



DATE: April 16, 2024

TO: Mayor and City Council

FROM: City Clerk

SUBJECT: Municipal Elections: Adopt a Resolution of Intention to Transition from At-Large Election of the Mayor and City Council to District-Based Elections Beginning with the 2026 Election

RECOMMENDATION

That the Council adopts a resolution (Attachment II) declaring its intention to transition from at-large elections to district-based elections for the 2026 election cycle, outlining specific steps to be undertaken to facilitate the transition, and estimating a time frame for action.

SUMMARY

The City of Hayward currently has an at-large election system, which means that the electors from the entire City choose each of the seven (7) members of the City Council, including the Mayor. A district-based election system is one in which the city is geographically divided into separate districts, each with one Councilmember who resides in the district and is chosen by the electors residing in that particular district. Adoption of this resolution would not affect the upcoming November 2024 municipal elections, which would still be conducted pursuant to the at-large system.

BACKGROUND

On May 28, 2021, the City received a letter from attorney Scott Rafferty of Walnut Creek, California alleging that the City's system of at-large elections violates the California Voting Rights Act ("CVRA"). On March 10, March 21 and March 22, 2024, Mr. Rafferty sent additional letters to the City Council on this topic (see Attachment III). The letters generally claim that Asian American voters in Hayward have different voting preferences than the rest of the Hayward electorate, a phenomenon known as "racially polarized voting," and that their electoral influence has been unlawfully diluted by the current at-large voting system. Mr. Rafferty alleges that the existence of racially polarized voting and vote dilution in Hayward violates the CVRA and demands that the City convert to district elections in advance of the November 2024 election.

On April 9, 2024, Mr. Rafferty served a complaint he had filed against the City of Hayward in Alameda Superior Court alleging that the City is in violation of the CVRA. The complaint

names as plaintiffs Jack Wu and an organization called Neighborhood Elections Now and asks the court to order the City to adopt district elections for the November 2024 general election. The complaint also alleges that the City Council violated the Brown Act in the way it provided notice for a closed session in which it discussed Mr. Rafferty's demand letter on March 19, 2024.

DISCUSSION

The California Voting Rights Act (CVRA)

The CVRA was signed into law in 2002. 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 purpose 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 elected their members to its governing body through "at-large" elections. A plaintiff need only prove the existence of "racially polarized voting" and vote dilution to establish liability under the CVRA. A plaintiff need not prove any discriminatory intent by the voters or elected officials, nor must a plaintiff establish that the protected class can comprise a majority-minority district; it is sufficient for a plaintiff to simply show that under a different electoral system, the protected class would have greater electoral influence.

As a result, cities throughout the State have faced legal challenges to their "at-large" systems of electing City Council members. Almost all have settled claims out of court by agreeing to transition to district-based elections. To date, no city has successfully defended a CVRA challenge in the courts.

The CVRA grants a prevailing plaintiff the right to recover reasonable attorneys' fees and expert witness fees. This has resulted in payment of substantial amounts of plaintiff's attorneys' fees by cities that have chosen to litigate the CVRA challenge. Awards to plaintiffs' attorneys and expert witnesses routinely total several millions of dollars. For example, in February 2015, the City of Santa Barbara reportedly paid \$900,000 in attorneys' fees and expert costs to settle its ongoing CVRA lawsuit. Another example is the City of Palmdale, which was ordered to pay plaintiffs' attorney's fees in excess of \$4.6 million after losing a CVRA case at trial.

Even if the City defeated a CVRA claim in court (which has never before happened), it could not recover its own attorneys' fees or costs. Also, the City would remain vulnerable to subsequent CVRA litigation brought by different plaintiffs.

To date, multiple cities throughout the state have received CVRA demand letters and have adopted Resolutions of Intention to transition to district elections or have completed the transition process. Examples of Bay Area jurisdictions that have recently transitioned to district elections include Union City, Redwood City, and San Ramon.

AB 350 Safe Harbor

On September 28, 2016, the Governor signed AB 350 into law, codified as Elections Code Section 10010 (effective on January 1, 2017). The legislation attempts to provide local jurisdictions a “safe harbor” from CVRA litigation if they choose to transition to a district election system voluntarily. If a city receives a demand letter, such as in Hayward’s case, the city is given 45 days of protection from litigation to assess its situation. 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. Thus, the legislation provides time (a safe harbor) for the City to assess and implement a transition to a district-based election system before a lawsuit may be filed.

The legislation sets forth a number of steps a city must take in the effort to transition to a district-based election system, including holding at least four (4) public hearings to determine district boundaries prior to adopting an ordinance establishing the districts. Under AB 350, a city’s liability is capped at \$30,000¹ if it follows this process after receiving a CVRA notice letter and the plaintiff shows financial documentation substantiating the demand for reimbursement of costs of the work product generated to support the demand for conversion to district-based elections.

Mr. Rafferty’s complaint alleges that the City is not protected by the safe harbor provision because it did not adopt a resolution of intent within 45 days of the date that he sent his first demand letter in 2021. Mr. Rafferty’s May 28, 2021 demand letter said that he would provide details shortly of the evidence he had uncovered of “a possible violation” of the CVRA, but he never did nor did he contact the City again until sending his March 21, 2024 letter. Because Mr. Rafferty failed to follow up by providing evidence in support of his original demand and then delayed nearly three years, the City is entitled to the protection of the safe harbor provision if the City passes a resolution of intent on or before April 24, 2024.

Process and Timing

Under the law, the City Council has 45 days to decide whether to adopt district-based elections. If the Council votes affirmatively to move to district elections, the City then has 90 days in which to adopt an ordinance establishing the new districts. During that time, the City must hold two public hearings for input on district composition before maps are drawn, release draft maps at least 7 days before the next public hearing, hold two more public hearings on the draft maps, and then adopt an enacting ordinance. If the City Council adopts the resolution as recommended, the earliest that the ordinance establishing district elections and the district map could be adopted would be July 15, 2024.

Based on the timeline described above, it will therefore not be possible for the City to implement district-based elections in time for the orderly conduct of the November 2024

¹ This amount is subject to CPI escalation. Present value is approximately \$38,000.

election since it conflicts with election related deadlines and does not provide potential candidates sufficient time to make a decision about running in the election. Accordingly, the next election at which districts could be implemented is the November 2026 election. The districts the Council adopts will be in place until 2031.

To ensure those districts best serve Hayward's residents, all interested members of the public must be afforded an opportunity to participate in public hearings regarding district lines. The process of soliciting public input, including receiving testimony regarding communities of interest, hiring a demographer, publishing draft maps, and facilitating productive dialogue on how the districts should be drawn requires organized, deliberate planning and a well-coordinated public communications plan. Staff will perform public outreach, which will consist of press releases, social media outreach, and information on the City's website. In addition, the City will provide outreach specific to underrepresented communities in Hayward to facilitate their participation in the district elections process.

FISCAL IMPACT

Significant staff resources will be devoted to carrying out the process described in this report, including public outreach strategies. The City will also incur costs related to the engagement of outside legal counsel, a demographer and other consultants that may be necessary. The City will also incur costs related to reimbursement of Mr. Rafferty pursuant to the Elections Code.

NEXT STEPS

If Council adopts the attached resolution, staff will work with outside legal counsel, a demographer and the City Attorney's Office in preparation for the public hearings. Staff will begin the process of public outreach and engage stakeholders to ensure a robust public education/information effort.

Prepared by: Miriam Lens, City Clerk

Recommended by: Regina Youngblood, Assistant City Manager

Approved by:



Kelly McAadoo, City Manager