



File #: 2018-423, Version: 1

Report to Mayor and City Council

Friday, July 03, 2018

Discussion

SUBJECT:

DISCUSSION OF THE CALIFORNIA VOTING RIGHTS ACT AND CONSIDERATION OF POSSIBLY CHANGING FROM AT-LARGE TO BY-DISTRICT SYSTEM FOR COUNCILMEMBER ELECTIONS IN THE CITY (CITY COUNCIL)

I. SUMMARY

On May 22, 2018 the City of Carson received a letter demanding a conversion from the current at-large Councilmember election system to a district-based electoral system pursuant to the California Voting Rights Act ("CVRA"). The letter threatens if the City does not "voluntarily change its at-large system of electing City Council members [then] on behalf of the residents... we will be forced to seek judicial relief."

The burden for establishing a CVRA violation can be met by showing that racially polarized voting ("RPV") occurs in elections for the City Council. RPV may be shown if a protected class regularly votes as a group for candidates that do not win their elections. A successful CVRA claim does not require proof of discriminatory intent.

If there is a lawsuit and if City loses, the City could be exposed to significant attorneys' fees. State law however provides a "safe harbor" to cap potential attorney's fees which the City may otherwise be subject. Upon receipt of a CVRA demand letter, if the City within 45 days adopts a resolution outlining its intent to switch to districts, and then switches to districts within 90 days of the resolution, a potential plaintiff's attorney's fees are capped at \$30,000. Staff is asking if Council is interested in invoking the "safe harbor" option.

II. RECOMMENDATION

CONSIDER TAKING ONE of the following actions:

1. **AFFIRM** City will not presently switch to districts for Councilmember elections; or
2. **CONTINUE TO REVIEW ISSUE** and bring back to another Council meeting; or
3. **ADOPT** Resolution No. 18-092 outlining the City Council's intention to change from at-

large elections for members of the City Council, to district-based elections, and establishing an estimated timeline for doing so (Attachment 1).

III. ALTERNATIVES

Take other action as considered appropriate and consistent with law.

IV. BACKGROUND

A. Threat of CVRA Litigation

On May 22, 2018, the City received a letter from Law Offices of Shenkman & Hughes ("Shenkman"). (See Attachment No. 1.) Shenkman wrote the letter on behalf of his client the Southwest Voter Registration Education Project ("SVREP"), alleging "voting within Carson is racially polarized, resulting in minority vote dilution, and, therefore, the City's at-large elections violate the California Voting Rights Act."

Shenkman, and his clients, demand under threat of litigation that the City begin the process of transitioning from at-large to district-based elections, and threatened legal action if the City does not do so.

State law bars a CVRA lawsuit from being filed until 45 days after receipt of a CVRA demand letter. The 45th day after the City received Mr. Shenkman's letter is July 6, 2018.

The City may prevent a CVRA lawsuit from being filed if the City Council adopts a resolution outlining (1) its intention to transition from at-large to district-based elections, (2) specific steps it will undertake to facilitate this transition, and (3) an estimated timeframe for doing so. After passage of such a resolution, City has 90 days to pass an ordinance shifting the City to district based elections, or else a lawsuit may be filed.

Such a resolution is only a preliminary step that may be necessary due to the threatened litigation. This is not a final authorization to transition to district-based elections, as the Elections Code lays out several steps, including at least four public hearings, the City must satisfy prior to adopting an ordinance formally transitioning to district-based elections.

B. At-Large Versus District-Based Elections

The members of the City Council are currently elected at-large. Under an at-large system of elections, every voter in the City votes for each member of the City Council, regardless of where the voter or the candidate is registered to vote in the City.

Under a by-district based system of elections, the City is divided into districts, and candidates may only run for the seat representing the district in which they are registered to vote, and voters may only vote for the candidates from their district.

The City currently has a directly elected Mayor set by the voters.

