Implementing Districts - Now That You Have Gone to Districts, What Next?

Wednesday, May 17, 2023

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YOUR CITY HAS TRANSITIONED TO DISTRICT ELECTIONS--NOW WHAT?

THE LEAGUE OF CALIFORNIA CITIES
CONFERENCE
May 17, 2023

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Introduction

Over the last several years, cities and other local agencies throughout California have transitioned from at-large elections to district-based elections, largely in response to claims their at-large system violated the California Voting Rights Act ("CVRA"). The CVRA prohibits using an at-large election system if doing so "impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an elections …." (Elec. Code, § 14027.) Since the law's passage in 2002, at least 185 cities and nearly 400 other California jurisdictions have made the switch. This paper's focus is not on the threshold issue of CVRA compliance or whether to transition to district-based elections. Rather, the paper focuses on the myriad of issues that may arise after a city has made that transition.[1]

Who Represents Whom?

A. When do new districts take effect?

To answer this question, we distinguish between the effective date of an ordinance and the date the districts that such ordinance creates are implemented. As with all non-urgency ordinances, the effective date is 30 days after adoption, although it seems reasonable to take the position that the ordinance is one "[r]elating to an election" and therefore may take effect immediately on second reading. However, it may be best to make the ordinance effective in 30 days (especially as the election will be moths away) to allow time for any referendum petition challenging the district map's adoption to circulate. (E.g., *Ortiz v. Board of Supervisors* (1980) 107 Cal.App.3d 866 [ordinance redistricting board of supervisors could not be immediately effective so as to defeat referendum power].) For election purposes, however, the maps themselves are implemented at "the first election for council members in each city following adoption of the boundaries of council districts, excluding a special election to fill a vacancy or a recall election …." (Elec. Code, § 21606, subd. (b) and § 21626, subd. (b).)

[1] For a primer on the CVRA generally, see "The California Voting Rights Act: Recent Legislation & Litigation Outcomes" prepared by Youstina N. Aziz, James L. Markman and Dr. Douglas Johnson and presented at the Spring 2018 City Attorney's Conference. https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2018/2018-Spring-Conference/5-2018-Spring;-Aziz-Johnson-Markman-California-Vot

B. Who represents whom until the new districts take effect?

Based on the statutory language, at a minimum, until the next regularly scheduled election, a council member is politically accountable to the district in place when they were elected. (See, Elec. Code, § 21606, subd. (d) and § 21626, subd. (b).) This construction flows from the requirement that if, in the interim, a vacancy occurs, the appointed or elected replacement to serve out the balance of the term must come from the original district that elected the departing council member. (97 Ops.Cal.Atty.Gen. 12 (2014); see also Gov. Code, § 36512.) Elections Code section 21606, subdivision (a) further supports this conclusion and statues, "The term of office of any council member 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 the council member was elected." Charter cities have the same rule. (Elec. Code, § 21626, subd. (a).) Otherwise, redistricting that changed the political tenor of a district could lead to the immediate recall of an incumbent elected previously, as was recently attempted in Sacramento.

But such interpretation does not mean that a council member must represent only those residing in the district that elected them. Recently, the Orange County Board of Supervisors attempted to mandate that the districts it drew following the decennial census would become immediately effective and adopted a resolution that individual supervisors could not direct the use of county resources outside their newly drawn district except in limited circumstances. This effectively limited the supervisors' representation to their new districts. The Attorney General issued an opinion that the county could not prohibit supervisors from representing the districts that elected them pending the next regularly scheduled election at which the new maps would apply. (Opinion No. 22-501, 2022 WL 2960559 (July 20, 2022).) The opinion also concluded that nothing prohibited the county from allowing supervisors also to represent the residents of their new districts. (*Id*., at pp. 5-6.)

