September 24, 2018

**SUBJECT**
Resolution Expressing the City Council’s Intention to Initiate Procedures for Establishing and Implementing By-District Elections for City Council Members Pursuant to Elections Code § 10010

**RECOMMENDATION**
By motion, adopt a resolution expressing the City Council’s intention to initiate procedures for establishing and implementing by-district elections for City Council Members pursuant to Elections Code § 10010.

**BACKGROUND**
The City received a certified letter on August 8, 2018 from Kevin Shenkman of the law firm of Shenkman & Hughes asserting that the City’s at-large council member electoral system violates the California Voting Rights Act (the “CVRA”) (Elections Code §§ 14025-14032) and threatening litigation if the City declines to voluntarily change to a district-based election system for electing City Council Members (Attachment A).

Under its charter, Redwood City utilizes an at-large elections system, which means voters of the entire City elect the seven City Council Members. A district-based election is one in which the City is divided into separate districts, each with one City Council Member who resides in the district and is chosen by the voters in that particular district.

The CVRA only applies to jurisdictions that utilize an “at-large” election method. Numerous cities and other public agencies in California have been sued under the CVRA. 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 governmental defendant that has challenged the conversion to by-district elections under the CVRA has either lost in court or settled/agreed to change its election system and been forced to pay at least some portion of the plaintiff’s attorneys' fees and costs. A few cities that have extensively litigated CVRA cases have been eventually forced to pay multi-million-dollar fee awards and transition to by-district
elections. For example, the City of Palmdale incurred $4.7 million in plaintiff’s legal fees in unsuccessfully defending in court an at-large City Council election system, in addition to their own nearly $2 million in legal defense fees, and the Cities of Santa Barbara, Whittier, Anaheim and Modesto incurred legal fees of between $600,000 and $3 million in settling such challenges. All of these cases ended with those cities adopting by-district elections.

In 2016, the California legislature amended Elections Code § 10010 to simplify the process of converting to by-district elections and to provide a “safe harbor” process to protect agencies from litigation. Under the amended Elections Code, the attorneys’ fees a prospective plaintiff may recover are capped at $30,000, if a public agency adopts a resolution of intention to change to a by-district system of elections within 45 days after the receipt of a letter from that prospective plaintiff alleging a CVRA violation and then completes the transition process within 90 days after the adoption of that initial resolution.

Staff has prepared a draft Resolution of Intention for establishing and implementing by-district elections for City Council consideration. The resolution allows the City to take advantage of the above-described “safe harbor” provisions to implement a by-district election system, thus protecting the City’s taxpayers from the risk of future litigation. The recommendation to approve the resolution is not based on any admission or concession that the City would ultimately be found to have violated the CVRA. Rather, the public interest may be ultimately better served by voluntarily transitioning to district-based elections due to the uncertainty of litigation to defend against a CVRA lawsuit and the potentially extraordinary cost of such a lawsuit, even if the City were to prevail.

The proposed resolution outlines the City’s intention to transition from an at-large to district-based elections, specific steps it will undertake to facilitate this transition, and an estimated time frame for doing so (Attachment B). The proposed schedule envisions City Council adoption of an election district map and election sequence on or before March 31, 2018, followed by a vote on a Charter revision during the statewide primary in March 2020, followed by the first by-district City Council election in November 2020.

A prospective plaintiff may not bring a CVRA lawsuit within 90 days after passage of the resolution and Mr. Shenkman and the City mutually agreed to extend that safe harbor to March 31, 2019. This allows the City to retain its own ability to determine and adopt an appropriate district map instead of having the risk of a court doing so. Additionally, adopting the resolution by March 31 enables the City to cap at $30,000 its exposure of having to reimburse Mr. Shenkman his attorney fees.
ANALYSIS

Under the City Charter, City Council Members are elected in "at-large" elections, in which each City Council Member is elected by the registered voters of the entire City. In 2003, the California Voting Rights Act (CVRA) became law. The CVRA, in an attempt to prevent disenfranchisement of protected classes of voters, establishes a cause of action for “protected class” voters who seek to force cities to convert from at-large to by-district elections if certain conditions are met. Numerous public agencies in California have been sued under the CVRA. Two CVRA cases have been tried to judgment: the City of Palmdale incurred $4.7 million in legal fees in unsuccessfully defending its at-large election system, and the City of Santa Clara recently lost its case but the remedy and legal fees have not yet been determined.

A violation of the CVRA is established if it is shown that racially polarized voting occurs in elections (Elections Code § 14028(a)). "Racially polarized voting" means voting in which there is a difference 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 (Elections Code § 14026(e)).