C. California Voting Rights Act

In 2002, the CVRA was enacted through Election Code sections 14025-14032. In 2006, the California Court of Appeal upheld the CVRA as constitutional, and the United States Supreme Court subsequently declined to review the case. (*Sanchez v. City of Modesto*, (2006) 145 Cal.App.4th 660 (Review Denied March 21, 2007) (Certiorari Denied Oct. 15, 2007).)

The CVRA expands on the Federal Voting Rights Act by making it easier for protected classes to challenge at-large electoral systems in the courts. According to some critics, the Federal Voting Rights Act ("FVRA") has failed to meet its goals when applied to California. To overcome these alleged failures of the FVRA, in 2002 the California Legislature enacted the CVRA. "The legislative history of the CVRA indicates that the California Legislature wanted to provide a broader right to challenge circumstances of vote dilution than was provided for by federal law." (*Sanchez v. City of Modesto*, (2006) 145 Cal. App. 4th 660, 669.)

A violation of the CVRA does not require proof of discriminatory intent. Rather, a CVRA violation may be established by showing that racially polarized voting ("RPV") occurs in elections for the City Council. (Election Code section 14028.) Racially polarized voting may be determined by the extent to which "candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body." (Election Code section 14028(a-b).)

In other words, if a protected class consistently votes differently - as a group - than the rest of the electorate, and their candidates fail to win election, a violation of the CVRA may be triggered. Any voter who is a member of a protected class and who resides in the City may bring a CVRA lawsuit. (Election Code section 14032.)

"Protected class" is defined in the CVRA to mean a class of voters who are members of a race, color or language minority group, as referenced and defined in the FVRA. (Election Code section 14026(d).) Expanding on this, a court has also ruled that "[a]ll persons have standing under the CVRA to sue for race-based vote dilution because all persons are members of a race." (*Sanchez v. City of Modesto*, (2006) 145 Cal. App. 4th 660, 685.)

Additional factors probative, but not necessary, to establish a CVRA violation are: 1) history of discrimination; 2) use of electoral devices or other practices or procedures that may enhance the dilutive effects of at-large elections; 3) denial of access to those processes determining which groups of candidates will receive financial or other support in a given election; 4) extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment and health; and 5) use of overt or subtle racial appeals in political campaigns. (Election Code section 14028(e).)

A judge has broad authority to implement appropriate remedies that are tailored to address specific CVRA violations. (Election Code section 14029.) The most common remedy has been to order a municipality to switch from at-large elections to by-district elections. The presumption is that if a city has a by-district system, then minority candidates who are not elected under the at-large electoral system, would be able to get elected to the City

Council.

Two municipal procedures are available (short of a court order) to switch to by-district elections. A city council may pass an ordinance to enact the change. A city council may also submit a measure to the voters which proposes to switch a city to by-district elections. (Government Code section 34871.) However, if the voters reject such an ordinance, the City is not immunized from civil liability under the CVRA.

D. Threatened Litigation Under the California Voting Rights Act and “Safe Harbor” To Cap Attorney’s Fees at \$30,000

State law provides certain safe harbor provisions to a City that is threatened with a CVRA lawsuit and demand for attorney’s fees.

In order to bring a CVRA lawsuit, a prospective plaintiff must first send a notice to the local government agency alleging the agency’s at-large elections violate the CVRA. The prospective plaintiff may not file the lawsuit until 45 days after the local government agency receives the notice. (Elections Code section 10010(e)(1-2).)

If, within 45 days after receiving a notice from a prospective CVRA plaintiff, the local governmental agency adopts a resolution outlining its intention to transition from at-large to district-based elections, specific steps it will undertake to facilitate the transition, and an estimated timeframe for doing so, then the prospective plaintiff may not bring a lawsuit until 90 days after the adoption of the resolution. (Elections Code section 10010(e)(3).)

