

Santa Cruz Port District
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TO: Port Commission
FROM: Marian Olin, Port Director
DATE: August 4, 2021
SUBJECT: Resolution Declaring the Santa Cruz Port District's Intent to Transition from an At-Large Port Commission Election Process, to a District-Based Election Process

Recommendation: ***Approve Resolution 21-03, and provide direction on funding for this unbudgeted expenditure.***

BACKGROUND

Santa Cruz Port District received a letter dated January 22, 2021, from attorney Micah D. Fargey, on behalf of his client and registered voter, Avraham Sabaduqui, alleging that the Port District's current at-large election system violates the California Voting Rights Act ("CVRA") Elections Code Sections 14025-14032 (Attachment B).

The Port District currently utilizes an at-large election system in accordance with State of California Harbors and Navigation Code Section 6240.5 which states the Port District "...shall be governed by a board of port commissioners consisting of five members, elected by the district at large,..." The statute further provides that the Uniform District Election Law (Election Code Section 10500 et seq.) governs all district elections for Port Commissioners, and the Elections Code provides guidance when there is a conflict between the elections law and specific statutes. The general election laws, of which the CVRA is a part, applies and controls in this case. Section 10650 of the Elections Code provides that the governing body of a special district may decree, by resolution, that the members of its governing body be elected using district-based elections, as defined in subdivision (b) of Election Code Section 14026, without being required to submit the resolution to the voters for approval.

The CVRA, which was signed into law in 2002, disfavors the at-large method of election, if that method harms the ability of a protected class to elect preferred candidates, or reduces the ability of a protected class to influence the outcome of an election. The threshold to establish liability under the CVRA is extremely low, and the CVRA mandates the award of attorneys' fees to prevailing plaintiffs. Under the CVRA, a plaintiff need only to statistically show the existence of "racially polarized voting" to establish liability. Proof of intent on the part of voters or elected officials to discriminate against a protected class is not required. With the exception of the City of Santa Monica (which is still litigating their case and has reportedly spent more than \$20 million on legal fees), all public entities that have tried to contest the conversion have either lost or have agreed to make the transition.

ANALYSIS

State law provides a “safe harbor” to protect agencies from litigation. Under the Elections Code, a public agency can adopt a resolution of intention to transition from an at-large election system to a district-based election system. Although the law requires a short timeline of 45 days to adopt a resolution of intention, Governor Newsom’s Executive Order of April 9, 2020, temporarily suspended the statutory deadline during the pandemic. The Governor’s order was lifted as of July 1, 2021, restarting the “safe harbor” clock to transition to district-based elections.

After considerable analysis regarding the impact and outcome of potential litigation under the CVRA, District Counsel Barbara Choi recommends that the Port Commission adopt a resolution declaring its intention to transition from at-large to district-based elections by no later than August 16, 2021. This recommendation stems from the extraordinary costs of defending against a CVRA lawsuit and the fact that no public entity has successfully prevailed against a CVRA lawsuit.

On July 27, 2021, the Port Commission met in closed session to consider the threatened CVRA litigation. After weighing the legal implications, potential costs of such litigation and the experiences of, and processes followed, by other public agencies, the Port Commission directed staff to prepare a resolution of intent to transition from at-large to district-based elections. If the resolution is adopted by the Port Commission, there will be significant staff time needed to transition to district-based elections and administer the process with assistance from a demographer and legal counsel.

The process to transition to district-based elections is an intensive public process requiring five public hearings and community outreach, including development of a webpage dedicated to the district election issue that must be updated throughout the process. Additionally, updated census data necessary for districting is not expected to be available until late-September 2021. Though the Elections Code requires that district boundaries be established no more than six months before the next regular election, other entities have established boundaries beyond the 6-month period. In light of the above, and to ensure adequate time for a full and deliberate public process, the Commission expressed majority support for a 2024 transition.

Alternatively, the Port District can choose to retain the current at-large Port Commission election system. This would allow Mr. Fargey and his client to then initiate a lawsuit under the CVRA to attempt to force the Port District to convert to by-district elections. If the Port District were to lose that litigation, a judge would then decide on what district map to impose on the Port Commission, and the Port District would be subject to paying the plaintiff’s legal fees.

IMPACT ON PORT DISTRICT RESOURCES

There is currently no funding budgeted in FY22 for a transition to district-based elections.

