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CITY OF LODI

COUNCIL COMMUNICATION

AGENDA TITLE: Adopt Resolution Expressing the City Council's Intention to Initiate Procedures for Establishing and Implementing By-District Elections for City Council Members Pursuant to Elections Code Section 10010

MEETING DATE: December 12, 2017

PREPARED BY: City Attorney

RECOMMENDED ACTION: Adopt Resolution expressing the City Council's intention to initiate procedures for establishing and implementing by-district elections for City Council members pursuant to Elections Code Section 10010.

BACKGROUND INFORMATION:

Summary:

On October 31, 2017, the City received a letter from the Mexican American Legal Defense and Educational Fund (MALDEF). The letter asserts that the City's at-large system for the election of city council members results in Latino vote dilution and prevents Latino voters from electing candidates of their choice in violation of the California Voting Rights Act (the CVRA) (Elec. Code §§ 14025-14032). The letter also threatens litigation unless the City voluntarily converts to a "by-district" election system. MALDEF has served similar letters and subsequently filed lawsuits against cities for alleged CVRA violations. A copy of MALDEF's letter is attached.

The City of Lodi currently utilizes an at-large election system, which means that the registered voters of the City elect the five Council Members. A district-based election is one in which the City is divided into separate districts, each with one Council member who resides in the district and is chosen by the voters residing in that particular district.

The CVRA only applies to jurisdictions (like the City of Lodi) that utilize an "at-large" election method, where voters of the entire jurisdiction elect the members of the City Council. Cities throughout the state have increasingly been facing legal challenges to their at-large election systems. The threshold to establish liability under the CVRA is extremely low and prevailing CVRA plaintiffs are guaranteed to recover their attorney's fees and costs. As a result, every governmental defendant that has challenged the conversion to by-district elections under the CVRA has either lost in court or settled/agreed to implement by-district elections, and been forced to pay at least some portion of the plaintiffs attorneys' fees and costs. A few cities that have extensively litigated CVRA cases have been eventually forced to pay multi-million-dollar fee awards and transition to by-district elections.

Discussion:

The CVRA was enacted in 2002 with the specific intent of eliminating several key burden of proof requirements that exist under the federal Voting Rights Act of 1965 (the "FVRA") (52 U.S.C. § 10301 et

APPROVED: _____
Stephen Schwabauer, City Manager

seq.) after several jurisdictions in California successfully defended themselves in litigation brought under the FVRA.

Under the FVRA, four factors must be met in order to establish a violation. The CVRA removes two of these factors: (1) the "geographically compact" FVRA precondition (i.e., can a majority-minority district be drawn?); and, (2) the "totality of the circumstances" or "reasonableness" test. Instead, under the CVRA, the only "element" a plaintiff must establish is that "racially polarized" voting occurs in a jurisdiction with at-large elections. As a result, the CVRA is tilted heavily in favor of plaintiffs' attorneys, and was enacted with that specific intent in mind. Despite its removal of key safeguards contained in the FVRA, the California courts have held that the CVRA is constitutional. (See *Sanchez v. City of Modesto* (2006) 145 Cal.AppAth 660.)

Over the relatively short 15-year history of the CVRA, and only after an initial challenge to it was resolved in 2006, public agencies have paid a total of nearly \$15 million to CVRA plaintiff attorneys. The City of Modesto, which challenged the CVRA's constitutionality, ultimately paid \$3 million to the plaintiffs' attorneys. The City of Palmdale, which also aggressively litigated a CVRA claim, ultimately paid \$4.5 million in attorneys' fees. Importantly, these figures do not include the tens of millions of dollars spent by government agency defendants paying for their own attorneys and associated defense costs. Also important to note is that both these cities – like all other CVRA defendants – ultimately ended up converting to by-district elections.

Due to the combination of the CVRA's low burden to trigger mandatory districting and its mandatory attorneys' fees provision, all CVRA cases that have been filed have ended with the defendant governmental agency implementing a by-district election system and making some sort of attorneys' fee payment. The expense of CVRA claims explains in part why no entity has brought a challenge of the California statute to the U.S. Supreme Court. All of the cases have settled prior to that step, generally with the payment of significant legal fees and costs.

In 2016, responding to the substantial costs imposed upon cities and other public agencies in defending CVRA suits, the California Legislature amended the Elections Code to simplify the process of converting to by-district elections and to provide a "safe harbor" process to protect agencies from litigation. If a city receives a demand letter, such as the case here, then the city is given 45 days of protection from litigation to assess its situation. If within that 45 days, the city adopts a resolution declaring the Council's intent to transition from at-large to by-district elections, outlining the steps to be taken to facilitate that 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 following adoption of the resolution. (Elec. Code § 10010(e)(3).)

