

CITY OF OAKLAND

FILED
OFFICE OF THE CITY CLERK
OAKLAND

09 DEC 22 PM 2:22

OFFICE OF THE CITY ATTORNEY

TO: President Brunner and Members of the City Council
FROM: John A. Russo, City Attorney
DATE: January 5, 2010

RE: Report and Resolution Authorizing the City Administrator to Negotiate and Execute a Memorandum of Understanding Between the County of Alameda and the Cities of Oakland, Berkeley and San Leandro Regarding Ranked Choice Voting, in an Amount Not to Exceed One Million Five Hundred Thousand Dollars (\$1,500,000), with Oakland's Share Being Nine Hundred Forty-Six Thousand Nine Hundred Fifty Dollars (\$946,950)

SUMMARY

We recommend that the City Council authorize the City Administrator to negotiate and execute a Memorandum of Understanding Between the County of Alameda and the Cities of Oakland, Berkeley and San Leandro Regarding Ranked Choice Voting ("MOU") substantially similar to the draft agreement attached as Exhibit A hereto.

The County Registrar of Voters has requested that Oakland, Berkeley and San Leandro execute the MOU to ensure that the County will be reimbursed for those costs associated with the upgrades that are required to implement a new Ranked Choice Voting ("RCV") (also known as Instant Runoff Voting) system in the three cities for the November 2010 election.

Each of the three cities will pay their proportionate share of the total not-to-exceed amount of \$1.5 million based on the number of registered voters in each city; if other jurisdictions in Alameda County adopt an RCV system, Oakland, Berkeley and San Leandro will be reimbursed their proportionate share of their payment.

FISCAL IMPACT

The proposed MOU sets a not-to-exceed amount of \$1.5 million, to be allocated among the three cities as depicted in Table 1 below.

Table 1: Allocation of Proportionate Shares

<i>City</i>	<i>Registered Voters</i>	<i>Percentage Share</i>	<i>Share of \$1.5 million</i>
Berkeley	86,020	24.79%	\$371,850
San Leandro	41,297	12.08%	\$181,200
Oakland	219,102	63.13%	\$946,950

This amount represents the County's high end estimate of the cost of the necessary hardware, firmware, software upgrades, special mailings to voters regarding RCV, voter education, voter outreach by the County, and poll worker training attributable to RCV only. These costs do not include the usual costs of conducting an election on each city's behalf. Oakland will remain responsible for regular election costs, such as the tallying of the votes, post-election processing, and staffing of polling places. Oakland also will remain responsible for the cost of any RCV outreach to voters that it conducts, separately from the County's outreach. The City Clerk's Office will coordinate this additional outreach.

The County has stated that: \$1.5 million is a high estimate that anticipates any possible contingency, the actual amount likely will be less, and the County will bill the cities only for the actual costs of implementing RCV.

Oakland's FY 2009-10 budget does not include Oakland's share of \$946,950. In the FY 2009-10 budget, the City Council allocated funds for a June election, and it did not allocate funds for the upgrades and outreach that would be required for an RCV election in November. At the time the budget was approved it was not clear whether the County would be able to conduct an RCV election in November.

BACKGROUND

In November 2006, the voters of the City of Oakland approved Measure O, which amended the City Charter to provide that elections for all city offices will be conducted using ranked choice voting (RCV), known sometimes as "instant runoff voting." The Charter defines RCV as "an election system in which voters rank the candidates for office in order of preference, and the ballots are counted in rounds that, in the case of a single-winner election, simulate a series of runoffs until one candidate receives a majority of votes." The Charter requires that the City use RCV to conduct Oakland elections "once the Alameda County Registrar of Voters is able to conduct the [RCV] election."

As with the Charter provision that mandates that Oakland use RCV, the MOU only becomes effective when Mr. Dave Macdonald, Alameda County Registrar of Voters, notifies the cities that he is capable of implementing RCV in the November 2010 election. On December 4, Secretary of State Debra Bowen approved the County's RCV voting system. On December 22, 2009, Mr. Macdonald notified the cities as follows: "Key staff have received the training required to conduct an RCV election. The only thing we are waiting for is a signed MOU from Oakland, Berkeley and San Leandro. We are definitely ready to conduct a successful RCV election."

KEY ISSUES AND IMPACTS

Reimbursement by Other Jurisdictions

The MOU provides that if any other district or city within Alameda County, or the County itself, adopts an RCV system for its elections, it will be required to join the MOU as a party, and the

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new city or district will reimburse Oakland, San Leandro and Berkeley for its proportionate share of the RCV setup costs. As of now, the reimbursement formula is unknown. The formula determining the reimbursement shares will not be decided until after that jurisdiction joins the agreement because the size and scope of such entity is unknown, as well as the timing of its entry into the MOU.

Participation of San Leandro

In Oakland, voters have approved a charter amendment requiring RCV as soon as the County is able to implement it. In San Leandro, however, the City Council makes the decision whether to use RCV. While San Leandro staff has been actively involved in the long discussions with the County and the other cities regarding the implementation of RCV, its City Council has not yet made the final decision to authorize its use for the November 2010 election.

At its December 7 meeting, the San Leandro City Council voted to delay any decisions on whether to use RCV until its meeting on January 19, 2010, after the City of Oakland considers this MOU. At the December meeting, the San Leandro City Council voted down a motion to prevent RCV from being implemented in November 2010, by a 4-3 vote.

If San Leandro decides against using RCV in the November election, the costs of implementing RCV in Alameda County will be split between Berkeley and Oakland. As set forth in Table 2 below, without San Leandro's participation, Oakland's share of the not-to-exceed amount would increase by \$130,050, to a total maximum of \$1,077,000.