Legal and labor costs to date total approximately \$9,562. Demographer services are estimated to be \$25,000, with additional services available. Plaintiff’s fees are estimated to be \$31,930 (including CPI adjustment), and there will be associated legal fees, in-house labor, mailing, publishing, printing and other costs. Staff estimates that the total cost to transition to district-based will be

approximately \$100,000, though this figure could be less depending on the level of legal consultation and additional demographer services required.

The Commission can elect to cover current unbudgeted expenditures out of any surplus funding from the FY22 budget and/or unreserved cash, and provide funding for anticipated expenditures in future budget cycles.

Another option is to utilize the reserve fund which currently has a balance of \$1,964,831. Use of reserve funding is limited to unanticipated, non-recurring needs and requires a Port Commission resolution authorizing such use. However, the Port District's reserve policy states that use of reserves shall only occur after exhausting the current year's budgetary flexibility, and it seems unlikely that expenses would exhaust the current year's budget flexibility, making this option impractical.

ATTACHMENTS: A. Santa Cruz Port District Commission Resolution 21-03
B. Elections Code Sections 14025-14032

Santa Cruz Port District
Resolution 21-03

August 10, 2021

On the motion of _____

Duly seconded by _____

A resolution of the Santa Cruz Port District Declaring its Intention to Transition from At-Large to District-Based Elections and Setting Forth the Specific Steps for Transitioning to District-Based Elections by November of 2024.

WHEREAS, the Santa Cruz Port District ("Port District") is a public corporation created for municipal purposes and is a political subdivision of the State of California, organized and operating pursuant to California Harbors and Navigation Code Section 6200, *et seq.*; and

WHEREAS, the Board of Port Commissioners ("Port Commissioners") of the Port District are currently elected in "at-large" elections, in which each Port Commissioner is elected by the registered voters of the entire district pursuant to Harbors and Navigation Code Section 6240.5; and,

WHEREAS, California Elections Code Section 10650 permits the governing body of a special district to adopt a resolution that requires members of the governing body to be elected using district-based elections without being required to submit the resolution to the voters for approval; and,

WHEREAS, on January 22, 2021, the Port Director received by certified mail a letter ("Notice") from Attorney Micah D. Fargey, on behalf of Avraham Sabaduquia ("Prospective Plaintiff"), alleging that the Port District's at-large Port Commissioner electoral system violates the California Voting Rights Act ("CVRA") and threatening litigation if the Port District declines to voluntarily change to a district-based election system for electing Port Commissioners; and,

WHEREAS, under the Elections Code Section 14028(a), a CVRA violation is established if it is shown that racially polarized voting occurs in elections. "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, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate (Elections Code Section 14026(e)); and,

WHEREAS, the CVRA allows Prospective Plaintiff to file a lawsuit against the Port District if the Port District does not adopt a resolution of intent to institute district-based elections within forty-five days of receiving such letter (Elections Code Section 10010(3)); and;

WHEREAS, the Notice states that if the Port District declines to timely adopt a resolution of intent to transition to district-based elections, Prospective Plaintiff will commence a lawsuit to compel district-based elections; and

WHEREAS, On April 9, 2020, in response to the COVID-19 pandemic and State of Emergency, Governor Gavin Newsom issued Executive Order N-48-20 suspending the timeframes set forth in Elections Code Section 10010, which included a suspension of the timeframe for political subdivisions to adopt a resolution of intent to transition to district-based elections; and

WHEREAS, On June 11, 2021, in light of the improved circumstances surrounding the COVID-19 pandemic, Governor Gavin Newsom issued Executive Order N-08-21 rescinding a number of prior Executive Order provisions, including those suspending the timeframes set forth in Elections Code Section 10010, effective on July 1, 2021; and

WHEREAS, the COVID-19 pandemic significantly delayed the 2020 U.S. Census Bureau's operations and data collection activities, with results now anticipated in late September of 2021; and

WHEREAS, to adequately consider the 2020 U.S. census data in drawing district boundaries, to allow for public outreach, and to avoid significant time and expense associated with a potential CVRA lawsuit, the Port District will begin the process set forth in Elections Code 10010 to transition to district-based elections for Port Commissioners by November 2024; and,

WHEREAS, the Port District denies that its at-large election system violates the CVRA or any other provision of law and asserts that the Port District's election system is legal in all respects; and

WHEREAS, the Port District has nevertheless determined that due to the extraordinarily high cost to defend against a CVRA lawsuit, including the payment of plaintiff's attorneys' fees should the Port District lose such lawsuit, that the public interest is better served by initiating a process for transition to a district-based election system in order to avoid the cost associated with defending a potential lawsuit under the CVRA; and

WHEREAS, the reimbursable costs and attorneys' fees would be capped at a maximum of \$30,000 plus a Consumer Price Index adjustment, by following the procedures set forth in Elections Code Section 10010; and

WHEREAS, the adoption of a district-based elections system will not affect the terms of any sitting Port Commissioner, each of whom will serve out his or her current term.