In the Bay Area, numerous jurisdictions have already received such letters and either completed or begun the change to by-district elections. These include the County of San Mateo, the cities of Brentwood, Concord, Fremont, Half Moon Bay, Martinez, Menlo Park, Pacifica, San Rafael, Santa Clara, Santa Rosa, and South San Francisco; Redwood City School District, Sequoia Union High School District, and the San Mateo County Harbor District.

The letter received from Attorney Kevin Shenkman alleges the City’s at-large City Council election system violates the CVRA by diluting the ability of certain protected classes (Latino Citizen Voting Age Population approximately 24%, Asian Citizen Voting Age Population approximately 13%) of persons within the City to elect candidates. The letter was not accompanied by any evidence to support the claim of a CVRA violation, and the City does not concede to Mr. Shenkman’s allegations. However, the sending of this letter is a precursor to the filing of a lawsuit as required under the 2016 amendments to the CVRA. This letter triggers a very short timeline for the City to act and implement City Council Districts to avoid the excessive attorneys' fees that cities faced before the 2016 amendments. If the City adopts a resolution of intention to change to a by-district system of elections within 45 days after the receipt of the letter and completes the transition process within 90 days after the adoption of that initial resolution, the attorneys’ fees a prospective plaintiff may recover are capped at $30,000, and the City cannot be sued under the CVRA.
This transition timeline is compressed to meet the requirements of the 2016 amendments to the CVRA; the tight schedule is not optimal—it is also not the City’s choice. In addition to the March 31 deadline, there are some very specific actions that are required of the City Council. To start the process, the statute requires that the City Council hold two public hearings to consider the “composition” of districts within thirty days of each other. These two hearings are required before the City Council may consider any draft maps. Next, the City Council must hold at least two additional public hearings during a 45-day period on the map(s) of the districts themselves. The maps must be publicly available for at least seven days before the public hearing, and if a change is made to the map after the first public hearing, the revised map must be available at least seven days before the districts are adopted by ordinance.

The ordinance establishing the City Council districts will also assign an election year to each of the districts. If the current seven-Council Member system is retained, four of the districts would be assigned a November 2020 election and three districts would be assigned a November 2022 election. This is referred to as the “sequencing” of elections. All current City Council Members, and those elected in November 2018, will serve as at-large City Council Members until the end of their terms in 2020 and 2022, at which time they would have to run for re-election by-district, if they reside in one of the districts up for election that year, or simply finish their current term and leave the council. Since each seated council member was elected “at-large,” until their term expires, they can be serving in an “at-large” capacity and are allowed to live anywhere in the City.

If the City Council adopts the resolution, there will be significant staff time needed to transition to by-district-based elections and to administer the process, including the need for five public hearings and community outreach. The community outreach will include a webpage dedicated to the district election issue and updated throughout the process, and the creation of “public participation kits” that empower residents to draw and submit their own population-balanced proposed maps, which the City Council will consider along with the draft maps that the City’s demographic consultants will draw for City Council consideration. The City Council will have the ability to request modifications to the options presented or a different option.

** Alternatives **

Keep the At-Large Election System

The City Council can choose to retain the current at-large City Council election system. It is likely Mr. Shenkman and his client would then initiate a lawsuit under the California Voting Rights Act to attempt to force the city to convert to by-district elections. If the City
were to lose that litigation, a judge would then decide on what district map to impose on the City.

**Adopt a Citywide Elected Mayor and/or Change the Number of Districts**
The City Council may opt to retain a seven-member City Council but change the structure to have one Citywide elected Mayor and six by-district-elected City Council Members. There is some legal question regarding whether a Citywide elected Mayor violates the California Voting Rights Act, but so far the three jurisdictions challenged on that point and have prevailed (Ranch Cucamonga, Palmdale and Whittier), and a study by the City of Carlsbad found that roughly half of the cities that had changed to by-district elections had opted for a system combining a citywide elected Mayor with by-district City Council Members.

This could also be an opportunity for the City to change the number of Council Members, if it so desires. California General Law cities can have five, seven or nine Council Members (or a citywide elected Mayor and four, six or eight Council Members). As a charter city, Redwood City could select one of those options or its own alternative. Such a change would need to be approved by the voters as part of the proposed March 2020 charter revision, but the direction would preferably be given now to focus the districting process on that revised number of districts.

**Alternative Election Systems**
There are a variety of theoretical and actual alternative voting systems that the City can consider thanks to its status as a Charter City. The most commonly mentioned are “cumulative voting,” “ranked choice voting,” and “from district” elections.

In a “From District” election system, districts are drawn and candidates to represent a given district must reside in that district, but the election continues to be held citywide. All voters on Election Day would see one election for “District 1,” one election for “District 2,” and so on. This system ensures each geographic region of the city is represented on the City Council, while voters continue to vote for all seven City Council Members and City Council Members remain accountable to voters in all parts of the city. The California Voting Rights Act, however, specifically classifies “From District” systems as “At Large,” and thus this option does not provide a safe harbor from a lawsuit under the Act. Santa Ana uses “From District” elections and is currently facing a California Voting Rights Act challenge.