Table 2: Allocation of Proportionate Shares Without San Leandro

<i>City</i>	<i>Registered Voters</i>	<i>Percentage Share</i>	<i>Share of \$1.5 million</i>	<i>Cost Increase</i>
Berkeley	86,020	28.2%	\$423,000	\$51,150
Oakland	219,102	71.8%	\$1,077,000	\$130,050

Participation of Berkeley

Oakland's charter provides that the City will implement an RCV election as soon as the County is "able" to conduct the election. As the City Attorney's Office stated in a public legal opinion dated December 16, 2009, RCV implementation in Oakland only depends upon the ability of the Registrar of Voters to conduct the election on behalf of the City.

Before Berkeley conducts an RCV election, however, its City Council must make the determination that RCV will not result in "additional City election costs."¹ Using RCV will permit Berkeley to forego its runoff elections, and so whether an RCV election will lead to "additional City election costs" depends on whether Berkeley's share of the RCV setup costs exceed the amount that Berkeley would be saving from not holding its runoff elections.

¹ Charter of the City of Berkeley §5(12) (Rev. 11/2006)

Unlike Oakland, Berkeley's general election takes place in November, with any necessary runoff election held in February of the following year. The Berkeley City Council could decide against implementing RCV this year if it determines that Berkeley's share of the RCV setup costs would exceed the projected cost of a February 2011 runoff election. However, each city's share of the MOU costs constitutes only those expenses related to the setup of an RCV election for November 2010, and not ongoing costs into the future. While Berkeley's share of the \$1.5 million setup costs may exceed the cost of one runoff election, the creation of an RCV election system in Berkeley could still save the city runoff election costs this year and in the future. Because of the future cost savings, the Berkeley City Council could make the determination that RCV will not result in "additional City election costs," depending on the total ultimate cost. We expect the Berkeley City Council to make its RCV determination at either its meeting of January 26 or its meeting of February 9, when it considers this MOU.

Performance Commitments of the County

The MOU commits the County to:

- Upgrade its voting equipment and software so that it can conduct RCV elections in November 2010;
- Conduct RCV elections in November 2010 per the cities' requests and/or needs, including any voter education, outreach, poll worker training and other similar activities that are required by the Secretary of State as a condition of certification;
- Conduct any necessary maintenance to the RCV-enabled equipment and software on an ongoing basis; and
- Provide monthly reports of these activities.

While the MOU commits the County to conduct RCV elections as stated above, it does not provide any remedy against the County if it becomes unable or unwilling to hold an RCV election in November 2010. This is potentially problematic once Oakland foregoes holding a June Nominating Election in favor of a November RCV election. In Section 3 of the MOU, the County acknowledges this legal quandary, and it states that it will make "every effort to implement and conduct an RCV election for November 2010." If, for any reason, the County reneges on its commitment to hold RCV elections in November, the cities' only remedy against the County will be a lawsuit seeking specific performance.

SUSTAINABLE OPPORTUNITIES

There are no direct economic, environmental, or social equity opportunities resulting from action on this item.

DISABILITY AND SENIOR CITIZEN ACCESS

The proposed action does not impact disability and senior citizen access.

RECOMMENDATION(S) AND RATIONALE

Because of the clear mandate of the Charter, the City Attorney's Office reviewed the draft MOU and negotiated certain revisions to the agreement. The City Attorney therefore is recommending Council approval of the version of the MOU that the parties negotiated which provides in significant part as follows:

- The County is required to: upgrade its voting equipment and software so that it can conduct RCV elections in November 2010; conduct RCV elections in November 2010 per the cities' requests and/or needs, including any voter education, outreach, poll worker training and other similar activities that are required by the Secretary of State as a condition of certification; conduct any necessary maintenance to the RCV-enabled equipment and software on an ongoing basis; and provide monthly reports of these activities.
- The cities of Oakland, Berkeley and San Leandro are required to reimburse the Registrar of Voters for their proportionate shares of the actual costs incurred by the Registrar for RCV setup only, in an amount not to exceed \$1.5 million total. These setup costs may only include the necessary hardware, firmware, and software upgrades, special mailings to voters regarding RCV, voter education, voter outreach, and poll worker training.
- Each city remains separately responsible for the normal costs of conducting its elections, such as the tallying of the votes, post-election processing, staffing of polling places, canvassing, etc.
- The County acknowledges that the City of Oakland will be legally bound to use RCV in its November 2010 elections once it forgoes calling a June 2010 Nominating Election, and the Registrar will make every effort to implement and conduct an RCV election for November 2010.
- The cost allocation among the cities is determined by the number of registered voters in each jurisdiction. Any jurisdiction that adopts RCV after the MOU is executed will be required to become a party to the MOU, and will reimburse Oakland, San Leandro and Berkeley for a fair share of the RCV setup costs they have incurred.

Oakland's charter provides that the City will implement an RCV election as soon as the County is "able" to conduct the election. Because the County has affirmed its ability to implement RCV, Oakland is obligated to hold RCV elections, which includes reimbursing the County for the costs attributable to RCV.

The Registrar of Voters normally conducts elections on behalf of cities and districts - and such jurisdictions reimburse the County for their election costs - without any written agreement in place. An MOU regarding RCV is not necessary for the implementation of RCV in Oakland; given the requirements of Oakland's charter, the County could move forward with an RCV election in Oakland without an MOU in place. Entering into the proposed MOU is advantageous to Oakland because it will (1) commit the County to certain tasks and responsibilities in its implementation of RCV; (2) limit the County's RCV-related costs to certain categories of

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expenditures; (3) allocate the RCV setup costs equitably among the three cities; and (4) require that any jurisdiction that adopts RCV at a future date reimburse the three cities for its proportionate share.

