted by the Public

You should also consider imposing the following requirements on any plans proposed by the public for your consideration: (1) any plan submitted for consideration must be a complete plan, that is, it must be a plan that includes configurations for all districts and not just a selected one or several. This is important because, although it may be possible to draw a particular district in a particular way if it is considered only by itself, that configuration may have unacceptable consequences on other districts and make it difficult or impossible for an overall plan to comply with the applicable legal standards; and (2) any plan submitted for consideration must follow the adopted redistricting criteria.

ATTACHMENT D

GLOSSARY

GLOSSARY

Census blocks, census block groups, census VTDs, census tracts – Geographic areas of various sizes recommended by the states and used by the Census Bureau for the collection and presentation of data.

Citizen voting age population (CVAP) – Persons 18 and above who are citizens. This is a better measure of voting strength than VAP; however, the relevant citizenship data will need to be developed.

Compactness – Having the minimum distance between all parts of a constituency.

Contiguity – All parts of a district being connected at some point with the rest of the district.

Cracking – The fragmentation of a minority group among different districts so that it is a majority in none. Also known as "fracturing."

Fracturing – *See* "cracking."

Homogeneous district – A voting district with at least 90 percent population being of one minority group or of Anglo population.

Ideal population – The population that an ideal sized district would have for a given jurisdiction. Numerically, the ideal size is calculated by dividing the total population of the political subdivision by the number of seats in the legislative body.

Majority minority district – Term used by the courts for seats where an ethnic minority constitutes a numerical majority of the population.

One person, one vote – U.S. Constitutional standard articulated by the U.S. Supreme Court requiring that all legislative districts should be approximately equal in size.

Packing – A term used when one particular minority group is consolidated into one or a small number of districts, thus reducing its electoral influence in surrounding districts.

Partisan gerrymandering – The deliberate drawing of district boundaries to secure an advantage for one political party.

PL 94-171 – The Public Law that requires the Census Bureau to release population data for redistricting. The data file, referred to as "PL 94-171", was supposed to be released by April 1, 2021, although due to technical issues it was not released until August, is reported at the block level, and contains information on:

- Total population
- Voting age population
- By Race
- By Hispanic origin

Racial gerrymandering – The deliberate drawing of district boundaries to secure an advantage for one race.

Retrogression – The Section 5 standard (not applicable in this redistricting cycle) that considered whether a proposed new districting plan made it less likely a protected minority group could elect candidates of the group's choice.

Section 2 of the Voting Rights Act – The part of the federal Voting Rights Act that protects racial and language minorities from discrimination in voting practices by a state or other political subdivision.

Section 5 of the Voting Rights Act – The part of the federal Voting Rights Act that required certain states and localities (called "covered jurisdictions") to preclear all election law changes with the U.S. Department of Justice ("DOJ") or the federal district court for the District of Columbia before those laws may take effect. Not applicable this redistricting cycle.

Shaw v. Reno – The first in a line of federal court cases in which the U.S. Supreme Court held that the use of race as a dominant factor in redistricting was subject to a "strict scrutiny" test under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. This case and the line of Supreme Court cases that follows it establishes that race should not be used as a predominant redistricting consideration, but if it is, it must be used only to further a "compelling state interest" recognized by the courts and even then must be used only as minimally necessary to give effect to that compelling state interest ("narrow tailoring").

Spanish surnamed registered voters (SSRV) – The Texas Secretary of State publishes voter registration numbers that show the percentage of registered voters who have Spanish surnames. It is helpful to measure Hispanic potential voting strength, although it is not exact.

Total population – The total number of persons in a geographic area. Total population is generally the measure used to determine if districts are balanced for one person, one vote purposes.

Voting age population (VAP) – The number of persons aged 18 and above. DOJ requires this to be shown in section 5 submissions. It is used to measure potential voting strength. For example, a district may have 50 percent Hispanic total population but only 45 percent Hispanic voting age population.

Voter tabulation district (VTD) – A voting precinct drawn using census geography. In most instances, especially in urban areas, VTDs and voting precincts will be the same. In rural areas, it is more likely they will not be identical.

ATTACHMENT E

HYPOTHETICAL POPULATION DEVIATION CALCULATION

Hypothetical Population Deviation Calculation

Consider a hypothetical political subdivision with four districts and a total population of 40,000. The "ideal district" for this political subdivision would have a population of 10,000 (total population / number of districts). This is the target population for each district. The deviation of each district is measured against this ideal size.

Suppose the latest population data reveals that the largest district, District A, has 11,000 inhabitants. The deviation of District A from the ideal is thus 1000 persons, or 10 percent. Suppose also that the smallest district, District D, has 8000 inhabitants; it is underpopulated by 2000 persons compared to the ideal size. It thus has a deviation of –20 percent compared to the ideal size. The *maximum total deviation* is thus 30 percent. Since this is greater than the 10 percent range typically allowed by the courts for one person-one vote purposes, this hypothetical subdivision must redistrict in order to bring its maximum total deviation to within the legally permissible limits.

The following table illustrates this analysis:

District	Ideal district	District total pop.	Difference	Deviation
A	10,000	11,000	1000	+ 10.0 percent
B	10,000	10,750	750	+ 7.5 percent
C	10,000	10,250	250	+ 2.5 percent
D	10,000	8,000	- 2000	- 20.0 percent
Totals:	40,000	40,000	net= 0	net= 0 percent

Total maximum deviation = difference between most populous and least populous districts = 10 percent + 20 percent = 30 percent.

