TOWN OF WINDSOR
AGENDA REPORT

Town Council Meeting Date: November 28, 2018

To: Mayor and Town Council
From: Robin Donoghue, Town Attorney
Subject: Study Session Regarding Response to Notice of Violation of the California Voting Rights Act

Recommendation to Council:
Discuss and hear public comment on a legal challenge to the Town's at-large election system and potential response(s).

Background and Discussion:
On October 22, 2018, the Town received a letter (attached) from Kevin Shenkman on behalf of his client, the Southwest Voter Registration Project ("Education Project"), alleging a violation of the California Voting Rights Act ("CVRA"). The letter claims that the Town's current at-large election system dilutes the ability of Latino voters to elect candidates of their choice or otherwise influence the outcome of Town Council elections. Specifically, the letter states that (1) Rosa Reynoza ran for Town Council in 2016 and lost despite receiving the support of Latino voters in the Town, and (2) Latinos comprise approximately 31.8% of the Town's population but no Latino has served on the Town Council. The letter threatens litigation if the Town declines voluntarily to change to a district-based election system. Attorney Shenkman has submitted similar claims against cities, counties and school districts throughout California.

Since incorporation, the Town has had an at-large election system whereby the voters throughout the entire Town choose each of the five Councilmembers in staggered elections. By contrast, in by-district elections, each Councilmember is chosen only by the voters residing in the same district as the Councilmember. Because the term of office for a Councilmember would remain at four years, in a district election system residents of a certain district would vote for the Town Council once every four years.

The Federal Voting Rights Act ("FVRA") was enacted in 1965 to protect the voting rights of Americans of all races. The CVRA was signed into law in 2002 and is set forth in California Elections Code sections 14025 through 14032. The CVRA is intended to expand the protections of the FVRA by making it easier for plaintiffs to prevail in lawsuits against public entities that utilize at-large elections. All persons have standing to sue for race-based vote dilution because all persons are members of a race.[1] In a CVRA challenge, a plaintiff need only prove the existence of "racially polarized voting" to establish liability. "Racially polarized voting" is defined as voting in which there is a difference in the choice of candidates preferred by voters in a protected class, from the choice of candidates preferred by other voters in the rest of the electorate. To establish racially polarized voting, plaintiffs typically use experts to conduct statistical analyses to estimate group voting behavior in previous elections in which at least one

[1] *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660), *cert. denied,* 552 U.S. 974.

candidate was a member of a protected class. A plaintiff is not required to prove an intent to discriminate against a protected class on the part of either voters or elected officials. To confirm compliance with the CVRA, a public entity must undertake sophisticated demographic analysis. Such studies commonly focus on past election results, success of candidates in the protected class, and other factors, such as past discrimination, that may be present. The Town Attorney's Office has contracted with Q2 Data & Research, LLC to conduct statistical analyses and, should Council intend to move toward district elections, to assist with determining district boundaries.

If demographic and statistical evidence confirms a violation of the CVRA, the remedies are substantial. The courts have broad discretion to tailor remedies to address a violation, including the possible imposition of court-ordered district elections. Also, a prevailing plaintiff is entitled to an award of attorneys' fees and costs of litigation against the defendant. These costs are on top of the defendant's own costs of litigation. Attorneys' fees in recent CVRA cases have ranged from approximately $100,000 for a quick settlement to over $4 million for a case fully litigated. In light of the relatively low threshold for liability under the CVRA and the high costs and risks of litigation, almost all local agencies faced with a CVRA challenge have transitioned to district-based elections, either voluntarily or through settlement of litigation. Over 80 cities have switched to district elections as a result of CVRA challenges, including the following cities in 2018: Antioch, Concord, Fremont, Half Moon Bay, Martinez, Menlo Park, Redwood City, Santa Rosa, and South San Francisco. Cities with relatively small populations that have switched to district elections include Tehachapi (14,414), Duarte (21,321), Lemoore (24,531), and Atwater (28,168). Furthermore, we are not aware of any CVRA litigation in which the defendant entity has yet prevailed. Most recently, just a couple weeks ago, the City of Santa Monica lost a CVRA challenge filed by Mr. Shenkman's firm.