That same reasoning should apply to cities to permit city council members to represent the constituents of their newly drawn districts even before the map takes effect at the next regularly scheduled election. The period of potential "double representation" is simply an artifact of the redistricting process. (Cf., e.g., *Legislature v. Reinecke* (1973) 10 Cal.3d 396, 405.) It similarly allows an area to effectively go unrepresented pending an election, too, as when an area moves from a Senate seat scheduled for election to one that is not – voters there may have to wait six years for an opportunity to vote for a state senator. (*Ibid*.)

C. How do you encourage council members to develop a citywide perspective?

One challenge of moving from an at-large election system to a district-based one is the incentive council members to focus exclusively on their district to the exclusion of the city as a whole. To mitigate this effect, some cities also undertook efforts to buffer city services from district by district demands. One common example of such an effort is cities conducting city-wide surveys of road construction dates and adopting a date-driven citywide repaving schedule. Another example is allocating equal numbers of events held in each district.

Changes to Districts After Creation

A. Can a city return to at-large districts?

Theoretically, a city could return to at-large districts, but it should proceed with great caution if it considers doing so.

Cities that convert to a district-based election system after receiving a CVRA demand letter do not need voter approval to make the change provided the ordinance accomplishing the change declares it is being made "in furtherance of the purposes of the California Voting Rights Act of 2001." (Gov. Code, § 34886.) If making a change for any other reason, however, voter approval is necessary. Government Code section 34873 expressly allows amendments to ordinances establishing by-district election systems, and that power has been construed to authorize an ordinance to change the election system to an at-large approach with voter approval. (*Bridges v. City of Wildomar* (2015) 238 Cal.App.4th 859 ["Accordingly, the City Council had the authority to act as it did—to alter the voting system from by-district to at-large, as approved by the electorate."].) Notably, *Bridges* focused on the city council's power to propose an ordinance converting to an at-large election system after voters had approved the initial incorporation of the city and a district-based election system. While procedurally such a change is permissible with voter approval, the resulting election system must still comply with the CVRA, and Wildomar's experience following its conversion to an at-large system is instructive on the challenges associated with such a change.

Within months of voters' decision to elect Councilmembers at large, Wildomar received a CVRA claim and opted to return to by-district elections to

avoid the anticipated significant legal defense costs. Wildomar's experience illustrates a common approach to a CVRA claim. As a practical matter, given the high costs to defend a CVRA claim (Santa Monica has reportedly spent many millions in its CVRA case now pending in the California Supreme Court) and the short deadline to act to limit plaintiff's attorneys' fees, many cities opt to transition to district-based elections rather than evaluate or otherwise litigate whether racially polarized voting actually occurs in their elections. Racially polarized voting is key to establishing a CVRA violation. (Elect. Code, § 14028.) It exists when a protected minority group's preferred candidate of choice differs from the candidate preferred by the majority.

Absent that time pressure, some cities might revisit whether, in fact, racially polarized voting exists in their jurisdiction. Any city considering such a change should first engage a demographer to prepare a racially polarized voting analysis. The analysis will likely need to account for voter preferences in an existing district-based system versus those in a proposed at-large system. If evidence of racially polarized voting patterns is present, moving to an at-large system without triggering a new CVRA claim is unlikely, as there are several California attorneys active statewide on CVRA claims who would likely pounce on the opportunity to challenge a return to at-large elections, particularly when a city-funded study has found evidence of racially polarized voting.

B. Can a city change the number of districts and/or move to a directly elected Mayor?

When responding to a CVRA demand, a City need not obtain voter approval of either an ordinance to convert to district-based elections (including the number of districts) or the map adopted to implement the change. (Gov. Code, § 34886.) Such map may be adopted by ordinance or resolution. (Elec. Code, §§ 21601, subd. (a) and 21621, subd. (a).) Even after a city has moved to district-based elections following a CVRA demand, it may change the number of districts and/or to an at-large mayor with voter approval. Whether a map implementing such change can be effective at times other than the redistricting following the decennial federal census is unclear.