ACTION REQUESTED OF THE CITY COUNCIL

We recommend that the City Council adopt the attached resolution authorizing the City Administrator to negotiate and execute a Memorandum of Understanding Between the County of Alameda and the Cities of Oakland, Berkeley and San Leandro Regarding Ranked Choice Voting substantially similar to the draft agreement attached as Exhibit A hereto.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Russo', written over a horizontal line.

John A. Russo
City Attorney

Attorney Assigned:
Alix A. Rosenthal

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Exhibit A

**DRAFT MEMORANDUM OF UNDERSTANDING BETWEEN
THE COUNTY OF ALAMEDA AND THE CITIES OF
OAKLAND, BERKELEY AND SAN LEANDRO**

This Memorandum of Understanding ("MOU"), dated as of _____, 2010, is by and between the County of Alameda, hereinafter referred to as the "County", and the City of Oakland, the City of Berkeley and the City of San Leandro, each is hereinafter referred to as a "City," or together, the "Cities."

WITNESSETH

Whereas, the Registrar of Voters ("ROV") for the County of Alameda conducts elections on behalf of the Cities and other jurisdictions;

Whereas, the Cities desire to hold certain local elections using Ranked Choice Voting ("RCV");

Whereas, the ROV currently contracts with Sequoia, Inc. for its voting equipment and software;

Whereas, the ROV will have to enter into an agreement or amendment to its contract with Sequoia, Inc. to upgrade its voting equipment and software to conduct RCV elections pursuant to the Cities' requests;

Whereas, the Cities have each agreed to reimburse the ROV its proportionate share of the costs of upgrading the Sequoia voting equipment and software, as well as other setup costs attributable to RCV ("Proportionate Share") and the ROV has relied on the Cities' agreement to reimburse the ROV for such costs before entering into the agreement or amendment with Sequoia to upgrade its voting equipment to conduct RCV elections;

Now, therefore it is agreed that each City shall reimburse the ROV its Proportionate Share of the RCV setup costs on the General Terms and Conditions hereinafter specified in this MOU.

The term of this MOU shall be from the Effective Date set forth in Section 2 and continue until no party to this MOU, including jurisdictions that join in the future, continues to hold elections that use RCV.

GENERAL TERMS AND CONDITIONS

1. **PURPOSE AND SCOPE:** The County, through the ROV, and the Cities hereby enter into this MOU for the purpose of having the Cities reimburse the ROV for conducting certain, local RCV elections as set forth below. Each City shall reimburse the ROV for its Proportionate Share of the costs incurred by the ROV, as set forth in this MOU.
2. **EFFECTIVE DATE OF AGREEMENT:** This MOU shall be effective when the Secretary of State approves the Sequoia voting system for RCV use in Alameda County and the ROV notifies the Cities that it is capable of implementing RCV in the November 2010 election.
3. **DESCRIPTION OF SERVICES AND RESPONSIBILITIES:**
 - a. General Scope of Services for the ROV: The ROV will enter into an agreement or amendment to its contract with Sequoia, Inc. to upgrade its voting equipment and software so that it can conduct RCV elections in November 2010 per the Cities' requests and/or needs. The ROV will thereafter conduct RCV elections in November 2010 per the Cities' requests and/or needs, including any voter education, outreach, poll worker training and other similar activities that are required by the Secretary of State as a condition of certification. The ROV will also conduct any necessary maintenance to the RCV-enabled equipment and software on an ongoing basis. The ROV shall provide monthly reports of these activities.

The County acknowledges that the City of Oakland will be legally bound to use RCV in its November 2010 elections once it forgoes calling a June 2010 Nominating Election in favor of an RCV election in November. The ROV will make every effort to implement and conduct an RCV election for November 2010.

Given the nature of RCV voting, the ROV shall not, under any circumstances, provide any RCV election results until all of the ballots have been tallied, including, but not limited to, vote by mail, provisional, and early voting ballots. The ROV will provide only final election results once all of the ballots have been tallied.

- b. General Responsibilities of the Cities: Each City agrees to reimburse the ROV for its Proportionate Share of the Setup Costs that are incurred in order to obtain from Sequoia, Inc. an RCV system that is approved for use by the Secretary of State. These Setup Costs include the necessary hardware, firmware, and software upgrades, special mailings to voters regarding RCV, voter education, voter outreach, and poll worker training. Collectively, these costs shall be referred to as "Setup Costs". The Setup Costs shall not exceed \$ 1,500,000.00 (one million five hundred thousand dollars) for the RCV elections to be held in November of 2010.

Each City agrees and understands that the RCV Setup Costs described above are in addition to the normal costs of conducting an election on each City's behalf. Each City

remains responsible for these election costs. Such costs include, by way of example, the tallying of the votes, post-election processing, staffing of polling places, canvassing, etc.

