

CITY COUNCIL AGENDA ITEM NO. 1

Meeting Date: January 22, 2019

Subject/Title: A Resolution declaring the City of Brentwood's City Council's intent to transition from at-large to district-based City Council member elections, outlining specific steps to be taken to facilitate the transition, estimating a time frame for action, and establishing the number of City Council districts.

Prepared by: Margaret Wimberly, City Clerk

Submitted by: Gustavo "Gus" Vina, City Manager
Damien Brower, City Attorney

RECOMMENDATION

Adopt a Resolution declaring the City of Brentwood's City Council's intent to transition from at-large to district-based City Council member elections, outlining specific steps to be taken to facilitate the transition, estimating a time frame for action, and establishing the number of City Council districts.

CITY COUNCIL STRATEGIC INITIATIVE

Not Applicable.

PREVIOUS ACTION

None

BACKGROUND

The City of Brentwood currently has an at-large election system, which means that voters from the entire City choose each of the four (4) council members and Mayor. The council members' are elected for four year terms. Their terms of office are staggered, and two are up for election every two years. In 1982, the voters approved a measure to make the office of Mayor directly elected in an at-large citywide election; and in 2006, they approved a measure to make the Mayor's term of office four years.

A district-based election system is one in which the City's election map would be divided up into four separate areas, or districts. Each district would be represented by one council member who resides in that district and who is chosen by voters who also reside in that particular district. The office of Mayor would still be directly elected by the voters citywide.

The City received a certified letter in November, 2017, from Mr. Scott Rafferty, a Walnut Creek attorney representing the Bay Area Voting Rights Initiative (BAVRI) (Attachment A). The letter alleged the occurrence of "racially polarized voting" in Brentwood and threatened litigation if the City declined to voluntarily convert to district-based elections for council members.

As defined by the California Voting Rights Act (CVRA), "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)). Mr. Rafferty's letter asserts that the City's at-large electoral system dilutes the ability of Latinos (a protected class) to elect candidates of their choice or otherwise influence the outcome of

Brentwood's City Council elections and that, as a result, Brentwood's at-large electoral system violates the CVRA.

The California Voting Rights Act

The CVRA was signed into law in 2002. It 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 intent is to expand protections against vote dilution over those provided by the Federal Voting Rights Act of 1965 (FVRA). The law was motivated, in part, by plaintiffs' lack of success in 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 (such as cities, school districts, and special districts) that elect their governing body members through "at-large" elections. A plaintiff need only prove the existence of "racially polarized voting" to establish liability under the CVRA. Proof of intent on the part of voters or elected officials to discriminate against a protected class is not required. In other words, the burden of proof to show the existence of racially polarized voting is very low.

As a result, cities throughout the State have increasingly faced legal challenges to their "at-large" systems of electing city council members. Almost all have settled claims out of court by agreeing to voluntarily shift to district-based elections. Those cities that have defended against CVRA court challenges have ultimately either voluntarily adopted, or have been forced to adopt, district-based elections.

If a CVRA challenge is litigated, a prevailing plaintiff has the right to recover attorneys' fees and expert witness fees. This has resulted in the payment of large amounts of money in attorneys' fees by cities that have chosen to litigate a CVRA challenge. On the other hand, even if a city prevails in CVRA litigation, it cannot recover either its attorneys' fees or costs. In addition, prevailing in one CVRA lawsuit does not prevent the filing of future lawsuits by different plaintiffs.

Fee awards to plaintiffs' attorneys and expert witnesses in CVRA litigation have reached close to \$5 million. For example, in February, 2015, the city of Santa Barbara reportedly paid \$900,000 in attorneys' fees and expert costs to settle its CVRA lawsuit. In addition, the city of Palmdale was ordered to pay plaintiffs' attorney's fees in excess of \$4.6 million in its unsuccessful attempt to defend against a CVRA lawsuit. Staff and legal counsel are unaware of any city that has prevailed in defending its "at-large" system of election against a CVRA claim.

To date, multiple cities in Contra Costa County, including Antioch, Concord, and Martinez, have received CVRA demand letters and have voluntarily adopted ordinances to transition from at large to district elections.

Assembly Bill 350; Safe Harbor Provision

In 2016, State Assembly Bill 350 was signed into law, and codified as Elections Code section 10010. The legislation attempted to provide a "safe harbor" from CVRA litigation for cities that choose to voluntarily transition to a district election system.

