



Council Agenda Report

ATTACHMENT 6

FROM: Christine Davi, City Attorney

SUBJECT: Adopt a Resolution of Intention to Transition from At-Large to District Based Elections Pursuant to Elections Code Section 10010(e)(3)(A) (Not a Project under CEQA)

RECOMMENDATION:

That the City Council adopt a resolution of intention to transition from at-large to district based elections for City Councilmembers. The proposed resolution does not direct changing the structure of the City Council; it would start the process to implement four districts in the City for Councilmember seats, with the Mayor's seat continuing to be elected at-large.

POLICY IMPLICATIONS:

The City's policy is to uphold the federal and California constitutions and to take any steps necessary to ensure equal protection under the law and the right to vote.

FISCAL IMPLICATIONS:

Significant staff time will be needed to transition to district based elections, including multiple public hearings to determine district boundaries and to draft a proposed ordinance establishing districts. Demographer costs for drafting multiple maps, assisting with public outreach, and analyzing public input is estimated to be \$42,000. There may be a need to consult with outside legal counsel, adding additional costs. These expenses are not included in the FY 2021/2022 budget.

Under a relatively new law enacted in 2016, if the City makes a decision to transition to a district based election system by November 16, 2021, it would cap the City's exposure to the League of United Latin American Citizens (LULAC), District 12 (Monterey, San Benito, and Merced counties) for its attorneys' fees and costs at \$30,000 (adjusted for CPI annually starting in 2018 per AB 350). (Elections Code section 10010(f)(3).)

ENVIRONMENTAL DETERMINATION:

The City of Monterey determined that the proposed action is not a project as defined by the California Environmental Quality Act (CEQA)(CCR, Title 14, Chapter 3 ("CEQA Guidelines"), Article 20, Section 15378). In addition, CEQA Guidelines Section 15061 includes the general rule that CEQA applies only to activities which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. Because the proposed action and this matter have no potential to cause any effect on the environment, or because it falls within a category of activities excluded as projects pursuant to CEQA Guidelines section 15378, this matter is not a project. Because the matter does not cause a direct or any reasonably foreseeable indirect physical change on or in the environment,

this matter is not a project. Any subsequent discretionary projects resulting from this action will be assessed for CEQA applicability.

ALTERNATIVES CONSIDERED:

One alternative is to change the number of proposed districts (i.e., six or eight districts) with an at-large Mayor.

Another alternative is to transition away from an at-large elected Mayor and have five, seven, or nine districts. For example, there could be five districts in the City and the Mayor chosen from amongst the five councilmembers.

Finally, the City Council could choose not to adopt the resolution of intention, maintain an at-large election system, and defend its election system in court.

DISCUSSION:

Election Systems

The City of Monterey currently utilizes an at-large election system. This means that all voters, no matter where they live in the City, have a say in electing every member of the City Council. At-large voting systems may operate to minimize or cancel out the voting strength of minorities, thereby defeating the choices of minority voters.

A district based election system is one where the City is divided into separate geographical areas making up the districts, and voters residing within the district elect a representative who also resides within the district.

Demand to Switch to District Based Elections System

On September 25, 2021, the City received a demand from LULAC to switch to district based elections. (Attachment 1.) LULAC alleges that it studied the City's demographics and election results, "...and determined that a violation of the California Elections Code section 14025 et. seq., known as the California Voting Rights Act of 2001 (CVRA) may be occurring by polarized voting." LULAC would not share its racially polarized voting analysis with the City, and the letter does not contain sufficient evidence to support the claimed CVRA violation. However, this letter is a precursor to LULAC filing a lawsuit against the City under the CVRA, and it triggers a very short timeline for the City to act and implement districts to avoid substantial attorneys' fees.

The City Council met in closed session on September 29, 2021, October 19, 2021, October 27, 2021, and November 3, 2021 to consider this threatened litigation.

