

**CITY OF DANA POINT
AGENDA REPORT**

Reviewed By:	
DH	_____
CM	_____X_____
CA	_____X_____

DATE: MAY 15, 2018

TO: CITY MANAGER/CITY COUNCIL

FROM: CITY ATTORNEY

SUBJECT: SECOND READING OF ORDINANCE ADOPTING TRANSITION TO BY-DISTRICT ELECTIONS FOR CITY COUNCIL MEMBERS

RECOMMENDED ACTION:

It is recommended that the Council conduct a second reading, and adopt attached Ordinance No. 18-XX (Action Document A), adopting a five-district, by-district election system and election sequence for the City Council.

DISCUSSION:

The background facts leading to the City’s conversion from “at large” to “by district” elections have been the subject of numerous recent meetings and thus are not summarized here, but are detailed in the Staff Report from the City Council’s May 1, 2018 meeting (Attachment B).

On February 2, 2018, the City received a letter from attorney Russell D. Myrick of the law firm RDM Legal Group threatening to sue the city for alleged violations of the California Voting Rights Act (“CVRA”) (Elec. Code §§ 14025-14032) unless the city voluntarily converts to a by-district election system. The CVRA only applies to jurisdictions, like the City of Dana Point, that utilize an at-large election method, where voters of the entire jurisdiction elect each of the members of the City Council.

In 2016, the California Legislature amended the Elections Code to simplify the process of converting to by-district elections and to provide a “safe harbor” process to protect agencies from the type of litigation that arose from changes in the CVRA. If a city receives a demand letter, the city is initially given 45 days of protection from litigation to assess its situation. Here, on February 20, 2018, which was within the City’s initial 45 day safe harbor period, the Council adopted Resolution No. 18-02-20-04 outlining its intention to transition from at-large to by-district elections, and as a result, no lawsuit can be filed against the City for an additional 90 day period. (Elec. Code § 10010(e)(3).)

The City Council is now reaching the end of its transition to a by-district method of election, having held five public hearings following the Council's adoption of Resolution No. 18-02-20-04. Pursuant to Elections Code section 10010(a)(1), the City held two public hearings (before drawing any draft maps of proposed voting districts) in order to receive public input regarding the composition of the districts. The first such hearing was held on March 6, and the second hearing was held on March 20. At the City Council's April 3 and April 17, 2018 public hearings, the City's districting consultant, NDC, presented multiple proposed district maps pursuant to input provided by both the Council and the public. Pursuant to the Council's direction, NDC prepared variations of maps with five voting districts, as well as maps with four districts and an at-large mayoral office. Public comment was also taken. In addition, pursuant to the Council's request, two additional public forums on the proposed district maps were held on April 9, 2018 and April 25, 2018. At the forums, the City provided a Spanish-language interpreter for members of the public, and the written materials were provided in both English and Spanish.

In order to allow the Council maximum flexibility, staff prepared two ordinances and presented both to the City Council at its May 1, 2018 meeting: one adopting a five (5) councilmember district map prepared by NDC, and one adopting a four (4) councilmember district map with an at-large Mayor prepared by NDC. At its May 1, 2018 meeting, the City Council ultimately approved and introduced for first the reading the five (5) councilmember district map prepared by NDC, labeled the Tan VI Map. In addition, Council further approved as part of the ordinance the following sequence of elections:

2018 Ballot

District 1
District 2
District 3

2020 Ballot

District 4
District 5

The Council favored the Tan VI Map based on a number of factors, including concerns the Councilmembers have heard from the public, keeping communities of interest together, other traditional districting criteria, and ensuring both continuity and a comprehensive "entire city" orientation to decision making as the City transitions to district elections.

CONCLUSION:

It is recommended that should the Council wish to avail itself of the safe harbor provision, that the Council conduct a second reading, and adopt attached Ordinance No. 18-XX (Action Document A), adopting a five district, by-district election system and election sequence for the City Council.

FISCAL IMPACT:

There is no fiscal impact associated with holding this public hearing.

ALTERNATIVE ACTION:

The City Council could provide other direction.

ACTION DOCUMENT:

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SUPPORTING DOCUMENTS:

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ACTION DOCUMENT A**ORDINANCE NO. 18-XX****AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA ESTABLISHING AND IMPLEMENTING BY-DISTRICT ELECTIONS (GOV. CODE § 34886 & ELEC. CODE §10010)**

WHEREAS, the City of Dana Point currently elects its members of the City Council using an at-large method of election where candidates may reside in any part of the City and each member of the City Council is elected by the voters of the entire City; and

WHEREAS, while the City Council of the City of Dana Point strongly believes that the interests of all of the City's residents have been fully and fairly represented under the City's current at-large method of election, the City Council nonetheless finds that moving to a by-district method of election is in the best interest of the City and its taxpayers because of the status of State law, and the significant litigation costs that could result if the City does not change its method of election; and

WHEREAS, California Government Code Section 34886, which became effective January 1, 2017, permits the City Council to change the City's method of election by ordinance to a "by-district" system in which each member of the City Council is elected only by the voters in the district in which the candidate resides; and