If within 90 days of the passage of the resolution, a local agency adopts an ordinance changing from at-large to district-based elections in response to a threat of litigation, then the agency must only reimburse a maximum of \$30,000 in fees of the prospective plaintiffs who sent the notice for their reasonable attorney’s fees and costs incurred to prepare the notice. (Elections Code section 10010(f).)

However, if the local agency does not adopt the resolution of intent within that 45-day period and then adopt an ordinance changing to district-based elections within that 90-day period and a lawsuit is actually filed, then there is no cap on attorney’s fees and costs.

E. Experiences of Other Cities

Most of California’s 482 cities elect their city councils by at-large elections. However, since the enactment of the CVRA in 2002, over 130 local governments have switched from at-large to by-district elections, according to legislative analysis from the California Senate on Senate Bill 493 (which in 2015 enacted Govt. Code section 34886 concerning the CVRA).

Many of these local governments were sued under the CVRA by groups arguing that at-large elections prevented minority groups from electing candidates representing their community or interests.

In all such cases, according to the SB 493 legislative analysis referenced above, citizens alleging at-large elections *who brought a lawsuit* that a city violated the CVRA prevailed.

Below is a summary of the experience of a few cities.

1. Modesto - sued in 2004 under the CVRA and litigated the matter. California Court of Appeal upheld the CVRA as constitutional, and the U.S. Supreme Court declined review. That city eventually settled the case, paid \$3 million in attorney's fees and switched to districts pursuant to a voter passed ballot measure.
2. Anaheim - sued in 2012 under the CVRA and settled the lawsuit in January 2014. As part of the settlement, that city paid \$1.2 million in attorney's fees and agreed to increase the city council from five seats to six members elected by-district, with a mayor elected at-large.
3. Highland - sued in 2014 under the CVRA, and a judge ordered the city to go to by-district elections in the upcoming November 2016 election. The judge also ordered that all seats on the city council be contested in November 2016.
4. Wildomar - threatened with litigation in 2015 under the CVRA, and has taken steps, as of January 2016, to move the city to by-district elections.
5. Rialto - threatened with litigation in 2016 by MALDEF, and city responded that it was not presently going to switch to districts, to date no lawsuit filed against city.
6. Huntington Beach - threatened with litigation in 2017 by Shenkman, city disagreed there was liability under the CVRA, and to date no litigation.
7. Santa Monica - recently threatened with CVRA litigation by Shenkman, city decided not to switch to districts, Santa Monica is now embroiled in litigation. They have budgeted \$8 Million for this fight.
8. Torrance - recently received a CVRA demand letter from Shenkman, decided to switch to districts, and commenced the process of holding state required public hearings for the adoption of district maps.

F. District Maps

Both federal and California law require that voting districts must be as equal in population as possible. (U.S. Constitution, Amendment XIV; Election Code section 21601.)

California law generally provides that the following factors be considered when drawing a district map: (1) topography; (2) geography; (3) cohesiveness, contiguity, integrity, and compactness of territory; and (4) community of interests of the districts. (Election Code section 21601.)

G. Process for Changing to District Elections

Government Code section 34886 allows the City to, by ordinance, change from at-large elections for the City Council to district-based elections.

Elections Code section 10010 lays out several requirements the City would need to satisfy before adopting an ordinance establishing district-based elections. First, the City would be required to hold two public hearings prior to drawing any district maps, over a period of no longer than 30 days, in order to receive public input and discuss the composition of the voting districts. (Elections Code section 10010(a)(1).)

Second, after district maps are drawn, the City must hold at least two more public hearings, over a period of no more than 45 days, to receive public input on the draft map(s). (Elections Code subdivision 10010(a)(2).)

The draft district map(s) must also contain the proposed sequence of elections, if the district elections are to be implemented over the course of several elections, to account for staggered terms of office for sitting members of the City Council.

After at least four public hearings are held, the City may introduce and adopt the ordinance establishing district elections.