Government Code section 34871 provides the general rules for the number of districts or the method of mayoral election, and unless proposed to comply with the CVRA, voter approval is required. (Gov. Code, § 34871.) For general law cities, a city may have five, seven or nine districts or, alternatively, four, six or eight districts with a directly elected mayor pursuant to section 34900. (*Ibid*.) Any

change in the number of districts cannot affect a councilmember's term. (Gov. Code, § 34873.) Accordingly, it is easier to increase, than to reduce, the number of council seats. Shrinking the council, while legally possible, takes significant coordination to time the effective date of such an ordinance to avoid shortening the term of a council member and to avoid having a greater number of council members qualified to hold office concurrently than are authorized by the ordinance—a condition that Government Code section 34875 prohibits.

If voters approve a proposed ordinance to change the number of council members or to provide for a directly elected mayor, the city must adopt new districts. (Gov. Code, § 34877.5.) In drafting the map, both general law and charter cities must comply with Election Code provisions applicable to drawing district boundaries generally, such as ensuring the districts are substantially equal in population and comply with the federal and state constitutions and the federal Voting Rights Act of 1965. (*Ibid.*; Elec. Code §§ 21603 and 21623.) Also, cities must solicit public input and hold hearings as required in the Elections Code. (Gov. Code, § 34877.5; Elec. Code, §§ 21607, 21627.) Finally, if the districts are in the original ordinance submitted to the voters, the map must first have been submitted to the city's planning commission, or if there is no planning commission, the city council, "for an examination as to the definiteness and certainly of the boundaries of the legislative districts proposed." (Gov. Code, § 34874.)

It is uncertain whether a proposed district map not adopted in response to a CVRA demand requires voter approval. One might argue that when adopted mid-cycle and not in response to a CVRA claim, the map requires voter approval under Government Code sections 34874 and 34877. But legislative intent and rules of statutory construction weigh heavily in favor of interpreting the law to eliminate the requirement of voter approval of district maps. One of the express purposes of 2016's AB 278 was to remove the need for voter approval of an adopted map. This goal makes sense. Requiring voter approval of the district map could lead to voters approving a move to districts or changing the number of Council seats, but then effectively nullify that approval by rejecting the necessary map. Not requiring such pre-approval, but leaving the implementing map subject to referendum, allows efficient adoption of the map—including the required public hearing process—while respecting voter control via a referendum petition. And construing section 34877 to apply only to the question of altering the number of districts, as distinct from also approving an implementing map, gives effect to AB 278's amendments without requiring the implied repeal of any statute. On balance, the stronger argument is that voter approval of a new map is not required. In light of the lack of clarity in the statute, however, cities considering altering the number of

districts mid-decade would be wise to include the map in the original ordinance put to the voters, despite the potential negative impact on support for the proposal, to avoid both the arguable need to put a second measure before the voters and the risk of a potential legal challenge to the lack of that second measure.

Notably, no published decision addresses whether the second portion of this process—drawing new maps —can occur other than in conjunction with decennial redistricting following the U.S. Census. The Election Code generally only permits mid-cycle redistricting: 1) if a court orders it; 2) the council is settling a claim that the district boundaries violate the United States Constitution, the federal VRA or the Elections Code rules for redistricting; or 3) the city's boundaries change and the new population is more than 25 percent of the city's earlier population. (Elec. Code, § 21605.) These same rules apply to charter cities unless their charters provide different rules. (Elec. Code, § 21625, subd. (c).)

However, cities have a strong argument that an exception allows new districts in response to a voter approved change in their number. When a city adopts council districts "for the first time," the limitation on mid-cycle districting does not apply. ((Elec. Code, §§ 21605, subd. (b) and 21625, subd. (b).) Although, arguably, a city moving from five districts to seven, for example, is not adopting council districts for the first time, it is adopting the sixth and seventh districts for the first time. And construing that provision to permit mid-cycle redistricting in response to this change is consistent with and recognizes a city's general power to amend its ordinance regarding the number of districts. Absent a court decision addressing the question, however, a general law city could minimize any uncertainty regarding the issue by coordinating a change in the number of districts with the decennial redistricting. A charter city could also take that route, or it could adopt a charter provision explicitly allowing a mid-decade redistricting.