Under section 10010 of the Elections Code, if a city receives a demand to go to district elections, it is given 45 days of protection from litigation to assess its situation. If within that 45 days, a city adopts a resolution: 1) declaring its council's intent to transition from at-large to

district-based elections; 2) outlining specific steps to be undertaken to facilitate the transition; and 3) estimating a time frame for action, then a potential plaintiff is prohibited from filing a CVRA action for an additional 90 day period. Within that 90 day period, the city must hold at least four public hearings and introduce an ordinance setting forth maps and a district election system.

The legislation therefore provides a very short period of time (a safe harbor) for a city to assess and implement a transition to a district-based election system before a lawsuit may be filed. Effective January 1, 2019, section 10010 was amended to permit a city and potential plaintiff to agree to extend this 90 day period for an additional 90 days, thereby increasing the period for a jurisdiction to adopt an ordinance up to 180 days.

Under Elections Code section 10010, a city's liability to a plaintiff is limited to \$30,000 if the city follows the above process, and the plaintiff shows financial documentation substantiating the demand for reimbursement of costs of the work product generated to support the notice alleging the CVRA violation.

Process and Timing

As discussed above, the City received a certified letter in November 2017, from Scott Rafferty on behalf of BAVRI. Extension agreements were reached between the City and Mr. Rafferty to continue the 45 day period to adopt a resolution of intent so the parties could discuss the CVRA allegations and an appropriate way to move the process forward.

Although the City maintains that its at-large council member electoral system does not violate the CVRA or any other provision of law, the City Council has determined that the public interest would be best served by considering the transition to a district-based electoral system because of:

- the CVRA clearly favoring district elections, making it very difficult to prevail in a CVRA lawsuit;
- the extraordinary cost to defend against a CVRA lawsuit;
- the risk of losing such a lawsuit which would require the City to pay the prevailing plaintiffs' attorneys' fees and potentially having district maps drawn by a superior court judge or his or her designee; and
- the applicable \$30,000 limit on the City's liability for plaintiff's reimbursable costs and attorneys' fees under the safe harbor provisions.

An agreement has been reached between the parties that allows the safe harbor set forth in Elections Code section 10010 to continue to apply to the City provided the City Council adopts a resolution of intent to transition to district elections by January 31, 2019, and adopts an ordinance adopting a district-based election system within 180 days thereafter. If the Council takes such action, the new districts would be in effect for the 2020 City Council elections. Pursuant to section 10010, should the ordinance be adopted the reasonable costs of the work done by BAVRI's counsel will be reimbursed up to \$30,000.

Should the Council choose to adopt the Resolution of Intent to Establish District Elections, staff will begin the public outreach process to inform the community of the public hearings that will be held to draw the district maps. These public hearings are proposed to commence February 11, 2019. Outreach efforts regarding the mapping process will include press releases, social media postings, and information on the City's website.

As two members of Brentwood’s City Council are elected to four-year terms every two years, if the City Council adopted an ordinance establishing district elections, the elections in the first two districts would occur in 2020. The Mayoral election would still occur in 2020 and not be impacted by the district election process. By law, no sitting Brentwood City Council members can have their terms extended or cut short through the formation of districts.

As stated above, if the City Council votes to move to district elections, there must be two public hearings for input on district composition before maps are drawn; two more public hearings on the draft maps; and then an introduction and adoption of an ordinance that puts the district election system into place. Under the revised Elections Code section 10010, the City and Mr. Rafferty have agreed to extend the required 90 day period for an additional 90 days. As a result, if the resolution intent is adopted tonight, the City must adopt the ordinance establishing district elections by July 21, 2019, in order to stay within the safe harbor provision set forth in Elections Code section 10010.

A detailed schedule setting forth the proposed meeting and public hearing dates is attached as Exhibit A to the Resolution, and presented here:

City Council Meeting Number	Topic	Date
1	Public Hearing without maps to provide input on criteria to be used for drawing districts	February 11, 2019
2	Public Hearing without maps to provide input on criteria to be used for drawing districts Council to provide direction to demographer on desired criteria to be used for drawing maps	March 11, 2019
3	Public Hearing with maps produced by the demographer for consideration and feedback by the public and Council	April 3, 2019
4	Public Hearing with revised map(s) produced by the demographer for consideration; selection of one of the published maps to be introduced as part of the ordinance to establish districts; and public input and consideration of sequencing of district elections	May 1, 2019

5	Public meeting to introduce an ordinance setting forth the district election process.	June 25, 2019
6	Public Meeting to adopt the introduced ordinance	July 9, 2019

The above chart displays the state mandated public hearings should the Council proceed with establishing election districts. The resolution referencing the chart authorizes the City Manager to adjust the schedule as necessary, provided that such adjustments will not prevent the City from complying with the time frames specified by Elections Code Section 10010 and subsequent agreements with Mr. Rafferty and his clients.

