



CITY COUNCIL

AGENDA REPORT

TO: Honorable Mayor and Members of the City Council
FROM: Daniel Fox, City Manager
TITLE: **INTENT OF THE CITY OF DIAMOND BAR TO TRANSITION FROM AT-LARGE TO BY-DISTRICT ELECTIONS PURSUANT TO CALIFORNIA ELECTIONS CODE SECTION 10010(E)(3)(A).**
STRATEGIC GOAL: *Open, Engaged & Responsive Government*

RECOMMENDATION:

Adopt Resolution No. 2022-10 Stating the City's intent to transition from At-Large to By-District Elections pursuant to California Elections Code Section 10010(e)(3)(A).

FINANCIAL IMPACT:

If the City adopts the resolution and completes the transition to district-based elections within the state-established timeline, potential plaintiff's attorneys' fees will be capped at \$30,000. There will be additional costs to engage the City Attorney's Office, special consultants, and public engagement.

BACKGROUND:

Since incorporation in 1989, registered voters in Diamond Bar have elected City Council members using an "at-large" system in which all members are elected by all registered voters to provide city-wide representation. In 2001, the state legislature approved the California Voting Rights Act (CVRA), modifying burden of proof requirements contained in the federal Voting Rights Act of 1965 to make it easier for plaintiffs to challenge at-large voting systems. The CVRA prohibits an agency from using at-large elections if it impairs the ability of a protected class, as defined, to elect candidates of its choice or otherwise influence the outcome of an election. The CVRA includes the imposition of district-based elections by a court as a remedy to violations of the Act, and requires the government agency to pay all legal and court fees should the plaintiff prevail in court.

In a letter received January 13, 2022, Mr. Kevin Shenkman, counsel representing the Southwest Voter Registration Education Project (SVREP), alleges that the City's at-

large elections system violates the CVRA because it results in racially polarized voting that dilutes the impact of Latino voters. The letter demands that Diamond Bar voluntarily change its at-large system for electing City Council members to a district-based system to avoid litigation.

Mr. Shenkman has sent similar demand letters to cities, school districts and special districts across the state and has successfully sued governmental agencies under similar allegations. The majority of agencies receiving the letter have avoided litigation by voluntarily transitioning from at-large to district-based elections citing the cost of legal defense and potential liability for significant attorney's fees and settlement costs if the City's legal defense is unsuccessful.

Prior to the enactment of the CVRA, whether racially polarized voting existed was determined under the Federal Voting Rights Act. Very few lawsuits challenging at-large voting systems in California were successful under the Federal Voting Rights Act. As a result, the State Legislature enacted the CVRA, which has established such a low threshold for racially polarized voting to be found, that no jurisdiction of which we are aware has ever successfully argued it did not have racially polarized voting. Prior to the CVRA and in the absence of a court order, a city could not switch from an at-large system to a district-based election system without the approval of the City's voters. Recent legal challenges to cities under the CVRA has essentially taken away the voters right to determine which system is best for their own particular community and may ultimately bring an end to at-large election systems.

ANALYSIS:

Elections Code section 14026(e) provides that "racially polarized voting" exists when there is a difference in how members of a protected class vote versus members not within the protected class. Federal protected classes include members of the same race, color, national origin, religion, sex/gender, age (over 40), and disability.

It is important to note what a finding of racially polarized does not mean. It does not mean voters of any particular jurisdiction or race are racists, nor does it mean that racial groups, whatever their ethnicity, are not getting candidates of their choice elected. It does not even necessarily mean that members of a particular race are voting in larger numbers for people of their own race. At its core, the CVRA simply means there is a tendency, based on statistical analysis and assumptions of ethnicity, not on actual knowledge of how each person voted, that racial groups vote for candidates and on issues differently. While having candidates of diverse ethnic backgrounds elected to the city council is a factor under the Federal Voting Rights Act, it is less so under the CVRA. Diamond Bar has a history of electing council members of diverse ethnicities. Carol Herrera, a Latino, was the longest serving council member in Diamond Bar's history, serving 24 years and 6 terms as Mayor before retiring in 2019. According to the Consultant's report, the current makeup of the City Council is three Asians and two Caucasians.