- c. Allocation and Reimbursement of Costs: Each City's Proportionate Share shall be determined by dividing the number of registered voters in each of the participating Cities by the total number of registered voters in all of the participating Cities. The total number of registered voters for each of the Cities shall be determined according to the ROV's last official report of registration to the Secretary of State prior to the election for which an invoice for each City's Proportionate Share was issued by the County. The allocation for 2010 is set forth in Exhibit A hereto. The allocation in Exhibit A is subject to change if any City or Cities decide not to hold an RCV election and terminate its or their participation in this MOU. In such cases, the allocation for each participating City will be recalculated as outlined in this section. Other jurisdictions within Alameda County that adopt RCV shall reimburse the Cities for their Setup Costs, and shall pay the County/ROV for their ongoing costs, according to a formula agreed upon in writing by all parties to this MOU.
 - d. The County/ROV shall require any jurisdiction that adopts RCV to become a party to this MOU as a condition of conducting RCV elections for that jurisdiction. Prior to the accession of a new party, all parties shall negotiate in good faith to agree upon an equitable formula for determining the amount in which the new party shall reimburse the Cities for a fair share of the Setup Costs they have incurred, and for sharing the costs of RCV after accession.
 - e. If the County/ROV desires to change to a vendor other than Sequoia, Inc., or accept an upgrade or other RCV implementation software or hardware that incurs more than one-half the Setup Cost, it shall give 90 days advance notice to all other parties. Upon such notice, all parties shall negotiate in good faith to agree upon an equitable formula for determining the amount, if any, that the Cities should be required to reimburse the County/ROV for a fair share of the new Setup Costs directly attributable to RCV.
4. **PAYMENT**: For conducting RCV elections in accordance with this MOU, each of the Cities shall reimburse the ROV as follows:
- a. Once the ROV enters into an agreement or amendment with Sequoia, Inc. to upgrade its voting equipment and software to conduct RCV elections and receives an invoice from the vendor, the ROV shall bill each of the Cities for its Proportionate Share of that invoice for upgrading its voting equipment and software. The Cities shall pay this amount within 30 days of the date on which the ROV pays Sequoia, Inc., whether the Cities ultimately decide to hold an RCV election or not.
5. **TAXES**: Payment of all applicable federal, state, and local taxes shall be the sole responsibility of the Cities.

6. INDEMNIFICATION:

- a. To the fullest extent permitted by law, the Cities shall hold harmless, defend (with legal counsel reasonably acceptable to County) and indemnify the County and its officers, agents, departments, officials, representatives and employees (collectively "Indemnitees") from and against any and all claims, loss, cost, damage, injury (including, without limitation, injury to or death of an employee of County or its subcontractors), expense and liability of every kind, nature and description, including any violation of federal, state or municipal law or regulation that arise out of or result from the performance of this MOU, (collectively "Liabilities"). Such obligations to defend, hold harmless and indemnify any Indemnitee shall not apply to the extent that such Liabilities are caused in whole or in part solely by the negligence or willful misconduct of any Indemnitee. The Cities shall have no obligation under this MOU to indemnify each other with respect to any claims, loss, cost, damage, or injury arising from the implementation of this MOU. The Cities may participate in the defense of any such claim without relieving County of any obligation hereunder.
- b. To the fullest extent permitted by law, the County shall hold harmless, defend (with legal counsel reasonably acceptable to an affected City or Cities) and indemnify the Cities and their officers, agents, departments, officials, representatives and employees (collectively "Indemnitees") from and against any and all claims, loss, cost, damage, injury (including, without limitation, injury to or death of an employee of County or its subcontractors), expense and liability of every kind, nature and description, including any violation of federal, state or municipal law or regulation that arise out of or result from its negligence or willful misconduct in the performance of this MOU, (collectively "Liabilities"). Such obligations to defend, hold harmless and indemnify any Indemnitee shall not apply to the extent that such Liabilities are caused in whole or in part solely by the negligence or willful misconduct of any Indemnitee. The Cities shall have no obligation under this MOU to indemnify each other with respect to any claims, loss, cost, damage, or injury arising from the implementation of this MOU. The Cities may participate in the defense of any such claim without relieving County of any obligation hereunder.

7. NOTICES: All notices, requests, demands, or other communications under this MOU shall be in writing. Notices shall be given for all purposes as follows:

Personal delivery: When personally delivered to the recipient, notices are effective on delivery.

First Class Mail: When mailed first class to the last address of the recipient known to the party giving notice, notice is effective three (3) mail delivery days after deposit in a United States Postal Service office or mailbox. Certified Mail: When mailed certified mail, return receipt requested, notice is effective on receipt, if delivery is confirmed by a return receipt.

Overnight Delivery: When delivered by overnight delivery (Federal Express/Airborne/United Parcel Service/DHL WorldWide Express) with charges prepaid or charged to the sender's account, notice is effective on delivery, if delivery is confirmed by the delivery service. Facsimile transmission: When sent by facsimile to the last facsimile number of the recipient known to the party giving notice, notice is effective on receipt, provided that (a) a duplicate copy of the notice is promptly given by first-class or certified mail or by overnight delivery, or (b) the receiving party delivers a written confirmation of receipt. Any notice given by facsimile shall be deemed received on the next business day if it is received after 5:00 p.m. (recipient's time) or on a non-business day.

Addresses for purpose of giving notice are as follows:

To County: COUNTY OF ALAMEDA
Registrar of Voters
1225 Fallon Street G-1
Oakland, CA 94612-4283
Attn: Dave Macdonald

To Oakland: Office of the City Clerk
City Hall, 2nd Floor
1 Frank H. Ogawa Plaza
Oakland, CA 94612
Attn: LaTonda Simmons

Office of the City Attorney
City Hall, 6th Floor
1 Frank H. Ogawa Plaza
Oakland, CA 94612
Attn: Alix Rosenthal

To Berkeley: City Clerk
2180 Milvia Street, First Floor
Berkeley, CA 94704

To San Leandro: Office of the City Clerk
City Hall
835 East 14th Street
San Leandro, CA 94577

Any correctly addressed notice that is refused, unclaimed, or undeliverable because of an act or omission of the party to be notified shall be deemed effective as of the first date that said notice was refused, unclaimed, or deemed undeliverable by the postal authorities, messenger, or overnight delivery service.

Any party may change its address or facsimile number by giving the other party notice of the change in any manner permitted by this MOU.