The City Council held a closed session on November 14, 2017, to discuss the threatened CVRA litigation. As reported by the City Attorney after the closed session, the City Council provided direction to staff to prepare a draft Resolution of Intention, for establishing and implementing by-district elections for members of the City Council, to be presented for consideration at the December 12, 2017 Special Council meeting. The timing of bringing the resolution forward for possible approval is strategic in that it allows the City to take advantage of the above-described "safe harbor" provisions by adopting the attached resolution and voluntarily implementing a by-district election system to protect the City's taxpayers from the risk of future litigation. The recommendation to approve the resolution is not based on any admission or concession that the City would ultimately be found to have violated the CVRA; rather, the risks and costs associated with protracted CVRA litigation — particularly in light of results in all other cities that have fought to retain at-large voting — cannot be ignored. The public interest may ultimately be better served by a by-district electoral system if converting to that system avoids significant attorneys' fees and cost award.

The attached resolution, if approved, would affirm Council's intent to adopt a by-district election system. The resolution also includes an attachment setting forth the tentative timeline for implementing transition to by-district elections, including the schedule for the required public hearings. The timeline proposes holding public hearings on December 20, 2017, January 17, 2018, January 31, 2018, February 7, 2018, and February 21, 2018 (two separate public hearings would be held on February 21 — one to take additional public input on the final draft map, the other for introduction of the ordinance selecting the final map and implementing by-district elections), as well as a second reading of the final ordinance on March 7, 2018. If adopted, the ordinance would be effective on April 4, 2018.

The multiple public hearing process is required by the Elections Code. Elections Code 10010(a), requires the Council to hold a total of five public hearings before a by-district electoral system can be adopted: two must be held before any proposed district boundaries have been drawn (December 20 and January 17), two must be held after proposed district maps have been generated (January 31 and February 7), and finally, the Council must consider the actual ordinance that would establish district based elections and adopt district boundaries at a fifth public hearing (February 21). The fourth and fifth public hearings can occur at the same meeting; here, the attached resolution proposes such a schedule in order to complete the transition to districts within the 90-day "safe harbor" period.

The initial public hearing on December 20th will include an overview of the process and city demographics. It is an opportunity to gather input from the public to be used in establishing options for district boundaries. Additionally, the City Council will consider a resolution setting forth mandatory and permissive districting criteria. The second public hearing on January 17th is another opportunity to gather input from the public to be used in establishing options for the district boundaries.

The January 31st and February 7th public hearings will provide an opportunity for public comment and discussion on draft maps and the proposed sequence of elections. The fifth public hearing on February 21st will provide public comment on the final map followed by the introduction and first reading of the ordinance establishing district boundaries and the transition/plan for sequence of elections. The second reading and adoption of the ordinance establishing district maps and the transition plan/sequence of elections will occur at the City Council's regular meeting on March 7, 2018.

In addition to the public hearings, a website dedicated to the district election issue will be established and updated throughout the process. In order to accomplish these tasks in the limited amount of time under the law, the City has retained an expert districting consultant and demographer to evaluate the City's position under the CVRA and to advise on risks and potential liabilities. Douglas Johnson, an expert with National Demographics Corporation ("NDC"), has extensive experience drawing districts in compliance with the requirements of both the FVRA and CVRA. If the City Council elects to transition to by-district elections, Dr. Johnson and his staff at NDC will draw proposed districts after the first two public hearings, and (together with any maps prepared and submitted by members of the public) present all qualifying maps to the Council at its January 31st meeting. The Council will have the ability to request modifications to the options presented or a different option.

Fiscal Impact:

If the City Council concurs with staff's recommendation, there will be significant staff time needed to transition to by-district-based elections and to administer the process, including the need for five public hearings and community outreach. The fiscal impact of voluntarily converting to by-district elections is estimated to be approximately \$100,000. The demographic and election consultants' costs are anticipated to be approximately \$40,000 to \$50,000. Publication notices, translation fees for council communications, and the cost to have interpreters at all public hearings are anticipated to be \$30,000 to \$40,000. Special legal fees could be incurred for additional analysis and public hearings, but are not anticipated to exceed \$10,000. In addition, the City will be required to reimburse MALDEF for its

documented attorney's fees and costs up to \$30,000. The City's good faith and voluntary approach to transition to by-district elections may forestall threats of litigation demands for attorneys' fees, but that cannot be guaranteed as other jurisdictions have suffered such demands even after initiating efforts to transition to by-district elections. Should the Council choose not to voluntarily convert to by-district elections and defend the threatened lawsuit, the costs and attorneys' fees would likely exceed \$1,000,000, and would be a general fund liability which would be a significant unbudgeted expense.

Environmental Review:

This action is not subject to CEQA review.

Public Notification:

A notice of public meeting for this agenda item was published in the Lodi News Sentinel on December 6, 2017.