The California Voting Rights Act

The City must comply with both the federal Voting Rights Act and the California Voting Rights Act. Both statutes prohibit the City from imposing election systems that result in discrimination against minorities.

The California Voting Rights Act of 2001 ("CVRA") was enacted to implement the California constitutional guarantees of equal protection and the right to vote. (Elections Code section 14031.) The CVRA is based on the federal Voting Rights Act, but the legal standards are

different. The CVRA's intent is to expand the protections provided under federal law. Its adoption was motivated in part by the lack of success by California plaintiffs in challenging at-large election systems under the federal Voting Rights Act. Thus, the CVRA purposefully adopted a lower legal standard to make it easier to establish a voting rights claim.

Racially Polarized Voting

The CVRA requires a plaintiff to prove "racially polarized voting," which means "...voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act... in the choices of candidates or other electoral choices that are preferred by voters in a protected class as compared to the rest of the electorate." (Elections Code section 14026(e).)

It must be shown that "a significant number of minority group members usually vote for the same candidates" (minority cohesion); and that "the white majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate." (Thornburg v. Gingles (1986) 478 U.S. 30.)

What this means, for example, is if a White majority outvotes the Latinx choice of candidates most of the time, even if the Latinx voters tend to congregate around the same candidate, there is racially polarized voting. Note that the Latinx candidate need not be a minority candidate.

Vote Dilution

The CVRA prohibits an at-large election system if it dilutes the rights of voters who are members of a protected class. "An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgement of the rights of voters who are members of a protected class...." (Elections Code section 14027.) A protected class for purposes of the CVRA is a class of voters who are members of a race, color, or language minority group. (Elections Code section 14026(d).)

Creating districts may facilitate a minority group's ability to elect its preferred representatives. The question of vote dilution is whether a minority group would have more influence in elections under an alternate election system than they do under the current system.

Under federal law, a voter dilution analysis is a bright line test. It must be shown that a minority group is large enough and compact enough that it would account for a majority of voters in a hypothetical district. That is, if a city has a minority population that could be 51% of a reasonably drawn district, then that district should be drawn under federal law if there is racially polarized voting. This 51% test under federal law is not a required element under the CVRA; it is instead a "factor in determining an appropriate remedy." (Elections Code section 14028.)

Therefore, something less than 50% is sufficient to show voter dilution, but how low can that percentage be? The trial court in the Santa Monica case found that creating a district with 30% minority voting age population was enough to show that the system would be better for that minority population than Santa Monica's at-large system. The court of appeal disagreed with the trial court and ruled that the plaintiff in the Santa Monica case had not shown voter dilution since 30% is not enough to win a majority and elect someone. The court stated that "...there was no dilution because the result with one voting system is the same as the result with the other: no

representation.” This case is now pending before the California Supreme Court in City of Santa Monica v. Pico Neighborhood Association (Case No. S263972). The court has posed the question “What must a plaintiff prove in order to establish vote dilution under the [CVRA]?” It is anticipated that the answer to that question by the court will provide much needed guidance on how to evaluate the merits of CVRA claims. Short of that guidance, many cities are abandoning at-large election systems based on the uncertainty of the application of the CVRA and the potential economic consequences.

Litigation Costs

Staff’s recommendation to approve the resolution is not based on an admission by the City that a court would find its election system violates the CVRA. Rather, the public interest may be better served by voluntarily transitioning to district based elections for a number of reasons, including the uncertainty of the litigation and the extraordinary costs of such a lawsuit even if the City were to prevail.

The probability of success defending a CVRA claim on the merits is uncertain without guidance from the California Supreme Court. This is due to the absence of clear objective standards on how a plaintiff is supposed to prove a case and how a city is to defend it. There is very little precedent regarding the CVRA’s application, including the elements of a violation and how they are applied to cities, especially to cities like Monterey where the protected class population may not be sufficiently large or compact.

