



*City
Council
Report*

Item: 15
Category: NEW BUSINESS
Meeting Date: January 15, 2019

TITLE: City Council Consideration to Move to District Based City Election (Resolution /Roll Call Vote)

RECOMMENDED ACTION

Staff recommends that the City Council adopt a resolution of intention to transition from an at-large to a district-based election method for City Council elections.

BACKGROUND

In 2002, the Legislature enacted the California Voting Rights Act (CVRA) (Elec. Code §§14025 –14032), which prohibits California public agencies from imposing or applying an at-large election method “that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election.” (Elec. Code §14027) A protected class is defined by the CVRA as “a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965.”

The CVRA defines an at-large method of election to include the election method used by the City of Campbell, in which the voters of the entire City elect all the members of the City Council. In a lawsuit brought pursuant to the CVRA, a plaintiff who establishes a history of “racially polarized voting” under a city’s at-large election system can require a city to change to a district-based election system.

DISCUSSION

On December 3, 2018 the City received a letter that threatens to seek judicial relief if the City does not go to district-based elections. The letter stated allegations that the City’s at-large election system violates the California Voting Rights Act (CVRA). The letter was written by Malibu-based law firm Shenkman & Hughs, PC on behalf of clients, Southwest Voter Registration Education Project and its members. The letter alleges that there is evidence of “racially polarized voting” in the City of Campbell’s at-large election system. The letter alleges that the City of Campbell’s at large system dilutes the ability of Latinos (a “protected class”) and impedes the emergence of Latino candidates from the protected communities.

Under the CVRA, any evidence of racially polarized voting is sufficient to require a court to order a change from at-large voting to district-based voting, even without actual

evidence of an electoral injury such as the inability of a protected class to elect a candidate of its choice. 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 the electorate.

Elections Code section 10010 (effective on January 1, 2017) provides a “safe harbor” from CVRA litigation for cities. If a city receives a demand letter, such as in this case, the city is given 45 days of protection from litigation to determine its options. If within that 45 days, a city adopts a resolution declaring the Council’s intent to transition from at-large to district-based elections, outlining specific steps to be undertaken to facilitate the transition, and estimating a time frame for action, then a potential plaintiff is prohibited from filing a CVRA action for an additional 90-day period from the time the resolution is passed. This provides time for the city to voluntarily transition to a district-based election system without having to litigate the district election system. The legislation sets forth a number of steps a city must follow prior to the public hearing at which the governing body votes to approve or defeat an ordinance establishing a district based election.

Under section 10010, the prospective plaintiff that sent the written notice asserting that the City’s method of conducting elections may violate the California Voting Rights Act of 2001 may demand reimbursement for the cost of the work product generated to support the notice. The amount of reimbursement required by this section is capped at \$30,000, as adjusted annually to the Consumer Price Index for All Urban Consumers, United States city average, as published by the United States Department of Labor. This amount applies if the City adopts an Ordinance after receiving a threat and the prospective plaintiff must provide financial documentation to substantiate the claims. The \$30,000 in liability is not automatic, prospective plaintiff must prove that the alleged costs were actually incurred.

Staff believes it is in the best interest of the public to avoid a costly lawsuit and the spending of significant amounts of tax payer dollars, which would be the likely result if the Council did not adopt the resolution. Even cities that have settled (without conceding the merits) lawsuits brought under the CVRA have incurred significant expenses, not only to pay their own attorneys’ fees, but to pay the attorneys’ fees for the plaintiffs. For example, in February 2015, the City of Santa Barbara reportedly paid \$600,000 in attorneys’ fees and expert costs to settle its CVRA lawsuit. However, the costs are much higher for those cities that have litigated cases to judgment. For example, the City of Palmdale incurred expenses in excess of \$4.5 million in its unsuccessful attempt to defend against a lawsuit brought under the CVRA. According to the League of California Cities, no city has successfully defended an “at-large” system of election under a claim filed by any individual or group under the CVRA.

Staff recommends that the City Council adopt the proposed resolution stating the Council’s intention to transition to district-based elections for the 2020 general municipal election, within the 90 period provided in Elections Code section 10010. If the Council adopts a resolution at this meeting, then pursuant to Elections Code section 10010, the

Council is required to hold four public hearings within 90 days, or by April 15, 2019, prior to adopting an ordinance establishing the district-based election system.