8. **TIME OF ESSENCE:** Time is of the essence in respect to all provisions of this MOU that specify a time for performance; provided, however, that the foregoing shall not be construed to limit or deprive a party of the benefits of any grace or use period allowed in this MOU.
9. **TERMINATION:** The County may terminate this MOU at any time upon (180) one hundred and eighty days written notice to the Cities. A party other than the County may withdraw from this MOU by giving 120 days notice to the other parties and 120 days notice to the County. After the initial 120-day notice is given, any other non-County party may withdraw upon 90 days notice to the remaining parties. Notwithstanding any such withdrawal, the ROV shall be entitled to compensation for services performed pursuant to the MOU to the effective date of withdrawal, and the withdrawing party shall remain entitled to reimbursement for Setup Costs as set forth in Section 3 from the remaining participating City or Cities. If this MOU is terminated by the County within 5 years of the Effective Date, all other parties shall be entitled to a *pro rata* reimbursement from the County of their Proportionate Shares of Setup Costs within 90 days of the effective date of termination.
10. **CHOICE OF LAW:** This MOU shall be governed by the laws of the State of California.
11. **WAIVER:** No waiver of a breach, failure of any condition, or any right or remedy contained in or granted by the provisions of this MOU shall be effective unless it is in writing and signed by the party waiving the breach, failure, right or remedy. No waiver of any breach, failure, right or remedy shall be deemed a waiver of any other breach, failure, right or remedy, whether or not similar, nor shall any waiver constitute a continuing waiver unless the writing so specifies.
12. **ENTIRE AGREEMENT:** This MOU, including all attachments, exhibits, and any other documents specifically incorporated into this MOU, shall constitute the entire agreement between County and Cities relating to the subject matter of this MOU. As used herein, MOU refers to and includes any documents incorporated herein by reference and any exhibits or attachments. This MOU supersedes and merges all previous understandings, and all other agreements, written or oral, between the parties and sets forth the entire understanding of the parties regarding the subject matter thereof. The MOU may not be modified except by a written document signed by all parties.
13. **HEADINGS:** herein are for convenience of reference only and shall in no way affect interpretation of the MOU.
14. **MODIFICATION OF AGREEMENT:** This MOU may be supplemented, amended or modified only by the mutual agreement of the parties. No supplement, amendment or modification of this MOU shall be binding unless it is in writing and signed by authorized representatives of all parties.

15. SURVIVAL: The obligations of this MOU, which by their nature would continue beyond the termination or expiration of the MOU, shall survive termination or expiration.
16. SEVERABILITY: If a court of competent jurisdiction holds any provision of this MOU to be illegal, unenforceable, or invalid in whole or in part for any reason, the validity and enforceability of the remaining provisions, or portions of them, will not be affected, unless an essential purpose of this MOU would be defeated by the loss of the illegal, unenforceable, or invalid provision.
17. SIGNATORY: By signing this agreement, signatories warrant and represent that they executed this MOU in their authorized capacity and that by their signatures on this MOU, they or the entities upon behalf of which they acted, executed this MOU.

[END OF GENERAL TERMS AND CONDITIONS]

IN WITNESS WHEREOF, the parties hereto have executed this MOU as of the day and year first above written.

COUNTY OF ALAMEDA

By: _____
Signature

Name: Dave Macdonald
(Printed)

Title: Registrar of Voters, County of Alameda

Date: _____

Approved as to Form:

By: _____
Alameda County Counsel

CITY OF BERKELEY

By: _____: _____
Signature

Name: _____: _____
(Printed)

Title: _____: _____

Date: _____: _____

Approved as to Form:

By: _____
Berkeley City Attorney

By signing above, signatory warrants and represents that he/she executed this MOU in his/her authorized capacity and that by his/her signature on this MOU, he/she or the entity upon behalf of which he/she acted, executed this MOU

CITY OF OAKLAND

By: _____
Signature

Name: _____
(Printed)

Title: _____

Date: _____

Approved as to Form:

By: _____
Oakland City Attorney

CITY OF SAN LEANDRO

By: _____
Signature

Name: _____
(Printed)

Title: _____

Date: _____

Approved as to Form:

By: _____
San Leandro City Attorney

By signing above, signatory warrants and represents that he/she executed this MOU in his/her authorized capacity and that by his/her signature on this MOU, he/she or the entity upon behalf of which he/she acted, executed this MOU

Exhibit A to MOU

Allocation of Proportionate Shares
October 20, 2008 Report of Registration

<i>City</i>	<i>Registered Voters</i>	<i>Proportionate Share</i>
<i>Berkeley</i>	86,020	24.79%
<i>San Leandro</i>	41,297	12.08%
<i>Oakland</i>	219,102	63.13%

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Approved as to Form and Legality


City Attorney

OAKLAND CITY COUNCIL

RESOLUTION No. _____ C.M.S.

RESOLUTION AUTHORIZING THE CITY ADMINISTRATOR TO NEGOTIATE AND EXECUTE A MEMORANDUM OF UNDERSTANDING BETWEEN THE COUNTY OF ALAMEDA AND THE CITIES OF OAKLAND, BERKELEY AND SAN LEANDRO REGARDING RANKED CHOICE VOTING, IN AN AMOUNT NOT TO EXCEED ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000), WITH OAKLAND'S SHARE BEING NINE HUNDRED FORTY-SIX THOUSAND NINE HUNDRED FIFTY DOLLARS (\$946,950)

WHEREAS, in November 2006, the voters of the City of Oakland approved Measure O, which amended the City Charter to provide that elections for all city offices will be conducted using ranked choice voting (RCV), known sometimes as "instant runoff voting;" and

WHEREAS, the Charter requires that the City use RCV to conduct Oakland elections "once the Registrar of Voters is able to conduct the [RCV] election;" and

WHEREAS, the Registrar of Voters has requested that Oakland, Berkeley and San Leandro execute a Memorandum of Understanding (MOU) to ensure that the County will be reimbursed for those costs associated with the upgrades that are required to implement a new RCV system in the three cities for the November 2010 election; and

