



Minneapolis
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TO: Elizabeth Glidden, Chair
Members of the Elections Committee

FROM:  Susan Segal, City Attorney
Lisa Needham, Assistant City Attorney

CC: Mayor R.T. Rybak

DATE: February 3, 2009

RE: Status Update: Instant Runoff Voting Litigation

MEMORANDUM

This report provides a status update on the lawsuit commenced by the Minnesota Voters Alliance against the City of Minneapolis. The second section outlines the options if the Council were to determine that the City was not ready to implement Instant Runoff Voting (“IRV”) for the 2009 election.

I. STATUS UPDATE ON IRV LAWSUIT.

The lawsuit brought by the Minnesota Voters Alliance challenges the legality of the Instant Runoff Voting (“IRV”) system implemented following a voter referendum mandating IRV for municipal elections in Minneapolis. The Plaintiffs allege that IRV violates provisions of both the federal and Minnesota constitutions and is preempted by state law. FairVote Minnesota, an IRV advocacy organization, intervened in the lawsuit on the City’s side of the case.

On January 13, 2009, Hennepin County District Court Judge George McGunnigle granted summary judgment in favor of the City on all of the plaintiffs’ claims. Winning at the district court, however, does not end the lawsuit. On January 28, 2009, the Minnesota Voters Alliance appealed the district court decision. Counsel for the plaintiffs have indicated they are agreeable to joining the City in a petition for accelerated review through the appellate process, but there is no way to predict with accuracy when a final decision could be obtained in the case, with all rights of appeal exhausted, particularly since there is a possibility that a petition for U.S. Supreme Court review could be filed after a final state appellate court decision is issued. We expect, however, that the Minnesota Supreme Court would render a prompt decision on whether it will grant accelerated review.



A. Timeline for Obtaining a Final Court Decision in the IRV Lawsuit.

Cross motions for summary judgment in the lawsuit were filed by the parties and oral argument was heard on December 11, 2008.¹ The District Court issued an Order on January 13, 2009, granting summary judgment in favor of the City on all counts, upholding IRV as both constitutional and permitted under Minnesota law. The City was served with a copy of plaintiffs' Notice of Appeal on January 28, 2009.

The Minnesota Rules of Appellate Procedure allow for an accelerated review directly to the Minnesota Supreme Court, bypassing a decision on the case by the Minnesota Court of Appeals. Minn. Rules App. Pro. 118. The petition for accelerated review must show that the case is "of such imperative public importance as to justify deviation from the normal appellate procedure and to require immediate determination in the Supreme Court." *Id.* The City Attorney's Office has obtained agreement from plaintiffs to jointly request accelerated review by the Minnesota Supreme Court, bypassing review by the Court of Appeals, and an expedited schedule for Supreme Court review. We would anticipate that the Minnesota Supreme Court would make a prompt decision whether to grant accelerated review and an expedited schedule.

If the Minnesota Supreme Court denied the Petition for Accelerated Review, the case would need to go through the Court of Appeals. Under a conventional schedule, we could expect a timeline of up to thirteen months from the appeal to the date a ruling was obtained from the Court of Appeals.² This timeline could be shortened if the Court of Appeals granted an expedited schedule for briefing and oral argument. A petition for review by the Minnesota Supreme Court would then follow. While there is no right of review, the Minnesota Supreme Court may view this issue as important and agree to hear the case. The standard schedule in the Minnesota Supreme Court would add another number of months to the timeline.³

As set out above, it is also possible that after a final state court ruling, the losing party could petition the United States Supreme Court for review if the decision by the Minnesota courts turns on an interpretation of the federal constitution. While review by the U.S. Supreme Court is discretionary by the Court, this process could also add several months, at a minimum, to the lawsuit process.⁴

¹ The summary judgment motions were initially scheduled to be heard in September 2008. This date was delayed twice. First, it was delayed briefly to allow FairVote to intervene in the case. It also was delayed by court order to allow additional briefing by the parties in response to expert affidavits submitted by plaintiffs with their Response to the City's Motion for Summary Judgment.