The requirements for the meetings are established by the statute:

- a. Before drawing a draft map or maps of the proposed boundaries of the districts, the City must hold at least two public hearings over a period of no more than 30 days, at which the public is invited to provide input regarding the composition of the districts.
- b. After all draft maps are drawn, the City must publish and make available for release at least one draft map and, if members of the City Council will be elected in their districts at different times to provide for staggered terms of office, the potential sequence of the elections. The City must also hold at least two additional hearings over a period of no more than 45 days, at which the public is invited to provide input regarding the content of the draft map or maps and the proposed sequence of elections, if applicable. The first version of a draft map shall be published at least seven days before consideration at a hearing. If a draft map is revised at or following a hearing, it shall be published and made available to the public for at least seven days before being adopted.

Attachment 1 to this staff report is a resolution of intention to immediately start the transition to district based elections. Exhibit A of the resolution sets a tentative timetable for accomplishing the above tasks. Adopting the resolution commits the City to follow the outlined process but does not legally bind the City to adopt the final ordinance. As noted in the draft resolution, the City will be required to hire a professional demographer to assist in the preparation of draft district maps. Pursuing this option would protect the City from the filing of a lawsuit under the CVRA. By statute, Mr. Shenkman would be entitled to reimbursement of his documented fees and expenses, not to exceed the amount prescribe in Government Code 10010 (3); however, the City would be spared possibly hundreds of thousands of dollars in attorney's fees required to litigate a CVRA action.

Should Council proceed with adopting the resolution of intent, the City would then need to complete the following process:

- Retain a demographic consultant
- Update city demographic
- Adopt districting criteria
- Get community input at multiple public hearings
- Draw maps/determine election sequencing for electoral district
- Additional public hearing prior to adoption of districting ordinance
- Consider passing ordinance adopting district

ALTERNATIVE ACTION

Decide against transitioning to district-based elections, and not adopt a resolution of intention. Council's may reject Mr. Shenkman's demand to switch to district-based elections with the intention to vigorously fight any ensuing CVRA lawsuit. If successful, the City would be liable only for its own attorneys' fees and other litigation costs, which could still amount to hundreds of thousands of dollars. If unsuccessful, the City would also be liable for payment of the plaintiffs' attorneys' fees and costs, also likely to amount to hundreds of thousands of dollars.

To follow this option, the City Council would merely decline to adopt a resolution of intention.

FISCAL IMPACT

The fiscal impact of a change to district elections is unknown at this time. However, there will be significant resource impacts to staff to meet the legal requirements of transitioning to district-based elections. Additionally, the City will need to hire a demographics consultant outside legal counsel. Staff is in the process of requesting quotes. The City may also be required to reimburse the plaintiff for its attorneys' fees and costs in accordance to the amount prescribed on Government Code Code10010 (3).

Prepared by:



Brian Loventhal, City Manager

Attachment:

1. Resolution
2. Exhibit A - Timeline
3. Letter from Shenkman & Hughs, PC

RESOLUTION NO.

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CAMPBELL
DECLARING ITS INTENTION TO TRANSITION FROM AT-LARGE TO DISTRICT-
BASED ELECTIONS FOR CITY COUNCIL PURSUANT TO ELECTIONS CODE
SECTION 10010(E)(3)(A), EFFECTIVE FOR THE NOVEMBER 2020 GENERAL
MUNICIPAL ELECTION**

WHEREAS, the City of Campbell, is a municipal corporation and general law city duly organized and existing under and pursuant to the Constitution and laws of the State of California ("City"); and

WHEREAS, members of the City Council of the City of Campbell ("City") are currently elected in "at-large" elections, in which each City Councilmember is elected by the registered voters of the entire City; and

WHEREAS, California Government Code Section 34886 authorizes the legislative body of a city to adopt an ordinance to change its method of election from an "at-large" system to a "district-based" system in which each council member is elected only by the voters in the district in which the candidate resides; and

WHEREAS, on December 3, 2018 the City Clerk received by certified mail a letter from attorney Kevin I. Shenkman asserting that the City's at-large election system violates the California Voting Rights Act of 2001 (Elections Code §§14025-14032) ("CVRA") and threatening to sue the City unless the City transitions to a district-based election system for its city council; and