WHEREAS, on December 22, 2009, the Registrar of Voters declared that he will be able to conduct an RCV election for the cities of Oakland, Berkeley and San Leandro in November 2010 once the cities of Oakland, Berkeley and San Leandro execute the MOU; and

WHEREAS, the Registrar of Voters has requested that Oakland, Berkeley and San Leandro each pay their proportionate share of the RCV setup costs, in an amount not to exceed \$1.5 million, which shares will be based on the number of registered voters in each city; and

WHEREAS, if both Berkeley and San Leandro hold RCV elections in November 2010, Oakland's share of the \$1.5 million in setup costs will not exceed \$946,950; and

WHEREAS, the proposed MOU provides that if other jurisdictions in Alameda County adopt an RCV system, Oakland, Berkeley and San Leandro will be reimbursed a portion of their shares of the RCV setup costs; and

WHEREAS, the City Attorney's Office reviewed the draft MOU attached hereto as Exhibit A and negotiated certain revisions to the agreement with the County, San Leandro, and Berkeley; and

WHEREAS, Because of the clear mandate of the Charter, the City Attorney recommends Council approval of a Memorandum of Understanding Between the County of Alameda and the Cities of Oakland, Berkeley and San Leandro Regarding Ranked Choice Voting substantially similar to the draft agreement attached as Exhibit A hereto; now, therefore, be it

RESOLVED: That the City Administrator is hereby authorized to negotiate and execute a Memorandum of Understanding Between the County of Alameda and the Cities of Oakland, Berkeley and San Leandro Regarding Ranked Choice Voting substantially similar to the draft agreement attached as Exhibit A hereto; and be it

FURTHER RESOLVED: That the total amount of the agreement may not exceed One Million Five Hundred Thousand Dollars (\$1.5 million), which cost will be shared among the cities in Alameda County that hold RCV elections in November 2010; and be it

FURTHER RESOLVED: That the agreement authorized hereunder is subject to City Attorney approval for form and legality and shall be placed on file in the Office of the City Clerk.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 2010

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL, QUAN, REID, and PRESIDENT BRUNNER

NOES -

ABSENT -

ABSTENTION -

ATTEST: _____
LaTonda Simmons
City Clerk and Clerk of the Council
of the City of Oakland, California

Exhibit A

**DRAFT MEMORANDUM OF UNDERSTANDING BETWEEN
THE COUNTY OF ALAMEDA AND THE CITIES OF
OAKLAND, BERKELEY AND SAN LEANDRO**

This Memorandum of Understanding ("MOU"), dated as of _____, 2010, is by and between the County of Alameda, hereinafter referred to as the "County", and the City of Oakland, the City of Berkeley and the City of San Leandro, each is hereinafter referred to as a "City," or together, the "Cities."

WITNESSETH

Whereas, the Registrar of Voters ("ROV") for the County of Alameda conducts elections on behalf of the Cities and other jurisdictions;

Whereas, the Cities desire to hold certain local elections using Ranked Choice Voting ("RCV");

Whereas, the ROV currently contracts with Sequoia, Inc. for its voting equipment and software;

Whereas, the ROV will have to enter into an agreement or amendment to its contract with Sequoia, Inc. to upgrade its voting equipment and software to conduct RCV elections pursuant to the Cities' requests;

Whereas, the Cities have each agreed to reimburse the ROV its proportionate share of the costs of upgrading the Sequoia voting equipment and software, as well as other setup costs attributable to RCV ("Proportionate Share") and the ROV has relied on the Cities' agreement to reimburse the ROV for such costs before entering into the agreement or amendment with Sequoia to upgrade its voting equipment to conduct RCV elections;

Now, therefore it is agreed that each City shall reimburse the ROV its Proportionate Share of the RCV setup costs on the General Terms and Conditions hereinafter specified in this MOU.

The term of this MOU shall be from the Effective Date set forth in Section 2 and continue until no party to this MOU, including jurisdictions that join in the future, continues to hold elections that use RCV.

GENERAL TERMS AND CONDITIONS

1. **PURPOSE AND SCOPE:** The County, through the ROV, and the Cities hereby enter into this MOU for the purpose of having the Cities reimburse the ROV for conducting

certain, local RCV elections as set forth below. Each City shall reimburse the ROV for its Proportionate Share of the costs incurred by the ROV, as set forth in this MOU.

2. **EFFECTIVE DATE OF AGREEMENT:** This MOU shall be effective when the Secretary of State approves the Sequoia voting system for RCV use in Alameda County and the ROV notifies the Cities that it is capable of implementing RCV in the November 2010 election.
3. **DESCRIPTION OF SERVICES AND RESPONSIBILITIES:**

- a. General Scope of Services for the ROV: The ROV will enter into an agreement or amendment to its contract with Sequoia, Inc. to upgrade its voting equipment and software so that it can conduct RCV elections in November 2010 per the Cities' requests and/or needs. The ROV will thereafter conduct RCV elections in November 2010 per the Cities' requests and/or needs, including any voter education, outreach, poll worker training and other similar activities that are required by the Secretary of State as a condition of certification. The ROV will also conduct any necessary maintenance to the RCV-enabled equipment and software on an ongoing basis. The ROV shall provide monthly reports of these activities.

The County acknowledges that the City of Oakland will be legally bound to use RCV in its November 2010 elections once it forgoes calling a June 2010 Nominating Election in favor of an RCV election in November. The ROV will make every effort to implement and conduct an RCV election for November 2010.

Given the nature of RCV voting, the ROV shall not, under any circumstances, provide any RCV election results until all of the ballots have been tallied, including, but not limited to, vote by mail, provisional, and early voting ballots. The ROV will provide only final election results once all of the ballots have been tallied.