² Under a conventional schedule at the Court of Appeals, 60 days is allowed for briefing, oral argument is scheduled anywhere from 90 to 180 days after the briefs are filed and the Court of Appeals has 90 days to render a decision.

³ A party has 30 days to petition for review to the Minnesota Supreme Court. *See* Minn. Rules of Appellate Procedure at Rule 117. The party opposing review has 20 days to file a brief in opposition to the petition. *Id.* In the event the petition is granted, appellants have 30 days to file a brief, and the respondents have the same. *See* Minn. Rules of Appellate Procedure at Rule 131. The Minnesota Supreme Court then calendars the matter for oral argument and renders a decision.

⁴ The losing party would have 90 days after a Minnesota Supreme Court decision to petition the Supreme Court for review. *See* Rules of the Supreme Court Rule 13. The opposing party has 30 days to file a brief in opposition to the petition for review. *See* Rules of the Supreme Court Rule 15. The Supreme Court will then determine whether to grant review. There are no timelines within which the Court must make a decision on whether to grant the petition.

B. Risks of Conducting an IRV Election Prior to a Final Court Ruling.

There are significant risks of conducting an IRV election prior to a final ruling from the appellate courts on the lawsuit. First, there is the risk that, if there is an adverse appellate decision on the legality of IRV prior to the election date, the City would not have adequate time to administer the election under an alternate, traditional primary/ general election method. If the adverse decision was obtained after the election, there is a risk that the IRV-conducted election could be overturned and a new election ordered. The election process presumably would have to include both a primary and a final election (assuming there are more than two candidates for any office). The Mayor and all City Council positions are up for election in 2009, as are all nine Park Board positions and two positions on the Board of Estimate and Taxation. The term of office for the current incumbents ends January 4, 2010. City Charter, Ch. 2, Sec. 3. There is no provision either in state law or in the City Charter to govern who would run the City or the Park Board if a new election is ordered, but can't be completed prior to the expiration date of the term of office for the incumbents.

Whether a new election would be ordered as a remedy by the courts depends on whether the legal problem found by the courts renders the results of an election "uncertain or inaccurate as a free and fair expression of the popular will." Erickson v. Sammons, 242 Minn. 345, 350 (Minn. 1954). Whether a new election would be ordered would turn on legal defects identified by the appellate court in the event of an adverse decision.

In Brown v. Smallwood, 153 N.W. 953 (1915), the only appellate court decision to date in Minnesota addressing the constitutionality of ranked choice voting, the Minnesota Supreme Court held that the preferential voting system adopted by the City of Duluth was unconstitutional.⁵ In a related case, State ex rel Windom v. Prince, 155 N.W. 628 (1915), Mr. Smallwood's opponent, who had received the most first choice votes, sued to obtain a writ of mandamus naming him to the contested position. The Minnesota Supreme Court refused to grant the request because the election system had been found constitutionally deficient and, consequently, no one was lawfully elected.

It is difficult to predict which branch of government would have the power to govern after expiration of the current office terms if the election is invalidated and a new election is ordered. The possible options include a special session of the legislature to establish a process or an interim remedy fashioned by the courts. No answer is provided either in the City Charter or state law. In the event of an invalidated election by the courts, the disruption to city governance and delivery of city services would be substantial.

⁵ As the District Court concludes in its Memorandum Opinion in the Minneapolis IRV lawsuit, the Minneapolis IRV system is different in significant respects from the system at issue in the Brown v. Smallwood case.

II. OPTIONS IF THE COUNCIL DETERMINES IT IS NOT READY TO IMPLEMENT IRV.

A. Charter Provision Allowing Delay of IRV Implementation.

The section of the City Charter prescribing IRV as the method for conducting municipal elections included a provision for the City Council to delay implementation of the IRV method by ordinance upon a finding that the City “will not be ready to implement the method in that election.” Minneapolis City Charter, Ch. 2, Sec. 5B. The ordinance must be enacted at least four months before the election. The charter provision reads as follows:

The method shall be used for the first municipal election after adoption and all subsequent elections unless the City Council certifies, by ordinance, no later than four months prior to the election, that the City will not be ready to implement the method in that election. Such certification must include the reasons why the City is not ready to implement the method.