C. How are annexations handled?

Elections Code section 21601 governs how cities handle district boundaries when annexing new territory. The default rule adds the new territory to the "nearest existing council district without changing the boundaries of the other council district boundaries." (Elec. Code, § 21603, subd. (a).) If, however, more than four years remain before the next federal decennial census redistricting and the new territory's population is more than 25 percent of the City's population in the most recent federal decennial census, then the city council may redistrict. (Elec. Code, § 21603, subd. (b).) Unless a charter city has adopted a different standard by ordinance or in its charter, the same rules apply. (Elec. Code,

§ 21623.) Note that the 25 percent population test uses the annexed area's population pre- not post-annexation.

D. How to respond to Census data

Once a city has district-based elections, it must redistrict in response to the decennial federal census. The Fair Maps Act provisions governing the substantive and procedural requirements apply to general law cities (Elec. Code, §§ 21600 et. seq.) and to charter cities with some exceptions when a city's charter provides other rules. (Elec. Code, §§ 21620.) Many cities recently went through this exercise. The Act provides rules about the timing of adopting a new map, the number of public hearings that should take place and their timing, limits on when a city may release its first draft map and detailed requirements regarding information that the city must post on its website and maintain through the next redistricting cycle. (Elec. Code, §§ 21600 et. seq; Elec. Code, §§ 21620.)

Traditionally, compliance with equal population requirements in any mid-decade redistricting would be evaluated using the most recent population data available (typically Department of Finance estimates, local estimates or American Community Survey population estimates). But Government Code 21601(a)(1) and 21621(a)(1) state that when adopting districts for the first time or for decennial redistricting "shall be based on the total population of residents of the city as determined by the most recent **federal decennial census … .**" It is unclear whether that requirement applies to mid-cycle redistricting under Government Code 21605 and 21625. Logically, more recent population estimates would be used, but statutorily a claim that such data violate 21601(a) or 21621(a) might be possible. Federal precedents make clear that more recent population estimates can meet Federal requirements for equal population, but the FAIR MAPS Act is less clear and might reflect a lack of legislative confidence in alternative data sources or a desire to eliminate local discretion as to what data source to draw from to require use of a noncontroversial data source.

Using a local population estimate presents its own risks. If one is used, Federal standards for the quality and detail of those estimates are demanding. Either the Census Bureau must be engaged to conduct a Special Census (which is very expensive and time consuming[2]), or a parcel-by-parcel analysis of residential construction and demolitions throughout the entire jurisdiction since the last

[2] Presuming the Census Bureau will even agree to do the work, regardless of the fee: https://www.census.gov/programs-surveys/specialcensus.html

decennial Census count, paired with a detailed analysis of likely vacancy rates and persons-per-household counts, are required.

Challenges to District Lines

A. Current issues in challenges to district lines

The Fair Maps Act invites legal challenges to maps that, before the Act, would have been non-justiciable. For example, when and how many public hearings to conduct before adopting a map would have been within the discretion of the Council. So, too, would have been whether to draw a map to favor a political party or to expressly consider a community's relationship with an incumbent. But the Fair Maps Act provides guidelines on each of these, creating new possible claims. Of course, compliance with the federal and state constitutions and the federal Voting Rights Act has always been required.

It is beyond the scope of this paper to catalog all redistricting challenges following the 2020 redistricting cycle, but we note a few and their procedural status at the time of this paper.

- *Chaldean Coalition v. County of San Diego Independent Redistricting Commission* (San Diego Superior Court Case No. 37-2022-00008447)

  This suit challenges the Commission's adoption of the County's supervisorial map, alleging the Commission unlawfully divided the Chaldean community of interest in violation of the federal and state constitutions and the federal Voting Rights Act. It also alleges procedural claims, including that the Commission released its first draft map prematurely and that certain Commissioners were not qualified to serve.