- b. General Responsibilities of the Cities: Each City agrees to reimburse the ROV for its Proportionate Share of the Setup Costs that are incurred in order to obtain from Sequoia, Inc. an RCV system that is approved for use by the Secretary of State. These Setup Costs include the necessary hardware, firmware, and software upgrades, special mailings to voters regarding RCV, voter education, voter outreach, and poll worker training. Collectively, these costs shall be referred to as "Setup Costs". The Setup Costs shall not exceed \$ 1,500,000.00 (one million five hundred thousand dollars) for the RCV elections to be held in November of 2010.

Each City agrees and understands that the RCV Setup Costs described above are in addition to the normal costs of conducting an election on each City's behalf. Each City remains responsible for these election costs. Such costs include, by way of example, the tallying of the votes, post-election processing, staffing of polling places, canvassing, etc.

- c. Allocation and Reimbursement of Costs: Each City's Proportionate Share shall be determined by dividing the number of registered voters in each of the participating Cities by the total number of registered voters in all of the participating Cities. The total number of registered voters for each of the Cities shall be determined according to the ROV's last official report of registration to the Secretary of State prior to the election for which an invoice for each City's Proportionate Share was issued by the County. The allocation for 2010 is set forth in Exhibit A hereto. The allocation in Exhibit A is subject to change if any City or Cities decide not to hold an RCV election and terminate its or their participation in this MOU. In such cases, the allocation for each participating City will be recalculated as outlined in this section. Other jurisdictions within Alameda County that adopt RCV shall reimburse the Cities for their Setup Costs, and shall pay the County/ROV for their ongoing costs, according to a formula agreed upon in writing by all parties to this MOU.
 - d. The County/ROV shall require any jurisdiction that adopts RCV to become a party to this MOU as a condition of conducting RCV elections for that jurisdiction. Prior to the accession of a new party, all parties shall negotiate in good faith to agree upon an equitable formula for determining the amount in which the new party shall reimburse the Cities for a fair share of the Setup Costs they have incurred, and for sharing the costs of RCV after accession.
 - e. If the County/ROV desires to change to a vendor other than Sequoia, Inc., or accept an upgrade or other RCV implementation software or hardware that incurs more than one-half the Setup Cost, it shall give 90 days advance notice to all other parties. Upon such notice, all parties shall negotiate in good faith to agree upon an equitable formula for determining the amount, if any, that the Cities should be required to reimburse the County/ROV for a fair share of the new Setup Costs directly attributable to RCV.
4. **PAYMENT:** For conducting RCV elections in accordance with this MOU, each of the Cities shall reimburse the ROV as follows:
- a. Once the ROV enters into an agreement or amendment with Sequoia, Inc. to upgrade its voting equipment and software to conduct RCV elections and receives an invoice from the vendor, the ROV shall bill each of the Cities for its Proportionate Share of that invoice for upgrading its voting equipment and software. The Cities shall pay this amount within 30 days of the date on which the ROV pays Sequoia, Inc., whether the Cities ultimately decide to hold an RCV election or not.
5. **TAXES:** Payment of all applicable federal, state, and local taxes shall be the sole responsibility of the Cities.
6. **INDEMNIFICATION:**

- a. To the fullest extent permitted by law, the Cities shall hold harmless, defend (with legal counsel reasonably acceptable to County) and indemnify the County and its officers, agents, departments, officials, representatives and employees (collectively "Indemnitees") from and against any and all claims, loss, cost, damage, injury (including, without limitation, injury to or death of an employee of County or its subcontractors), expense and liability of every kind, nature and description, including any violation of federal, state or municipal law or regulation that arise out of or result from the performance of this MOU, (collectively "Liabilities"). Such obligations to defend, hold harmless and indemnify any Indemnitee shall not apply to the extent that such Liabilities are caused in whole or in part solely by the negligence or willful misconduct of any Indemnitee. The Cities shall have no obligation under this MOU to indemnify each other with respect to any claims, loss, cost, damage, or injury arising from the implementation of this MOU. The Cities may participate in the defense of any such claim without relieving County of any obligation hereunder.
- b. To the fullest extent permitted by law, the County shall hold harmless, defend (with legal counsel reasonably acceptable to an affected City or Cities) and indemnify the Cities and their officers, agents, departments, officials, representatives and employees (collectively "Indemnitees") from and against any and all claims, loss, cost, damage, injury (including, without limitation, injury to or death of an employee of County or its subcontractors), expense and liability of every kind, nature and description, including any violation of federal, state or municipal law or regulation that arise out of or result from its negligence or willful misconduct in the performance of this MOU, (collectively "Liabilities"). Such obligations to defend, hold harmless and indemnify any Indemnitee shall not apply to the extent that such Liabilities are caused in whole or in part solely by the negligence or willful misconduct of any Indemnitee. The Cities shall have no obligation under this MOU to indemnify each other with respect to any claims, loss, cost, damage, or injury arising from the implementation of this MOU. The Cities may participate in the defense of any such claim without relieving County of any obligation hereunder.

7. NOTICES: All notices, requests, demands, or other communications under this MOU shall be in writing. Notices shall be given for all purposes as follows:

Personal delivery: When personally delivered to the recipient, notices are effective on delivery.

First Class Mail: When mailed first class to the last address of the recipient known to the party giving notice, notice is effective three (3) mail delivery days after deposit in a United States Postal Service office or mailbox. Certified Mail: When mailed certified mail, return receipt requested, notice is effective on receipt, if delivery is confirmed by a return receipt.

