Item: 9.A.

MOORPARK CITY COUNCIL
AGENDA REPORT

TO: **Honorable City Council**

FROM: **Kevin G. Ennis, City Attorney**

DATE: **10/03/2018 Regular Meeting**

SUBJECT: **The California Voting Rights Act - Background and Overview of Potential Process for Changing to District-Based Elections, and Consider Special City Council Meeting on October 11, 2018**

SUMMARY

The City of Moorpark currently elects its City Councilmembers through an "at-large" election system in which each Councilmember can reside anywhere in the City and is elected by the voters of the entire City to provide citywide representation. The office of Mayor is a separate, directly elected office. Since the passage of the California Voting Rights Act ("CVRA"), cities and other jurisdictions, such as school districts, throughout the State of California have faced challenges to their at-large election systems under the CVRA.

On August 29, 2018, the City received a letter challenging the City's current election method and asserting that the City's at-large election system violates the CVRA.

This report is intended to bring this matter to the City Council's and the community's attention so that the City Council and community can begin to better understand what this challenge means, and what steps are provided by law to address the challenge to the City's current election system.

BACKGROUND

Historically, the City of Moorpark has elected its Councilmembers through an at-large election system. Under this system, candidates for the City Council can reside anywhere in the City and are elected by the registered voters of the entire City.

The City received the attached letter dated August 27, 2018, from attorney Kevin Shenkman, claiming that the City's current method of electing the City Council through at-large elections violates the CVRA. The letter alleges that "voting within Moorpark is racially polarized, resulting in minority vote dilution," and threatens litigation if the City declines to adopt a district-based election system. A district-based election system is generally one in which a city is divided into separate districts, with

each district's voters electing a representative from that district, who must also be a resident of the district.

The CVRA was adopted in 2002, and is based upon the Federal Voting Rights Act of 1965 ("FVRA") with some important differences that make at-large election systems much more susceptible to legal challenge. For a plaintiff to be successful in a claim of violation under the FVRA relating to at-large elections, the plaintiff must show that: 1) a minority group is sufficiently large and geographically compact to form a majority of the eligible voters in a single-member district; 2) the minority group is politically cohesive; and 3) there is "white bloc voting" sufficient usually to prevent minority voters from electing candidates of their choice. Stated another way, the racially predominant voting group effectively submerges the voting strength of a politically cohesive racial minority. If a plaintiff proves these three elements, then the federal court will consider whether, under the "totality of circumstances", minority voters have an equal opportunity to elect their chosen candidates in at-large election system.

The CVRA removes two of these factors. It eliminates at the liability stage what is known as the "geographically compact" FVRA precondition. It also purports to make proof under the "totality of the circumstances" test optional (although nearly every CVRA court case to date has included proof under the totality factors). Because the CVRA eliminates some of the elements that a plaintiff must prove, a lawsuit brought pursuant to the CVRA is substantially more difficult to defend against than a claim under the FVRA. As a result of the lower threshold for proving a claim under the CVRA, many jurisdictions have voluntarily switched to district-based election systems instead of facing litigation.

Because of the low standards necessary for a plaintiff to prevail in CVRA litigation, every public entity defendant since the CVRA was enacted in 2002, (except one that had the case dismissed after its voters enacted by-district elections during the pending litigation) has either lost in court or settled. To date, every government defendant has ultimately been forced to pay at least some portion of the plaintiff's attorney fees and costs. Awards in contested CVRA cases have reportedly ranged from approximately $400,000 to over $4,500,000. Few cases have been fully litigated under the CVRA because many jurisdictions decide to settle with the plaintiff and a growing number of jurisdictions are voluntarily choosing to change from an at-large election system to a district-based election system in order to avoid costly litigation.

For example, in a CVRA action involving the City of Highland, knowing that no jurisdiction has prevailed in a CVRA action, Highland stipulated to liability and took the position that the court should adopt cumulative voting as an appropriate remedy. The parties submitted briefing on the issue, and the court held a three-day trial in which expert witnesses for both the plaintiff and Highland testified. After the court held that a district-based election system was the appropriate remedy, the parties settled the issue of attorneys' fees, and Highland paid the plaintiff $1,325,000 in attorneys' fees and costs. In a CVRA action involving the City of Rancho

Cucamonga, upon settling a substantive issue, the plaintiffs were ultimately awarded $1,387,599 in attorneys' fees and costs. Additionally, in an action involving the City of Palmdale, the judgment contained an award of attorneys' fees and costs to the plaintiffs in the amount of $4,500,000 plus interest.

