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Mr. Paul Gant
Counsel, Folsom-Cordova USD
via Electronic Mail

SETTLEMENT COMMUNICATION SUBJECT TO EVIDENCE CODE, SECTION 1152

Dear Mr. Gant:

Based on our prior telephone conversation, I felt reassured that the Folsom-Cordova USD would fulfill its intention to transition to trustee area elections in the November 2020 elections, as the Board resolved to do. Your subsequent letter and today's email speak about a "stipulation" that has not been drafted and a "90-day extension of the boundary drawing process." The 90-day extension is unrelated to the actual length of the stay-at-home order. The real effect, which you seem too embarrassed to state directly, is to delay the creation of any maps until after July 1, 2020, when the registrar can no longer accept them without a court order. We all know that the District is not going to create "maps to nowhere" once that deadline passes. Correct this understanding if it is incorrect, but it appears that the District is simply abandoning the safe harbor process and requiring litigation to enforce the California Voting Rights Act. The public health emergency offers no excuse for doing so.

This letter proposes some possible settlement options. If the District is not inclined either to negotiate or to conduct the required hearings, the Board should repeal the resolution of intent or stipulate that the prospective plaintiffs may initiate litigation without regard to 90-day notice period stated in Elections Code, Section 10010(e)(2)(B). Delay is in no one's interests.

At the onset, I want to agree that the health and safety of the public is a paramount concern. But I am not aware of any emergency in our state that has ever excused the failure to conduct a lawful election.[1] In this case, Executive Order No. N-29-20 sets forth exactly how the Board can conduct business in a safe and lawful manner.[2] The public health emergency does not provide an excuse for the Board to

[1] The emergency powers of the Governor and Secretary of State to postpone an election or alter its procedures are very detailed. Elections Code, Sections 3018(b), 12281(b), 15213, 19005, 19104(a)(1). They do not include authorizing at-large elections where single-member districts are required by law.
[2] If circumstances do not improve by July 5, 2020, the Board will presumably use the meeting procedures set forth in this Executive Order to order and establish specifications for the November election, as

repeal its resolution of intent, nor does it authorize the District to order the registrar to conduct an election using a method that is inconsistent with state law.

AB 350 provides an alternative to litigation. The alternative process remains available if the Board conducts hearings in the manner specified by E.O. N-29-20. Executive Order N-34-20 does not prohibit the District from availing itself of the AB 350 process; it simply suspends the 30-day timeframe set forth in Elections Code, Section 10010(a)(1) and the 45-day timeframe set forth in Section 10010(a)(2). Currently, the Board complies with both timeframes, referred to in paragraph 2 (a) and (d) of Resolution 03-12-20-31. As a result of the Executive Order, it could delay the second hearing, which now occurs 28 days after the first, but it is not required to do so. The statutory timeframes waived by Governor Newsom apply to any transition to single-member districts, even if the Board is acting on its own initiative and the safe harbor did not apply.

The Executive Order does not alter the safe harbor period, which has nothing to do with the intervals among hearings. Section 10010(e)(3)(B) simply provides: "If a political subdivision [FCUSD] passes a resolution pursuant to subparagraph (A) [as it did on March 12, 2020], a prospective plaintiff shall not commence an action to enforce Sections 14027 and 14028 within 90 days of the resolution's passage [i.e., before June 10, 2020]." As we discussed, the Legislature has reacted negatively to agreements that allowed an additional at-large election to occur; A.B. 2123 prohibits these agreements to extend the safe harbor more than 90 days. Your letter states that you "disagree" that the 90-day extension to the safe harbor is "unavailable." But the plain language of Section 10010(e)(3)(C)(i) prohibits us from agreeing to any extension unless the District makes a firm commitment to create districts six months before its next regular election, i.e., May 3, 2020, which is more than a month ***before*** the current deadline. . Your proposal to stipulate to a delay not only violates the statute, but guarantees that without a court order, the District will be incapable of conducting a lawful election in November 2020.

Any attempt to delay compliance until after the November 2020 election would offend two important policies. A.B. 350 requires the District to "give special consideration to the purposes of the CVRA" when it determines the sequence in which areas elect trustees. The legislative history makes clear that the minority areas are entitled to elect in the presidential year (i.e., 2020), because minority turnout is

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required by Education Code, Section 5322. If it still wishes to avoid litigation, it can choose to conduct the hearing process the same way.

disproportionately low in the gubernatorial cycle. Furthermore, trustees elected at-large this November, if certified, would participate in redistricting, potentially perpetuating the status quo for another decade.

If the District opts to require litigation, it should proceed as soon as possible. In Rey v. Madera USD (2012) 203 Cal.App.4th 1223, the plaintiff chose to file a CVRA complaint on August 21, which was 52 days after the deadline for submitting boundary changes to the registrar. In mid-October, long after the printing of the ballots, the court granted an injunction against certifying the results. That is an outcome that all parties want to avoid.