In addition to the district election process, the City Council will be considering a number of time consuming matters during the first half of 2019, Meetings 1-4 above will not be held on regular City Council meeting days. It is anticipated that this schedule will permit all City Council agenda items to receive sufficient consideration. As previously discussed, prior to and during the public hearing process, staff will engage in public outreach efforts regarding district elections so the community may participate in this process.

FISCAL IMPACT

If the City Council adopts the resolution of intent, there will be significant staff time needed to transition to district-based elections and to administer the process, including the need for at least four (4) public hearings. The City will also incur the costs for a demographer, and special legal counsel. Staff anticipates these costs being approximately \$150,000 and will be funded through the General Fund. Additionally, the City may be liable to reimburse the prospective plaintiffs for their documented attorney’s fees and costs up to a combined total of \$30,000. Staff has included the requisite budget amendments with the mid-year budget report as a separate item on tonight’s City Council agenda. Any FY 2019/20 costs will be included in the mid-term budget report in June 2019.

Attachments:

- A. Certified letter dated November 13, 2017, from Scott J. Rafferty, Attorney at Law
- B. Resolution

SCOTT J. RAFFERTY

ATTORNEY AT LAW

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November 13, 2017

NOV 15 2017

VIA CERTIFIED MAIL

City Clerk

Ms. Margaret Wimberly
Clerk
150 City Park Way
Brentwood, CA 94513
mwimberly@brentwoodca.gov

Re: California Voting Rights Act

Dear Ms. Wimberly:

Last month, several jurisdictions in our county received a "demand letter" from attorney Kevin Shenkman, who has written other jurisdictions regarding the California Voting Rights Act ("CVRA") on behalf of the Southwestern Voter Registration Education Project. Since these communications involve litigation, the recipients have decided not to release them yet. However, the Dublin Unified School District ("DUSD") has made a similar letter public.¹

In 2001, the Legislature determined that the use of at-large elections (by cities and districts that are characterized by racially polarized voting) dilutes the influence of minority voting blocks. The CVRA created a private right of action to require the jurisdiction to elect its governing body from single-member districts.

Mr. Shenkman typically asserts that a district has "racially polarized voting" without a scintilla of evidence. In his letter to DUSD, he tries to excuse the lack of any good faith basis for this allegation. Mr. Shenkman cites Elections Code 14028(a) and asserts that, "to establish a violation of the CVRA, a plaintiff must *generally* show" racially polarized voting. In actuality, Section 14028(a) *unconditionally requires* a showing of racially polarized voting. "The failure of minority candidates to be elected to office does not by itself establish the presence of racially polarized voting." Jagueri v. Palmdale, (2014) 226 Cal. App. 4th 781. It is *essential* to present ecological regressions of demographic studies to prove racially polarized voting, which is the prerequisite for a court to impose district based elections. See Elections Code 14046(e).

In 2016, the Legislature created a safe harbor to enable cities voluntarily to adopt district elections prior to such costly litigation. AB 350 requires a prospective plaintiff to send a notice to a city or district that their use of at-large elections "may violate the CVRA." Election Code 10010(f) allows the attorney sending such a notice to recover up

¹<https://www.dublin.k12.ca.us/cms/lib/CA01001424/Centricity/Domain/1/Shenkman%20Letter%20re%20CVRA.pdf>

Rafferty to City of Brentwood, Voting Rights Challenge, page 2

to \$30,000 for the costs of demographic studies and other work product generated to support the notice. The law is intended to allow the city to consider the evidence by staying the plaintiff's right to sue for 45 days, at which point litigation can proceed if the city has not enacted an ordinance agreeing to single-member districts.

