



STAFF REPORT

City Council

Meeting Date:

10/4/2017

Staff Report Number:

17-234-CC

Regular Business:

Review and consider options regarding at-large and by-district elections

Recommendation

Staff recommends that the City Council consider and select one or more of the following options:

1. Adopt Resolution of Intention to Transition from At-Large to By-District Elections and authorize City Manager to enter into Contract with National Demographics Corporation to assist in transition.
2. Authorize City Manager and City Attorney to Negotiate and Enter into Contract with National Demographics Corporation to Work with the City in exploring transition to by-district elections.
3. Direct City Attorney and City Manager to Explore Transition from City At-Large Elections to “At-Large From” District Elections in 2018.
4. Appropriate \$75,000 from General Fund reserves to cover costs of the above.

Policy Issues

Cities throughout the State of California have increasingly been facing legal challenges under the California Voting Rights Act (“CVRA”) to their “at-large” systems of electing councilmembers. The CVRA was adopted to address racially polarized voting in at large elections. Almost all cities facing CVRA claims have settled out of court by voluntarily shifting to district-based elections. In 2012, in response to a CVRA lawsuit, the County of San Mateo placed a ballot measure on the ballot to transition to by-district elections. The ballot measure passed making San Mateo County the last county in California to transition to by-district elections.

Last year, the Legislature approved a series of bills to make it easier for local governments to transition from at-large to district-based elections. This new “safe harbor” legislation provides a transition timeline and if followed insulates the City from litigation and caps attorney fee liability.

If Council does not adopt a Resolution of Intention at this meeting, the Forty-Five (45) day from receipt of the CVRA claim letter will lapse and may leave the City susceptible to a CVRA lawsuit and possible liability for the plaintiff’s attorneys’ fees if the plaintiff is successful in an ensuing lawsuit. To date, there is no reported case law concerning litigation based on a violation of the CVRA where the defendant public agency prevailed on the merits.

Background

On Aug. 21, 2017, the City received a letter from Kevin Shenkman of Shenkman & Hughes (“Shenkman Letter”). A copy of the letter is attached. It alleges that voting within the City is racially polarized, resulting in minority vote dilution and that the City’s at-large elections violate the CVRA. Specifically, the letter alleges that, “Menlo Park’s at-large system dilutes the ability of Latinos and African Americans (each a ‘protected class’) to elect candidates of their choice or otherwise influence the outcome of Menlo Park’s council elections.” The Shenkman Letter makes the following claims to support this allegation: (1) The 2016

election, whereby Cecilia Taylor, an African American woman from Belle Haven, ran for City Council and lost, despite being preferred by Latino and African American voters; and (2) No Latinos have ever run for City Council. The City has not confirmed whether these statements are accurate. The Shenkman Letter closes with a demand that the City advise Mr. Shenkman by no later than October 3, 2017, as to whether it would like to discuss voluntary change to the City's current at-large system. [Note the 45-day period expires on October 5, 2017, not October 3, 2017.]

Menlo Park Elections, 2010 Census Data and Election History

The City utilizes an at-large election system with a rotating mayor. This means that the electors from the entire City choose each of the Five (5) Councilmembers and the mayor is chosen among the Councilmembers by vote of the City Council on a rotating basis. A by-district election system is one in which the city is physically divided into separate districts, each with one Councilmember who resides in the district and is chosen solely by the electors residing in that particular district.

The 2010 Census data for the City breaks down the population percentage based on ethnicities for the City as a whole, and includes a breakdown by Census Tract. The major race and ethnicity breakdowns from the 2010 Census for the City as a whole and for the Belle Haven neighborhood are listed below. [We have only provided data for the Belle Haven neighborhood because the allegations of racially polarized voting are only applicable to that neighborhood.] Note that the sum of the demographic categories exceeds 100% and the sum of the population numbers exceed actual total population because the Census data classifies Hispanic or Latino as an ethnicity, not race. Therefore, those that identify as Hispanic or Latino, also identify as a race. For example, a person that represents themselves as white on census data, may also identify themselves as Hispanic or Latino.