WHEREAS, a violation of the CVRA is established if it can be proven that "racially polarized voting" occurs in the City's at-large election system. Racially polarized voting means voting in which there is a difference in the choice of candidates or other electoral choices that are preferred by voters in a "protected class", an in the choice of candidates or other electoral choices that are preferred by voters in the rest of the electorate (Elections Code §14026(e)); and

WHEREAS, the City Council has been advised that defending a lawsuit filed pursuant to the CVRA will require the City to incur legal fees and costs potentially in the hundreds of thousands of dollars for the City's own defense, and additional liability of potentially hundreds of thousands of dollars in legal fees and costs payable to the prevailing plaintiffs if the City is unsuccessful; and

WHEREAS, if the City elects to transition to a district-based election system within the timeframe established in Elections Code section 10010, then the City is protected from the filing of a CVRA lawsuit with its incumbent costs, and its liability to the potential plaintiffs for legal fees will be capped at prescribed by Government Code 10010 (3); and

WHEREAS, the City Council finds that it is in the best interests of the City to act within the safe-harbor timeframe provided by Elections Code Section 10010 to transition from an at-large election system to a district-based election system for electing the mayor and city councilmembers; and

WHEREAS, prior to the City Council's consideration of an ordinance to establish district boundaries for a district-based electoral system, California Elections Code Section 10010 requires all of the following:

1. Prior to drawing a draft map or maps of the proposed boundaries of the districts, the City shall hold at least two (2) public hearings over a period of no more than thirty (30) days, at which the public will be invited to provide input regarding the composition of the districts;
2. After all draft maps are drawn, City shall publish and make available for release at least one draft map and, if members of the City Council will be elected in their districts at different times to provide for staggered terms of office, the potential sequence of the elections shall also be published. The City Council shall also hold at least two (2) additional hearings over a period of no more than forty-five (45) days, at which the public shall be invited to provide input regarding the content of the draft map or maps and the proposed sequence of elections, if applicable. The first version of a draft map shall be published at least seven (7) days before consideration at a hearing. If a draft map is revised at or following a hearing, it shall be published and made available to the public for at least seven (7) days before being adopted; and

WHEREAS, the City will retain an experienced demographer to assist the City to develop a proposal for a district-based electoral system; and

WHEREAS, the adoption of a district-based electoral system will not affect the term of any sitting Council Member, each of whom will serve out his or her current term;

NOW, THEREFORE, BE IT RESOLVED, by the City Council of the City of Campbell as follows:

1. The City Council hereby outlines its intent to transition to a district-based election system as authorized by Government Code Section 34886 for use in the City's General Municipal Election for City Council Members beginning in November 2020.
2. The City Council directs staff to engage a demographer, and other appropriate consultants as needed, to provide a detailed analysis of the

City’s current demographics and any other information or data necessary to prepare a draft map that divides the City into voting districts in a manner consistent with the intent and purpose of the California Voting Rights Act and the Federal Voting Rights Act.

- 3. The City Council approves the tentative timeline set forth in Exhibit A, attached to and made a part of this resolution, for conducting a public process to solicit public input on proposed district-based electoral maps before adopting any such map.
- 4. The City Council directs staff to institute a program for public outreach and to inform the residents of Campbell of this resolution and the process set forth in Exhibit A, and to facilitate and encourage public participation.
- 5. The timeline contained in Exhibit A may be adjusted as deemed necessary, provided that such adjustments shall not prevent the City from complying with the time frames by Election Code Section 10010.

PASSED AND ADOPTED this 15TH day of January, 2019 by the following roll call vote:

AYES: Councilmembers:

NOES: Councilmembers:

APPROVED:

Richard M. Waterman, Mayor

ATTEST:

Wendy Wood, City Clerk

Attachment: Resolution (1348 : City Council Consideration to Move to District Based City Election)

EXHIBIT
A
DRAFT
TIMELINE / CHECKLIST

Letter Received by City Clerk's Office: December 3, 2018
 45-Day Deadline [AB 350(e)(3)(A)]: January 17, 2019
 90-Day Deadline [AB 350(e)(3)(B)]: April 15, 2019