In neighboring jurisdictions, Mr. Shenkman has provided no evidence. By demanding that cities commit to single-member districts prior to any study, Mr. Shenkman may be attempting to provoke litigation. His letter to DUSD boasts of his success in Jagueri, in which the plaintiffs' attorneys reportedly claimed \$3.4 million in fees. The few jurisdictions that have resisted districting have uniformly failed.²

I am optimistic that I can work with the City of Brentwood on behalf of my client to resolve this issue for less than the \$30,000 cap set by the Legislature. I strongly believe that the people of Brentwood have a right to a detailed study before making a decision so fundamentally affecting their democratic rights. I note, however, that AB 350 gives priority to the first plaintiff to give notice. Therefore, on behalf the Bay Area Voting Rights Initiative ("BAVRI"), I give notice of our good faith belief that at-large voting dilutes minority electoral influence in Brentwood, thus violating Elections Code Section 14047. On the basis that Brentwood accepts the need for a formal demographic study pursuant to Section 10010(f), my client will not file litigation until at least 45 days after a Council meeting at which the study is presented.³

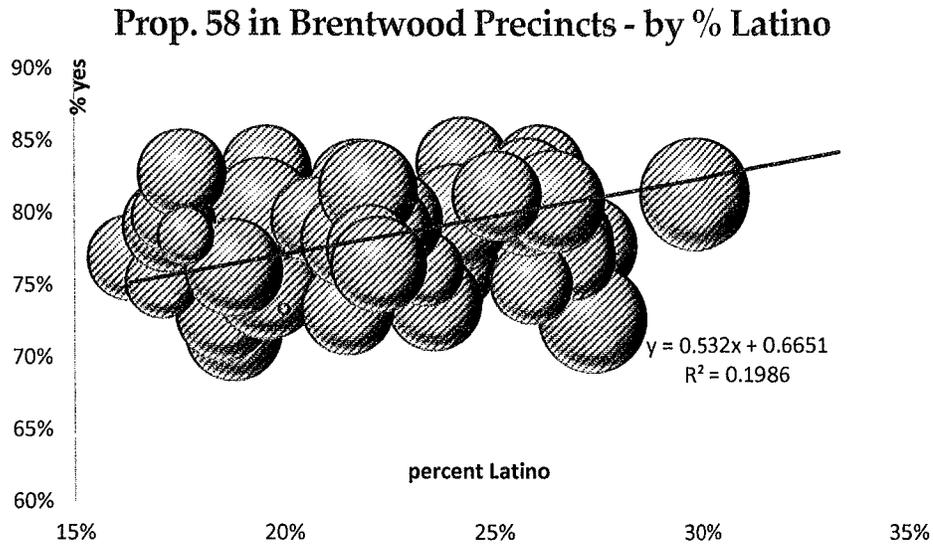
PRELIMINARY EVIDENCE OF RACIALLY POLARIZED VOTING

Racially polarized voting occurs when some candidates preferred by one race or language group receives a higher level of support from that group than from the electorate at-large. This differential is inferred by comparing the vote share in precincts in which different percentages of the voters belong to the race or group in question.

Ballot measures that relate to the rights and privileges of a protected class may provide evidence of racial polarization. Prop. 58 (2016) repealed most of Prop. 227 to allow public schools to offer instruction in languages other than English. Each ball represents a precinct sized by the number of voters. The trendline shows that 30% Latino precincts were significantly more favorable to Prop. 58 than 15% Latino precincts.

² Sanchez v. City of Modesto (App. 5 Dist. 2006) 51 Cal.Rptr.3d 821, 145 Cal.App.4th 660, *review denied, cert. denied* 552 U.S. 974 (2007); Rey v. Madera Unified School Dist. (App. 5 Dist. 2012, 203 Cal.App.4th 1223.

³ Another prospective client whose attorney was willing to dispense with compensation for such a study could conceivably start the 45-day clock by filing a notice after this is received. In that case, BAVRI will file and seek a stay so that Brentwood has a full opportunity to act based on evidence.



OTHER RISKS AND BENEFITS OF SINGLE-MEMBER DISTRICTS

Even if there is no racially polarized voting, the public interest may be served by moving from at-large election to districts. Single member districts reduce the cost of elections, both to candidates and to the city. Assuming that the election continues to be staggered, the printing required on ballots and pamphlets will be roughly halved, reducing the registrar's variable fees. Districting will substantially reduce the entry costs of running for office.