Recommended Action:

It is recommended that the City Council adopt a Resolution of Intention to initiate procedures for establishing and implementing by-district elections pursuant to Elections Code section 10010(e)(3)(A), that will start the transition from at-large to district-based elections in the City of Lodi.

FISCAL IMPACT: If Council pursues by-district elections, the estimated \$100,000 cost can be absorbed within known employee vacancy savings in various departments. For now costs will be charged to the City Clerk's elections budget.

FUNDING AVAILABLE: City Clerk's elections budget (10005000-72450)

Janice D. Magdich, City Attorney

Attachment: October 26, 2017 Letter from MALDEF

RECEIVED

OCT 31 2017

CITY CLERK



MALDEF

The Latino Legal Voice for Civil Rights in America

October 26, 2017

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Los Angeles, CA 90014
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Fax: 213.629.0266

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Tel: 202.293.2828

VIA U.S. MAIL

Doug Kuehne, Mayor
City of Lodi
Lodi City Hall
221 W. Pine Street
Lodi, CA 95240

Re: Demand for Compliance with California Voting Rights Act

Dear Mr. Kuehne:

We have received complaints from Latino voters in the City of Lodi that the use of an at-large system for the election of city council members results in Latino vote dilution and prevents Latino voters from electing candidates of their choice. We reviewed demographic and electoral information pertaining to your jurisdiction with particular attention to the protections of the California Voting Right Act of 2001 ("CVRA"). Based on our investigation, we believe that the City of Lodi is in violation of the CVRA and must convert to a by-district election system.

The CVRA, California Elections Code § 14027, states in relevant part:

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...

Latino residents of the City of Lodi are a "protected class" within the meaning of the CVRA. U.S. Census population data shows that Latinos constitute 20.6% of the citizen voting age population of Lodi. However, it appears that none of the five current members of the City Council is Latino and that no Latino candidate has ever served on the City Council. Based on our review of election returns and demographic information, we believe that the lack of success of Latino candidates results from the inability of Latino voters to elect candidates of choice due to racially polarized voting among the electorate, and that continued use of at-large elections therefore violates the CVRA. We demand that the City convert its at-large election system to a district-based electoral system. Under the authority of Government Code §

Doug Kuehne, Mayor

October 26, 2017

34886, the City Council can effectuate that conversion by passage of a resolution, and we demand that it do so without delay.

We request your response to this demand within 45 days of receipt of this letter. In the absence of a satisfactory response, we will be forced to seek judicial relief in the form of an action to obtain an order converting the election system from at-large to by-district, together with other relief provided for in the CVRA, including an award of litigation and expert witness costs, and attorneys' fees. The City can avoid the imposition of a judicially-mandated plan, including district maps designed or approved by the Court, by taking appropriate action without the filing of litigation.

We look forward to your response.

Sincerely,



Tanya G. Pellegrini
Staff Attorney
MALDEF

cc: Alan Nakanishi, Mayor Pro Tem (via U.S. mail)
Mark Chandler, Council Member (via U.S. mail)
Bob Johnson, Council Member (via U.S. mail)
Joanne Mounce, Council Member (via U.S. mail)
Janice Magdich, City Attorney (via U.S. mail)

RESOLUTION NO. 2017-_____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY
OF LODI EXPRESSING THE CITY COUNCIL'S INTENTION,
PURSUANT TO ELECTIONS CODE SECTION 10010(e)(3)(A), TO
INITIATE PROCEDURES FOR ESTABLISHING AND IMPLEMENTING
BY-DISTRICT ELECTIONS FOR CITY COUNCIL MEMBERS

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WHEREAS, the City of Lodi ("City") is a general law city, duly organized under the constitution and laws of the State of California; and

WHEREAS, five of the members of the Lodi City Council are currently elected in at-large elections, in which each City Council member is elected by the registered voters of the entire City; and

WHEREAS, Government Code section 34886, in certain circumstances, authorizes the legislative body of a city of any population to adopt an ordinance to change its method of election from an at-large system to a by-district system or by-district system with an elective mayor without the need to put such a change to voters; and

WHEREAS, on October 31, 2017, the City received a letter from the Mexican American Legal Defense and Education Fund (MALDEF) asserting that the City's at-large system of voting results in Latino vote dilution and prevents Latino voters from electing candidates of their choice and threatening action against the City under the California Voting Rights Act (CVRA), a period of less than forty-five (45) days before the date of this Resolution; and

WHEREAS, a violation of the CVRA is established if it is shown that racially polarized voting occurs in elections (Elections Code §14028(a)). "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 §14026(e)); and