No.	Task	Date / Timeline	Notes
1	Council Meeting – Initial Consideration of Topic – Item to Introduce Topic, Seek Council Direction on How to Proceed, Adopt Resolution	January 15, 2019	
2	Council Meeting/Public Hearing #1 Consider Public Input on Composition of Districts	February 5, 2019	Before Map(s) Drawn E.C. 10010(a)(1)
3	Council Meeting/Public Hearing #2 Consider Public Input on Composition of Districts	February 19, 2019	Before Map(s) Drawn – E.C. 10010(a)(1), within 30 days of Public Hearing #1
5	Publish Draft Map(s) and Sequencing	By February 25, 2019	E.C. 10010(a)(2), Published Once at Least 7 Days Prior to Public Hearing #3
6	Council Meeting/Public Hearing #3 Consider Draft Maps and Election Sequence for District Elections	March 5, 2019	After Map(s) and Sequencing Published E.C. 10010(a)(2), More than 7 Days After Draft Map(s) and Sequencing Publication
7	Council Meeting/Public Hearing #4 – Introduction/First Reading of Ordinance to Consider Draft Maps and Election Sequence, and Establishing District Elections	March 19, 2019	After Map(s) and Sequencing Published E.C. 10010(a)(2), within 45 days of Public Hearing #3
8	Council Meeting – Second Reading of Ordinance	April 2, 2019	Publish Entire Adopted Ordinance
	Day 90	April 15, 2019	
9	Ordinance Effective 30 Days After Adoption	May 15, 2019	Government Code 36937 (Election Ordinance Effective Immediately) Unless Charter
10	Council Members Transition to Representing Their Respective Districts via Ordinance	November 2020 November 2022	

Attachment: Exhibit A - Timeline (1348 : City Council Consideration to Move to District Based City Election)

SHENKMAN & HUGHES, PC

Attorneys

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RECEIVED

DEC 03 2018

CITY CLERK'S OFFICE

cc: City Attorney
 City Manager

VIA CERTIFIED MAIL

November 28, 2018

Wendy Wood, City Clerk
 City of Campbell
 70 N. First Street
 Campbell, CA 95008

Re: Violation of California Voting Rights Act

I write on behalf of our client, Southwest Voter Registration Education Project and its members. The City of Campbell (“Campbell” or “City”) relies upon an at-large election system for electing candidates to its City Council. Moreover, voting within Campbell is racially polarized, resulting in minority vote dilution, and, therefore, the City’s at-large elections violate the California Voting Rights Act of 2001 (“CVRA”).

The CVRA disfavors the use of so-called “at-large” voting – an election method that permits voters of an entire jurisdiction to elect candidates to each open seat. *See generally Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 667 (“*Sanchez*”). For example, if the U.S. Congress were elected through a nationwide at-large election, rather than through typical single-member districts, each voter could cast up to 435 votes and vote for any candidate in the country, not just the candidates in the voter's district, and the 435 candidates receiving the most nationwide votes would be elected. At-large elections thus allow a bare majority of voters to control *every* seat, not just the seats in a particular district or a proportional majority of seats.

Voting rights advocates have targeted “at-large” election schemes for decades, because they often result in “vote dilution,” or the impairment of minority groups’ ability to elect their preferred candidates or influence the outcome of elections, which occurs when the electorate votes in a racially polarized manner. *See Thornburg v. Gingles*, 478 U.S. 30, 46 (1986) (“*Gingles*”). The U.S. Supreme Court “has long recognized that multi-member districts and at-large voting schemes may operate to minimize or cancel out the voting strength” of minorities. *Id.* at 47; *see also id.* at 48, fn. 14 (at-large elections may also cause elected officials to “ignore [minority] interests without fear of political consequences”), citing *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *White v. Register*, 412

Attachment: Letter from Shenkman & Hughes, PC (1348 : City Council Consideration to Move to District Based City Election)

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Factors other than “racially polarized voting” that are required to make out a claim under the FVRA – under the “totality of the circumstances” test – “are probative, but not necessary factors to establish a violation of” the CVRA. Elec. Code § 14028(e). These “other factors” include “the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns.” *Id.*

The City of Campbell’s at-large system dilutes the ability of Latinos (a “protected class”) – to elect candidates of their choice or otherwise influence the outcome of the City’s elections. As of the 2010 Census, the City of Campbell had a population of 39,349. According to this data, Latinos comprise approximately 18.42%. However, in the last 10 years, there has not been a single Latino City Councilmember. Therefore, not only is the contrast between the significant Latino proportion of the electorate and the absence of Latinos to be elected to the Campbell City Council outwardly disturbing, it is also fundamentally hostile towards participation by members of that protected class.