Because of claims of abuses by some plaintiff's attorneys in CVRA cases, Elections Code Section 10010 offers a "safe harbor" cap of a maximum of $30,000 on attorney's fees that a plaintiff would be entitled to recover if the target city, within 45 days of receipt of the plaintiff's demand letter, voluntarily adopts a Resolution of Intent to consider an ordinance to establish a district-based election system, and then actually adopts such an ordinance within 90 days following the date it adopted the Resolution of Intent. However, if the City decides not to change its election system and plaintiff files an action and prevails, Section 10010's $30,000 cap would not apply, and the City would be liable for plaintiff's attorneys' fees and expert witness costs, if plaintiff prevails.

DISCUSSION

By October 13, 2018 (within 45-days after the City's receipt of the August 27, 2018 letter from Mr. Shenkman), the City Council will need to decide if it wants to consider starting a process of establishing district-based elections. The August 27, 2018 letter threatens costly litigation if the City Council chooses to not adopt a Resolution of Intent to implement a district-based election system on or before October 13, 2018. If successful, such a lawsuit would force a district-based election system upon the City, with districts drawn by the City, but approved by the Court after a finding of liability. In addition, election dates for each district could be determined by the court.

To utilize the state law "safe harbor" and cap potential attorney fees that the City could be required to pay, the City Council would need to adopt the Resolution of Intent to initiate the transition to a district-based election system on or before October 13, 2018. (Elec. Code § 10010.)

If the City Council adopts that Resolution of Intent, then the CVRA provides a 90-day period to adopt the ordinance would include the following steps. This 90-day period starts to run from the date the Resolution of Intention is adopted:

1) Prior to drawing a draft map or maps of the proposed boundaries of the districts, the City would hold at least two public hearings over a period of no more than 30 days, at which time the public will be invited to provide input regarding the composition of the districts. (Elec. Code §10010(a)(1).) These "public hearings" are not City Council meetings, but community meetings organized by the City.

2) After the draft maps are drawn, the City would publish and make available for release at least one draft map and, if members of the City Council will be elected in their districts at different times to provide for staggered terms of

office, the potential sequence of the elections would also be published. (Elec. Code §10010(a)(2).)

3) The City Council would hold at least two additional public hearings over a period of no more than 45 days, at which the public shall be invited to provide input regarding the content of the draft map or maps and the proposed sequence of elections, if applicable. (Id.)

4) The first version of a draft map is required to be published at least seven days before consideration at a public hearing. If a draft map is revised at or following a public hearing, it is required to be published and made available to the public for at least seven days before being adopted. (Id.)

A new state law that will take effect on January 1, 2019 (AB 2123) provides for the opportunity for an additional 90-day extension to the process if an agreement can be reached between the prospective plaintiff and the City regarding that extension. However, this law does not provide for an overall extension to the entire process but just to the 90-day period for holding public hearing and drawing and adopting maps.

If the City Council choses to adopt the Resolution of Intent by October 13, 2018 to initiate the transition to a district-based election system, a demographer will need to be hired to assist the City in creating districts that meet legal requirements, and will also coordinate public outreach at some of the public hearings and through an online interactive system that would allow the public to draw and submit proposed districting plans for the Council's consideration.

A follow-up staff recommendation that will be made either prior to or at the date that the City Council considers the Resolution of Intention will be for the City Council to direct the City Attorney to engage National Demographics Corporation to participate in the public outreach process, including educating the public about the establishment of districts, including criteria and methodology, for demographic services relating to the drawing of districts, and to assist in facilitating and coordinating the public hearings and other processes, including demographic analysis of all maps proposed by members of the public. National Demographics has provided CVRA analysis and districting efforts for more than 80 cities and 250 school districts in California.

FISCAL IMPACT

There will be significant staff and consultant time needed should the City transition to a district-based election system, because the City must conduct at least five public hearings.

Should the City Council determine to adopt the Resolution of Intent at an upcoming meeting, Mr. Shenkman could seek up to $30,000 in attorney fees and costs from the City, but the City would be protected from litigation if it adopted a district-based election system within the statutory time frame.

