



City of Long Beach

Working Together to Serve

Office of the City Attorney

Memorandum

DATE: February 25, 2021

To: Honorable Mayor and Members of the City Council

FROM: Charles Parkin, City Attorney
Amy R. Webber, Deputy City Attorney *ARW*

SUBJECT: Municipal Election Dates for 2022 and Beyond

Recommendation:

Request the City Council refer the issue of Municipal Election dates to the Government, Personnel and Elections Oversight Committee for discussion and recommendation to the full City Council. Several issues have made it necessary for the City to consider changing its election dates for the primary and general municipal elections in 2022 to June and November and the placement of a ballot initiative on the November 2022 ballot to change the City Charter election dates as set forth in more detail below and in the attached memo from the City's outside counsel.

Background:

The Legislature passed the California Voter Participation Rights Act (the "Act" or "SB 415"), which required cities to move their municipal election dates to statewide election dates if average voter turnout at the last municipal elections was at least 25 percent less than the average voter turnout within the city for the previous four statewide general elections. In 2017, the California Attorney General issued an opinion concluding that the Act applied to charter cities. Long Beach was therefore subject to the Act because voter turnout for its primary elections had been at least 25 percent less than the voter turnout for the previous four statewide elections. Accordingly, on October 11, 2017, the City Council adopted Resolution No. RES-17-0117, which moved the primary and general municipal elections dates "to those of the statewide primary and general election, in March and November of even-numbered years, beginning in 2020." The purpose of the Resolution was "to increase voter turnout and to ensure compliance with SB 415." As a result, the City's 2020 primary and general elections were held on March 3 and November 3, respectively. Terms and election cycles were modified accordingly.

In late November, 2020, the California Supreme Court held in *City of Redondo Beach v. Padilla* that SB 415 did not apply to charter cities as a matter of home rule, the principle that charter cities have broad powers over "municipal affairs," including elections.

Therefore, pursuant to this case, the Long Beach City Charter's established election dates would control over the Resolution adopted by the City Council in 2017. This presents the City with a decision about when to hold its upcoming elections. There are several factors which should also be included in the analysis.

A. Census Information/Redistricting Commission: The US Census provides population and demographic information to states and cities to permit the re-drawing of Council district boundaries. State law requires charter cities to redistrict every ten years and have district boundaries in place for the elections occurring after the Census under Cal. Elections Code section 21621. The City's Independent Redistricting Commission must receive the data promptly so that they have sufficient time to conduct community outreach and establish district boundaries. Per City Charter section 2502(a), the district boundaries must be in place six months prior to Council elections. The Census has announced that there will be a significant delay in the release of information. Normally, this information is released in March; the current projected release date is September, 2021, but this date may be further extended.

B. Coordination with Los Angeles County for Local Elections: The Los Angeles Registrar-Recorder/ County Clerk (the "LARRCC") has conducted primary and general elections for the City of Long Beach on a contract basis. When the City changed its election dates, the City Clerk reported that the company which had for years supplied elections processing equipment, as well as staff training and certifications, went out of business. Like many other California cities, Long Beach had to decide whether to devote resources to the purchase of elections equipment and training with another company or to contract with Los Angeles County. Since SB 415 required cities to hold elections on the same dates, it was cost-efficient to have the County perform elections services for the City.

LA County has informed the City Clerk's office that they require final district boundaries to be submitted 180 days prior to a local election. For an election in April, 2022, the new district lines would have to be completed and received by October, 2021. For an election in June, 2022, new boundaries would have to be completed and received by December, 2021.

Additionally, LA County has informed the City Clerk that due to the recent changes in the County voting system, including County-wide vote centers and increased availability of vote-by-mail ballots, the County's election workload has increased and it is not able to conduct Long Beach elections on a contract basis in April and June, as the turnaround time is too short. June and November elections would be possible, subject to voter approval of these dates.

C. Options: In light of these facts, the following options exist for City election dates going forward:

1. April primary election, June general election. These are the election dates specified in City Charter section 1901.

Pro: The dates are familiar to many Long Beach residents.