Overnight Delivery: When delivered by overnight delivery (Federal

Express/Airborne/United Parcel Service/DHL WorldWide Express) with charges prepaid or charged to the sender's account, notice is effective on delivery, if delivery is confirmed by the delivery service. Facsimile transmission: When sent by facsimile to the last facsimile number of the recipient known to the party giving notice, notice is effective on receipt, provided that (a) a duplicate copy of the notice is promptly given by first-class or certified mail or by overnight delivery, or (b) the receiving party delivers a written confirmation of receipt. Any notice given by facsimile shall be deemed received on the next business day if it is received after 5:00 p.m. (recipient's time) or on a non-business day.

Addresses for purpose of giving notice are as follows:

To County: COUNTY OF ALAMEDA
Registrar of Voters
1225 Fallon Street G-1
Oakland, CA 94612-4283
Attn: Dave Macdonald

To Oakland: Office of the City Clerk
City Hall, 2nd Floor
1 Frank H. Ogawa Plaza
Oakland, CA 94612
Attn: LaTonda Simmons

Office of the City Attorney
City Hall, 6th Floor
1 Frank H. Ogawa Plaza
Oakland, CA 94612
Attn: Alix Rosenthal

To Berkeley: City Clerk
2180 Milvia Street, First Floor
Berkeley, CA 94704

To San Leandro: Office of the City Clerk
City Hall
835 East 14th Street
San Leandro, CA 94577

Any correctly addressed notice that is refused, unclaimed, or undeliverable because of an act or omission of the party to be notified shall be deemed effective as of the first date that said notice was refused, unclaimed, or deemed undeliverable by the postal authorities, messenger, or overnight delivery service.

Any party may change its address or facsimile number by giving the other party notice of the change in any manner permitted by this MOU.

8. TIME OF ESSENCE: Time is of the essence in respect to all provisions of this MOU that specify a time for performance; provided, however, that the foregoing shall not be construed to limit or deprive a party of the benefits of any grace or use period allowed in this MOU.
9. TERMINATION: The County may terminate this MOU at any time upon (180) one hundred and eighty days written notice to the Cities. A party other than the County may withdraw from this MOU by giving 120 days notice to the other parties and 120 days notice to the County. After the initial 120-day notice is given, any other non-County party may withdraw upon 90 days notice to the remaining parties. Notwithstanding any such withdrawal, the ROV shall be entitled to compensation for services performed pursuant to the MOU to the effective date of withdrawal, and the withdrawing party shall remain entitled to reimbursement for Setup Costs as set forth in Section 3 from the remaining participating City or Cities. If this MOU is terminated by the County within 5 years of the Effective Date, all other parties shall be entitled to a *pro rata* reimbursement from the County of their Proportionate Shares of Setup Costs within 90 days of the effective date of termination.
10. CHOICE OF LAW: This MOU shall be governed by the laws of the State of California.
11. WAIVER: No waiver of a breach, failure of any condition, or any right or remedy contained in or granted by the provisions of this MOU shall be effective unless it is in writing and signed by the party waiving the breach, failure, right or remedy. No waiver of any breach, failure, right or remedy shall be deemed a waiver of any other breach, failure, right or remedy, whether or not similar, nor shall any waiver constitute a continuing waiver unless the writing so specifies.
12. ENTIRE AGREEMENT: This MOU, including all attachments, exhibits, and any other documents specifically incorporated into this MOU, shall constitute the entire agreement between County and Cities relating to the subject matter of this MOU. As used herein, MOU refers to and includes any documents incorporated herein by reference and any exhibits or attachments. This MOU supersedes and merges all previous understandings, and all other agreements, written or oral, between the parties and sets forth the entire understanding of the parties regarding the subject matter thereof. The MOU may not be modified except by a written document signed by all parties.
13. HEADINGS: herein are for convenience of reference only and shall in no way affect interpretation of the MOU.
14. MODIFICATION OF AGREEMENT: This MOU may be supplemented, amended or modified only by the mutual agreement of the parties. No supplement, amendment or

modification of this MOU shall be binding unless it is in writing and signed by authorized representatives of all parties.

15. SURVIVAL: The obligations of this MOU, which by their nature would continue beyond the termination or expiration of the MOU, shall survive termination or expiration.
16. SEVERABILITY: If a court of competent jurisdiction holds any provision of this MOU to be illegal, unenforceable, or invalid in whole or in part for any reason, the validity and enforceability of the remaining provisions, or portions of them, will not be affected, unless an essential purpose of this MOU would be defeated by the loss of the illegal, unenforceable, or invalid provision.
17. SIGNATORY: By signing this agreement, signatories warrant and represent that they executed this MOU in their authorized capacity and that by their signatures on this MOU, they or the entities upon behalf of which they acted, executed this MOU.

[END OF GENERAL TERMS AND CONDITIONS]

IN WITNESS WHEREOF, the parties hereto have executed this MOU as of the day and year first above written.

COUNTY OF ALAMEDA

By: _____
Signature

Name: Dave Macdonald
(Printed)

Title: Registrar of Voters, County of Alameda

Date: _____

Approved as to Form:

By: _____
Alameda County Counsel

CITY OF BERKELEY

By: _____
Signature

Name: _____
(Printed)

Title: _____

Date: _____

Approved as to Form:

By: _____
Berkeley City Attorney

By signing above, signatory warrants and represents that he/she executed this MOU in his/her authorized capacity and that by his/her signature on this MOU, he/she or the entity upon behalf of which he/she acted, executed this
MOU

CITY OF OAKLAND

By: _____
Signature

Name: _____
(Printed)

Title: _____

Date: _____

Approved as to Form:

By: _____
Oakland City Attorney

CITY OF SAN LEANDRO

By: _____
Signature

Name: _____
(Printed)

Title: _____

Date: _____

Approved as to Form:

By: _____
San Leandro City Attorney

By signing above, signatory warrants and represents that he/she executed this MOU in his/her authorized capacity and that by his/her signature on this MOU, he/she or the entity upon behalf of which he/she acted, executed this MOU