There will be additional legal and consultant costs related to this matter. The City will incur additional unbudgeted expenses in preparation of the October 11, 2018 meeting at which the Resolution of Intent will be considered. If the Resolution of Intent is adopted, the City will thereafter need to undertake the process of public hearings, using the services of a demographer, drawing district maps, and adopting those maps. Staff will come back to the City Council with a more specific budget for anticipated costs, but at this point, it is estimated to be no less than $30,000.

PUBLIC POLICY CONSIDERATIONS

Given the significant change that transitioning to districts will have on the culture and governance of the City, it is understandable that the City Council may desire to know the public policy implications of transitioning to districts and the public policy implications of maintaining the current at-large election system.

Transition to Districts

If the City proceeds with a transition to election districts, this would have the advantage of avoiding a costly and time consuming CVRA legal challenge. Some of the advantages and disadvantages of having a district-based election system are:

Pro:

- Each geographic area of the City is represented;
- Viewpoints that might not be citywide can be represented;
- Minority candidates (racial or political) may have a better opportunity to be elected;
- Running for City Council could be less expensive since citywide campaigning is not required;
- Each voter has a specific Councilmember to contact for assistance; and
- Voter choice may be simplified with fewer offices and thus fewer candidates are provided to each voter.

Con:

- Councilmembers may represent only the interests of their districts, not the whole City;
- Candidates may be elected with few votes;
- Councilmembers may have more divergent views, and this may result in greater conflict with each other;

- District lines have to be reviewed and redrawn after each census and significant annexation;
- "Best qualified" candidates may be concentrated in one district;
- Depending on staggered terms, not all voters may be voting each election and turnout for important citywide measures could be reduced; and
- There is a very compressed timeline to exercise this option which will dominate the City's policy agenda for a period of time and may delay other priorities.

Maintain At-Large Election System and Defend Litigation

The City Council could decide to maintain the status quo and wait for a legal challenge in court. Some of the advantages and disadvantages of maintaining an at-large election system are:

Pro:

- Mayor and City Council are all accessible to the public;
- City Councilmembers consider interest of the whole City, not just their district in making decisions;
- Each voter may approach every City Councilmember for support;
- Provides City Council with broad perspective, allowing citywide and regional perspective;
- May mute effects of parochial interests influencing elected officials;
- Provides largest pool to select candidates;
- Each voter gets to vote for all City Councilmembers every two years;
- Candidates need substantial citywide support to win; and
- City Councilmembers can move within the City without losing their seats.

Con:

- May result in elected officials who pay less attention to and have less familiarity with some neighborhood interests;
- May unduly enhance the influence of business interests and other special interests;

- Higher cost to run for office;
- May reduce accountability of elected officials by broadening the constituency served;
- May result in less representation of minority groups;
- More costly campaigns, higher cost to candidates to get elected;
- Campaigns are more expensive--limiting who may run;
- Several City councilmembers could live close together, leaving other areas “unrepresented”; and
- Litigation will be expensive and time consuming.

STAFF RECOMMENDATION

Staff seeks direction from the City Council on whether a Special Meeting should be scheduled to consider the adoption of a Resolution of Intent to transition to district-based elections and establish criteria for establishing such districts. Staff recommends the Special Meeting be scheduled for October 11, 2018 if the City Council wishes to consider a Resolution of Intent.

Attachment A: August 27, 2018 Letter from attorney Kevin Shenkman, claiming that the City's current method of electing the City Council through at-large elections violates the CVRA

Attachment B: CVRA (Elections Code §§ 14025-14032)

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RECEIVED
AUG 29 2018
CITY CLERK'S DIVISION
CITY OF MOORPARK

VIA CERTIFIED MAIL

August 27, 2018

Attn: City Council
City of Moorpark
799 Moorpark Ave.
Moorpark, CA 93021

Re: Violation of California Voting Rights Act

Dear City Council,

I write on behalf of our client, Southwest Voter Registration Education Project. The City of Moorpark ("Moorpark") relies upon an at-large election system for electing candidates to its City Council. Moreover, voting within Moorpark is racially polarized, resulting in minority vote dilution. Therefore, Moorpark's at-large elections violate the California Voting Rights Act of 2001 ("CVRA").