Con: For the 2022 elections, it would be physically impossible to have district lines drawn in time to comply with state law and County deadlines. Los Angeles County has indicated that it would be unable to conduct an election in April and certify results in time to consolidate for a June election; therefore, the City would need to purchase new elections equipment (estimated cost: \$2-3 million) and re-train staff to operate it. In addition, off-cycle elections have been shown to result in lower voter turnout.

2. Use Current District Boundaries for 2022 election.

The Independent Redistricting Commission's new district boundaries, once drawn, will go into effect immediately upon adoption, unless on the date of adoption there are less than six (6) months until the next primary City election, in which case the final map shall go into effect after that election and any applicable run-off election, per City Charter section 2502(b). However, the City would still need to ensure the old districts comply with the federal equal population requirement and the Voting Rights Act. The equal population standard requires that the total population deviation among districts is no greater than 10%, which may not be the case given ten years of uneven growth. An April election with the old lines is therefore likely to raise legal concerns.

3. March primary election, November general election. These are the dates used most recently for statewide elections.

Pro: These dates may also be familiar to voters as they were required by SB 415 and were statewide election dates. According to the City Clerk and the LARRCC, voter turnout increased on these election dates.

Con: SB 970 again changed statewide election dates in order to give California a prominent position in the primaries. Beginning in 2022, the statewide primary will occur in March in presidential primary years and in June in gubernatorial primary years. While this may have the effect of increasing voter turnout or improving California's influence in presidential primary years, it may be confusing and difficult for Long Beach voters.

4. Mixed Approach: June, 2022 Primary Election, November, 2022 General Election; Charter Amendment for Permanent Change

Pro: This approach would allow the City to obtain new district boundaries through its Independent Redistricting Commission and would allow the City to contract with the County for election services. It would also allow the City Council, on its own motion, to place a ballot measure before Long Beach voters to consider when Long Beach municipal elections should occur. In the event that the release of census data is delayed past the current projected date of September, 2020, we would recommend using the primary date selected by the State due to the unusual circumstances.

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Con: Holding the election in June/November could result in an uneven campaigning cycle between 2020 and 2022 candidates.

As indicated above, we recommend this issue be referred to the Government, Personnel and Elections Oversight Committee of the City Council for discussion and then referred to the entire Council for direction. Please let us know if you have questions regarding this memo.

ARW:bg

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Attachment

cc: Tom Modica, City Manager
Monique DeLaGarza, City Clerk
Michael J. Mais, Assistant City Attorney

MEMORANDUM

ATTORNEY-CLIENT PRIVILEGED

TO: Amy Webber and Taylor Anderson, Deputy City Attorneys

FROM: Robin Johansen and Tom Willis

DATE: February 9, 2021

RE: City Election Dates

INTRODUCTION

The City Charter provides that the City's primary and general municipal elections shall be held in even-numbered years, in April and June, respectively. In 2015, however, the Legislature passed the California Voter Participation Rights Act (the Act or SB 415) that required cities to move their municipal election dates to statewide elections if voter turnout at their municipal elections was significantly less than turnout at statewide elections. That was the case for Long Beach, and so in 2017, the City Council passed a resolution moving the municipal election dates to coincide with the statewide primary and general election dates.

Last year, however, a California court of appeal held that the Act did not apply to charter cities such as Long Beach, thereby calling into question the validity of the City's resolution moving the election dates. In light of that decision, you have asked for a legal analysis as to which election dates should apply in 2022 and beyond and for options for resolving any uncertainty. As discussed below, we believe a court would hold that the election dates in the Charter control. Therefore, if the City Council wants to keep the municipal elections aligned with statewide elections, we suggest that the Council submit a Charter amendment to the voters.

There is, however, some uncertainty as to whether the City could hold the primary election in April 2022 if it reverted to the Charter election dates. That is because the City must redraw the City Council district boundaries before the next election, and a delay in the release of the census data may make it difficult or impossible for the Redistricting

Commission to conduct the open and transparent process contemplated in the Charter in time for an April 2022 election. The viability of an April election will ultimately depend on when the census data is released to California, and that is currently unknown, although a Census Bureau representative said recently that the release may not occur until after July 31, four months later than usual. If that turns out to be the case, the City likely will not be able to hold an April election with new district boundaries. We hope the Bureau will issue more formal guidance soon. Once that occurs, the City could decide which of three options it would like to pursue.