If the City Council chooses to maintain at-large elections and defend the threatened lawsuit, attorneys’ fees and costs would likely exceed several million dollars. The cost of defending the City’s at-large election system in court is projected to be significant due to the potential of having to pay the plaintiff’s attorneys’ fees and costs in addition to the City’s defense costs. Almost all cities that have received a legal challenge have settled out of court by agreeing to voluntarily change to district based elections. Those that have opposed the CVRA challenges in court have ultimately either voluntarily adopted, or have been forced to adopt, district based elections. Cities that have litigated the CVRA have resulted in large attorneys’ fees payments. For example, in the Santa Monica case, plaintiff’s motion for attorney’s fees dated June 3, 2019 requested more than \$22 million be paid by the City of Santa Monica. Another recent example is the Yumori-Kaku v. City of Santa Clara case, where Santa Clara settled a challenge to its election system in April 2021 after losing on appeal. Santa Clara agreed to pay \$6 million (\$4.5 million to plaintiff and \$1.5 million on its own outside counsel fees).

Districting Procedure

Staff and a demographer from the consulting firm Redistricting Partners, LP, will give a presentation on the required procedure and rules for transitioning to a district based election system. There are a number of factors to consider in the mapping process to ensure that the districts are reasonable and constitutional.

The City has 90 days after the adoption of the resolution of intention to adopt an ordinance that will implement the change with the next election. (Elections Code section 10010(e)(3)(A)-(B).) As authorized by statute, LULAC may be willing to extend this deadline by another 90 days in order to provide more time for public outreach and input.

Will Councilmembers lose their seats during their term?

Councilmembers will not lose their seats during their term. Pursuant to Elections Code section 21626, the term of any councilmember who has been elected and whose term of office has not expired shall not be affected by any change in the boundaries of the district from which they were elected.

The City Council is comprised of the Mayor and four councilmembers. (Charter section 4.1.) Councilmembers are elected at each General Municipal Election and hold office for a four year term. (*Id.*) The Mayor is elected at each general municipal election and holds office for a two year term. (Charter section 3.1.) The current terms expire as follows:

Mayor Clyde Roberson, December 2022
Vice Mayor Tyller Williamson, December 2022
Councilmember Ed Smith, December 2022
Councilmember Dan Albert, December 2024
Councilmember Alan Haffa, December 2024

A potential sequence for establishing districts will be developed through the public hearing process. All city councilmembers serve at-large and can live anywhere in the city until the end of their terms in 2022 and 2024.

An election year will be assigned to each of the districts. For example, two districts could be assigned to the November 2022 election, and two other districts could be assigned to the 2024 election. Then, in 2022 and 2024, incumbents would have to run for re-election by-district, if they reside in one of the districts up for election that year, or finish their terms and leave the Council.

The Mayor's seat will continue to be at-large unless a different system is proposed by the City Council.

Is a Charter Amendment Required?

The legislature has authorized the change from at-large elections to district elections without taking the matter to the voters. Government Code section 34886 provides:

Notwithstanding Section 34871 or any other law, the legislative body of a city may adopt an ordinance that requires the members of the legislative body to be elected by district or by district with an elective mayor, as described in subdivision (a) and (c) of Section 34871, without being required to submit the ordinance to the voters for approval. An ordinance adopted pursuant to this section shall include a declaration that the change in the method of electing members of the legislative body is being made in the furtherance of the purposes of the California Voting Rights Act of 2001.

The Charter specifies that there are four councilmembers, and so there will be four districts with an at-large elected Mayor. Therefore, a charter amendment would not be required to switch to district elections with four districts and an at-large mayor, and if the terms of office remain the same.

Attachments: 1. Resolution
2. Letter from LULAC

Attached Spanish Language Translations

Agenda Report
Resolution
Letter from LULAC

cc: LULAC, District 12
Neighborhood Associations

Writings distributed for discussion or consideration on this matter within 72 hours prior to the meeting, pursuant to Government Code § 54957.5, will be made available at the following link:
<https://monterey.org/Submitted-Comments>