WHEREAS, under the provisions of California Elections Code, a city that changes from an at-large city council method of election to a by-district city council method of election requires a total of five public hearings, which includes at least two public hearings regarding potential voting district boundaries prior to the release and consideration of any draft voting district maps, two public hearings following the release of draft voting district map(s); and a fifth public hearing for the purpose of adopting an ordinance, that includes district maps, in order to transition to district voting; and

WHEREAS, at regular meeting of the City Council of the City of Dana Point held on the 20th day of February, 2018, the City Council adopted Resolution No. 18-02-20-04 that initiated the process of establishing a by-district election system and adopted the schedule therefore; and

WHEREAS, at regular meetings of the City Council of the City of Dana Point held on the 6th and 20th day of March, 2018, pursuant to California Elections Code Section 10010(a)(1), the City Council held public hearings where the public was invited to provide input regarding the composition of the City's voting districts before any draft maps were drawn, and the City Council of the City of Dana Point considered and discussed the same; and

WHEREAS, thereafter, at regular meetings of the City Council of the City of Dana Point held on the 3rd and 17th day of April, 2018, pursuant to California Elections Code

Section 10010(a)(2), the City Council held public hearings where the public was invited to provide input regarding the content of the draft maps that had been released at least seven (7) days before each meeting, and the City Council of the City of Dana Point considered and discussed the same; and

WHEREAS, additional public forums were held to take public input regarding potential maps on April 9 and April 25, 2018; and

WHEREAS, at the regular meeting of the City Council of the City of Dana Point held on the 1st day of May, 2018, the City Council held a final public hearing on the proposal to establish district boundaries, reviewed additional public input, and introduced this Ordinance for a first reading which: formally selects voting district map Tan VI, attached hereto; directs that seats for Council Districts 1, 2 and 3 will be placed on the City's 2018 ballot; and directs that the seats for Council Districts 4 and 5 will be placed on the 2020 ballot; and

WHEREAS, the purpose of this Ordinance is to enact, pursuant to California Government Code Section 34886, an Ordinance providing for the election of members of the City Council of the City of Dana Point by-district in five single-member districts as reflected in Exhibit A to this Ordinance, in furtherance of the purposes of the California Voting Rights Act of 2001 (Chapter 1.5 (commencing with Section 14025) of Division 14 of the Elections Code) and to implement the guarantees of Section 7 of Article 1 and of Section of Article II of the California Constitution.

NOW, THEREFORE, the City Council of the City of Dana Point does ordain as follows:

SECTION 1. The foregoing recitals are true and correct.

SECTION 2. Chapter 2.05 of the Dana Point Municipal Code is hereby amended by adding new Sections 2.05.085, 2.05.086 and 2.05.087 to read as follows:

2.05.085 By-District Electoral System.

Pursuant to California Government Code Section 34886 and the schedule established in Section 2.05.087 of this Chapter, beginning in November 2018, members of the City Council shall be elected on a by-district basis from five (5) single-member Council Districts. The City's by-district electoral system shall be conducted in accordance with California Government Code Section 34871, subdivision (a).

2.05.086 Establishment of City Council Electoral Districts.

A. Pursuant to Section 2.05.085 of this Chapter, members of the City Council shall be elected on a by-district basis, as that term is defined in California Government Code Section 34871, subdivision (a), from the five Council Districts described as follows, which shall continue in effect until they are amended or repealed in accordance with law:

1. Council District 1 shall comprise all that portion of the City reflected on Exhibit A.
2. Council District 2 shall comprise all that portion of the City reflected on Exhibit A.
3. Council District 3 shall comprise all that portion of the City reflected on Exhibit A.
4. Council District 4 shall comprise all that portion of the City reflected on Exhibit A.
5. Council District 5 shall comprise all that portion of the City reflected on Exhibit A.

B. Members of the City Council shall be elected in the electoral districts established by this Section and subsequently reapportioned pursuant to applicable State and federal law.

C. Except as provided in subdivision D herein and notwithstanding any other provision of this Chapter, once this Ordinance is fully phased in, each member of the City Council elected to represent a district must reside in that district and be a registered voter in that district, and any candidate for City Council must live in, and be a registered voter in, the district in which he or she seeks election at the time nomination papers are issued, pursuant to California Government Code section 34882 and Elections Code section 10227. Termination of residency in a district by a member of the City Council shall create an immediate vacancy for that Council district unless a substitute residence within the district is established within thirty (30) days after the termination of residency.

D. Notwithstanding any other provision of this Section, and consistent with the requirements of California Government Code Section 36512, the members of the City Council in office at the time the Ordinance codified in this Chapter takes effect shall continue in office until the expiration of the full term to which he or she was elected and until his or her successor is qualified. At the end of the term of each member of the City Council that member of the City Council's successor shall be elected on a by-district basis in the districts established in this Section and as provided in this Chapter.

