

CITY OF DANA POINT MEMORANDUM

DATE: February 20, 2018
TO: Honorable Mayor & City Council
FROM: *KW* Kathy M. Ward, City Clerk
SUBJECT: Item # 23 – Potential Transfer to By-District City Council Elections

There are several revisions to the Resolution in Item #23:

On Page 6 of the Resolution, Item number 4 is changed to read:

4. The city's redistricting/demographic consulting firm, acting under the supervision of the City Manager **Attorney** is hereby authorized to direct and formulate on or more electoral district scenarios for review by the public and City Council at two or more public hearings if necessary, in accordance with the city's proposed tentative timeline.

On Page 7 on the Resolution, Item number 7 is changed to read:

7. The City Manager **and City Attorney** ~~is~~ **are** authorized to take any and all other necessary action to give effect to this Resolution.

Also, please see the attached PowerPoint provided for Council's review.

c: City Manager

The California Voting Rights Act and the City of Dana Point's Potential Transition to District Elections

Purpose of this Discussion

- The City has received a letter alleging violations of the California Voting Rights Act (“CVRA”) (Elec. Code §§ 14025-14032)
- CVRA only applies to local public agencies that elect the members of its legislative body “at-large”
 - all residents of the City vote for all Councilmembers, who may reside anywhere in the City
- There is a statutory “safe harbor” provision, that if invoked, would insulate the City from a CVRA lawsuit until May 3, 2018

CVRA Background

- The CVRA was enacted in 2002 with the intent of significantly reducing the burden of proof under the preexisting federal Voting Rights Act (“FVRA”), which was enacted in the 1960s
- As written – and by design – it is virtually impossible for a public agency to prevail when faced with a CVRA lawsuit
- CVRA was authored, at least in part, by attorneys who subsequently brought CVRA litigation against public agencies, collecting a significant amount of attorneys fees
 - Courts are required to award attorneys fees to prevailing CVRA plaintiffs



Lawyers Earn \$4.3M in Fees From Law They Wrote

Published November 16, 2009

Associated Press

LOS ANGELES – Every lawsuit filed or even threatened under a California law aimed at electing more minorities to local offices — and all of the roughly \$4.3 million from settlements so far — can be traced to just two people: a pair of attorneys who worked together writing the statute, The Associated Press has found.

The law makes it easier for lawyers to sue and win financial judgments in cases arising from claims that minorities effectively were shut out of local elections, while shielding attorneys from liability if the claims are tossed out.

The law was drafted mainly by Seattle law professor Joaquin Avila, with advice from lawyers including Robert Rubin, legal director for the Lawyers' Committee for Civil Rights of the San Francisco Bay Area. Avila, Rubin's committee and lawyers working with them have collected or billed local governments about \$4.3 million in three cases that settled, and could reap more from two pending lawsuits.

That's only a fraction of what might come. Dozens of cities and school boards have been warned they could be sued under the 2002 California Voting Rights Act.

Threshold for Liability Under the FVRA

- Under federal law, a plaintiff must prove the existence of the following three “preconditions” in order to establish a violation:
 - the presence of a sufficiently large and geographically compact minority group that would allow the creation of a “majority-minority” district;
 - the presence of a politically cohesive minority group; and
 - that the white majority votes sufficiently as a bloc to enable it to usually defeat the minority group’s preferred candidate
- If the foregoing preconditions are established, the court then analyzes the challenged voting system under a “totality of the circumstances” test, where the court can consider “real world” factors, such as actual minority representation

CVRA Compared to FVRA

- The CVRA was enacted after multiple victories in the 1990s by public agencies against claims brought under the FVRA
- CVRA eliminates the following:
 - the requirement that a sufficiently large, geographically compact minority population exist
 - the totality of the circumstances test
- Accordingly, the fact that no “majority-minority” voting district can be drawn is not a defense to CVRA liability
 - nor is any other factor typically considered under the “totality of the circumstances,” such as the presence of members of a protected class on the legislative body

Threshold for Liability Under the CVRA

- Only one “element” is required to establish liability under the CVRA: the existence of “racially polarized voting”
 - Defined as: voting in which there is a difference in the choice of candidates or other electoral choices (i.e., it applies to all ballot issues including city council, county supervisor, assembly, ballot measures, etc.) 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.” (Elec. Code § 14026(e).)
- A “protected class” is a class of voters who are members of a race, color, or language minority group

- The CVRA’s definition of “racially polarized voting” does not contain clear elements that a city can rely on to show it does not exist. Rather, it is sufficiently vague, that the determination becomes a matter of expert opinion in virtually all cases.
 - litigating his question entails extensive statistical analysis of prior city election results and an expensive “battle of the experts”
- And, a plaintiff can “cherry pick” election issues (not limited to council races) to try to find an issue where a protected class voted differently than a non protected class. (i.e. Prop 209, 206, 227, 187)
- In essence there will be an expert that opines it exists in virtually all jurisdictions