Id.

B. Alternative Methods for Conducting the 2009 Elections.

If the Council finds that the City is “not ready to implement” IRV this election cycle and passes an ordinance to that effect, the 2009 election will need to be conducted under the state law provisions for conducting a municipal election or the Council will need to amend the Charter to revive its prior method of conducting elections for 2009. The prior method for conducting elections was eliminated from the Charter when it was amended to provide for IRV.

The chief difference between the state law provisions and the prior Charter is that the City’s method required political party or “political principle” designation for candidates on the primary ballot. The state law method does not allow for this designation on the primary ballot. Party designation or “political principle” would only be required to appear on the general election ballot pursuant to City Charter, Chapter 2, Section 5A.

An amendment to the Charter requires a unanimous vote of the Council members and requires a timeline of approximately six months to allow for action by the Charter Commission, a public hearing, publication and the ninety day delay required before the amendment can be effective. The state law election process likely would apply by default if no Charter amendment was passed, but the Council had passed a timely ordinance (four months prior to the election) to delay implementation of IRV.

Both methods are detailed below.

1. **Amend the Charter to Reinstate the Pre-IRV Election Process.**

The requirements for a Charter Amendment are set out in Minn. Stat. § 410.12 subd. 7:

Upon recommendation of the charter commission the city council may enact a charter

amendment by ordinance. Within one month of receiving a recommendation to amend the charter by ordinance, the city must publish notice of a public hearing on the proposal and the notice must contain the text of the proposed amendment. The city council must hold the public hearing on the proposed charter amendment at least two weeks but not more than one month after the notice is published. Within one month of the public hearing, the city council must vote on the proposed charter amendment ordinance. The ordinance is enacted if it receives an affirmative vote of all members of the city council and is approved by the mayor and published as in the case of other ordinances. An ordinance amending a city charter shall not become effective until 90 days after passage and publication or at such later date as is fixed in the ordinance.

There are certain time requirements which are inviolate and certain time requirements that are under the City's control. First, the Charter Commission must make a recommendation. The City then has one month to publish notice of a public hearing. A public hearing must be held at least two weeks, but not more than one month, after the notice. The Council must vote on the proposed ordinance within one month after the public hearing. The amending ordinance cannot become effective until at least 90 days after passage and publication of the ordinance. A Charter amendment requires, at a bare minimum, four months pursuant to statute (90 days to become effective plus at least 2 weeks between public notice and public hearing plus approximately 2 weeks for special meetings of the charter commission and Council).

2. Conduct the Election Under State Law Provisions for Municipal Elections.

The Minnesota statutes include a process for conducting municipal elections that the City could use to govern the process for the 2009 elections. The Charter as currently written is now silent on the manner of conducting an election other than by IRV.

The state law provisions for municipal elections provides:

Subd. 2. **City elections.** In all statutory and home rule charter cities, the primary, general and special elections held for choosing city officials and deciding public questions relating to the city shall be held as provided in this chapter, except that sections 205.065, subdivisions 4 to 7; 205.07, subdivision 3; 205.10; 205.121; and 205.17, subdivisions 2 and 3, do not apply to a city whose charter provides the manner of holding its primary, general or special elections.

Minn. Stat. § 205.02

Primary elections are governed by Minn. Stat. § 205.065, which provides rules governing candidate filing, canvassing returns and other matters. The one significant difference between the state procedure and the pre-IRV City Charter process is that, under the state statutes, the primary ballot may not contain any partisan

designations. See Minn. Stat. § 205.065 subd. 4. In contrast, the Minneapolis Charter provides that, for the general election, the political party or political principle shall be placed on the ballot. If the Council determined that it desired party designations on the primary ballot, it would need to proceed by Charter amendment, under the procedure outlined above. Should the Council desire to proceed under state law, the Council would still need to pass an ordinance or resolution providing that the primary would be conducted under state law. This action must take place no later than three months before the municipal general election, or August 4, 2009. The resolution or ordinance remains in effect until revoked.