First, the City could seek a court order moving the election to June, given that an April election conflicts with the redistricting process. This is likely the safest course of action since the propriety of the June election could not be questioned. Second, the City could simply rely on the existing resolution moving the primary and general elections to coincide with the statewide elections, and take the position it is still in effect and requires the election to be in June.¹ There is, however, a possibility, although perhaps remote, that someone could challenge that approach arguing that the justification for the resolution, SB 415, no longer exists.

Third, you have asked whether the City could hold the election in April and use the current district boundaries for the 2022 elections, if it becomes clear the Commission will not be able to adopt a new plan in time and the County agrees to administer the election. Although perhaps possible, we do not believe that is a viable option. State law requires charter cities to redistrict every ten years and have those plans in place for the elections occurring after the census. Cal. Elec. Code §§ 21621-21622. Even though Long Beach is a charter city and thus has control over the method and timing of its City Council elections, the City would still need to ensure the old districts comply with the federal equal population requirement and the Voting Rights Act. The equal population standard requires that the total population deviation among districts is no greater than 10%, which we doubt will be the case given ten years of uneven growth. For these reasons, we believe running an April election with the old lines would raise several legal concerns.

¹ As discussed below, the resolution both states that the primary election is moved to the statewide primary date and references the fact that would be in March, based on the fact the statewide primary at the time was in March.

ANALYSIS

I. The Elections Dates in the Charter Likely Govern When Future Municipal Elections Should Occur

As discussed above, the City Charter states that the “primary and general municipal elections for elective officers of the City shall be held in even numbered years, on the second Tuesday in April and the first Tuesday after the first Monday in June, respectively . . .” Charter § 1901.

In 2015, however, the Legislature passed the California Voter Participation Act (the “Act”), which required cities to move their municipal election dates to statewide election dates if average voter turnout at the last municipal elections was at least 25 percent less than the average voter turnout within the city for the previous four statewide general elections. Cal. Elec. Code §§ 14051-14052. In 2017, the California Attorney General issued an opinion concluding that the Act applied to charter cities. 100 Ops. Cal. Atty. Gen. 4 (2017). Long Beach was therefore subject to the Act because voter turnout for its primary elections had been at least 25 percent less than the voter turnout for the previous four statewide elections. Accordingly, on October 11, 2017, the City Council adopted Resolution No. 17-0117, which moved the primary and general municipal elections dates “to those of the statewide primary and general election, in March and November of even-numbered years, beginning in 2020.” The purpose of the Resolution was “to increase voter turnout and to ensure compliance with SB 415.” As a result, the City’s 2020 primary and general elections were held on March 3 and November 3, respectively.

On March 23, 2020, the Second District Court of Appeal ruled that the Act does not apply to charter cities. The court held that charter cities have plenary authority over the timing of their elections, that authority cannot be contravened unless there is a clear directive by the Legislature to do so, and there was no evidence the Legislature intended to contravene such authority when it passed the Act. *City of Redondo Beach v. Padilla*, 46 Cal.App.5th 902 (2020). The California Supreme Court denied review, and so the decision is final and applies to Long Beach.

The question then is whether future municipal election dates should be held under the Resolution or City Charter. Although the Resolution remains in effect, the underlying rationale for it – that SB 415 required charter cities to move their elections to

statewide election dates – is no longer valid. A city’s charter provisions take precedence over ordinances and cannot be altered or amended by ordinance. *Citizens for Responsible Behavior v. Superior Court*, 1 Cal.App.4th 1013, 1034 (1991) (“While a city charter may be amended by a majority vote of the electorate, an ordinance cannot alter or limit the provisions of a city charter.”); *see also* Charter § 109 (“[T]he City shall have the power to make and enforce all laws and regulations with respect to municipal affairs, subject only to such restrictions and limitations as may be provided in this Charter and in the Constitution of the State of California.”). Therefore, in the absence of a statewide concern that would preempt the Charter provisions, the Charter must prevail. *See, e.g., San Diego City Firefighters, Local 145 v. Bd. of Admin. of San Diego City Emples. Ret. Sys.*, 206 Cal.App.4th 594, 609 (2012) (ordinance in conflict with charter is void).