The City of Campbell’s at-large election system has also impeded the emergence of Latino candidates from these protected communities. For example, during the past 10 years there has been only one Latino who has emerged as a candidate for the Campbell City Council. Opponents of fair, district-based elections may attribute the lack of Latinos vying for elected positions to a lack of interest in local government from the Latino community. On the contrary, the alarming absence of Latino candidates seeking election to the City Council reveals vote dilution. *See Westwego Citizens for Better Government v. City of Westwego*, 872 F. 2d 1201, 1208-1209, n. 9 (5th Cir. 1989).

The City’s election history is additionally illustrative. Notwithstanding the fact that in recent history there has not been a Latino to serve on the Campbell City Council, in 2014, Celeste Flores announced her candidacy. Despite significant support from the Latino community of Campbell, Ms. Flores lost that election as a result of a lack of support from the majority non-Hispanic white electorate. This election evidences vote dilution which is directly attributable to the City of Campbell’s unlawful at-large election system.

As you may be aware, in 2012, we sued the City of Palmdale for violating the CVRA. After an eight-day trial, we prevailed. After spending millions of dollars, a district-based remedy was ultimately imposed upon the Palmdale city council, with districts that combine all incumbents into one of the four districts.

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U.S. 755, 769 (1973). “[T]he majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.” *Gingles*, at 47. When racially polarized voting occurs, dividing the political unit into single-member districts, or some other appropriate remedy, may facilitate a minority group's ability to elect its preferred representatives. *Rogers*, at 616.

Section 2 of the federal Voting Rights Act (“FVRA”), 42 U.S.C. § 1973, which Congress enacted in 1965 and amended in 1982, targets, among other things, at-large election schemes. *Gingles* at 37; *see also* Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History* (1983) 40 Wash. & Lee L. Rev. 1347, 1402. Although enforcement of the FVRA was successful in many states, California was an exception. By enacting the CVRA, “[t]he Legislature intended to expand protections against vote dilution over those provided by the federal Voting Rights Act of 1965.” *Jauregui v. City of Palmdale* (2014) 226 Cal. App. 4th 781, 808. Thus, while the CVRA is similar to the FVRA in several respects, it is also different in several key respects, as the Legislature sought to remedy what it considered “restrictive interpretations given to the federal act.” Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.

The California Legislature dispensed with the requirement in *Gingles* that a minority group demonstrate that it is sufficiently large and geographically compact to constitute a “majority-minority district.” *Sanchez*, at 669. Rather, the CVRA requires only that a plaintiff show the existence of racially polarized voting to establish that an at-large method of election violates the CVRA, not the desirability of any particular remedy. *See* Cal. Elec. Code § 14028 (“A violation of Section 14027 *is established* if it is shown that racially polarized voting occurs ...”) (emphasis added); *also see* Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 (“Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown).”)

To establish a violation of the CVRA, a plaintiff must generally show that “racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision.” Elec. Code § 14028(a). The CVRA specifies the elections that are most probative: “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.” Elec. Code § 14028(a). The CVRA also makes clear that “[e]lections conducted prior to the filing of an action ... are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.” *Id.*

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More recently, this month, after a 7-week trial, we also prevailed against the City of Santa Monica, after that city needlessly spent millions of dollars defending its illegal election system – far in excess of what was spent in the Palmdale litigation - taxpayer dollars which could have been more appropriately spent on indispensable municipal services and critical infrastructure improvements. Just prior to the trial in that case, counsel for the City of Santa Monica – Kahn Scolnick, a partner at Gibson Dunn & Crutcher LLP proclaimed that, “the reality is that if Santa Monica fails the CVRA test, then no city could pass, because Santa Monica is doing really well in terms of full representation and success of minority candidates.” (“In Rare California Voting Rights Trial, Gibson Dunn Steps Up for Santa Monica”, Law.com, August 1, 2018). Notwithstanding Mr. Scolnick’s prediction, Plaintiffs succeeded in proving that Santa Monica’s election system was in violation of the CVRA and the Equal Protection Clause of the California Constitution.

Given the historical lack of Latino representation on the Campbell City Council in the context of racially polarized elections, we urge the City to voluntarily change its at-large system of electing its City Council members. Otherwise, on behalf of residents within the jurisdiction, we will be forced to seek judicial relief. Please advise us no later than January 17, 2018 as to whether you would like to discuss a voluntary change to your current at-large system.

We look forward to your response.

Very truly yours,



Kevin I. Shenkman