2.05.087 Election Schedule.

Except as otherwise required by California Government Code Section 36512, the members of the City Council shall be elected from Council Districts 1, 2, and 3 beginning at the General Municipal Election in November 2018, and every four years thereafter, as such Council Districts shall be amended. Members of the City Council shall be elected from Council Districts 4 and 5 beginning at the General Municipal Election in November 2020, and every four years thereafter, as such Council Districts shall be amended.

SECTION 3. A map showing the districts described in this Ordinance and codified in Section 2.05.086 of the City of Dana Point Municipal Code is attached hereto as Exhibit A and incorporated herein by reference.

SECTION 4. If necessary to facilitate the implementation of this Ordinance as determined by the County Registrar of Voters, the City Clerk is authorized to make technical adjustments to the district boundaries that do not substantively affect the populations in the districts, the eligibility of candidates, or the residence of elected officials within any district. The City Clerk shall consult with the City Manager and City Attorney concerning any technical adjustments deemed necessary and shall advise endeavor to provide the City Council with 3 days advance notice of any such adjustments required in the implementation of the districts.

SECTION 5. In the event at any time in the future the California Voting Rights Act is amended, found to be unconstitutional, or otherwise is no longer applicable to the City, the City Council expressly indicates its intention that the by-district election method be re-examined, and on behalf of itself and all future City Councils, expressly reserves its right to repeal or modify this Ordinance.

SECTION 6. To the extent the terms and provisions of this Ordinance may be inconsistent or in conflict with the terms or conditions of any prior City ordinance, motion, resolution, rule or regulation governing the same subject, the terms of this Ordinance shall prevail with respect to the subject matter thereof.

SECTION 7. In interpreting this Ordinance or resolving any ambiguity, this Ordinance shall be interpreted in a manner that effectively accomplishes its stated purposes.

SECTION 8. If any section, subsection, subdivision, sentence, clause, phrase, or portion of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, then such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council of the City of Dana Point hereby declares the Council would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase, or portion thereof, irrespective of the fact that anyone or more sections, subsections, subdivisions, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

SECTION 9. The Mayor shall sign and the City Clerk shall attest to the passage of this Ordinance. The City Clerk shall cause the same to be published once in the official newspaper within fifteen (15) days after its adoption. This Ordinance shall become effective thirty (30) days from its adoption.

INTRODUCED at a regular meeting of the City Council of the City of Dana Point held on the 1st day of May, 2018, and thereafter,

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Dana Point held on the ____ day of _____, 2018.

RICHARD VICZOREK, MAYOR

ATTEST:

KATHY M. WARD, CITY CLERK

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss.
CITY OF DANA POINT)

I, Kathy M. Ward, City Clerk of the City of Dana Point, do hereby certify that the foregoing Ordinance No. 18-XX was duly introduced at a regular meeting of the City Council on the 1st day of May, 2018, and was duly adopted and passed at a regular meeting of the City Council on the day of ____ day of _____, 2018, by the following vote, to wit:

AYES:

NOES:

ABSENT:

KATHY M. WARD, CITY CLERK

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss
CITY OF DANA POINT)

AFFIDAVIT OF POSTING
AND PUBLISHING

KATHY WARD, being first duly sworn, deposes, and says:

That she is the duly appointed and qualified City Clerk of the City of Dana Point;

That in compliance with State Laws of the State of California, ORDINANCE NO. 18-XX, being:

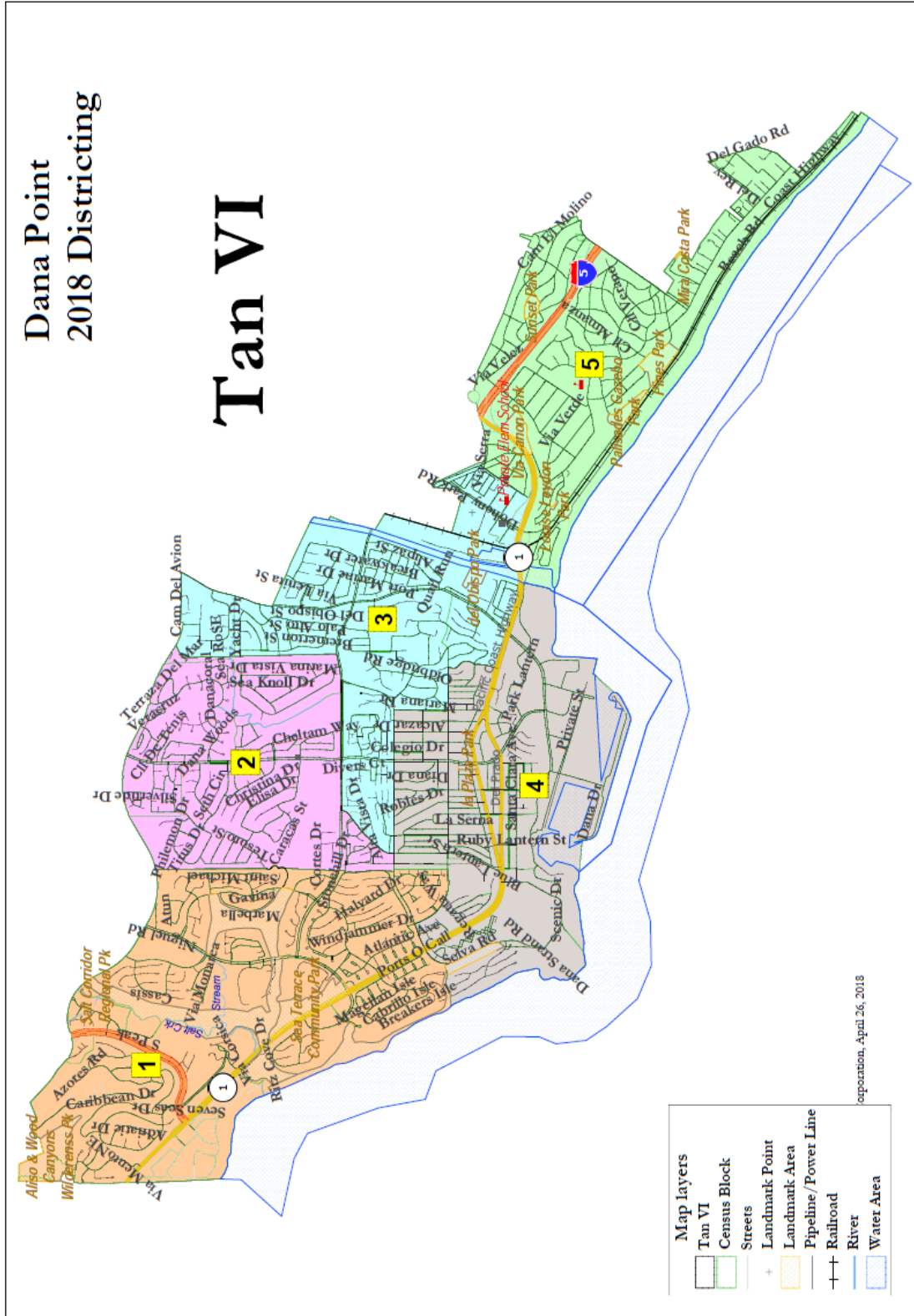
**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF
DANA POINT, CALIFORNIA ESTABLISHING AND
IMPLEMENTING BY-DISTRICT ELECTIONS (GOV. CODE
§ 34886 & ELEC. CODE §10010)**

was published in summary in the Dana Point News on the 10th day of May, 2018, and the ___ day of _____, 2018, and in further compliance with City Resolution No. 91-10-08-01 on the 3rd day of May, 2018, and on the ___ day of _____, 2018 was caused to be posted in four (4) public places in the City of Dana Point, to wit:

- Dana Point City Hall
- Capistrano Beach Post Office
- Dana Point Post Office
- Dana Point Library

KATHY WARD, CITY CLERK
Dana Point, California

Exhibit A



SUPPORTING DOCUMENT B

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Item #11

**CITY OF DANA POINT
AGENDA REPORT**

Reviewed By:	
DH	_____
CM	<u> X </u>
CA	<u> X </u>

DATE: MAY 1, 2018
TO: CITY MANAGER/CITY COUNCIL
FROM: CITY ATTORNEY
SUBJECT: FIRST READING OF ORDINANCE ADOPTING TRANSITION TO BY-DISTRICT ELECTIONS FOR CITY COUNCIL MEMBERS

RECOMMENDED ACTION:

It is recommended that the Council introduce for first reading either attached Ordinance No. 18-XX (Action Document A), or attached Ordinance No. 18-XX (Action Document B), adopting a by-district election system and election sequence for the City Council entitled:

Action Document A

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA ESTABLISHING AND IMPLEMENTING BY-DISTRICT ELECTIONS (GOV. CODE § 34886 & ELEC. CODE §10010);

Action Document B:

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA ESTABLISHING AND IMPLEMENTING BY-DISTRICT ELECTIONS AND AN AT-LARGE MAYOR (GOV. CODE § 34886 & ELEC. CODE §10010).

BACKGROUND:

On February 2, 2018, the City received a letter from attorney Russell D. Myrick of the law firm RDM Legal Group threatening to sue the city for alleged violations of the California Voting Rights Act ("CVRA") (Elec. Code §§ 14025-14032) unless the city voluntarily converts to a by-district election system. The CVRA only applies to jurisdictions, like the City of Dana Point, that utilize an at-large election method, where voters of the entire jurisdiction elect each of the members of the City Council. Similar letters have been served and lawsuits have been filed in recent years against dozens of cities and other public agencies for alleged CVRA violations, including many nearby cities. A copy of Mr. Myrick's letter is attached to this staff report (Attachment C).

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The threshold to establish liability under the CVRA is extremely low, and prevailing CVRA plaintiffs are guaranteed to recover their attorneys' fees and costs. As a result, every government defendant in the history of the CVRA that has challenged the conversion to district elections has either lost in court or settled/agreed to implement district elections, and been forced to pay at least some portion of the plaintiffs' attorneys' fees and costs. Several cities that have extensively litigated CVRA cases have been eventually forced to pay multi-million dollar fee awards.