Districting sometimes reduces the electoral strength of the very groups that it is designed to help. If Latinos do vote as a bloc, and comprise 15% of voters, they may exercise have decisive influence in the election of every member. Relatively few cities that have converted to single member districts have seen a significant increase in minority office holders. (Chula Vista and Anaheim are exceptions.) The greatest risk may be that there will be no qualified candidate willing to stand for election in a new district. In such a case, the remaining members must recruit and appoint a colleague, which completely disenfranchises voters in the new "minority" district.⁴

Districting can also force the community to choose among incumbents or other well-qualified candidates, when all could have been elected in the at-large system. The transition sequence may also have adverse effects. In a staggered system, the incumbents serve out their term. In the first election, the districts with the largest minority populations generally choose district members first. Elections Code §10010(b) (sequence must consider purposes of CVRA and preference by members (residents?) of

⁴ Governor Brown vetoed AB 182 (2015), which would have added Section 14040 to prohibit imposing district-based elections in a manner that impairs the ability of protected classes to elect candidates of their choice. This could have created a defense if abandoning at-large elections is likely to lead to this undemocratic outcome.

the districts).

PROCEDURES

Because Brentwood is a general law city, any candidate for city council must live in the district they propose to represent. Government Code §34882. Unless the city initiates a special reorganization, the incumbents are also entitled to serve the full terms to which they were elected. Government Code §34873, 34878. However, an incumbent living in a new district that is having its election while he still has two years left on his term must either resign early to run, or face the prospect of running against a new incumbent. Constituents may also face unequal representation during the transition. If multiple holdovers are placed in the same district, and desire to stay in office, they may all focus on gaining the allegiance of voters in their future district. Residents of any “empty” districts may not be effectively represented by any of the at-large members.

To preserve its safe harbor, the city council must declare an intention to move to district elections within 45 days, unless all who have filed demand letters agree to defer litigation. At this point, the city can have up to 75 more days to specify its plan. Government Code §34886 (AB 278 (2016)) dispenses with the requirement of a ballot question to adopt district election for a city council. However, Brentwood cannot have both district and at-large members, as Oakland and Downey do, and must use plurality voting without a runoff. In my view, Brentwood can continue to elect its mayor at-large. Government Code §34871. Elections Code §10010(a) and Government Code §34877.5 require four public hearings in order to adopt a district map.

CONCLUSION

It is likely that a formal analysis will provide additional evidence to confirm that Brentwood experiences racially polarized voting, which dilutes the electoral influence of the city’s protected racial and language groups, particularly Latinos. My client is committed to a process that will adequate time for the council and people of Brentwood to consider the evidence and develop a plan that will improve the equity and responsiveness of their city government.

Sincerely,



Scott J. Rafferty

RESOLUTION NO.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BRENTWOOD DECLARING THE CITY OF BRENTWOOD'S INTENT TO TRANSITION FROM AT-LARGE TO DISTRICT-BASED CITY COUNCIL MEMBER ELECTIONS; OUTLINING SPECIFIC STEPS TO BE TAKEN TO FACILITATE THE TRANSITION; ESTIMATING A TIME FRAME FOR ACTION; AND ESTABLISHING THE NUMBER OF CITY COUNCIL DISTRICTS

WHEREAS, members of the City Council of the City of Brentwood ("City") 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, in certain circumstances, California Government Code Section 34886 authorizes the legislative body of a city to adopt an ordinance to change its method of election from an "at-large" system to a "district-based" system in which each council member is elected only by the voters in the district in which the candidate resides; and

WHEREAS, on November 15, 2017, the City received, by certified mail, a demand letter dated November 13, 2017, from attorney Scott J. Rafferty on behalf of the Bay Area Voting Rights Initiative (BAVRI), asserting that the City's at-large council member electoral system violates the California Voting Rights Act ("CVRA") and threatening litigation if the City declined to voluntarily change to a district-based election system for electing council members; and

WHEREAS, under California Elections Code Section 14028(a), a CVRA violation is established if it is shown that racially polarized voting occurs in elections. One circumstance that may be considered in determining whether "racially polarized voting" is occurring is the extent to 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(b)); and

WHEREAS, the California Legislature, in amendments to Elections Code Section 10010, has provided a method that allows a jurisdiction to change to a district election system and limit its attorney's fees liability to \$30,000; and

WHEREAS, the City denies that its at-large council member electoral system violates the CVRA or any other provision of law; and