The CVRA disfavors the use of so-called "at-large" voting – an election method that permits voters of an entire jurisdiction to elect candidates to each open seat. *See generally Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 667 ("*Sanchez*"). For example, if the U.S. Congress were elected through a nationwide at-large election, rather than through typical single-member districts, each voter could cast up to 435 votes and vote for any candidate in the country, not just the candidates in the voter's district, and the 435 candidates receiving the most nationwide votes would be elected. At-large elections thus allow a bare majority of voters to control *every* seat, not just the seats in a particular district or a proportional majority of seats.

Voting rights advocates have targeted "at-large" election schemes for decades, because they often result in "vote dilution," or the impairment of minority groups' ability to elect their preferred candidates or influence the outcome of elections, which occurs when the electorate votes in a racially polarized manner. *See Thornburg v. Gingles,* 478 U.S. 30, 46 (1986) ("*Gingles*"). The U.S. Supreme Court "has long recognized that multi-member districts and at-large voting schemes may operate to minimize or cancel out the voting strength" of minorities.

Id. at 47; *see also id.* at 48, fn. 14 (at-large elections may also cause elected officials to "ignore [minority] interests without fear of political consequences"), citing *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *White v. Register*, 412 U.S. 755, 769 (1973). "[T]he majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Gingles*, at 47. When racially polarized voting occurs, dividing the political unit into single-member districts, or some other appropriate remedy, may facilitate a minority group's ability to elect its preferred representatives. *Rogers*, at 616.

Section 2 of the federal Voting Rights Act ("FVRA"), 42 U.S.C. § 1973, which Congress enacted in 1965 and amended in 1982, targets, among other things, at-large election schemes. *Gingles* at 37; *see also* Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History* (1983) 40 Wash. & Lee L. Rev. 1347, 1402. Although enforcement of the FVRA was successful in many states, California was an exception. By enacting the CVRA, "[t]he Legislature intended to expand protections against vote dilution over those provided by the federal Voting Rights Act of 1965." *Jauregui v. City of Palmdale* (2014) 226 Cal. App. 4th 781, 808. Thus, while the CVRA is similar to the FVRA in several respects, it is also different in several key respects, as the Legislature sought to remedy what it considered "restrictive interpretations given to the federal act." Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001-2002 Reg. Sess.) as amended Apr. 9, 2002, p. 2.

The California Legislature dispensed with the requirement in *Gingles* that a minority group demonstrate that it is sufficiently large and geographically compact to constitute a "majority-minority district." *Sanchez,* at 669. Rather, the CVRA requires only that a plaintiff show the existence of racially polarized voting to establish that an at-large method of election violates the CVRA, not the desirability of any particular remedy. *See* Cal. Elec. Code § 14028 ("A violation of Section 14027 ***is established*** if it is shown that racially polarized voting occurs …") (emphasis added); *also see* Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr. 9, 2002, p. 3 ("Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown).")

To establish a violation of the CVRA, a plaintiff must generally show that "racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision." Elec. Code § 14028(a). The CVRA specifies the elections that are most probative: "elections in which at least one

candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class." Elec. Code § 14028(a). The CVRA also makes clear that "[e]lections conducted prior to the filing of an action ... are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action." *Id.*

Factors other than "racially polarized voting" that are required to make out a claim under the FVRA – under the "totality of the circumstances" test – "are probative, but not necessary factors to establish a violation of" the CVRA. Elec. Code § 14028(e). These "other factors" include "the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns." *Id.*

Moorpark's at-large system dilutes the ability of Latinos (a "protected class") – to elect candidates of their choice or otherwise influence the outcome of Moorpark's council elections.

Moorpark's election history is illustrative. In the last twenty years, three Latino candidates sought election to Moorpark City Council: Ernesto Acosta in 1998, Bernardo Perez in 2002, and Jose Magdalano in 2008. Despite receiving significant support from Latino voters, Mr. Acosta, Mr. Perez, and Mr. Magdalano were unable to secure seats on the City Council due to the bloc voting of the non-Latino majority. Mr. Perez had even been a city council member and the mayor of Moorpark prior to his 2002 loss. Further, all three of the aforementioned candidates were "last place" in their respective competitions.

