File #: 18-304, **Version:** 1

Report regarding a resolution of the City Council of the City of South San Francisco declaring its intent to transition from at-large elections to district-based councilmember elections pursuant to California Elections Code Section 10010. *(Jason Rosenberg, City Attorney)*

RECOMMENDATION

Staff recommends that the City Council adopt a resolution of intent declaring its intent to transition from at-large elections to district-based councilmember elections, outlining specific steps to be undertaken to facilitate the transition, and estimating a time frame of action, pursuant to California Elections Code Section 10010.

BACKGROUND

On March 6, 2018, the City of South San Francisco (the "City") received a certified demand letter, included as Attachment 1, from Shenkman & Hughes, PC dated February 28, 2018 ("demand letter") alleging a violation of the California Voting Rights Act (CVRA) and demanding that the City move away from an at-large election system. The demand letter claims that the City's current at-large election system dilutes the ability of Latino voters to elect candidates of their choice or otherwise influence the outcome of City Council elections.

The City's current at-large election system allows voters from the entire City to choose each of the five Councilmembers. In a district-based election system, a city would be divided into separate districts where one councilmember resides in each district. There are two kinds of district-based elections: in "from district" elections each district councilmember is elected by voters from the entire City, and in "by district" elections each district councilmember is elected by only the voters who reside in the same district where the candidate lives.

DISCUSSION

The California Voting Rights Act

In 2002, the CVRA was signed into law and took effect in 2003. The CVRA prohibits at-large election systems from impairing the ability of a protected class (e.g. members of a race, color, or language minority group) to elect candidates of its choice or its ability to influence the outcome of an election. Modeled after the Federal Voting Rights Act (FVRA) (42 U.S.C. § 1973), the CVRA was specifically enacted to make it easier for plaintiffs to challenge at-large voting systems employed by many local jurisdictions. To prove a violation of the CVRA, plaintiffs need only show the existence of racially polarized voting-that there is a difference between the candidates or ballot measures preferred by the voters in the protected class compared to voters in the rest of the jurisdiction. (Elec. Code §§ 14026(e), 14028(a)). Plaintiffs are not required to show that members of a protected class live in a geographically compact area or prove intent to discriminate on the part of voters or officials.

Safe Harbor Under Assembly Bill (AB) 350.

Effective January 1, 2017, AB 350 (2016) amended California Elections Code Section 10010 and provided local jurisdictions a safe harbor against CVRA lawsuits. A city's liability would be capped at $30,000 if the city adopts a resolution of intention to transition to by district elections within 45 days of receiving a demand letter and then adopts an ordinance creating district elections within 90 days from adoption of the resolution of intent. Within the 90 days of passing the resolution of intention, the city must hold at least five public hearings to draw district maps, adopt an ordinance, and transition to by district elections. The public hearings will 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. If a city voluntarily chooses to transition to district elections within the timeframe established by AB 350, the city retains control over determining district boundaries with input from communities of interest through the public hearing process. If a city is compelled to adopt district elections, district boundaries will be drawn by the presiding court with input from the plaintiff.

Financial and Legal Implications.

In a lawsuit challenging at-large elections under the CVRA, a prevailing plaintiff is entitled to reasonable attorneys' fees and litigation expenses, whereas a prevailing defendant usually cannot recover any costs. (Elec. Code, § 14030). Additionally, if a CVRA violation is found, the court has authority to impose district-based elections and determine district boundaries with input from the plaintiff's attorney. (Elec. Code § 14029).

Further, even if successful, the City's attorney fees and legal costs may exceed $500,000, but the City could still remain susceptible to a subsequent challenge under the CVRA by a different plaintiff. On the other hand, if the plaintiff prevails or if the parties settle, to the public agency must reimburse plaintiff attorney's fees and legal costs, in addition to paying for the City's own legal costs. When cities have defended a CVRA lawsuit, settlements to pay for attorney fees have ranged from as little as $385,000 (Escondido) and $800,000 (Santa Barbara) to as high as $3,000,000 (Modesto) and $4,500,000 (Palmdale), depending on whether the superior court decision was appealed.

To date, City staff is unaware of any cities that have successfully defended their at-large election system after the initiation of a legal challenge. Rather, litigation and threats of litigation have led public agencies to either transition to a district-based method of election or be forced to transition based on an adverse ruling by the court. In many instances, a public agency chose not to litigate and voluntarily initiated a change in its method of voting once a legal challenge was threatened (e.g. receipt of a demand letter).

On March 6, 2018, the City of Half Moon Bay received a nearly identical demand letter from Shenkman & Hughes. In San Mateo County, the City of Menlo Park voted to transition from at-large to by district for the November 2018 elections after receiving a similar letter. In the Bay Area, the City of Concord and the City of Fremont are currently in the process of transitioning to by district elections after receiving the same demand letter from Shenkman & Hughes.