  The petitioners unsuccessfully sought a TRO to prevent use of the new map for the 2022 elections. Trial is set for May 2023.

- *Latino Information & Resource Network et al. v, City Of West Sacramento* (Yolo Superior Court Case No. CIV-21-1886)

  This suit began in October 2021as a CVRA suit to compel the city to transition to district-based elections. In January 2022, the city adopted a resolution of intention to make that transition and settled

with the plaintiffs. But after the city approved first reading of an ordinance to adopt the district map in May 2022, plaintiffs claimed the map failed to comply with the terms of the settlement agreement, including, among other provisions, that the map comply with the FAIR MAPS Act's requirement to minimize divisions of communities of interest—in this case the Latino community in the Broderick/Bryte neighborhood. The Court agreed with plaintiffs that the city's map improperly divided that neighborhood and ordered the city to use plaintiffs' offered alternative, which included that neighborhood in one district.

- *SLO County Citizens for Good Government et al. v. County of San Luis Obispo* (San Luis Obispo County Superior Court Case No. 22CVP-0007)

  This suit alleges the Board of Supervisors adopted a map dramatically different than its predecessor "for prohibited partisan purposes"—a classic partisan gerrymandering claim. The suit claims the Board "packed" Democratic voters, who they claimed outnumbered Republicans county-wide by 6,000–7,000, into two districts, while leaving Republican-leaning three districts. Following the 2022 election that shifted the Board's majority, the Board entered settlement negotiations and ultimately agreed to repeal the map and adopt a map "compliant" with applicable law by May 15, 2023.

- *Steve Tate, et al. v. Shannon Bushey et al.* (Santa Clara Superior Court Case No. 22CV396857)

  This suit challenged Morgan Hill's minor changes to the then-existing map of city council districts, which had been adopted before the Fair Maps Act took effect. Petitioner alleged the adopted map did not meet the Fair Maps Act requirement that districts be contiguous. The Court agreed (as did the City's demographer and City Attorney) that one district was not contiguous, issued an injunction preventing use of the map and allowed the City a brief period to adopt a compliant map, which it did in May 2022.

B. Update on Santa Monica CVRA litigation

Unlike many cities that opted to convert to district-based elections after receiving a CVRA demand letter, Santa Monica litigated the claim that its at-large election system discriminated against Latinos.[3] The trial court ruled in Petitioner's favor, but the Court of Appeal reversed, finding the City's voting system did not violate the CVRA or California's constitutional guarantee of equal protection. (*Pico Neighborhood Association v. City of Santa Monica* (2020) 51 Cal.App.5th 1002, *as modified on denial of reh'g* (Aug. 5, 2020); petition for review granted and ordered depublished (Oct. 21, 2020). Depublication upon a grant of Supreme Court review is rare since adoption of a Rule of Court allowing decisions to remain persuasive, but not binding, authority pending review, which might portend poorly for Santa Monica's prosects in the high court. The Court of Appeal determined that Petitioner failed to establish the at-large system diluted the Latino vote because the alternative district-based voting system Petitioner advanced did not create a majority-Latino district. Because a majority-minority district was not shown to be possible, the Court held Petitioner could not prove at-large elections diluted the Latino vote. It also found no evidence of intent to discriminate against minorities when it created the at-large system and, thus, no equal protection violation occurred. The fact that Latinos had been elected to office in Santa Monica may have affected the Court of Appeal's view of the case.

The Supreme Court ordered the parties to brief "What must a plaintiff prove in order to establish vote dilution under the California Voting Rights Act?" As of January 5, 2023, the matter was fully briefed. On March 9, 2023, the Supreme Court notified the parties it anticipates setting oral argument in that matter with the next few months. As this paper is drafted, argument has not yet been set.

[3] For those interested, the City of Santa Monica maintains a web page with copies of the pleadings and briefs filed in the case to date. https://www.santamonica.gov/election-litigation-pna-v-santa-monica