The City Council could propose a Charter amendment to move the election dates to statewide election dates, as the Resolution did. Under Elections Code sections 9255 and 1415, a city council may submit a proposed charter amendment on its own motion. Generally, such charter amendments must be voted on at a statewide general election but a city council can also place a charter amendment on any municipal or statewide election date if the proposal does not alter any “procedural or substantive protection, right, benefit or employment status of any local government employee or retiree of the local government.” Cal. Elec. Code § 1415(a)(2)(A). This rule may limit the City’s ability to place a charter amendment on the next municipal election ballot because a proposal moving the election dates arguably would affect the employment status of City Council members by moving the ending date of their terms from July to December. Thus, we believe any charter amendment should be placed on the November 2022 election ballot.

II. The 2022 Election Dates

A. Current Timing Considerations

If the City reverts to the election dates established by the Charter, and holds the primary in April, that probably will not provide the Redistricting Commission sufficient time to undertake the transparent and open process for redistricting contemplated by the Charter.

The Redistricting Commission is required to adopt a final map establishing new council districts within six months “after census-block-level population data from a regular

United States decennial census is made available to the public.” Charter § 2502(a). The Commission’s plan goes into effect “immediately upon adoption, unless on the date of adoption there are less than six (6) months until the next primary City election, in which case the final map shall go into effect after that election and any applicable run-off election.” *Id.* § 2502(b). As a result, the Commission must adopt a plan at least six months before the primary election if it is to be used in that election.

If the City reverts to the election dates required by the Charter, the 2022 primary election would be held on Tuesday, April 12. Thus, the Commission would have to adopt a final plan no later than October 12, 2021 under the Charter to be effective in time for an April primary.

However, we believe the Commission should actually complete the plan by early September for it to be considered effective in time for an April election. Although the Charter states that the Commission’s plan shall take effect immediately (*see* Charter § 2502(b)), that would not allow for a 30-day period to permit the possibility of a referendum, which is a constitutionally protected right of the people. *See, e.g.,* Cal. Const. art. II, §§ 9 (only urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations not subject to referendum) and 11 (applying right of referendum to cities and counties with exceptions); Charter § 2000 (reserving to the voters the power of referendum and incorporating by reference relevant portions of the Elections Code); *Ortiz v. Board of Supervisors*, 107 Cal.App.3d 866 (1980) (redistricting ordinance taking effect immediately was void). We therefore believe the Commission should finalize the plan no later than early September in order to provide the 30-day period before it takes effect.

Can the Commission complete a plan by early September? That appears almost impossible if the Census Bureau does not release the census data until after July 31. By statute, the Census Bureau is required to release census data to the states no later than April 1, 2021. The Bureau has not made a formal announcement yet on the release date although a Bureau representative stated recently that the release likely would not occur before July 31. Once the State receives that data, it must add state data (statement of vote and voter registration data) before the Statewide Database will be available for local redistricting. That will take another 4-6 weeks to complete. As a result, if the census data is released in early August, the statewide database would not be ready until early September.

That would give the Commission no real time to draft plans, revise those plans and adopt a final plan and report. The Commission is required to hold at least nine (9) public meetings, including one meeting in each Council district, and a final map may not be adopted less than seven days after the introduction of a substantially similar map at a prior public hearing. Charter § 2507(b). And although the Commission could presumably hold hearings to receive public input before it has redistricting data (the Charter does not say otherwise), that, in our view, would be only marginally helpful since neither the Commission nor the public would know what the district populations should be or where or whether certain districts must be drawn to comply with the federal Voting Rights Act.

For these reasons, we believe an April primary election will conflict with the Charter requirement that the Redistricting Commission hold a transparent and open redistricting process and complete the plan at least six months before the election. But that will not be known with certainty until the Census Bureau provides formal guidance. Therefore, we suggest that the City postpone any decision about its 2022 election dates until the Bureau provides that guidance. At that time, the City Council could consider relying on the current resolution (which references a “March” election but otherwise supports holding the primary election on the same day as the statewide primary, which would be June in 2022), adopting a new resolution making clear the 2022 election dates are June and November, or seeking a court order permitting such a move.