In order to avoid the potentially significant litigation expenses that are likely to occur if the City retains its at-large election method of election, at the City Council's February 20, 2018 hearing, the Council adopted Resolution No. 18-02-20-04 outlining its intention to transition from at-large to by-district elections, pursuant to Elections Code section 10010(e)(3)(A). (Attachment D.) As stated in that Resolution, the City Council took that action in furtherance of the purposes of the CVRA.

The City Council is now reaching the end of its transition to a by-district method of election, having held four public hearings following the Council's adoption of Resolution No. 18-02-20-04. Pursuant to Elections Code section 10010(a)(1), the City held two public hearings (before drawing any draft maps of proposed voting districts) in order to receive public input regarding the composition of the districts. The first such hearing was held on March 6, and the second hearing was held on March 20. At the City Council's April 3 and April 17, 2018 public hearings, the City's districting consultant, NDC, presented multiple proposed district maps pursuant to input provided by both the Council and the public. Pursuant to the Council's direction, NDC prepared variations of maps with five voting districts, as well as maps with four districts and an at-large mayoral office. Public comment was also taken. In addition, pursuant to the Council's request, two additional public forums on the proposed district maps were held on April 9, 2018 and April 25, 2018. At the forums, the City provided a Spanish-language interpreter for members of the public, and the written materials were provided in both English and Spanish. After discussion and consideration of public comment at the April 9, 2018 public forum, three new maps were added to the City's website. Staff will provide an update regarding any developments from the April 25th forum at the May 1st Council meeting.

In order to allow the Council maximum flexibility following the final hearing on May 1st, staff prepared two ordinances: one adopting a five (5) councilmember district map prepared by NDC, and one adopting a four (4) councilmember district map with an at-large Mayor prepared by NDC. (See Attachments A and B). If the Council desires to avail itself of the safe harbor provision it needs to choose a district map (and in doing so determine if it wishes to have 4 or 5 districts), and make a determination regarding sequencing (i.e., determine which districts will have elections in 2018 and which will have elections in 2020). The draft ordinances have blanks which need to be filled in once these choices have been made.

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DISCUSSION:

- **The California Voting Rights Act**

The CVRA was specifically enacted in 2002 to eliminate several key burden of proof requirements that exist under the federal Voting Rights Act of 1965 ("FVRA") (52 U.S.C. § 10301 *et seq.*) after several jurisdictions in California successfully defended themselves in litigation brought under the FVRA. The intent of the legislature was to facilitate private suits that ultimately force public entities to shift from "at-large" to "by-district" elections.

Specifically, the CVRA removes two elements that must be met in order to establish a violation under the FVRA: (1) the "geographically compact" FVRA precondition (e.g., can a majority-minority district be drawn?), and; (2) the "totality of the circumstances" or "reasonableness" test, whereby the defendant can defeat a lawsuit by demonstrating that certain voting trends – such as racially polarized voting – occur for reasons other than race, or that minority voters are still able to elect their candidate of choice. Under the CVRA, the only "element" a plaintiff must establish is that racially polarized voting occurs in a jurisdiction with at-large elections, without regard for why it might exist. (Elec. Code § 14028.) Despite its removal of key safeguards contained in the FVRA, California courts have held that the CVRA is constitutional. (See *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660.)

Most recently, on February 23, 2018, the U.S. District Court for the Southern District of California dismissed a lawsuit challenging the constitutionality of the CVRA and of the City of Poway's adopted district map. The lawsuit was initiated by the former mayor of Poway, Don Higginson, who alleged that the CVRA and Poway's by district map adopted pursuant thereto violate the equal protection clause of the U.S. Constitution. Higginson sought an order declaring both the CVRA and Poway's map unconstitutional and enjoining their enforcement and use. The Court not only denied Higginson's motion for a preliminary injunction, but also dismissed the case in its entirety based on lack of standing. (See *Higginson v. Becerra, et al.* (Feb. 23, 2018, No. 17cv2032-WQH-JLB) ___ F.Supp.___.)

Over the relatively short history of the CVRA, plaintiff public agencies have paid over \$15 million to CVRA plaintiff attorneys, including a recent settlement in West Covina for \$220,000. (See Table of Results of CVRA Litigation (Attachment E).) The City of Modesto, which challenged the CVRA's constitutionality, ultimately paid \$3 million to the plaintiffs' attorneys, and the cities of Palmdale and Anaheim, who also aggressively litigated CVRA claims, ultimately paid \$4.5 million and \$1.2 million in attorneys' fees, respectively. These figures do not include the tens of millions of dollars government agency defendants have spent on their own attorneys and associated defense costs. All of the above cities – like all other CVRA defendants – ultimately ended up converting to district elections.

