



City of Sunnyvale

Agenda Item

18-1025

Agenda Date: 11/20/2018

REPORT TO COUNCIL

SUBJECT

Adoption of Resolution Declaring the City of Sunnyvale's Intent to Transition from At-Large to District-Based City Council Elections, Outlining Specific Steps to be Undertaken to Facilitate the Transition, and Estimating a Time Frame for Action Pursuant to Elections Code Section 10010

BACKGROUND

On September 5, 2018, the City Council held a public hearing regarding changing from the City's current at-large with numbered seats system for electing City Council members to a district-based form of elections (RTC No. 18-0776). Council directed staff to scope a public outreach and education plan for receiving public input on transitioning to district-based elections, with the goal of placing a measure on the November 2020 ballot for voters to decide whether to amend the City Charter to change from at-large with numbered seats to district-based elections. Staff has hired a public outreach consultant, Placeworks Inc., to assist the City in developing a community education and outreach plan, which will be presented to Council on December 11, 2018.

On October 9, 2018, the City received a certified letter from attorney Laura Ho of the law firm Goldstein, Borgen, Dardarian & Ho, alleging that the City's current electoral system violates the California Voting Rights Act ("CVRA") because it "dilutes the voting power of Asian American voters." The City Attorney met with Ms. Ho the week following receipt of the letter, and has had ongoing discussions over the past month. The City Council also met in closed session three times to discuss the potential litigation and options for settlement. Although the demand letter commended the City for initiating steps to transition to district based elections and purported to offer extensions to timeframes set forth in the CVRA "safe harbor" legislation, the parties have thus far been unable to reach agreement on specific terms for a stipulation on extended timeframes or settlement.

Adopting this resolution of intent will confirm the Council's prior direction to move forward with a change to district based elections through public engagement and a ballot measure to amend the city council election provisions in the City Charter, and prohibit the potential plaintiffs from filing a lawsuit for an additional 90-day period (through February 20, 2019), during which the Council is scheduled to review and approve the public outreach plan regarding changing to district-based elections.

ENVIRONMENTAL REVIEW

The action being considered does not constitute a "project" with the meaning of the California Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines sections 15320, 15378 and 15061 (b)(3) as it is an organizational structure change and does not have the potential to result in either a direct or reasonable foreseeable indirect physical change in the environment.

DISCUSSION

1. The CVRA

The CVRA was signed into law in 2002. Broadly, the CVRA prohibits an at-large method of election that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election. The law's intent is to expand protections against vote dilution over those provided by the Federal Voting Rights Act of 1965 ("FVRA"). The law was also motivated, in part, by the lack of success by plaintiffs in California in lawsuits challenging at-large electoral systems brought under the FVRA. The passage of the CVRA made it much easier for plaintiffs to prevail in lawsuits against public entities that elect members to their governing bodies through "at-large" elections. To establish liability under the CVRA, a plaintiff must prove the existence of "racially polarized voting," which is defined as "voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act (42 U.S.C. Sec. 1973 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and the electoral choices that are preferred by voters in the rest of the electorate." Other factors are also relevant in determining liability. Proof of intent on the part of voters or elected officials to discriminate against a protected class is not required. In addition, plaintiffs are not required to prove that the protected class can form the majority of the eligible voters in a single-member district in order to proceed to trial, a significant change from the proof required under the FVRA.

The September 5, 2018 Report to Council (See Attachment 3) includes extensive discussion on the risks of CVRA litigation and recent cases. Generally, CVRA cases are problematic for public agencies because (1) agencies have been mostly unsuccessful in defending CVRA litigation, and (2) the cases involve extremely high costs, typically more than \$1 million for a City's own defense costs as well as plaintiff's fees and costs where the court finds a CVRA violation. The only new information since the September 5 Report to Council is that the court in the Santa Monica case issued a decision on November 13, 2018, finding the City of Santa Monica in violation of the CVRA. Unfortunately, the decision does not include any factual analysis or explanation of why the court concluded that Santa Monica's election system violates the CVRA. Trial on the remedies phase is set for December 2018.

2. AB 350, CVRA "Safe Harbor"

AB 350, codified as Elections Code section 10010, went into effect on January 1, 2017, and was framed as legislation that provides a "safe harbor" from CVRA litigation. The process under Elections Code section 10010 is as follows:

- Demand Letter: When a city receives a certified demand letter, no lawsuit can be filed for 45 days.
- Resolution of Intent: If, within 45 days of receipt of the letter, the city adopts a resolution declaring the Council's intent to change from at-large to district-based elections, outlining specific steps to facilitate the transition and estimating a time frame for action, then a potential plaintiff cannot file a CVRA action for an additional 90-day period.
- Completion of Process for Transitioning to District Elections: If a city completes the process for transitioning to district-based elections within that 90-day period, no lawsuit can be filed, but the prospective plaintiff can demand fees and costs, up to \$30,000, thus capping the City's liability for a plaintiff's attorney fees.