In 2016, in response to the tremendous costs being incurred by local agencies across the state as a result of the attorneys' fees provisions of the CVRA, the State legislature adopted revisions to Elections Code Section 10010 to provide local governments with a "safe harbor." The safe harbor slows the filing of lawsuits and caps attorneys' fees, provided that the local government acts quickly to transition to district elections. To invoke protections of the safe harbor, a local agency must take prompt action. Within 45 days of receipt of a demand letter under the CVRA, the local government must adopt a resolution (a) outlining its intent to transition from at-large to district-based elections, (b) identifying the specific steps it will undertake to facilitate the transition, and (c) setting forth an estimated timeframe for doing so. With respect to the letter sent from Mr. Shenkman, the 45-day period ends on December 6, 2018. If the local government adopts a resolution of intent within the 45-day period, the prospective plaintiff is barred from filing suit for a period of 90 days thereafter. If, within 90 days of its resolution of intent, the local government adopts an ordinance establishing district-based elections, the prospective plaintiff will be limited to recovery of the costs it incurred in preparing the CVRA demand letter, not to exceed $30,000.

Leading up to the adoption of an ordinance establishing district-based elections, the local government must hold at least four public hearings. The hearings must include at least two public hearings *prior* to the drafting of proposed district maps. Those hearings must be held over a period of no more than thirty days. Two additional public hearings must be held *after* the maps are drawn. Those additional hearings must be held over a period of no more than 45 days.

Drafts of the maps must be published at least seven days before consideration at a hearing, and if revised, the map must be made available to the public for at least seven days before its adoption. If the proposed district elections are to be staggered, the potential sequence of elections must be made public prior to the second set of two public hearings. A final, fifth public hearing may be held at the time of adoption of the final ordinance. If the Council were to adopt a Resolution of Intent at its December 5 regular meeting, it would have until March 5, 2019, in which to hold the requisite public hearings and potentially adopt an ordinance.

AB 2123, effective on January 1, 2019, permits the Town to enter into a written agreement with Shenkman & Hughes to extend the 90-day period for another 90 days, or until approximately June 3, 2019, and remain immune from litigation during that period. The additional 90 days would allow the Town to conduct greater public outreach, encourage more public participation, and receive greater public input on district boundaries before adopting an ordinance transitioning to district elections. Within ten days of entering into such an agreement, the Town would be required to post on its website a tentative schedule of the public outreach events and the public hearings to be held.

Fiscal Impact:
The full fiscal impact of defending or settling a CVRA challenge cannot be determined at this time. If the Council were to determine to transition to district elections, liability to the Education Project (and any future plaintiffs) would be capped at $30,000. Costs of expert analysis and assistance in drawing district boundaries is preliminarily estimated at $50,000.

Environmental Review:
The action of considering a response to a CVRA challenge is exempt from the California Environmental Quality Act ("CEQA") because it is not a project which has the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect change in the environment, pursuant to CEQA Guidelines Section 15378.

Attachment:
1. Notice of Violation of CVRA from Shenkman & Hughes

Prepared by:
Robin Donoghue
Town Attorney

Reviewed by:
Maria De La O
Town Clerk

Recommended by:
John Jansons
Town Manager

SHENKMAN & HUGHES
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VIA CERTIFIED MAIL

October 15, 2018

Maria De La O – Town Clerk
Town of Windsor
9291 Old Redwood Hwy.
Windsor, CA 95492

Re: Violation of California Voting Rights Act

I write on behalf of our client, Southwest Voter Registration Education Project. The Town of Windsor ("Windsor") relies upon an at-large election system for electing candidates to its Town Council. Moreover, voting within Windsor is racially polarized, resulting in minority vote dilution, and therefore Windsor'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.*

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

The most recent election – in 2016 - is particularly illustrative. In 2016, Rosa Reynoza ran for Town Council. Ms. Reynoza received significant support from Latino voters, but was unable to secure sets on the Town Council due to the bloc voting of the non-Latino majority.

According to recent data, Latinos comprise approximately 31.8% of the population of Windsor. The contrast between the significant Latino proportion of the electorate and what appears to be a complete absence of Latinos elected to the Town Council is telling.

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 Town Council, with districts that combine all incumbents into one of the four districts.

Given the lack of Latino representation on the Town Council in the context of racially polarized elections, we urge Windsor 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 December 5, 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