NOW, THEREFORE, BE IT RESOLVED by the Santa Cruz Port District Commission as follows:

1. The above recitals are true and correct.

2. Before the November 2024 regular election, the Board of Port Commissioners will consider adoption of a resolution to institute a district-based elections system, as authorized by Elections Code Section 10650.
3. Prior to considering a resolution to establish district boundaries for a district-based election system, the Port District will take the following actions pursuant to Elections Code Section 10010:
 - a. Hire a qualified consultant to provide demographic services and assist in the preparation of proposed district maps;
 - b. Conduct public outreach, including to non-English speaking communities, to explain the districting process and to encourage public participation;
 - c. Before drawing a draft map or maps of the proposed division boundaries, hold at least two public hearings at which the public is invited to provide input regarding the composition of the districts and to consider district boundaries;
 - d. After drawing a draft map or maps, publish the draft map(s) and the potential sequence of the district elections and hold at least two public hearings at which the public is invited to provide input regarding the content of the draft map or maps and the proposed sequence of elections; and
 - e. Hold a public hearing at which the Port District will consider the adoption of a resolution establishing district-based elections, including a district boundary map and the sequence of the district elections.
4. This resolution will take effect upon its adoption and wherein the Port District declares that the change in method of election is being made in furtherance of the purposes of the California Voting Rights Act.

PASSED AND ADOPTED, by the Santa Cruz Port District Commission this 10th day of August 2021, by the following vote:

AYES: _____

NOES: _____

ABSENT: _____

Approved by:

Toby Goddard, Chairman

ELECTIONS CODE - ELEC

DIVISION 14. ELECTION DAY PROCEDURES [14000 - 14443]

(Division 14 enacted by Stats. 1994, Ch. 920, Sec. 2.)

CHAPTER 1.5. Rights of Voters [14025 - 14032]

(Chapter 1.5 added by Stats. 2002, Ch. 129, Sec. 1.)

14025.

This act shall be known and may be cited as the California Voting Rights Act of 2001.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14026.

As used in this chapter:

(a) "At-large method of election" means any of the following methods of electing members to the governing body of a political subdivision:

(1) One in which the voters of the entire jurisdiction elect the members to the governing body.

(2) One in which the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body.

(3) One that combines at-large elections with district-based elections.

(b) "District-based elections" means a method of electing members to the governing body of a political subdivision in which the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district.

(c) "Political subdivision" means a geographic area of representation created for the provision of government services, including, but not limited to, a general law city, general law county, charter city, charter county, charter city and county, school district, community college district, or other district organized pursuant to state law.

(d) "Protected class" means 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 (52 U.S.C. Sec. 10301 et seq.).

(e) "Racially polarized voting" means voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.

(Amended by Stats. 2016, Ch. 86, Sec. 121. (SB 1171) Effective January 1, 2017.)

14027.

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 abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14028.

(a) A violation of Section 14027 is established if it is shown 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. Elections conducted prior to the filing of an action pursuant to Section 14027 and this section are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.

(b) The occurrence of racially polarized voting shall be determined from examining results of 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. One circumstance that may be considered in determining a violation of Section 14027 and this section is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action based on Section 14027 and this section. In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis.

(c) The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy.

(d) Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required.

(e) Other factors such as 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 are probative, but not necessary factors to establish a violation of Section 14027 and this section.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14029.

Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14030.

In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorney's fee consistent with the standards established in *Serrano v. Priest* (1977) 20 Cal.3d 25, 48-49, and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14031.

This chapter is enacted to implement the guarantees of Section 7 of Article I and of Section 2 of Article II of the California Constitution.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14032.

Any voter who is a member of a protected class and who resides in a political subdivision where a violation of Sections 14027 and 14028 is alleged may file an action pursuant to those sections in the superior court of the county in which the political subdivision is located.

(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)