WHEREAS, despite the foregoing, the City Council has determined that the public interest would be best served by considering the transition to a district-based electoral system because of: 1) the CVRA clearly favoring district elections, making it very difficult to prevail in a CVRA lawsuit; 2) the extraordinary cost to defend against a CVRA lawsuit; 3) the risk of losing such a lawsuit which would require the City to pay the prevailing plaintiffs' attorneys' fees and potentially having district maps drawn by a superior court judge or his or her designee; and 4) the applicable \$30,000 limit on the City's liability for plaintiff's reimbursable costs and attorneys' fees under the safe harbor provisions; and

WHEREAS, the City, Mr. Rafferty, and his clients have agreed to extend the safe-harbor period under Elections Code section 10010(e) by which the City (1) will consider a resolution

outlining its intent to transition to district-based elections, by and including January 31, 2019; and (2) will consider for adoption, an ordinance establishing district-based elections within 180 days after adoption of its resolution of intent, or by July 31, 2019, whichever is earlier; and

WHEREAS, under the provisions of Elections Code section 10010 and subject to any further agreement between the parties, Mr. Rafferty and his clients could not commence a CVRA action if the City Council adopts an ordinance establishing district elections by July 31, 2019;

WHEREAS, California Elections Code Section 10010 requires that a city that is changing from at-large to district-based elections shall do all of the following before a public hearing at which the city council votes to approve or defeat an ordinance establishing district-based elections:

1. Before drawing a draft map or maps of the proposed boundaries of the districts, the political subdivision shall hold at least two public hearings over a period of no more than 30 days, at which the public is invited to provide input regarding the composition of the districts. Before these hearings, the political subdivision may conduct outreach to the public, including to non-English-speaking communities, to explain the districting process and to encourage public participation;
2. After all draft maps are drawn, the political subdivision shall publish and make available for release at least one draft map and, if members of the governing body of the political subdivision will be elected in their districts at different times, to provide for staggered terms of office and the potential sequence of the elections. The political subdivision shall also hold at least two additional hearings over a period of no more than 45 days, at which the public is invited to provide input regarding the content of the draft map or maps and the proposed sequence of elections, if applicable. The first version of a draft map shall be published at least seven days before consideration at a hearing. If a draft map is revised at or following a hearing, it shall be published and made available to the public for at least seven days before being adopted; and

WHEREAS, the City has retained special legal counsel, who in turn has retained an experienced demographer, to assist the City in developing a proposal for a district-based electoral system; and

WHEREAS, the adoption of a district-based electoral system will not affect the terms of any sitting Council Member, each of whom must be allowed to serve out his or her current term by law.

NOW, THEREFORE BE IT RESOLVED AS FOLLOWS:

1. The City Council will consider adoption of an ordinance to transition to a district-based election system as authorized by Government Code Section 34886 for use in the City's General Municipal Election for four City Council member seats with a proposed implementation date of November 2020. Under this system, the Mayor would remain directly elected by all City voters for a four-year term of office.

2. The City Council directs staff to work with the City's special legal counsel, the demographer, and other appropriate consultants as needed, to provide a detailed analysis of

the City's current demographics and any other information or data necessary to prepare at least one draft map that divides the City into voting districts in a manner consistent with the intent and purpose of the state and federal Constitutions, the CVRA, the Federal Voting Rights Act, and the Elections Code.

3. The City Council approves the tentative timeline as set forth in Exhibit A, attached to and made a part of this resolution, for conducting a public process to solicit public input and testimony on proposed district-based electoral maps before adopting any such map.

4. The timeline contained in Exhibit A may be adjusted by the City Manager as deemed necessary, provided that such adjustments will not prevent the City from complying with the time frames specified by Elections Code Section 10010 and subsequent agreements with Mr. Rafferty and his clients.

5. The City Council directs staff to post online information regarding the proposed transition to a district-based election system, including maps, notices, agendas and other information and to establish a means of communication to answer questions from the public.

6. This resolution shall become effective immediately upon its adoption.

PASSED, APPROVED AND ADOPTED by the City Council of the City of Brentwood at a regular meeting held on the January 22, 2019, by the following vote:

City Council Meeting Number	Topic	Date
1	Public Hearing without maps to provide input on criteria to be used for drawing districts	February 11, 2019
2	Public Hearing without maps to provide input on criteria to be used for drawing districts Council to provide direction to demographer on desired criteria to be used for drawing maps	March 11, 2019
3	Public Hearing with maps produced by the demographer for consideration and feedback by the public and Council	April 3, 2019
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