

CITY OF SANTA ROSA
CITY COUNCIL

TO: MAYOR AND CITY COUNCIL

FROM: SUE GALLAGHER, CITY ATTORNEY

SUBJECT: CALIFORNIA VOTING RIGHTS ACT

AGENDA ACTION: RESPONSE TO LEGAL CHALLENGE TO CITY'S AT-LARGE
ELECTION SYSTEM (CALIFORNIA VOTING RIGHTS ACT)

RECOMMENDATION

It is recommended by the City Attorney that Council state its intent to respond to a legal challenge, brought under the California Voting Rights Act, to Santa Rosa's at-large voting system. Council action may be by:

1. Motion directing staff to research and defend against claims that the City's at-large election system violates the California Voting Rights Act; or
 2. Resolution stating Council's intent to place a measure on the ballot in June 2018, or as soon thereafter as is practical, proposing an amendment to the City Charter to transition the City to a district-based election system, and directing staff to undertake associated actions; or
 3. Resolution stating Council's intent to transition to district-based elections by ordinance adopted pursuant to Elections Code Section 10010 and Government Code Section 34886, and directing staff to undertake associated actions; or
 4. Motion directing staff to seek declaratory relief in Superior Court.
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EXECUTIVE SUMMARY

The Southwest Voter Registration Education Project (the "Education Project"), through its attorney Kevin Shenkman, has submitted a certified letter challenging the City's at-large election of council members. The Education Project alleges that racially polarized voting within the City has combined with the City's at-large election system to impair the ability of Latino voters to elect candidates of their choice or to influence the outcome of an election. The Education Project thus alleges that the City's at-large election system

may violate the California Voting Rights Act, and it threatens litigation if the City does not voluntarily transition to a district-based election system. Attorney Shenkman has submitted similar claims against cities, counties and school districts throughout California. The City Attorney recommends that the Council give direction as to the appropriate response to the allegations.

BACKGROUND

Pursuant to Section 4 of the City Charter, the City of Santa Rosa elects its council members through an at-large voting system. The seven members of the Council are each elected through a city-wide vote. Elections are held in even years. Three seats are filled in one election cycle and the remaining four seats are filled in the next cycle, two years later. In each cycle, the candidates that receive the most votes city-wide earn a four-year term on the Council. There is no limit to the number of terms that a council member may serve.

The California Voting Rights Act (CVRA) was enacted in 2002 and is set forth in California Elections Code sections 14025 through 14032. In its key provision, the CVRA prohibits the use of an at-large election system in a manner that impairs the ability of a protected class to elect candidates of its choice or to influence the outcome of an election.

a. Essential elements of the CVRA

There are four essential elements for a finding of violation under the CVRA:

- **At-large election system:** Voters of the entire city vote for, and elect, all members of the City Council. As noted above, by Charter, Santa Rosa has an at-large election system, in which the top vote-getters across the City are elected to the City Council.
- **Presence of protected class:** Class of voters who are members of a race, color or language minority group, as defined by the Federal Voting Rights Act. Latino voters qualify as a protected class.
- **Racially polarized voting:** Voters in the protected class prefer candidates and electoral choices that are different from those preferred by voters in the rest of the electorate. The Education Project alleges that Latinos in Santa Rosa vote differently than the rest of the Santa Rosa electorate. The Education Project, however, has not submitted any statistical evidence to support that allegation.

- **Impairment of voting influence:** The votes of those *not* in the protected class have the effect of defeating the preferences of the protected class. The Education Project alleges that the non-Latino majority in Santa Rosa vote as a bloc and thereby defeat the preferences of the City's minority Latino voters. The Education Project, however, again has not submitted any statistical evidence to support the allegation.

It is important to note that no finding of racial animus or intent to discriminate is required to find a violation of the CVRA. Nor is there any requirement that the protected class be concentrated in a single geographic area. For purposes of liability under the CVRA, it is irrelevant whether a voting district could reasonably be designed such that the protected class would constitute a majority of the voting district. Liability under the CVRA rests solely upon the presence of racially polarized voting that results in impairment of the voting strength of a protected class of voters.

b. Investigation under CVRA

To confirm compliance with the CVRA, a public entity must undertake sophisticated analysis of demographics and historic voting patterns. In particular, studies commonly focus on:

- **Past election results:** Presence or absence of racially polarize voting may be determined by examining results of elections in which at least one candidate is a member of the protected class or the election involves ballot measures or other electoral choices that affect the rights and privileges of the protected class.
- **Success of candidates of the protected class:** In particular, the CVRA highlights whether candidates who are members of the protected class have been elected to the City Council. (Where the number of candidates from the protected class are less than the number of seats available, the relative group-wide support received by such candidates may be considered.)
- **Other factors:** Other factors may be considered, including history of discrimination in the community, use of voting practices or procedures that may result in the dilution of protected class voting, denial of access to procedures that determine which candidates receive financial or other support in a given election, past discrimination in education, employment or health which might hinder electoral participation, and use of overt or subtle racial appeals in campaigns.

