



AGENDA REPORT

CITY ATTORNEY'S OFFICE

DATE: November 5, 2019

TO: Mayor Tom Butt and Members of the City Council

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

SUBJECT: First Public Hearing Regarding Composition of Possible City Council Districts

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 four (4) public hearings and adopts an ordinance within ninety (90) days of adopting the resolution of intention.

On October 22, 2019 the City adopted a Resolution of Intention to transition from at-large to district-based elections of City Councilmembers.

RECOMMENDED ACTION:

HOLD a public hearing to review the districting process for City Council elections and receive public input regarding the composition of potential City Council districts.

FINANCIAL IMPACT OF RECOMMENDATION:

There is no specific impact from tonight's public hearing, although the consideration of transitioning to a district-based election system will involve the use of the demographer retained by the City.

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 four (4) public hearings and adopts an ordinance within ninety (90) days of adopting the resolution of intention.

On October 22, 2019 the City adopted a Resolution of Intention to transition from at-large to district-based elections of City Councilmembers.

Public Hearings on District Formation

Following adoption of the Resolution of Intention, four 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 demographer, 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. Since the Resolution of Intention was adopted on October 22, 2019, the fifth hearing must occur by January 20, 2020.

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.

Analysis

Tonight's public hearing will be the first of two public hearings required to be held regarding composition of City Council districts. The public hearing will include a presentation from a representative from National Demographics Corporation, the firm providing demographic services relating to the drawing of the districts.

The first two hearings are to help develop criteria for creating the proposed districts. These criteria may include:

- School attendance areas
- Natural neighborhood dividing lines, such as highway or major roads, rivers, canals, and/or hills
- Areas around parks and other neighborhood landmarks
- Common issues, neighborhood activities, or legislative/election concerns
- Shared demographic characteristics (e.g. levels of income, education)

NEXT STEPS

The second public hearing regarding the composition of City Council districts will be held on November 19, 2019. Staff is interested in any suggestions the Council has for additional public engagement.

DOCUMENTS ATTACHED:

Tentative public hearing schedule

EXHIBIT A

Tentative Public Hearing Timeline

DATE	EVENT	COMMENT
November 5, 2019	1st Public Hearing	Council to receive input from community to be used to draw preliminary district maps. No maps yet drawn.
November 19, 2019	2nd Public Hearing	Council to receive additional input from community to be used to draw preliminary district maps. No maps yet drawn.
Late November/ Early December 2019	Publish Draft Maps and Potential Sequence of elections.	
December 3, 2019	3rd Public Hearing	Regarding draft maps and proposed sequence of elections. Opportunity for public to respond and make recommendations regarding the proposed district boundaries and sequence of elections.
December 17, 2019	4th Public Hearing	Expected that Council will select map to establish district boundaries, introduce an ordinance establishing district elections, and determine election sequence. Note: If posted maps are further amended, ordinance cannot be introduced until 7 days after amended map is published.
January 14, 2020	5th Public Hearing	Further opportunity for public to respond to the proposed district boundaries and sequence of elections. Expected that Council will adopt an ordinance establishing district elections.