There are also a variety of negotiated approaches that we could discuss, most of which would probably require court approval. My clients will not entirely rule out discussion of a court-approved remedy that includes an at-large election in 2020. However, there would have to be actions to guarantee eventual compliance with the CVRA and to mitigate the adverse consequences in the interim. At a minimum, the District should delegate the 2021 redistricting to an independent commission, so the lines will not be drawn by at-large trustees. It may also be appropriate to consider shortening terms, so that all five districts would be elected in 2022. There may be other actions to train and encourage candidates from protected groups to run for public office. My clients observe that a negotiated map would focus on creating a remedial district in Rancho Cordova, which would almost certainly include the residence of President Clark, who could seek reelection in 2020 is likely the minority coalition candidate of choice. In the context of a court-approved settlement, it is conceivable that plaintiffs would not oppose a map in which trustee Reinking resides within the second area electing in 2020, if that is an important objective of the Board.

I am reluctant to dispute aspects of your letter if the District is prepared to move forward with implementation in 2020, either through teleconference hearings or by way of a court-approved settlement. However, it is ingenuous to argue that "any… person concerned about their health or otherwise desiring to comply with the order of the Governor" would have their rights prejudiced by teleconferencing.

The opposite is true; teleconferencing will enhance public input.[3] The District did not propose any physical workshops or outreach to the minority community. While

[3] Federal research has demonstrated that video hearings are often more effective precisely because they reduce the burden of participation placed on the public. See Administrative Conference of the United States, Recommendations 2011-4, https://www.acus.gov/recommendation/agency-use-video-

jurisdictions are entitled to schedule hearings during their regular meetings, it is a great inconvenience to most members of the public. Long evening meetings are especially problematic for minority parents with multiple jobs and large families, who must travel to and sit through an entire meeting to speak for two or three minutes on a matter that requires reference to maps and tables that are far more easily communicated electronically. Second, it will difficult for the Board to convince the public (or a court) that it is excused from performing this task – which some members may have a personal interest in delaying – when it will likely continue to resolve District business on other matters, great and small, by teleconference.

I attach the protocol that another school district is using to allow public observation and to receive public input through teleconferences. We would accept this or any similar arrangement as equivalent (and if fact preferable) to the current requirement that the public attend a regular meeting in order to present. It is more critical that the Board give the public an opportunity to submit written comments, to have those written comments delivered to the Board (if received prior to a hearing), to include them in the record and to post them so that other members of the public may respond and build upon them.

It is certainly true, as you say, that the public is "being required to make profound sacrifices in the face of the current emergency." Democratic elections must not be one of them. My clients also agree that "governmental resources must be preserved in a manner that best serves the most urgent needs of the public." AB 350 was designed to avoid the very substantial costs of litigation. There are great uncertainties about the future, but it is likely that all school districts, including Folsom-Cordova USD, will face financial strain. Several trustees spoke eloquently in support of trustee area elections. Now is not the time to waste hundreds of thousands of dollars in public resources when most, if not all, of the trustees accept the need for trustee elections.

Sincerely,



Scott J. Rafferty

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hearings-best-practices-and-possibilities-expansion, 2014-7
https://www.acus.gov/recommendation/best-practices-using-video-teleconferencing-hearings

MODEL FOR PUBLIC INPUT DURING CORONAVIRUS

The Napa Valley Unified School District has taken the following steps to utilize technology to encourage full public participation during our upcoming board meetings in order to comply with public health guidance during the COVID-19 pandemic:

1. As usual, the meeting is live streamed on the NVUSD District YouTube Channel. To access the live stream or archived videos visit our board of education webpage at https://www.nvusd.k12.ca.us/board or visit www.youtube.com and search NVUSD-TV.

2. Public comments for non-agenda or agendized items may be emailed to publiccomment@nvusd.org . Please identify if the public comment is for a non-agenda or agendized item. If your public comment is for an agendized item, please identify clearly the agenda item number and title in the subject line of your email. Any written testimony for public comment submitted via email before 8:00 am the day of the meeting will be provided to the Board members electronically or in written format. Public comment received after 8:00 am the day of the scheduled meeting may be read into the record, and it will become part of the meeting archive as long as it is received before the meeting is officially called to order.

3. You can also call into the meeting to provide public comment via Zoom. You can join the Zoom Meeting from a computer, mobile device, or tablet. The Zoom meeting information will be provided in every board meeting agenda, as long as needed during the COVID-19 pandemic. In order to facilitate effective remote participation for all, please remember a few courtesies of conference calls if you opt to use Zoom for the purpose of providing public comment:

● Please mute your phone unless you are speaking when prompted.

● Please do not put the call on hold.

● Please do not have the television/website transmission of the meeting playing also while you are speaking as you provide public comment. You must minimize background noise.