There are only two published California cases analyzing the CVRA-Shenkman & Hughes served as the

plaintiff's attorney in both instances. The City of Modesto and City of Palmdale unsuccessfully defended their at-large election systems in 2006 and 2014, respectively. (*Sanchez v. City of Modesto* (2006) 145 Cal.App. 4th 660, 665; *Jagueri v. Palmdale* (2014) 226 Cal.App.4th 781, 790).

Implications for the Community.

According to the FVRA, a voting practice has a discriminatory effect if, based on the totality of circumstances, minorities have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The intent of switching to district elections is to ensure minorities are represented fairly at all levels of government because their voting strength is not diluted. Through the public hearing process, interested parties, including non-profit organizations and community leaders, will review the maps and share input about where district boundaries should be drawn.

Transition from At-Large to District-Based Elections.

Most communities have taken a phased approach to implementing district-based elections. If district elections are initiated by the City, the City Council may determine the potential sequence of the elections. (Elec. Code § 10010(a)(2)). Additionally, no council member's term may be cut short (Gov. Code § 34873; Elec. Code § 21606(a)), but when his or her term ends, an incumbent can only run from the new district in which he or she resides. The term of office for each councilmember remains four years. (Gov. Code § 34879).

The district election sequence depends on a number of factors, such as the number of districts drawn, the number of incumbents located in each district, and the incumbents' existing terms. State law does not specifically prescribe the method for election sequencing when transitioning to district elections.

However, the timing of a city council's exercise of discretion and the scope of its discretion is limited by other statutory requirements, which include:

- For each draft redistricting plan, a proposed election sequence must be specified at the time the plan is published.
- The expiration of terms of office can be considered in setting the election rotation.
- In determining the final sequence of the district elections, a city council "shall give special consideration to the purposes" of the CVRA.
- A city council shall take into account the preferences expressed by members of the districts.

For example only, a staggered election would occur every two years with two councilmembers elected in one election cycle and the residents of only those two districts would vote. In the next election cycle, three councilmembers would be elected by only the residents of those three districts with open seats.

Criteria for Creating District Maps.

Cities must comply with the following legally required criteria under federal law:

1. Each district must have equal populations or "shall be as nearly equal in population as may be," which

is known as the one person, one vote rule. (Elec. Code § 21601; Gov. Code § 34884(a)(1); Equal Protection Clause of the U.S. Constitution).

2. Race cannot be the "predominant" factor or criteria when drawing districts. (*Shaw v. Reno* (1993) 509 U.S. 630; *Miller v. Johnson* (1995) 515 U.S. 900)

3. The districting plan must comply with the FVRA, which prohibits districts from diluting minority voting rights and encourages a majority-minority district if the minority group is sufficiently large and such a district can be drawn without race being the predominant factor. (*Bartlett v. Strickland* (2009) 556 U.S. 1).

Additionally, cities may, but are not required to, give consideration to the following factors: (a) topography, (b) geography, (c) cohesiveness, contiguity, integrity, and compactness of territory, and (d) community of interests of the council districts. (Elec. Code § 21601; Gov. Code § 34884(a)(1)). When defining districts, other communities have considered natural and man-made physical/visual boundaries like major roads/corridors, freeways, creeks, railroad lines, political subdivisions, or other barriers. Community of interests includes school district boundaries, neighborhood boundaries, established homeowner associations ("HOAs"), retail/commercial districts, voting precincts, and public transit stops. Cities may also plan for future growth based on anticipated housing developments.

FISCAL IMPACT

If the City Council concurs with Staff's recommendation, there will be significant staff time needed to transition to district-based elections and to administer the process, including the need for at least five public hearings. The City will also incur costs for a demographer to assist with drawing district boundaries and soliciting public input in order to draw district maps, which will cost approximately $50,000 to $70,000. Additionally, the City will be required to reimburse the plaintiff for its documented attorney's fees and costs, up to $30,000. (Elec. Code § 10010(f)(3)). If City Council chooses to maintain at-large elections and defend a potential lawsuit, the costs and attorneys' fees would likely exceed $1,000,000 and would be a General Fund liability, which would be a significant unexpected expense.

CONCLUSION

Staff recommends the City Council adopt a resolution of intent declaring its intent to transition from at-large elections to district-based councilmember elections, outlining specific steps to be undertaken to facilitate the transition, and estimating a time frame of action, pursuant to Elections Code Section 10010.

Attachments

1. Demand Letter from Shenkman & Hughes
2. Powerpoint Presentation