There are also several other possible avenues for changing to district elections. Pursuant to Government Code section 34871, the City Council could submit the question of changing to district elections to the voters. The City Council could also pursue a settlement agreement with the prospective CVRA plaintiffs, whereby the City agrees to change to district-based elections at a later date. Finally, the City could potentially be ordered by a court to change to district-based elections after unsuccessfully defending against a CVRA lawsuit.

H. Resolution No. 18-092

Resolution No. 18-092 (Attachment No. 2) is provided for consideration by the Council. If adopted, the resolution outlines an intention to change to district-based elections in time for the November 2020 election. If the City Council adopts that resolution, then the prospective plaintiffs could not file a CVRA lawsuit for 90 days.

That resolution would only be a preliminary step towards transitioning to district-based elections, and not the final City Council action to formally make the change. As described above, Elections Code section 10010 lays out several requirements the City must satisfy before the transition may actually be made. Resolution No. 18-092 only declares the City's intention to begin the transition, and describes the steps the City intends to take to facilitate the transition.

Exhibit A to Resolution No. 18-092 is a sample schedule for holding the public hearings required by Elections Code section 10010. For purposes of illustration, the sample schedule anticipates adopting the ordinance within 90 days of adopting the resolution.

There is no legal requirement the City adopt the final ordinance within 90 days after passing the resolution of intention. However, after 90 days the prospective plaintiffs could file their lawsuit, and claim more in attorney's fees than the \$30,000 allowed for by Elections Code section 10010(f).

The sample schedule is also explicitly a tentative schedule. If the City Council chooses to adopt the resolution, the sample schedule may be adjusted by the City Council prior to adoption, or at a later date if it becomes necessary. One thing which should be noted is the City Council could choose to schedule special meetings for some of the steps described in the sample schedule. Each of the dates in the tentative schedule are dates where a regular meeting of the City Council is already scheduled.

Upon direction from Council, staff can return to the Council with a more detailed plan for next steps.

V. FISCAL IMPACT

A. Contract with National Demographic Corporation

As part of its potential litigation risk analysis, the City Council authorized the City Attorney to enter into a contract to engage the services of Douglas Johnson and National Demographics Corporation ("NDC") to conduct a racially polarized voting analysis of the City's 2016 Council elections and to provide a report. The cost for that contract is \$4,500.

In addition, after reviewing the initial data, if the City Council were to decide to begin the process of changing to district-based elections, then the contract with NDC could be increased to retain NDC to assist with the transition process, including drawing district maps. That cost would be \$27,500 with additional costs for in-person reports and optional services. The City could also contract with another demographer to assist with drawing district maps.

B. Potential Awards of Attorney's Fees to Prospective Plaintiffs

As mentioned above, if the City adopts a resolution of intention to change to district-based elections within 45 days, and then adopts an ordinance formally making the change to district-based elections within 90 days of adopting the resolution, then no CVRA lawsuit can be filed to force a change to district-based elections. Without a lawsuit, the potential attorney's fees and costs the City would be required to pay are limited to \$30,000.

However, if the City were to defend against a CVRA lawsuit, then the potential attorney's fees and costs (both the City's own and any amount the City could potentially be ordered to pay the plaintiffs) could total in the several hundreds of thousands of dollars or even millions of dollars.

C. Costs of Running District Elections

Changing to district-based elections will likely not change the City's cost related to Mayoral elections but would likely increase the cost of City Council member elections given additional procedures to run district based election.

VI. EXHIBITS

1. CVRA Demand Letter from Attorney Kevin I. Shenkman (pp. 9-12)

2. Resolution No. 18-092, A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CARSON, CALIFORNIA, DECLARING ITS INTENTION TO TRANSITION FROM AT-LARGE TO DISTRICT-BASED ELECTIONS WITH A DIRECTLY-ELECTED MAYOR PURSUANT TO ELECTIONS CODE SECTION 10010 AND GOVERNMENT CODE SECTION 34886 (pp. 13-17)

Prepared by: City Attorney's Office