ATTACHMENT F

ILLUSTRATIVE REDISTRICTING CRITERIA RESOLUTION

ILLUSTRATIVE REDISTRICTING CRITERIA RESOLUTION

(Here is an example of what the body of a resolution or ordinance adopting redistricting criteria might contain, but not including the footnotes. They are only included here by way of explanation to you of some of the criteria.)

The City Council will observe the following criteria, to the greatest extent possible, when drawing district boundaries:

1. Easily identifiable geographic boundaries should be followed.

2. Communities of interest should be maintained in a single district, where possible, and attempts should be made to avoid splitting neighborhoods.

3. Districts should be composed of whole voting precincts. Where this is not possible or practicable, districts should be drawn considering county election precincts. Avoid splitting census blocks unless necessary.

4. Although it is recognized that existing districts will have to be altered to reflect new population distribution, any districting plan should, to the extent possible, be based on existing districts.

5. Districts must be configured so that they are relatively equal in total population according to the 2020 federal census. In no event should the total population deviation between the largest and the smallest district exceed ten percent as compared to the ideal district size.

6. Districts should be compact and composed of contiguous territory. Compactness may contain a functional,[1] as well as a geographical, dimension.

7. Consideration may be given to the preservation of incumbent-constituency relations by recognition of the residence of incumbents and their history in representing certain areas.

8. The plan should be narrowly tailored to avoid racial gerrymandering in violation of *Shaw v. Reno.*

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[1] Functional compactness is a sometimes-controversial notion that has appeared in some cases. Basically, the concept is that compactness is not simply a matter of geography but can include considerations such as (1) the availability of transportation and communication, (2) the existence of common social and economic interests, (3) the ability of the districts to relate to each other, and (4) the existence of shared interests. We do not anticipate that we will rely heavily on functional compactness, but there may be instances in which it comes into play. For example, we might be able to draw a very geographically compact district by including land on both sides of a river. If, however, the nearest bridge is several miles away, our geographically compact district may not be functionally compact. Saying that compactness has a functional dimension gives us flexibility to address this type of situation.

9. The plan should not fragment[2] a geographically compact minority community or pack[3] minority voters in the presence of polarized voting so as to create liability under the Voting Rights Act.

The Council will review all plans considering these criteria and will evaluate how well each plan conforms to the criteria.

Any plan submitted by a citizen to the Council for its consideration should be a complete plan — *i.e.*, it should show the full number of districts and should redistrict the entire city. The Council may decline to consider any plan that is not a complete plan.

All plans submitted by citizens, as well as plans submitted by staff, consultants, and members of the Council should conform to these criteria.

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[2] Fragmenting or fracturing occurs when a geographically compact area of minority voters is split into two or more districts when, if the area had been put in a single district, minority voters would have had greater voting strength.

[3] Packing refers to concentrating excessively large numbers of minority voters in a single district. For example, if a district is drawn to be 90 percent African-American, that group's influence may be limited to that single district when, if it had been split, the group might have had an opportunity to elect candidates of their choice in two districts.

ATTACHMENT G

ILLUSTRATIVE REDISTRICTING GUIDELINES RESOLUTION

ILLUSTRATIVE REDISTRICTING GUIDELINES RESOLUTION

(Here is an example of what the body of a resolution or ordinance adopting redistricting guidelines for public participation might contain.)

The following guidelines are to be followed by each person submitting a redistricting plan for consideration or submitting comments:

1. Proposed plans must be submitted in writing and be legible. If a plan is submitted orally, there is significant opportunity for misunderstanding, and it is possible that errors may be made in analyzing it. The City Council wants to be sure that all proposals are fully and accurately considered.

2. Any plan must show the total population and voting age population for African-Americans, Hispanics, Asians, and Anglo/Other for each proposed district, based on the 2020 Census Data. If a plan is submitted without a population breakdown, the Council may not have sufficient information to give it full consideration.

3. Plans should redistrict the entire entity, so the Council may consider the effect of any plan on the entire city. All plans are subject to the Voting Rights Act, which protects various racial and language minorities. Thus, as a matter of federal law, the Council will be required to consider the effect of any proposal on multiple racial and ethnic groups. If a plan does not redistrict the entire [county, city, district], it may be impossible for the Council to assess its impact on one or more protected minority groups.

4. Plans should conform to the criteria the Council will be using in drawing the precincts.

5. Comments must be submitted in writing and be legible, even if the person also makes the comments orally at a public hearing.

6. Persons providing comments and those submitting proposed plans must identify themselves by full name and home address and provide a phone number and, if available, an email address. The Council may wish to follow up on such comments or obtain additional information about submitted plans.

7. All comments and proposed plans must be submitted to the City Council [by the close of / no later than __ days before] the public hearing.

This resolution shall be effective upon passage by the City Council.

ATTACHMENT H

SUGGESTED INITIAL ASSESSMENT AGENDA ITEM LANGUAGE

SUGGESTED INITIAL ASSESSMENT AGENDA ITEM LANGUAGE

Here is suggested language for the agenda item for receiving the Initial Assessment and for adopting the two suggested resolutions (criteria, guidelines).

Receive Initial Assessment regarding whether redistricting is required considering the new 2020 census data; and, if so, consider adoption of criteria to apply to development of new districting plans, and guidelines for public participation in the redistricting process.

If your practice is to specifically post executive session items, you may wish to use this language:

Executive Session. The City Council may go into executive session pursuant to Texas Government Code section 551.071 to receive advice from legal counsel regarding the City's redistricting obligations.