

Consideration of Transition from At-Large to District-Based City Council Electoral System

November 27, 2017

Election Systems

Under state law, three methods of selecting Councilmembers:

“At Large”

- Candidates may reside anywhere in the jurisdiction
- All voters vote for all offices

“From District” or “Residence” Districts

- Jurisdiction divided into districts
- Candidate must reside in district
- All voters vote for all offices

“By District”

- Jurisdiction divided into districts
- Candidates must reside in district
- Only voters in district vote for district office

Federal Voting Rights Act

- ❑ Federal Voting Rights Act of 1965 (FVRA) originally adopted to effectuate 15th Amendment's guarantee that no person shall be denied the right to vote on account of race or color.
- ❑ FVRA outlaws both intentional discrimination in voting practices and those practices that have unintentional but discriminatory effects when viewed in the totality of the circumstances.
- ❑ Under FVRA, the selection of local officials may violate federal law based upon the way they are selected (i.e., at-large, from district or by district) or the way in which the districts are drawn.
- ❑ Historically, Justice Department and interest groups focused enforcement of FVRA in states in the South (including Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia) – although other areas of country (including some counties in Central California) were also affected by actions brought pursuant to FVRA and monitoring of voting activities.

Federal Voting Rights Act [*cont.*]

- In 1986, the U.S. Supreme Court in *Gingles* outlined a four-part test to determine if the FVRA had been violated in the way in which elected officials are selected:
 1. Can the protected class constitute the majority of a district?
 2. Does the protected class vote as a bloc?
 3. Do the voters who are not in the protected class vote in a bloc to defeat the preferred candidates of the protected class?
 4. Do the “totality of circumstances” indicate race is a factor in elections?
- If all four elements were met, a violation of the FVRA has occurred, and the federal court was required to craft remedies to address the discrimination.
- *Gingles* test is a difficult test to meet unless clear discrimination exists.

California Voting Rights Act

- The California Voting Rights Act (CVRA) was enacted in 2002.
- Why did California want its own law?
 - Intended to prevent disenfranchisement of protected classes (race, color, language)
 - “. . . this bill would presumably make it easier to successfully challenge at-large districts.” (Bill Analysis with Senate Vote – June 11, 2002)
- Creates private right of action

California Voting Rights Act [*cont.*]

- The CVRA makes it significantly easier for plaintiffs to force jurisdictions into “by-district” election systems by eliminating two of the US Supreme Court *Gingles* tests:
 - ~~1. Can the protected class constitute the majority of a district?~~
 2. Does the protected class vote as a bloc?
 3. Do the voters who are not in the protected class vote in a bloc to defeat the preferred candidates of the protected class?
 - ~~4. Do the “totality of circumstances” indicate race is a factor in elections?~~
- Liability is now determined only by presence of racially polarized voting. “Racially polarized voting” occurs when there is a difference between the choice of candidates preferred by voters in a protected class and the choice of candidates preferred by voters in the rest of electorate.

California Voting Rights Act [*cont.*]

- Plaintiff does *not* need to prove that race was a factor in the elections or that the protected class would constitute the majority of a newly drawn district or districts.
- The consequences of the CVRA are significant. Because of the low standard to prove liability under the CVRA, a number of cities and special districts have changed the way of selecting their councilmembers or boardmembers to avoid the possibility of paying very high awards of attorney fees to plaintiffs.
- To date, every government entity that has been sued since the CVRA was enacted has either lost in court or settled. Every public government defendant in these cases has been forced to pay at least a portion of the plaintiff's attorney fees.

CVRA Impact

- Switched (or in the process of switching) as a result of CVRA:
 - ▣ At least 157 school districts
 - ▣ 28 Community College Districts
 - ▣ 77 cities
 - ▣ 1 County Board of Supervisors
 - ▣ 8 water and other special districts.
- Key decisions & settlements:
 - ▣ Only Palmdale has gone to trial on the merits (the city lost)
 - ▣ Key settlements:
 - Palmdale: \$4.7 million
 - Modesto: \$3 million
 - Anaheim: \$1.1 million
 - Whittier: \$1 million
 - Santa Barbara: \$600,000
 - Tulare Hospital: \$500,000
 - Madera Unified: about \$170,000
 - Hanford Joint Union Schools: \$118,000
 - Merced: \$43,000
 - Placentia: \$20,000

“Safe Harbor” under CVRA

- Because of claims of abuse by some plaintiffs’ attorneys in CVRA cases, in 2016, the Legislature adopted AB 350 to place a “safe harbor” cap of \$30,000 on the amount of attorney fees that a plaintiff could recover if specific requirements are met.
- Within 45 days after receiving a certified demand letter from plaintiff’s attorney, the public entity needs to adopt a “Resolution of Intent” to consider an ordinance to establish a district-based election system.
- Within 90 days after adopting the Resolution of Intent, the public entity would need to adopt the ordinance establishing the districts with specific boundaries for each district.

Oxnard and Demand for Council Districts

- City received a letter dated October 7, 2017 claiming that the City's current "at-large" method of electing Councilmembers violates the CVRA. Letter alleges that the City's elections "may be occurring by polarized voting" and threatens litigation if the City declines to adopt a district-based election system.
- In response to demand letter, City retained a demographer to study recent elections. The demographer determined that the City's recent elections do not reflect racially polarized voting in violation of the FVRA or CVRA.
- While the City would have a very solid legal case if it chose to contest a lawsuit brought under the CVRA, such litigation would be very expensive in terms of legal fees and expert witness fees. In addition, if the plaintiff prevailed on even a portion of the case, then the City would be required to pay for all or part of the plaintiff's attorney fees, expert fees and costs.

Next Steps

- If City Council wishes to utilize the “safe harbor” approach and agree to adopt Council districts, City Council should adopt Resolution of Intent agreeing to transition to district-based elections by adoption of an ordinance by no later than February 26, 2018.
 - The adoption of the Resolution of Intent would start the 90-day process that includes four public hearings and the drawing of proposed district maps for final consideration by the City Council.
- If City Council adopts the Resolution of Intent, City will need to retain a demographer to assist through the process. Proposed not-to-exceed agreement in the amount of \$70,000 would include robust tools for “draw your own district” maps to be utilized by interested members of the public.

Next Steps [*cont.*]

- If City Council adopts the Resolution of Intent, the City Council will need to provide specific direction to staff if the Council wishes to consider increasing the number of City Council seats. This information will be needed for the kick-off public hearing that is tentatively scheduled for mid-December (subject to availability of dates by the City Council and demographer) and the second public hearing in early January 2018.