c. Remedies

If demographic and statistical evidence confirms a violation of the CVRA, the remedies are substantial:

- **Imposition of district elections:** The CVRA gives the courts wide discretion to tailor remedies to address violations, including, under some circumstances, the imposition of court-ordered district-based elections.
- **Costs and attorneys' fees:** If a lawsuit is filed and plaintiffs prevail, plaintiffs may be entitled to some or all of their costs and attorneys' fees. Such costs and attorneys' fees can be significant. Attorneys' fees in recent CVRA cases have ranged from under \$100,000 in the case of 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.

d. Limited Safe Harbor Provisions:

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:

- **Resolution of intent:** Within 45 days of receipt of 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 Certified Letter sent from Mr. Shenkman, the 45 day period ends on August 31, 2017. If the local government adopts a resolution of intent within the 45 day period, the prospective plaintiffs are barred from filing suit for a period of 90 days thereafter.

- **Adopt ordinance establishing district based elections:** 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. Mr. Shenkman, counsel for the Education Project, has indicated informally that, in light of the pending Roseland annexation, he may stipulate to an extension of the 90 day period, so as to allow the new community to fully participate in the process.
- **Public Hearings:** Leading up to the adoption of an ordinance establishing district-based elections, the local government must hold at least four public hearings. The public 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 forty-five 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.

PRIOR CITY COUNCIL REVIEW

On August 8, Council discussed the threatened litigation in closed session.

ANALYSIS

The Southwest Voter Registration Education Project (the “Education Project”), represented by attorney Kevin Shenkman, has challenged the City’s at-large election of members of the City Council. The Education Project alleges that racially polarized voting within the City has combined with the City’s at-large election system to impair the ability of Latino voters to elect candidates of their choice or to influence the outcome of an election. The Education Project thus alleges that the City’s at-large election system may violate the California Voting Rights Act, and it threatens litigation if the City does not voluntarily transition to a district-based election system.

The Education Project has not provided any statistical evidence of racially polarized voting within the City or of any impairment of the ability of Latino voters to elect candidates of their choice or to influence the outcome of an election. Nor does staff have any such evidence at this time.

Nevertheless, in light of the costs of defending a CVRA lawsuit and the risk of potential liability for plaintiffs' attorneys' fees, the City Attorney recommends that the Council consider a range of options:

- **Defense of Lawsuit:** The Council may direct staff to research and pursue a defense of the claim. A successful defense would depend upon the City's ability to establish that (a) no racially polarized voting exists within the City, or (b) that if there is such polarized voting, it does not operate to impair the voting influence of a federally protected voting class, or (c) that other legal defenses apply. Defense costs are likely to include outside counsel and demographic consultant fees. Engaging in litigation runs the risk of liability for plaintiff's attorneys' fees as well.
- **Election:** The Council may adopt a resolution stating its intent to place a measure on the ballot proposing an amendment to the City Charter to transition the City to a district-based election system. The proposed district maps and voting system would be researched and formulated over the coming months. The election could be held in June 2018 or as soon thereafter as practical. If voters reject district elections (as they did in 2012), the CVRA litigation would likely resume.
- **Ordinance:** Government Code Section 34886 generally allows cities to adopt an ordinance to transition to district elections without need for voter approval. The statute and case law, however, are not entirely clear whether this Section gives the Council the authority to act by ordinance, independent of the provisions of the City Charter. Notwithstanding the legal debate, the Council may adopt a resolution stating its intent to transition to district-based elections by ordinance adopted pursuant to Elections Code Section 10010 and Government Code Section 34886. Again, the proposed district maps and voting system would be researched and formulated over the coming months.
- **Court Action:** The Council may direct staff to file an action for declaratory relief in Superior Court, seeking a judicial determination of the lawfulness of the City's existing at-large election system. Through such declaratory relief action, the City could research and place before the Court an analysis of the demographics and voting patterns of the City residents and request the Court's evaluation. The Court's decision could set a clear path for further Council action.

FISCAL IMPACT

Not known at this time.

ENVIRONMENTAL IMPACT

This action is exempt from the California Environmental Quality Act (CEQA) because it is not a project which has a potential for resulting in either a direct physical change in

the environment, or a reasonably foreseeable indirect physical change in the environment, pursuant to CEQA Guideline section 15378.

BOARD/COMMISSION/COMMITTEE REVIEW AND RECOMMENDATIONS

Not applicable.

NOTIFICATION

Not applicable.

ATTACHMENTS

Letter from Shenkman & Hughes
Draft Resolution – Election
Draft Resolution -- Ordinance

CONTACT

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