To determine if racially polarized voting exists in Diamond Bar, the City engaged the

services of professional demographers at Redistricting Partners. Using 2020 Census data, American Community Survey data, the California Voter File, and general election results to determine voting patterns by protected classes consistent with the process established in Elections Code section 14028(b) and the United States Supreme Court decision in *Thornburg v. Gingles* (1986). Redistricting Partners' analysis primarily used Regression/Trend Line Analysis and Ecological Inference to make reliable inferences about voting behavior. The analysis found that:

- In the 2018 statewide elections for Governor, Attorney General, and US House of Representatives, there was evidence of “polarized voting occurring for at least one substantially large protected class in Diamond Bar”.
- In the 2018 and 2020 City Council elections, the analysis determined “with a high degree of confidence that there is racial polarization occurring at the local level”, finding a strong correlation between a voter’s race/ethnicity and their support for or opposition to a candidate. The analysis finds that bloc voting against Asian candidates is evident among white and Latino voters, while Asian voters strongly support Asian candidates over others. In 2020, candidates who were elected were supported by Asian and white voters, but saw very little support from Latino voters.
- Diamond Bar has a Citizen Voting Age Population (CVAP) of 38,179. Analysts were able to create two maps with four of five districts composed of over 50% Asian CVAP, triggering Section 2 compliance under the federal Voting Rights Act. This demonstrates “that a federally protected class under the VRA could potentially have their voting power diluted if they were districted in a way that would separate them”.
- Racially polarized voting “may not happen in every election cycle, but the evidence that it can and does suggests that the ability of Asians and Latinos to elect their favored candidates may be impaired”.
- The analysis concludes that “Asian and Latino voters could have a greater ability to influence the outcome of an election with districted elections, which is the standard under the Voting Rights Act”.

In 2016, the legislature amended Elections Code section 10010 to create a limited “safe harbor” timeline for agencies to transition from at-large to district elections. The amendment prevents a CVRA lawsuit from being filed if the agency adopts a Resolution of Intent to transition to district-based elections within 45 days of receiving a letter from a potential plaintiff. The agency then has 90 days to complete legal proceedings to make the transition. If all required actions are completed within the timeline, the agency’s potential liability for plaintiff’s attorney’s fees is capped at \$30,000.

To transition to a district-based system, the City Council must adopt an ordinance requiring City Council members to be elected by district or by district with an elected mayor pursuant to Government Code section 34886. Per Government Code section 34886, the ordinance does not need to be submitted to the voters for approval, but must

include a declaration that the change in election procedures is being made to further the purposes of the CVRA. Prior to the adoption of the ordinance, the City Council must establish district boundaries and determine which of the new districts will be subject to the first district elections. To do so, a minimum of five public hearings must be scheduled, as follows (see Exhibit A to the attached Resolution for a complete proposed timeline):

- A minimum of two public hearings at which the public can provide input on district boundaries before draft district maps are prepared.
- A minimum of two public hearings to consider draft district maps.
- A public hearing to adopt the district map and establish the sequence of elections.

In addition to the preferences expressed by residents of the districts, the process must include consideration of natural geographic boundaries, communities of interest, and the “one person, one vote” standard, which requires all districts to be as nearly equal in population as possible. Federal case law prohibits districts from being drawn with race as a predominate factor.

If the City Council does not adopt the Resolution of Intent on or before February 27, 2022, the City may be required to defend a CVRA lawsuit, incur legal costs, and assume the liability for plaintiff’s attorney’s fees and costs that could reach into the millions of dollars. To date, there is no established CVRA case law in which a public agency defendant has successfully prevailed on the merits. The cost to defend and/or settle CVRA lawsuits has proven to be significant, with examples including:

- City of Santa Clara - \$5.2 million
- City of Palmdale - \$4.7 million
- City of Modesto - \$3 million
- City of Highland - \$1.3 million
- City of Anaheim - \$1.1 million
- City of Whittier - \$1 million
- City of Santa Barbara - \$600,000

The City of Santa Monica has already spent at least \$8 million to date on its own legal fees after losing at the trial court but prevailing on appeal. The California Supreme Court has granted review, which is expected to be heard later this year. The plaintiffs requested \$22 million in legal fees and litigation costs in connection with the trial court decision, so Santa Monica’s all-in costs to challenge their CVRA litigation could reach \$30 million if ultimately unsuccessful.

In addition to having to pay the successful plaintiff’s attorney fees and costs, a court may order the City to implement by-district elections. The judge would supervise the City’s transition to districts and will have the final decision as to where the district lines are drawn and the sequence of elections.

LEGAL REVIEW:

The City Attorney has reviewed and approved the Resolution as to form.

PREPARED BY:

Ryan McLean

Ryan McLean, Assistant City Manager 2/17/2022

REVIEWED BY:

Ryan McLean

Ryan McLean, Assistant City Manager 2/16/2022

Jason Jacobsen

Jason Jacobsen 2/16/2022

Kristina Santana

Kristina Santana, City Clerk 2/16/2022

Daniel Fox

Daniel Fox, City Manager 2/16/2022

Attachments:

1. 2.1.a Resolution No. 2022-10