



AGENDA REPORT

CITY ATTORNEY'S OFFICE

DATE: October 22, 2019

TO: Mayor Tom Butt and Members of the City Council

FROM: Bruce Reed Goodmiller, City Attorney
Pamela Christian, City Clerk

SUBJECT: Transitioning from At-Large to By-District (District-Based) System for Election of City Council Members

STATEMENT OF THE ISSUE:

On September 11, 2019, the City received a demand letter from attorney Scott J. Rafferty (Rafferty) which threatens legal action against the City under the California Voting Rights Act (CVRA) if the City does not transition from at-large to district-based elections of City Councilmembers.

Recent efforts to protect jurisdictions from costs related to CVRA litigation (which include plaintiffs' attorneys' fees and litigation expenses) led to an amendment of the Elections Code 10010 to include a "safe-harbor" provision that gives jurisdictions the opportunity to change their election system once they receive a demand letter and caps legal fees recoverable by a plaintiff at \$30,000 if a jurisdiction:

- Adopts a resolution of intention to transition to district-based elections that outlines specific steps and estimates a time frame, within forty-five (45) days of receiving the demand letter; and
- Holds at least five (5) public hearings and adopts an ordinance within ninety (90) days of adopting the resolution of intention.

The City has until October 26, 2019 (forty-five (45) days from the date of the Rafferty letter) to adopt a resolution of intention and stay within the safe-harbor.

RECOMMENDED ACTION:

DISCUSS and ADOPT a Resolution Declaring the City's Intention, Pursuant to Elections Code Section 10010, To Initiate Procedures for Establishing and Implementing By-District Elections for City Council Members; and AUTHORIZE the City Manager to Execute an Agreement to Retain the Services of National Demographics Corporation to assist with the transition to By-District Elections.

FINANCIAL IMPACT OF RECOMMENDATION:

Should the Council adopt a resolution declaring the City's intention to initiate procedures for establishing and implementing by-district elections, staff recommends retaining the demographic services of National Demographics Corporation to assist with the redistricting and public hearing process. Staff anticipates that the cost of the demographer services will be less than \$40,000.

If the Council ultimately adopts an ordinance implementing by-district elections, the City may also be liable for costs to the prospective plaintiffs of up to an additional \$30,000. If it does not, a fee demand will likely exceed that amount by a significant margin.

DISCUSSION:

On September 11, 2019, the City received a demand letter from Attorney Scott Rafferty (Rafferty) asserting that the City's at-large council member electoral system violates the Federal Voting Rights Act (FVRA) and the CVRA by denying Latino voters of an opportunity to elect candidates of their choice that is equal to the opportunity enjoyed by non-Latino voters and by diluting the electoral influence of Richmond's Asian and African-American communities.

The letter threatened litigation if the City declined to voluntarily change to a district-based election system.

Federal and California Voting Rights Acts

The FVRA was enacted in 1965 to overcome legal barriers at the state and local levels that prevented minority groups from exercising their right to vote as granted by the U.S. Constitution. Cities with at-large electoral systems have been challenged under Section 2 of the FVRA on the premise that the at-large system dilutes minority voting rights.

The CVRA was enacted in 2001 to implement the California constitutional guarantees of equal protection and the right to vote. The CVRA is broader than the FVRA and provides a private right of action to members of a protected class where, because of "dilution or the abridgment of the rights of voters," an at-large election system "impairs the ability of a protected class to elect candidates of its choice or its ability to include the outcome of an election." A violation of CVRA is established if racially polarized voting occurs in elections.

- "Racially polarized voting" means voting where there is a difference between candidates or other electoral choices preferred by voters in a protected class and those preferred by

voters in the rest of the electorate.” Intent to discriminate is not necessary to find evidence of racially polarized voting.

The essential difference between the federal and state statutes is that federal law applies only if a majority-minority district (i.e., a district in which a majority of residents are of a minority group) can be drawn while the state law applies whether or not this is so.

Attorney Fees

In many cases, the apparent motivation for a claim under the CVRA (as opposed to the FVRA) is the attorney fees often awarded to successful plaintiffs.¹ For example, Modesto settled a CVRA claim against that city for \$3 million in attorney fees.² Notably, no attorney fees award is available to the defending jurisdiction, even if it wins — which none has yet done.³

Under the CVRA, a plaintiff need not obtain a court judgment to recoup attorney fees. Under the “catalyst theory,” a party may seek attorney fees if a matter is settled or the defendant agency accedes to the plaintiff’s demands before judgment. To obtain catalyst fees, a plaintiff must demonstrate his or her suit or demand was “a substantial factor contributing to” the agency’s decision to adopt districts.⁴

Safe-Harbor Under the CVRA

Recent efforts to protect jurisdictions from costs related to CVRA litigation led to an amendment of the Elections Code 10010 to include a “safe-harbor” provision that gives jurisdictions the opportunity to change their election system once they receive a demand letter and caps legal fees recoverable by a plaintiff at \$30,000 if a jurisdiction:

- Adopts a resolution of intention to transition to district-based elections that outlines specific steps and estimates a time frame, within forty-five (45) days of receiving the demand letter; and
- Holds at least five (5) public hearings and adopts an ordinance within ninety (90) days of adopting the resolution of intention.

The City would have until October 26, 2019 (forty-five (45) days from date of Rafferty letter) to adopt a resolution of intention and stay within the safe-harbor.

Recommended Action

Staff recommends that the City Council adopt a Resolution of Intention to transition to district-based elections and retain the services of National Demographics Corporation.

¹ FVRA cases have been brought by non-profit impact litigation groups, while CVRA cases have been brought by private, for-profit attorneys sometimes suing for such groups.

² Ashton, “Settlement in Latino voting case will set Modesto back \$3 million,” *The Modesto Bee* (June 6, 2008).

³ Elec. Code, § 14030.

⁴ *Hogar Dulce Hogar v. Community Development Comm.* (2007) 157 Cal.App.4th 1358, 1365.

If the Council decides not to change to district-based elections, Rafferty or other prospective plaintiffs can be expected to sue the City for violation of the CVRA. Costs to defend against a CVRA lawsuit exceed \$1 million and successful plaintiffs are entitled to attorney's fees, costs and other litigation expenses which will be in the same or larger amount. Public agencies are not entitled to costs or litigation expenses unless the courts finds the action to be frivolous, unreasonable, or without foundation. No public agencies have successfully defended a CVRA violation claim.

Adopting the safe-harbor legislation is necessary to contain fees at \$30,000 but does not commit the City to completing the safe-harbor process. If the Council becomes convinced during the hearing process that the safe-harbor route is not in the City's interest, it need not complete it. Failing to complete it, however, has the risks noted above.

NEXT STEPS

If the City Council adopts a Resolution of Intention, then five public hearings must be held in 90 days. The first two public hearings are held prior to drawing maps to consider communities of interest and other interests which should influence map design. The third and fourth public hearings are held to receive public input on the draft maps provided by the City's contract demographers, those submitted by Mr. Rafferty and any other map proposals that are received. The fifth hearing to introduce the ordinance may be on the same day as the fourth hearing, provided the proposed draft district map does not change. If the Resolution of Intention is adopted on October 22, 2019, the fifth hearing must occur by January 20, 2019.

Staff recommends following the tentative hearing schedule set forth in Exhibit A to the Resolution of Intention, which provides that the first public hearing would take place on November 5, 2019.

DOCUMENTS ATTACHED:

Resolution of Intention