Recognizing the heavy financial burden at-large jurisdictions are now facing, in 2016, the California Legislature amended the Elections Code to simplify the process of converting to by-district elections to provide a "safe harbor" process designed to protect agencies

from litigation. (Elec. Code § 10010(e)(3)). If a city receives a demand letter, such as the RDM letter here, the city is given 45 days of protection from litigation to assess its situation. If within that 45 days, the city adopts a resolution declaring the Council's intent to transition from at-large to district based elections, the potential plaintiff is prohibited from filing a CVRA action for an additional 90 day period, during which time the process outlined below must occur. (Elec. Code § 10010(e)(3).) The Council was advised of this information at its February 20th meeting, and at that time voted unanimously to adopt Resolution No. 18-02-20-04, and to approve a tentative timeline that was presented and which included a schedule that would allow for compliance with the 90 day safe harbor time frames.

- **Process For Switching To By-District Elections**

In order to avoid the significant litigation expenses that are likely to occur if the City retains its at-large election method of election, at the City Council's February 20, 2018 hearing, the Council unanimously adopted Resolution No. 18-02-20-04 outlining its intention to transition from at-large to by-district elections, pursuant to Elections Code section 10010(e)(3)(A). (Attachment D.) It also approved a timeline that would allow for compliance with the 90 day time frame included in the safe harbor process. As a result, no potential plaintiff can file a CVRA lawsuit against the City before May 21, 2018.

Having adopted a resolution of intent, the first steps in the City's process of converting from its current at-large method of election to a by-district system was to hold two public hearings to receive public comment regarding the composition of the yet to be formed voting districts. (Elec. Code § 10010(a)(1).) The first such hearing was held on March 6, 2018, and the second such hearing was held on March 20, 2018.

Following the March 20th meeting, the City's districting consultant, National Demographics Corporation ("NDC"), prepared multiple proposed district maps pursuant to input provided by both the Council and the public. Pursuant to the Council's direction, NDC prepared variations of maps with 5 voting districts, as well as maps with 4 districts and an at-large mayoral office which were considered at the April 3rd and April 17th public hearings. Public comment was also taken. Pursuant to the Council's request, two additional public forums on the proposed district maps was held on April 9 and April 25, 2018. The City provided a Spanish-language interpreter for members of the public, and the written materials were provided in both English and Spanish. After discussion and consideration of public comment at the public forum on April 9, 2018, three new maps were added to the City's website.

The final required public hearing is set for May 1, 2018. After the public hearing, and assuming the Council desires to avail itself of the safe harbor provision, it must adopt an ordinance transitioning the City to by-district elections. The ordinance should establish districts and set a sequencing for elections, including which seats will be filled in 2018 and which seats will be filled in 2020. In setting a sequencing schedule, it should be noted that the term of the two at large seats currently held by Councilmembers Lewis and Wyatt will not expire until 2020.

- **Criteria to be Considered**

While all public input concerning the composition of the City's proposed voting districts should be considered, there are several mandatory criteria that the City will have to comply with when the actual districts are created:

1. Population equality across districts. (Elec. Code § 21601; Gov. Code § 34884 ["The districts shall be as nearly equal in population as may be."])
2. Race cannot be the "predominant" factor or criteria when drawing districts. (*Shaw v. Reno* (1993) 509 U.S. 630; *Miller v. Johnson* (1995) 515 U.S. 900.)
3. Compliance with the FVRA, which, among other things, prohibits districts that dilute minority voting rights, and encourages a majority-minority district if the minority group is sufficient large and such a district can be drawn without race being the predominant factor. (See, *Bartlett v. Strickland* (2009) 556 U.S. 1.)

Additionally, pursuant to Elections Code section 21601 and Government Code section 34884, the City Council may consider the following factors when establishing districts (which are not exclusive): (a) topography, (b) geography, (c) cohesiveness, contiguity, integrity, and compactness of territory, and (d) community of interests. The City Council may also plan for future growth, avoid head-to-head contests between incumbents (to the extent possible), consider boundaries of other political subdivisions, and consider physical/visual geographical and topographical features (natural and man-made). The City Council may choose to include some, all or none of these criteria, or may choose to come up with unique criteria that Council believes is applicable to the City. In addition, members of the community may suggest additional or alternative criteria that the Council may want to consider.

The district map ultimately chosen by the Council should take into account a number of factors, including concerns the Councilmembers have heard from the public, keeping communities of interest together, other traditional districting criteria, and ensuring both continuity and a comprehensive "entire city" orientation to decision making as the City transitions to district elections.

- **Permissible Forms of By-District Government**

In addition to the above criteria, the City has several options when it comes to the number of districts permitted. A city may adopt an ordinance that requires the members of the legislative body to be elected in five, seven, or nine districts (Gov. Code § 34871(a)); or in four, six, or eight districts, with an elective mayor (Gov. Code § 34871(c)). Thus, the City should consider (in conjunction with NDC) the number of districts to be established.

Although permitted by Government Code 34871(c), there is an open legal question as to whether a City that adopts a by-district method of election but establishes a separately

elected at-large mayoral office is insulated from liability under the CVRA. The CVRA defines "at-large method of election" to include any method of election "that combines at-large elections with district-based elections." (Elec. Code § 14026(a)(3).) This definition could arguably include district elections where the mayor is separately elected at large. Only an at-large method of election can violate the CVRA. (Elec. Code § 14027.)