WHEREAS, although the letter from MALDEF was not accompanied by any evidence to support the claim of a CVRA violation, the City Council has determined that it is in the best interest of the City to move from its current at-large electoral system to a by-district election for members of the City Council, in furtherance of the purposes of California Voting Rights Act and to avoid costs associated with defending a lawsuit based on the CVRA, even if that lawsuit settles; and

WHEREAS, the City Council has directed staff to initiate the process to transition from an at-large system to a district-based system in accordance with the procedural rules outlined in Government Code section 34886 and Elections Code section 10010; and

WHEREAS, the City will begin by working with an experienced demographer to assist the City in establishing maps for a by-district electoral system; and

WHEREAS, before drawing a draft map of the proposed boundaries of the districts, the City will hold at least two (2) public hearings over no more than thirty (30) days, at which time the public is invited to provide input regarding the composition of the districts; and

WHEREAS, the City will then publish and make available for release at least one (1) draft map of the new electoral districts, including the potential sequence of elections; and

WHEREAS, once the draft map has been publicized for at least seven (7) days, the City will hold at least two (2) additional public hearings, over a period of no more than forty-five (45) days, at which time the public is invited to provide input regarding the content of the draft map and the proposed sequence of elections prior to the public hearing at which the City Council considers adoption of the map; and

WHEREAS, if a draft map is revised at or following a public hearing, the revised map will be published and made available to the public at least seven (7) days before the City chooses to adopt it; and

WHEREAS, in determining the final sequence of staggered district elections, the City Council will give special consideration to the purposes of the California Voting Rights Act, and will take into account the preferences expressed by the members of the districts.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Lodi as follows

Section 1. The above recitals are true and correct and are incorporated herein by this reference.

Section 2. The City Council hereby resolves, pursuant to Elections Code section 10010, to adopt a by-district election system by ordinance as authorized by California Government Code section 34886, for use in the City's General Municipal Election for City Council members.

Section 3. The City Council further resolves to retain a qualified demographer, hold at least five (5) public hearings and publish at least one (1) draft map and staggering sequence, pursuant to the proposed hearing schedule attached hereto as Exhibit "A".

Section 4. The City's redistricting/demographic consulting firm, acting under the supervision of the City Attorney, is hereby authorized to direct and formulate one or more electoral district scenarios for review by the public and City Council at two or more public hearings as necessary, in accordance with the City's proposed timeline.

Section 5. Working with the demographic consulting firm, staff is directed to publicize relevant maps, information, notices, agendas, and other materials regarding by-district elections and to establish means of communication to answer questions from the public.

Section 6. All public hearings shall be noticed as follows: posting on the City's website at least ten (10) calendar days in advance of the hearing and publication at least ten (10) days in advance of the hearing in the newspaper adjudicated to provide notice within the City.

Section 7. The City Attorney and the City Manager are authorized to take any and all other necessary actions to give effect to this Resolution.

Section 8. This Resolution shall become effective immediately upon its adoption.

Dated: December 12, 2017

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I hereby certify that Resolution No. 2017-____ was passed and adopted by the City Council of the City of Lodi in a special meeting held December 12, 2017, by the following vote:

AYES:	COUNCIL MEMBERS –
NOES:	COUNCIL MEMBERS –
ABSENT:	COUNCIL MEMBERS –
ABSTAIN:	COUNCIL MEMBERS –
DISQUALIFIED:	COUNCIL MEMBERS –

JENNIFER M. FERRAILOLO
City Clerk

2017-____

EXHIBIT "A"

CALIFORNIA VOTING RIGHTS ACT (CVRA) DISTRICT ELECTION TIMELINE

City receives letter alleging violation of California Voting Rights Act	October 31, 2017
Special Meeting: City Council adopts resolution setting forth intention and timeline for adopting by-district elections.	December 12, 2017
Public Hearing: Overview of the process and city demographics. Gather input from public to be used in establishing options for district boundaries. Adopt resolution setting forth mandatory and permissive districting criteria.	December 20, 2017
Public Hearing: Second hearing to gather input from public to be used in establishing options for district boundaries.	January 17, 2018
Draft maps available for public review.	On or before January 23, 2018
Public Hearing: First public hearing to discuss and take public comment on draft maps and proposed sequence of elections.	January 31, 2018
Public Hearing: Second public hearing to discuss and take public comment on draft maps and proposed sequence of elections.	February 7, 2018
Publish final map for public review	February 10, 2018
Public Hearings: Public hearing to discuss and take public comment on final map and proposed sequence of elections. Introduce ordinance for first reading establishing district boundaries and transition plan/sequence of elections.	February 21, 2018
Public Meeting: Second reading and adoption of ordinance establishing district maps and transition plan/sequence of elections.	March 7, 2018

All public hearings will take place during a City Council meeting starting at 7:00 p.m. in the City Council Chambers, Carnegie Forum, 305 West Pine Street, Lodi, CA 95240.