B. Possibility of Using Current Districts for 2022 Elections

You have also asked whether the City could hold the primary in April using the current district boundaries for the 2022 elections if the Census Bureau’s delay in releasing census data makes it difficult or impossible for the Redistricting Commission to adopt a plan six months before the April primary. As discussed above, the Charter states that a plan adopted less than six months before a primary election must go into effect *after* that election and any run-off election, thereby implying that in such a case the City could continue to use the current districts for the elections occurring before the new plan goes into effect. See Charter § 2502(b).

Elections Code section 21621, which applies to charter cities, states that “following each federal decennial census for a city whose council is already elected using district-based elections, the council shall, by ordinance or resolution, adopt boundaries for all of

the council districts of the city so that the council districts shall be substantially equal in population as required by the United States Constitution.”² Subsection (b) of that section further requires a charter city to adopt districts that comply with the United States Constitution, the California Constitution and the federal Voting Rights Act. Further, section 21622 states that the new boundaries shall be adopted no later than 174 days before any election occurring before July 1, with the exception that charter cities may provide for a different redistricting deadline by ordinance or charter. Although Section 21622 permits charter cities to set a different deadline, we read sections 21621 and 21622 together to mean that a charter city must adopt a new redistricting plan every ten years and have that plan in place for the next elections after the census.

However, even if a court were to hold that state law could not require a charter city to redistrict every ten years, which seems unlikely, the districts would still have to be reviewed using the new census data to make sure they are (1) substantially equal in population, (2) do not violate the federal Equal Protection Clause by using race as a predominant factor (*see Shaw v. Hunt*, 517 U.S. 899 (1996)), and (3) comply with section 2 of the federal Voting Rights Act.

The equal population requirement should be met if the total deviation in population between the largest and smallest district is 10% or less. Although deviations of less than 10% still must be justified and the City would need to establish that the deviation is not predominantly caused by illegitimate redistricting criteria (such as partisan gerrymandering), we believe the stated purpose of accommodating the Charter election dates could suffice to justify deviations that are up to 10%. *See Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S.Ct. 1301, 1310 (2016); *Cox v. Larios*, 542 U.S. 947 (2004). But if the districts have a deviation of greater than 10%, they are presumed to be unconstitutional and likely cannot be used even under the unique circumstances presented by the census delay and approaching election dates. *See, e.g., Vandermost v. Bowen*, 53 Cal. 4th 421, 473-478 (2012) (new statewide plan would be for 2012 elections even though that plan was the subject of a referendum and therefore was

² Although charter cities that have established their own redistricting criteria do not have to follow the criteria set forth in Elections Code section 21622(c), the requirement to make districts substantially equal in population applies to all charter cities. *See Cal. Elec. Code* § 21621(e).

not in effect; Court held that using the old plan was not acceptable in part because it did not meet equal population requirement).

Moreover, even apart from concerns relating to population deviation or the Voting Rights Act, we believe the use of the current lines could still be subject to challenge. Here, the *Vandermost* case is informative. In that case, the 2011 statewide Senate plan had been the subject of a successful referendum effort and therefore could not go into effect for the 2012 elections. The California Supreme Court therefore had to decide what plan should be used for the 2012 elections, the new plan that had been referred, the old plan, or some other plan. The Court ultimately decided to use the new plan despite the fact it had been referred. It did so not only because the old plan violated the equal population standard but also because the old plan was the product of a redistricting system that had been replaced by the voters. The old plan had been adopted by the Legislature using criteria that had subsequently been amended. At the time, there was nothing prohibiting the Legislature from considering the residence address of incumbents, protecting incumbents, or considering political party data. In contrast, the new plan was adopted by a Citizen's Redistricting Commission using new criteria, including prohibitions against drawing lines for incumbency or partisan advantage. The Court concluded it would "contravene the intent of the new redistricting regime . . . if this court were to order the use of old state Senate districts that were perceived as designed for purposes no longer permissible." *Vandermost v. Bowen*, 53 Cal. 4th at 478. The same objection arguably could apply here if the City decided to use the current lines, a product of a redistricting system and criteria that have been amended by the voters.

For these reasons, we believe relying on the current districts for the 2022 elections could raise significant concerns.