Breakdown by Race and Ethnicity for Entire City:¹

1. White: 22,494; 70.2%
2. Black or African American: 1,551; 4.8%
3. Asian: 3,157; 9.9%
4. Hispanic or Latino: 5,902; 18.4 %

Percentage Breakdown by Race and Ethnicity for Belle Haven Neighborhood (Census Tract 6117):²

1. White: 1,727; 28.9%
2. Black or African American: 1,130; 18.9%
3. Asian: 167; 2.8%
4. Hispanic or Latino: 4,095; 68.6%

Using the information from the 2010 Census, approximately 7.7% of the City's population that identify as White reside in the Belle Haven Neighborhood; approximately 72.8% of the City's population that identify as Black or African American reside in the Belle Haven Neighborhood; approximately 5.3% of the City's population that identify as Asian reside in the Belle Haven Neighborhood; and approximately 69.4% of the City's population that identify as Latino or Hispanic reside in the Belle Haven Neighborhood.

Over the years, the City has had City Council candidates and Councilmembers that identify as a minority race or ethnicity. Most recently, African American Celia Taylor ran for Council in 2016 and lost. In 2014,

¹ According to the 2010 Census data, the total City population is 32,026.

² According to the 2010 Census data, the total population of the Belle Haven Neighborhood is 5,970.

Drew Combs, an African American, and Peter Ohtaki, an Asian, ran for Council -- Peter Ohtaki was elected to Council and the highest vote getter and Drew Combs lost. In 2012, Carolyn Clark, an African American ran for Council and lost. In 2010 Peter Ohtaki ran and won as the highest vote getter. In 2002 and in 1998, Nicholas Jellins, an African American, ran and won [as the second highest vote getter for the City in 2002]. In, 1998 Bernie Valencia Nevin, believed to be Hispanic ran for re-election and lost. In 1994 Bernie Valencia Nevin ran and was elected to Council. Billy Ray White, an African American, ran for Council and won as the highest vote getter in 1982 and won in 1978. In 1976, Elder Bostic ran for office, but was not successful. Billy Ray White also ran in 1974 and 1972, but was unsuccessful. Herbert Harrison, an African American ran unsuccessfully in 1972 and in the 1971 special election. In addition to the above, minority members have participated in and served on other City commissions.

The CVRA

The CVRA was signed into law in 2002 with an effective date of January 1, 2003. It was specifically enacted to eliminate several key burden of proof requirements that exist under the Federal Voting Rights Act of 1965 (“FVRA”)³ after several jurisdictions in California successfully defended themselves in litigation brought under the FVRA. The CVRA made fundamental changes to minority voting rights in California, making it easier for plaintiffs in California to challenge the at-large voting system employed by many local jurisdictions resulting in dilution of voting power for minority groups. In 2016 (effective January 1, 2017), the CVRA was amended to provide a safe harbor against a CVRA lawsuit (“Safe Harbor”). The Safe Harbor provisions place certain additional requirements on potential plaintiffs before filing a CVRA lawsuit.⁴

Analysis

1. *Establishing CVRA Violation*

The CVRA does not require proof of intent on the part of the voters or elected officials to discriminate against a protected class.⁵ Also, unlike federal law, the CVRA does not require a showing that members of a protected class live in a geographically compact area.⁶ This means that a CVRA claim can be established in many cities with a large minority of protected class residents.⁷

In order to prevail in a suit brought for a violation of the CVRA, the plaintiff must show evidence of “racially polarized voting” within the jurisdiction. According to the CVRA, “racially polarized” voting is determined:

“...from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class. One circumstance that may be considered in determining a violation of [Section 14027](#) and this section is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on [Section 14027](#) and this section. In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support

³ 52 USC § 10301 *et seq.*

⁴ See, Elections Code § 10010(e)

⁵ Elections Code § 14027

⁶ Elections Code § 14025(c); *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 667

⁷ According to the 2010 Census, 18.4% of the City’s residents are Hispanic or Latino and 4.8% are Black or African American.

received by candidates from members of a protected class shall be the basis for the racial polarization analysis.”⁸

There are only two published California cases analyzing the CVRA. In *City of Modesto*, the Court explained that, “the CVRA does not require that the plaintiff prove a ‘compact majority-minority’ district is possible for *liability* purposes.”⁹ “The CVRA provides a private right of action to members of a protected class where, because of ‘dilution or the abridgement 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 influence the outcome of an election....’”¹⁰ Courts have used a variety of factors in considering whether the plaintiff has established a violation of the CVRA, including: voting patterns correlate with the race of the voter, minority-preferred candidates are not elected, and the extent to which members of a protected class bear the effects of past discrimination such as education, employment, and health, which hinder their ability to participate effectively in the political process. Proof of intent on the part of the voters or elected officials to discriminate against a protected class is not required.¹¹