As explained to the Council and public at the April 3rd public hearing (and the April 9th and April 25th forums), this issue was being litigated in an action involving the City of Rancho Cucamonga, although that case has now settled. As part of the settlement, the City is required to pay the plaintiff's legal fees. The amount has not yet been determined, but the plaintiff is seeking \$1,300,000 and the City asserts the amount should not exceed \$190,000. Until a court of appeals rules on the issue, there is no certainty as to whether a City may avoid CVRA liability if it has a directly elected, at-large mayor. In short, notwithstanding the City's ongoing efforts to comply with the CVRA safe harbor provision, the City is at risk of being sued for a CVRA violation if the City adopts a by-district method of election but establishes a separately elected at-large mayoral office. The plaintiff bar position on this issue is perhaps best exemplified by the following excerpt from a document filed with the court by the plaintiff's attorney in the Rancho Cucamonga case, in which he addresses the alleged inadequacies of the at-large mayoral system:

For more than fifty years, courts have recognized that when addressing the violation of voting rights, "the court has not merely the power, but the duty, to render a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). Ignoring this established principle, Defendant asks this Court to declare Plaintiffs' case moot and, in so doing, neither "eliminate the discriminatory effects of the past," as unlawfully-elected council members would remain in office until December 2020, nor "bar like discrimination in the future," as one council seat would continue to be elected in the same at-large manner that has proven to dilute the Latino vote in Rancho Cucamonga and the other four would be elected pursuant to a district map that emulates the previous at-large system. *Id.*

While Defendant's newly adopted plan, to be phased in over the next four years, may be marginally better than its previous system of electing all five of its council members through at-large elections, it does not go nearly far enough. Under that new plan, one of the five council seats, coined the "mayor," would be elected in the same at-large manner, and thus the new plan is still a suspect "at-large method of election," as that phrase is explicitly defined in the California Voting Rights Act ("CVRA"). With nothing more in that new plan to eliminate the racially polarized voting that has plagued Defendant's city council elections, that new plan violates the CVRA just like its predecessor. Moreover the four-district map drawn by the self-interested city council without the oversight of this Court, was not drawn to remedy the years of vote dilution suffered by Latinos in Rancho Cucamonga as any remedy for the violation of the CVRA must be; it was drawn to

perpetuate the political careers of its unlawfully elected authors and frustrate this case.

In keeping with the established principle that voting rights violations should be *completely* remedied when they are called to the attention of the courts, the Legislature enacted the CVRA, commanding this Court to formulate what *it* believes are "appropriate remedies." Elec. Code 14029. With its motion, Defendant seeks to substitute its own judgment for that of this Court, hoping that this Court will abdicate its "duty...to eliminate the discriminatory effects of [Defendant's] past [violation of the CVRA] as well as bar [violations of the CVRA] in the future. *Louisiana v. United States*, 380 U.S. 145, 154 (1965). The law does not permit Defendant to usurp the role of this Court by adopting a half-measure that will continue to dilute the Latino vote. Plaintiffs' claim is plainly not moot because there is plenty of relief that the Court could, and should, order. For example:

- a truly district-based election system with all district-elected council members;
- a district map tailored to remedy the years of dilution of the Latino vote in Rancho Cucamonga; and
- a special election to have a district-elected council as soon as practicable;

All of that is the same sort of relief that has been ordered by other courts addressing CVRA violations, and federal courts addressing violations of the analog federal Voting Rights Act ("FVRA"). This Court should decide whether those measures, or perhaps something completely different, are "appropriate remedies" in this case once it has heard all of the evidence at trial. Having been denied their most fundamental of rights for decades, the Latino residents of Rancho Cucamonga deserve nothing less.

At this point, it is unclear whether such arguments will ultimately be upheld by the Courts. The point of including the above is to simply ensure that the City Council is aware that the issue is still unsettled, and the City is at risk of not getting the benefit of the CVRA safe harbor provisions if it chooses to adopt a separately elected at-large mayoral system.

- **Remedies Other Than Districting**

At past Council meetings on this topic, there has been discussion regarding Mission Viejo's approach to CVRA compliance, i.e., acknowledging racially polarized voting exists, but then asserting the appropriate remedy is something other than districting. There may in fact be other ways of remedying violations of the CVRA, however if the City Council decides to pursue a different remedy, the City will lose the benefit of the safe harbor provisions in Elections Code Section 10010(e)(3). This means that the City will be at risk of being sued, and having to prove in court that its chosen remedy is appropriate. At a minimum this

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means that the City would incur significant legal fees, and it plainly puts the City at risk of losing what is known to be very costly litigation.

To date, no remedy other than districting has been "approved" by the courts. In response to the Mission Viejo approach, the plaintiffs' lawyer is quoted in the Voice of OC as saying that while there may be other ways to remedy a violation, the only option the Courts currently recognize is districting:

"This is maybe a bit of a nuance here -- but in my view, districts would be a remedy, but likely not the best remedy in Mission Viejo," Shenkman said. "But to say that districts are not a remedy is a mischaracterization ... districts are the only really safe harbor (under state law) for better or for worse. And we operate based on what the law is and not what the law should be."