“Ranked Choice Voting,” sometimes referred to as Instant Runoff Voting, is currently used by San Francisco, Berkeley, Oakland and San Leandro. In theory, voters in these jurisdictions rank all of the candidates running for a given office, and the votes for the
last-place finishers are re-allocated to second choice votes until one of the candidates accumulates a majority of the votes cast for the office. In practice, the current voting systems limit the voters to ranking only their top three candidate preferences, and the winning candidate accumulates a majority of the voters who still have one of their top three in the mix, rather than a majority of voters casting ballots in that election. The dynamics of ranked choice voting can offer traditionally unrepresented protected class voters the opportunity to elect their preferred candidate when polarized voting is occurring (much like by-district elections), but it does not eliminate the cost and other challenges of a citywide campaign. Ranked choice voting is not a ‘safe harbor’ from California Voting Rights Act litigation. It may deter some plaintiffs from bringing a lawsuit, and it is easier to defend than at-large voting, but that defense remains a risky and expensive proposition. And ranked choice voting in elections that are conducted by the County Registrar requires the County to have and agree to use special vote-counting machines that are state-certified to count ranked choice voting ballots.

In a “Cumulative Voting” system voters retain the ability to cast three or four votes for City Council Members each election cycle, just as they do in the City’s current at-large system. The difference is that the voter may cast all three or four available votes for a single candidate. The theory is that a traditionally unrepresented protected class in a polarized voting environment could focus all of their votes on electing one or two representatives to the City Council, while the majority voters who traditionally elected the entire City Council would continue to divide their votes among their three or four preferred candidates. Cumulative voting has been a remedy in a handful of Federal Voting Rights Act lawsuits in jurisdictions outside of California – most recently ten years ago in Port Chester, New York. As with ranked choice voting, the election mathematics and dynamics can empower a traditionally unrepresented protected class, but the citywide election costs and other challenges remain; cumulative voting is not a ‘safe harbor’ from California Voting Rights Act litigation; and the County Registrar must use specialized vote-counting systems to count cumulative voting ballots. When Santa Clarita attempted to move to a cumulative voting system, however, the California Secretary of State informed the city and the court that under existing law the Secretary could not certify any vote-counting system for cumulative voting, and that certification is required before any vote-counting system can be used in the state. Mission Viejo recently entered into a new court-approved litigation settlement agreement with Mr. Shenkman agreeing to move to a cumulative voting system, but they have not yet figured out whether they will be able to address these issues (and Mission Viejo missed the ‘safe harbor’ time window, so the city faces a legal bill far in excess of the $30,000 cap provided by Elections Code Section 10010).
Next Steps
At the October 22, 2018, and November 19, 2018, City Council meetings, the City Council will conduct public hearings to seek public input and provide direction on communities and criteria to be considered while drafting district maps. Either at or following these two hearings, the City Council would be asked to provide direction on whether to proceed with by-district elections (and for how many districts) or to pursue another alternative option. If the City Council continues with by-district elections, draft district maps and proposed election sequencing will be posted to the City website and available at City Hall in December, and those maps (and any possible new or revised maps) will be discussed at City Council hearings on in January and February of 2019, with the preferred map adopted by ordinance by March 31, 2019. The City has retained the services of a demographer firm, National Demographics Corporation, to assist the City with preparing draft maps and navigating this process.

Fiscal Impact
The fiscal impact of voluntarily converting to by-district elections is estimated to be approximately $175,000. The demographic and election consultants’ costs are anticipated to be approximately $60,000. Publication notices, translation fees for City communications, and the cost to have interpreters at all public hearings are anticipated to be $5,000. The estimated cost to place a ballot measure on the March 2020 Primary ballot is $70,000. Special legal fees could be incurred for additional analysis and public hearings but are not anticipated to exceed $10,000. In addition, the City will be required to reimburse Mr. Shenkman up to $30,000 for his documented attorney’s fees and costs.

Should the Council choose not to voluntarily convert to by-district elections and defend the threatened lawsuit, the costs and attorneys’ fees would almost certainly exceed $1,000,000 (and could be far in excess of that amount, based on the experience of other jurisdictions). This would be a General Fund liability and a significant unbudgeted expense.

Environmental Review
This activity is not a project under CEQA as defined in CEQA Guidelines, section 15378, because it has no potential for resulting in either a direct or foreseeable physical change in the environment.
ATTACHMENTS:
   1. Letter dated August 8, 2018 from Kevin Shenkman, Esq.
   2. Resolution (with Exhibit A Timeline)