In *City of Palmdale*, the trial court ruled that Plaintiff’s evidence established racially polarized voting occurred in the city council elections.¹² This part of the trial court’s decision was not challenged on appeal and thus not analyzed on appeal. The trial court found that: “The failure of minority candidates to be elected to office does not by itself establish the presence of racially polarized voting, [but] the regression analysis undertaken by both experts nevertheless established a clear history of a difference between choice of candidates preferred by the protected class in the choice of the non-protected class.”¹³

2. CVRA Remedies

The Courts’ remedial powers under the CVRA are extremely broad, and specifically include the power to implement “appropriate remedies,” including court ordered “imposition” of by district elections.¹⁴ The CVRA also allows a prevailing plaintiff to recover attorney’s fees and litigation expenses, including, but not limited to, expert witness fees and expenses.¹⁵

Numerous CVRA cases have been litigated and/or settled by cities. Virtually every settlement involves the city changing from an at large voting system to by district elections and payment of substantial attorney’s fees. One city, Santa Clarita, agreed in its settlement to change to cumulative voting, but that settlement fell apart when the Court found that general law cities cannot convert to cumulative voting.

3. Post 2016 CVRA Reform

In 2016, the Legislature adopted two key bills designed to encourage the transition from at large to by district voting.

⁸ Elections Code § 14028(b)

⁹ *City of Modesto*, 145 Cal.App. 4th at 669.

¹⁰ *Id.* at 667, *citing* Elec. Code § 14027, 14032

¹¹ Elections Code § 14028(d)

¹² *City of Palmdale*, 226 Cal.App.4th at 791

¹³ *Id.* at 790

¹⁴ Elections Code §14029

¹⁵ Elections Code §14030

a. *AB 2220- Adoption of Ordinance Requiring Election By District*

Effective January 1, 2017, the legislative body of a city may voluntarily switch from an at-large elections system by adopting an ordinance that requires members of the legislative body to be elected by district or by district with an elective mayor, without being required to submit the ordinance to the voters for approval.¹⁶ Prior law limited this procedure to cities having populations of less than 100,000. To take advantage of this streamlined approach, the Council adopted ordinance must include a declaration that the change in the method of electing members of the legislative body is being made in furtherance of the purposes of the CVRA.¹⁷

b. *Assembly Bill 350 a “Safe Harbor”*

In addition, effective January 1, 2017, the Legislature added a Safe Harbor provision to the CVRA which insulates the City from litigation if it follows a prescribed process and timeline for converting to “by district” elections. The Safe Harbor requires a prospective plaintiff to send notice to a city alleging a CVRA violation, before that prospective plaintiff may file a CVRA lawsuit against the City.¹⁸ Then, the prospective plaintiff may not file a lawsuit until Forty-Five (45) days after a city received the letter, and may only file if the city does not adopt a resolution declaring the council’s intent to transition from at-large elections to district-based elections within that time.¹⁹ The Forty-Five (45) day deadline for the City to adopt a resolution under this safe-harbor provision is Thursday, October 5, 2016.

If a Resolution of Intention is adopted pursuant to the requirements of Elections Code § 10010 (e)(3)(A), a prospective plaintiff may not commence an action within Ninety (90) days of the Resolution of Intention’s passage.²⁰ During the Ninety (90) day period, a city must hold Five (5) public hearings and at the last public hearing adopt an ordinance establishing district-based elections as required by Elections Code § 10010(a) in order to avoid a potential CVRA lawsuit. The public hearings give the community an opportunity to weigh in on the composition of the districts and to provide input regarding the content of the draft maps and the proposed sequence of elections. The first two public hearings give the public an opportunity to provide input regarding the composition of districts. These two hearings must be held within the span of no more than Thirty (30) days. Subsequently, draft district maps will be drawn and two additional public hearings must be held within a span of no more than Forty-Five (45) days. The final public hearing will be held when the Council votes to consider an ordinance establishing district-based elections.²¹

At the final public hearing council votes to consider an ordinance establishing district-based elections. The deadline to hold the Five (5) public hearings and adopt an ordinance, if the City adopts a Resolution of Intention at its October 4, 2017 special meeting is, Tuesday, January 2, 2018.