As mentioned above, in a period of *twenty* years, only *three* Latino candidates competed in Moorpark City Council elections. The paucity of Latino candidates to seek election to the Moorpark City Council reveals vote dilution. *See Westwego Citizens for Better Government v. City of Westwego*, 872 F. 2d 1201, 1208-1209, n. 9 (5th Cir. 1989).

According to recent data, Latinos comprise approximately 31.41% of the population of Moorpark. However, there are currently no Latinos on the City Council, nor has there been a single Latino on the council since Mr. Perez in 1998.

The absence of Latino council members is hard to ignore, yet somehow, it has been ignored. Further, the effects of this absence have spread to other parts of city government. Specifically, of the twenty-eight appointed city officials, only three are Latino.

As you may be aware, in 2012, we sued the City of Palmdale for violating the CVRA. After an eight-day trial, we prevailed. After spending millions of dollars, a district-based remedy was ultimately imposed upon the Palmdale City Council, with districts that combine all incumbents into one of the four districts.

Given the historical lack of Latino representation on the City Council in the context of racially polarized elections, we urge Moorpark to voluntarily change its at-large system of electing council members. Otherwise, on behalf of residents within the jurisdiction, we will be forced to seek judicial relief. Please advise us no later than October 16, 2018 as to whether you would like to discuss a voluntary change to your current at-large system.

We look forward to your response.

Very truly yours,

Kevin I. Shenkman

ELECTIONS CODE

DIVISION 14. ELECTION DAY PROCEDURES [14000 - 14443]

(Division 14 enacted by Stats. 1994, Ch. 920, Sec. 2.)

CHAPTER 1.5. Rights of Voters [14025 - 14032]

(Chapter 1.5 added by Stats. 2002, Ch. 129, Sec. 1.)

14025.

This act shall be known and may be cited as the California Voting Rights Act of 2001.
(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14026.

As used in this chapter:
(a) "At-large method of election" means any of the following methods of electing members to the governing body of a political subdivision:
(1) One in which the voters of the entire jurisdiction elect the members to the governing body.
(2) One in which the candidates are required to reside within given areas of the jurisdiction and the voters of the entire jurisdiction elect the members to the governing body.
(3) One that combines at-large elections with district-based elections.
(b) "District-based elections" means a method of electing members to the governing body of a political subdivision in which the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within that election district.
(c) "Political subdivision" means a geographic area of representation created for the provision of government services, including, but not limited to, a general law city, general law county, charter city, charter county, charter city and county, school district, community college district, or other district organized pursuant to state law.
(d) "Protected class" means a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.).
(e) "Racially polarized voting" means voting in which there is a difference, as defined in case law regarding enforcement of the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.), in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate. The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 (52 U.S.C. Sec. 10301 et seq.) to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.
(Amended by Stats. 2016, Ch. 86, Sec. 121. (SB 1171) Effective January 1, 2017.)

14027.

An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.
(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14028.

(a) A violation of Section 14027 is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision. Elections conducted prior to the filing of an action pursuant to Section 14027 and this section are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action.
(b) The occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class. One circumstance that may be considered in determining a violation of Section 14027 and this section is 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 of a political subdivision that is the subject of an action based on Section 14027 and this section. In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis.
(c) The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027 and this section, but may be a factor in determining an appropriate remedy.
(d) Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required.
(e) Other factors such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of Section 14027 and this section.
(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14029.

Upon a finding of a violation of Section 14027 and Section 14028, the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation.
(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14030.

In any action to enforce Section 14027 and Section 14028, the court shall allow the prevailing plaintiff party, other than the state or political subdivision thereof, a reasonable attorney's fee consistent with the standards established in Serrano v. Priest (1977) 20 Cal.3d 25, 48-49, and litigation expenses including, but not limited to, expert witness fees and expenses as part of the costs. Prevailing defendant parties shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation.
(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14031.

This chapter is enacted to implement the guarantees of Section 7 of Article I and of Section 2 of Article II of the California Constitution.
(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)

14032.

Any voter who is a member of a protected class and who resides in a political subdivision where a violation of Sections 14027 and 14028 is alleged may file an action pursuant to those sections in the superior court of the county in which the political subdivision is located.
(Added by Stats. 2002, Ch. 129, Sec. 1. Effective January 1, 2003.)