The entire article is included herein as Attachment F. On March 22nd, a lawsuit was filed against the City of Mission Viejo seeking to enjoin its approach and asserting that it has violated the CVRA because of the admitted existence of racially polarized voting, as well as an alleged history in the city that comprises "an atmosphere of racial hostility." It is worth noting that the Complaint seeks to enjoin the current at large system. It remains to be seen if the Plaintiff will seek an injunction in connection with the 2018 election to prevent it from going forward as an at large election, and seek to impose district elections, cumulative voting, or other remedies as part of this election cycle. That approach would be similar to what occurred in Palmdale where the result was districts drawn by the plaintiff and all five seats being put up for election at once. Staff will monitor the litigation and advise the Council of any material developments.

CONCLUSION:

It is recommended that should the Council wish to avail itself of the safe harbor provision, it introduce for first reading either attached Ordinance No. 18-XX (Action Document A), or attached Ordinance No. 18-XX (Action Document B), to adopt a by-district election system and election sequence for the City Council. The Council needs to provide input to "fill in the blanks" of the draft ordinances as to its selected map, and the election sequencing it desires.

FISCAL IMPACT:

There is no fiscal impact associated with holding this public hearing.

The fiscal impact of moving forward with the transition to district elections, including the demographic consultant cost, the City's anticipated legal fees, and the amount likely to be paid to RDM under the CVRA safe harbor provision, is estimated to be approximately \$80,000. Additional legal costs could be incurred for additional analysis and public hearings. The City's good faith and voluntary approach to transition to by-district elections may forestall further threats and demands for attorneys' fees, but that cannot be

guaranteed as other jurisdictions have suffered such demands even after initiating such efforts.

Should the Council choose not to voluntarily convert to district elections and defend the threatened lawsuit, the costs are projected to be significant due to the requirement that the City pay the plaintiff's fees and costs. As demonstrated in Attachment C, awards in these cases have reached upwards of \$4,500,000. When sued, even the settlements reached by cities have included paying the plaintiff's attorneys' fees. If the City Council chooses to maintain its at-large elections and defend the threatened lawsuit, it should budget a significant amount for its own attorneys' fees, and should consider a contingency budget for use to pay the plaintiff's legal fees in the event of a loss.

ALTERNATIVE ACTION:

The City Council could provide other direction.

ACTION DOCUMENTS:

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A. Ordinance No. 18-XX	10
B. Ordinance No. 18-XX	16

SUPPORTING DOCUMENTS:

C. Letter from RDM Legal Group	22
D. City Council Resolution No.18-02-20-04	25
E. Table of Results of CVRA Litigation	29
F. Voice of OC Article, dated March 19, 2018	32
G. Correspondence	34

SUPPORTING DOCUMENT C

BOBBI OGAN

From: Ross Teasley <ross@danapointer.com>
Sent: Wednesday, May 02, 2018 2:15 PM
To: districting
Subject: New Voting Districts Map as Google Map?

Hi,

Is it possible to get from the demographer a standard Google Maps overlay version of the districts as marked in the approved Tan VI map?

Thanks for your help,
Ross

From: Carole Weling <weling6659@gmail.com>
Date: May 4, 2018 at 8:20:59 PM GMT+3
To: KATHY WARD <kward@danapoint.org>, Mark Denny <mdenny@danapoint.org>, dlewis@danapoint.org, pw Wyatt@danapoint.org, RViczorek@danapoint.org, jtomplison@danapoint.org, jmuller@danapoint.org, Capo Cares <capocares@gmail.com>, Rob Neal <rob.neal@hagerpacific.com>, editorial@danaponttimes.com, Mike Killebrew <MKILLEBREW@danapoint.org>
Subject: DISTRICT ISSUE

PLEASE PLACE THIS INTO THE PACKET FOR THE COUNCIL MEMBERS.

WE VOTE FOR DISTRICT 5 --- THIS IS THE BEST REPRESENTATION FOR EACH OF THE PROPOSED DISTRICTS. ESPECIALLY CAPISTRANO BEACH.

JAMES AND CAROLE WELING
CAPISTRANO BEACH

BOBBI OGAN

From: Linda Traylor <Linda_Traylor@msn.com>
Sent: Saturday, May 05, 2018 9:22 AM
To: districting
Subject: District Vote

What the Council did at the meeting was not fair to anyone but the 2 Council men from Monarch and the Bible area. What a disaster that was. They seemed confused and didn't care Debra Lewis was trying to convey. I'd say they botched it totally. Is what they did legal. I bet not.

Linda Traylor

Sent from Mail for Windows 10

From: <sj4ucla@cox.net>

Date: May 8, 2018 at 3:55:58 AM GMT+2

To: <kward@danapoint.org>

Subject: District voting May 19th meeting

Dear Dana Point City Council Members,

Please keep Capo Beach intact. We need the 4 district & mayor election model to do this. We in Capo Beach want to vote this year in our district. Please be fair to all districts. We are not being represented fairly and equally. Listen to the people you represent and do what is right for all districts.

Thank You,

John & Sharon Marshall, residents & voters in Capo Beach