Within Thirty (30) days of an ordinance’s adoption, the potential plaintiff who sent the notice may demand reimbursement for costs of the work product generated to support the notice.²² The city is then required to

¹⁶ Gov’t Code § 34886

¹⁷ *Id.*

¹⁸ Elections Code § 10010(e)(1)

¹⁹ Elections Code §§ 10010(e)(2),(3)(A)

²⁰ Elections Code § 10010(e)(3)(B)

²¹ Elections Code § 10010(a)

²² Elections Code § 10010(f)(1)

reimburse that potential plaintiff for reasonable costs claimed, which may not exceed \$30,000, within Forty-Five (45) days of receiving the written demand.²³

By law, the terms of sitting Councilmembers cannot be cut short. The City Council will have an opportunity to determine the number of districts to be formed and how their boundaries are defined. This will be decided upon by the City Council based on information from the initial public hearings as required by California Elections Code § 10010, and other appropriate considerations, should it adopt the proposed resolution.

The benefits of utilizing the Safe Harbor statutes is they allow for election to go to districts without a ballot measure, provide a defined process for making the switch, and limit the amounts of costs and fees that cities would otherwise likely be assessed if the plaintiff prevails in the litigation. In addition, for proponents of district elections, it provides incentive for cities to make the switch more quickly than they otherwise might. Drawbacks to the Safe Harbor statutes include the short period of time to complete the process. This often does not leave enough time for a city to evaluate whether racially polarized voting actually exists.

c. Cities that Have Utilized the Safe Harbor Provisions

To date we are aware of at least fourteen cities, including Menlo Park that have received CVRA demand letters since the effective date of AB 350. Thus far, the cities of Fremont, Morgan Hill, Santa Rosa, Vista, Carlsbad, Carpinteria, Exeter, Oceanside, and Poway, have passed resolutions of intention to switch to by-district elections. Most of the cities are moving forward with the required steps to eventually pass an ordinance under the Safe Harbor statute.

4. District Elections and Other Types of Voting Options

There are five major types of voting systems in use in California:

- At Large
- From District
- By District
- Cumulative
- Ranked Voting

All five are briefly summarized below, although as a general law city, Menlo Park's choices are limited to at large, from district or by district.

a. At-Large Elections

The at-large elections system is where voters of the entire city elect all members of council. Advocates of at-large elections argue that governance is improved when elected officials answer to the entire community and not the interests of their district alone. They further contend that officials elected by districts tend to have too much influence over decisions affecting their district and that the district elections system encourages deal-making between council members to benefit their individual districts, rather than the community as a whole. Some argue that districts are unnecessary in small cities, where it is relatively easy and inexpensive to reach out to the entire electorate, such as by door-to-door campaigning.

²³ Elections Code § 10010(f)(1-3).

b. From District

Another version of an at-large elections system is a “from district” elections system where each council member is elected by voters from the entire city, but the city is divided into districts and each council member must reside within a particular district. This hybrid system provides some assurance of geographical representation while also promoting citywide decision making. From district elections are used in Santa Ana and Newport Beach. The disadvantage of this system is that it is not immune from a CVRA challenge.

c. By District Elections

To the contrary, the by-district election system is where a city is divided into districts and one council member is elected by only the registered voters in that particular district. When a city utilizes a by district election system, the mayor may be elected at-large, or on a rotating basis. For example, if a city has five councilmembers, with a mayor elected at large, it will be broken up into four districts. Whereas, if the mayor is selected on a rotating basis, the city will consist of five districts. Most peninsula cities have a rotating mayor, except Morgan Hill’s mayor is directly elected to serve two-year terms.

Advocates of district-based elections argue that officials elected by districts are more responsive to the constituents in the district. Also, as is being asserted by the Shenkman Letter, by district voting allegedly makes it easier for members of protected classes to elect candidates of their choice. Additionally, some argue that non-incumbents fare better in by district elections. By district elections are typically utilized in large cities with distinct neighborhoods that have distinct needs and concerns. By district elections are the only form of elections that are immunized from a CVRA challenge.

d. Cumulative Voting

Under cumulative voting, a voter may cast more than one vote per candidate. For example, if there are three Council seats up for election, a voter can cast all three votes for one candidate, or two votes for one candidate and one for a second candidate, or one vote each for three candidates. There are no general law cities in California that use cumulative voting method. Additionally, the ability of a General law city to use cumulative voting has been called into question by a Los Angeles County Superior Court judge who ruled that cumulative voting cannot be used in the 2016 Santa Clarita City Council election. According to local news articles, the Judge reasoned that while it might be technically possible to rig the current ballot-tabulation machinery to handle cumulative voting, state law “does not define any cumulative voting ballot tabulation methods by which testing and certification criteria could be developed” by the Secretary of State’s office. The Judge’s ruling came after receipt of a letter from California Secretary of State Alex Padilla who explained in his letter that any voting system that has not been certified or tested for the purpose of which is intended to be used requires testing and certification by my office.” The current system “has not been tested for use in a cumulative voting election environment by the Secretary of State.”