The timelines in this statute may be extended by mutual agreement. Here, although the City and potential plaintiffs seem to generally agree that a 90-day period is a less-than-ideal timeframe to ensure robust community involvement, they were unable to agree within the initial 45-day period on terms for extension. Adopting the resolution of intent will provide an additional 90-day period without litigation. The Council is scheduled to consider a detailed public outreach plan during that time. Following the 90-day period, potential plaintiffs will be able to file a lawsuit alleging that the City's election system violates the CVRA.

3. Draft Resolution of Intent

The attached resolution of intent is consistent with the requirements of Elections Code section 10010 (e)(3)(A), which requires an outline of the following elements:

- The City's intention to transition from at-large to district-based elections,
- Specific steps the City will undertake to facilitate this transition, and
- An estimated time frame for making the transition.

The Council provided specific direction on all three of these elements at the September 5, 2018 meeting. At that meeting, the Council was clear in its direction to pursue a transition to district elections to address CVRA concerns, and that the steps it desires for that process include public outreach and education, followed by a ballot measure submitted to voters to approve changing section 601 of the City Charter, which currently provides a detailed process for at-large, numbered seat council elections. The Council is scheduled to consider a draft of the outreach plan at a special council meeting on December 11, 2018.

There are several issues and options regarding the time frame for making the transition to district-based elections. First, the City received several comments following receipt of the demand letter suggesting that it should forego seeking voter approval for a charter amendment and immediately adopt an ordinance to change to district elections pursuant to Government Code section 34886 and Elections Code section 10010. Although some charter cities have successfully used these provisions to switch to district by ordinance without challenge, that approach has some risk because these statutory sections, which purport to allow a switch to district elections by ordinance, do not explicitly address charter cities and have not been construed with regard to a charter city in any caselaw. The general rule under Article XI, Section 3(a) of the California Constitution is that charters must be amended in the same way they are adopted-majority vote of the electorate. How that requirement should be harmonized with the CVRA is not clear. It is possible that a court could conclude that the CVRA preempts the Charter and uphold a change by ordinance in deference to legislative intent and the goals of the CVRA. On the other hand, Section 601 of Sunnyvale's charter is distinguishable from the charters of several cities that have approved the change by ordinance because the Sunnyvale Charter contains a specific and detailed process for at-large, numbered seat elections, and the legislative history notes that "if the charter of a charter city contains provisions that contradict this bill, the charter would take precedence." (Report from the Assembly Committee on Local Government, p. 3)

Considering the ambiguities in the law, the constitutional preference to amend charters through voter approval, the fact that there is time available to place a charter amendment ballot measure on the ballot before the next possible election date as authorized by the California Elections Code, as discussed below, and based on prior Council direction to complete public outreach on this issue, staff

is not recommending that Council consider the ordinance option at this time.

The second issue related to time frame is that there are two possible dates for putting a charter amendment on the ballot: March 2020 and November 2020. The potential plaintiffs have stated that their preference is for district elections to be implemented with the next general municipal election for City Council in November 2020. Such a timeline is possible if a charter amendment measure is placed on the March 2020 ballot. This determination could be made at any time. However, staff recognizes Council's previously expressed desire to consider public input on this important governance issue before making a final determination. Thus, the attached Resolution anticipates that a charter measure would be placed on the March 2020 ballot, but recognizes November 2020 as an alternative date. Staff will bring forward a recommended timeline for making a final decision on this election date question with the public outreach plan in December.

A final related consideration on the timeframe issue is the extent of opportunity for public education, engagement, and input before the Council makes a final decision. Staff and the Council recognize that Sunnyvale residents have expressed a strong preference in recent years for greater involvement in important City decisions (for example, the citizen initiated 2016 Measure M), and that changing the election system has significant impacts to city governance. Given that the City has ample time before the Council is required to act to place a measure on the ballot, and understanding that there may be a risk of litigation if a decision is not made within the 90-day period, allowing time for public education and input on this issue before making a final decision may be an approach that reasonably balances the competing considerations for meaningful public participation, respect for the CVRA, and respect for constitutional authority granted to charter cities over its "municipal affairs," which includes the methods of elections. (California Constitution Article XI, section 5(b) and Elections Code section 10101 et seq.).

FISCAL IMPACT

There is no immediate fiscal impact to adopting this resolution of intent. Budget adjustments will be brought for approval as necessary depending on the outreach plan approved and resources required for future actions related to the process of switching to district-based elections.

PUBLIC CONTACT

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Senior Center, Community Center and Department of Public Safety; and by making the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's website.

STAFF RECOMMENDATION

Adopt Resolution Declaring the City of Sunnyvale's Intent to Transition from At-Large to District-Based City Council Elections, Outlining Specific Steps to be Undertaken to Facilitate the Transition, and Estimating a Time Frame for Action Pursuant to Elections Code Section 10010.

Prepared by: Melissa C. Tronquet, Assistant City Attorney

Reviewed by: John A. Nagel, City Attorney

Approved by: Kent Steffens, City Manager

ATTACHMENTS

1. Draft Resolution of Intention to Transition to District Based Elections
2. Demand Letter from GBDH received October 9, 2018
3. September 5, 2018 Report to Council (RTC No. 18-0776)