CVRA – Attorneys Fees

- CVRA also includes a mandatory attorneys fees provision that requires public agencies to pay successful plaintiffs’ attorneys fees and other costs. (Elec. Code § 14030.)
- The CVRA’s low liability threshold has resulted in the defeat of *every single public agency* facing a CVRA lawsuit, and its mandatory attorneys fees provision has required *all* those public agencies pay the plaintiffs’ attorneys fees
 - All of these agencies have been required to adopt a district election system
- Public agencies have paid over **\$15 million** to plaintiffs’ attorneys over the relatively short history of the CVRA

CVRA – Litigation in Other Jurisdictions

- Notable Attorneys Fees Payments:
 - City of Palmdale: \$4.5 million
 - City of Modesto: \$3 million
 - City of Highland: \$1.3 million
 - City of Anaheim: \$1.2 million
 - City of Whittier: \$1 million
 - City of Santa Barbara: \$599,500
 - City of Santa Clarita: \$600,000
 - Santa Clarita Community College District: \$850,00
 - Tulare Local Healthcare District: \$500,000
- Virtually all CVRA litigation has occurred from 2007 onward, after a challenge to the CVRA’s constitutionality was denied. (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660)

CVRA – Litigation in Other Jurisdictions

- Attorneys fees payments have been so high because CVRA lawsuits are typically discovery intensive, including depositions of Councilmembers and other city residents
- The foregoing numbers do not include payments made to the public agencies’ own attorneys and experts
- In recent years, vast majority of public agencies voluntarily adopt district elections when faced with a demand letter
 - Particularly true from 2016 onward, as the Legislature enacted a provision allowing cities to convert to by-district elections without a vote of the people of the City. (Gov. Code § 34886.)

CVRA – Litigation in Other Jurisdictions

- Switched (or switching) to district elections as a result of CVRA:
 - At least 155 school districts
 - 28 Community College Districts
 - 75 cities
 - 1 County Board of Supervisors
 - 8 water and other special districts
- The State has, in effect, mandated that local agencies adopt district based elections
 - Legislature likely has the power to enact such a mandate if the CVRA was ever overturned

CVRA – Further Risks

- In addition to risking an attorneys fee award, if the City does not adopt district based elections and is sued under the CVRA, a potential plaintiff could move to enjoin the results of the City’s 2018 election
- The *Court* could then take over drawing the City’s voting districts – with input from the *plaintiff* and his/her attorney
- By contrast, districts will be drawn by the *City Council – relying on input from its citizens* – if the City continues forward with its voluntary adoption of by-district elections

CVRA – Further Risks

- City of Palmdale - Worst Case Scenario:
 - Court enjoined certification of the results of an at-large election held while CVRA litigation was pending
 - Court drew City Council districts, using plaintiffs’ district map
 - All Council seats were placed on the same ballot, rather than transitioning the seats over two election cycles, cutting short Council terms
 - Paid \$4.5 million to plaintiffs’ attorneys
 - Paid millions more to its own attorneys and experts
 - Note: Mayor was African-American, but not relevant to defense of CVRA lawsuit

Fighting a CVRA lawsuit, or even delaying action, will almost certainly end in the same result as immediately and voluntarily adopting district elections but at a *much higher cost* with *significantly less local control*

Path Forward - Districting

- The City is insulated from liability under the CVRA if it adopts a “by-district” election system, where all Councilmembers are required to reside in a single-member district and are elected only by the residents of that district. (Elec. Code §§ 14026, 14027(a))
- Benefits of the City voluntarily adopting a by-district election system:
 - Council has full discretion to draw Council districts, based on input from its own citizens, not the courts or plaintiffs
 - Minimal costs, saving taxpayers potentially seven figures
 - Implementation of district elections over two election cycles in a manner chosen by Council; no existing Council terms will be cut short

Path Forward - Districting

- CVRA does not apply to public agencies with by-district elections; accordingly, the City’s district boundaries must only comply with federal law:
 - Near as equal population as possible, based on total population
 - Comply with FVRA, discussed earlier, by not diluting minority voting (i.e., the City cannot split geographically compact minority groups into multiple district)
 - No racial gerrymandering, which means that a district cannot be drawn such that race is the “predominate factor” for its boundaries
- Adoption and drawing of districts is a legislative decision, and the Council has broad authority in how it is done

Permissive, Traditional Districting Criteria

- **Communities of interest – examples include:**
 - School attendance areas
 - Homeowners Associations
 - Natural neighborhood dividing lines, such as highway or major roads, rivers, canals, and/or hills
 - Areas around parks and other neighborhood landmarks
 - Common issues, neighborhood activities, or legislative/election concerns
 - Shared demographic characteristics
- **Compactness**
- **Contiguity**
- **Visible boundaries, both natural and manmade**

Public Input

- Tonight, the City Council is considering a Resolution of Intention to move to by-district elections, which if adopted would insulate the City from liability for 90 days
- If the Resolution of Intention is adopted, the City must hold a total of five total public hearings before a by-district method of election can be adopted by Council ordinance (Elec. Code § 10010)