e. Ranked Voting

Ranked-choice, also known as instant-runoff voting, gives voters the option of choosing multiple candidates in order of preference. After the ballots are first counted, the candidate with the fewest top-rank votes is eliminated and the next choices of that candidate’s supporters are apportioned among the remaining candidates. The process continues until one candidate gets a majority.

Instant runoff/ranked choice voting can be combined with by district elections. It is used in lieu of a primary system in order to assure that each elected official has 50% more or more support from the constituents of his or her district. The system is used in combination with by district elections in San Francisco, Oakland, Berkley and San Leandro. All of which are charter cities.

On September 29, 2017, the Governor recently vetoed SB 1288, which would have authorized general law cities to utilize ranked voting.

f. Five, Seven or Nine Council Members

Historically, most San Mateo County cities have had five councilmembers, except the City of Palo Alto has nine, which will be reduced to seven in 2018. The Elections Code, however, also authorizes increased Council size to seven or nine Councilmembers. Increasing the number of members of a legislative body, may require a ballot measure.²⁴ We have not been able to find any general law cities that have increased the number of council members under the statute that allows the city council, without voter approval, to convert to by-district elections. We will continue to research that issue.

5. Hiring A Demographer

We recommend hiring National Demographics Corporation to assist the City in exploring the transition from at large elections to by-district elections, including assisting with the public hearing process, selection of the number of council members, whether to have an elected mayor and four or six districts, or to have five districts with a rotating mayor, and recommending/creating the district maps for consideration by the City Council and the public. National Demographics Corporation is the preeminent demographic company in California working with more cities and school districts to convert from at large elections to by-district elections than any other demographic firm.

If Council elects to adopt the Resolution of Intention transitioning to by district elections, it should also authorize the City Manager and City Attorney to negotiate and enter into an agreement with a demographer (National Demographics Corporation). The demographer will help to ensure that the City remains on the tight (statutorily required) schedule to adopt the requisite ordinance within the CVRA “safe harbor” requirements. The schedule is described in Exhibit A to the attached Resolution. The demographer will also work with the City to design the appropriate districts and coordinate public outreach for the required public hearings.

Impact on City Resources

Cities that have attempted to defend their “at-large” system of City Council elections in court have incurred significant legal costs, including attorneys’ fees incurred by plaintiffs. Award in these cases have reportedly reached \$3,500,000 and beyond. When sued, the settlements entered into by cities typically have included paying the plaintiff’s attorneys’ fees. For example, the City of Santa Barbara in February 2015, reportedly paid \$900,000 in attorneys’ fees and expert costs to settle their CVRA lawsuit. Another example, is the City of Palmdale that incurred expenses in excess of \$4,500,000 in its unsuccessful attempt to defend against a lawsuit brought under the CVRA. To date, staff is unaware of any city that has prevailed in defending its “at-large” system of election under a claim filed by any individual or group under the CVRA.

²⁴ Government Code § 34871

Under the “Safe Harbor” provisions if the City chooses to adopt a resolution of intent and ordinance to move to district-based elections, the financial recovery by a potential plaintiff is limited to \$30,000 by statute. The City would also incur its own fees to hire a demographer and go through the process of forming districts, holding the required public hearings, and drafting a resolution and ordinance.

It is estimated that the costs of the demographer and unbudgeted legal fees may be as much as \$75,000. If the City Council elects to adopt a Resolution of Intention to move to by district elections, the City Council should appropriate \$75,000 from its general fund reserves to cover the costs.

Environmental Review

This action is not a project within the meaning of the California Environmental Quality Act (CEQA) Guidelines §§ 15378 and 15061(b)(3) as it is an organizational structure change that will not result in any direct or indirect physical change in the environment.

Public Notice

Public Notification was achieved by posting the agenda, with the agenda items being listed, at least 24 hours prior to the meeting. Extended notice was provided by early release of the staff report.

Attachments

- A. Shenkman Letter
- B. Proposed Resolution
- C. 2010 Census Summary File QT-P3

Report prepared by:

William L. McClure,
City Attorney

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