



## Town Council Agenda Report

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Date: February 15, 2019 Item No. 1

To: Honorable Mayor and Town Council

Subject: A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF APPLE VALLEY DECLARING ITS INTENTION TO TRANSITION FROM AT-LARGE TO DISTRICT-BASED ELECTIONS PURSUANT TO CALIFORNIA ELECTIONS CODE SECTION 10010 (e)(3)(A)

From: Douglas B. Robertson, Town Manager

Submitted by: Thomas A. Rice, Town Attorney

Budgeted Item:  Yes  No  N/A

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### RECOMMENDED ACTION

That the Town Council:

- A. Adopt Resolution Adopt Resolution No. 2019-04, A Resolution of the Town Council of The Town of Apple Valley Declaring its Intention to Transition From At-Large to District-Based Elections Pursuant to California Elections Code Section 10010 (e)(3)(A); and
- B. Authorize the Town Manager to negotiate and execute a written agreement with potential plaintiffs' relating to the provision of an additional 90 days in which to conduct public outreach in accordance with Elections Code section 10010 (e)(3)(C).

### BACKGROUND

In recent years, a number of cities in California have been sued under the CVRA. Typically, plaintiffs allege that the defendant city's at-large election system has resulted in "racially polarized" voting, which is defined in the CVRA as "voting in which there is a difference . . . in the choice of candidates of 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." (Elec. Code, § 14026 (e).) The lawsuits usually request that the defendant city transition to a by-district system. In a by-district election system, a council candidate must reside within an election district that is a divisible part of the jurisdiction and is elected only by voters residing within that election district.

Since the CVRA was signed into law, many local government entities have converted (or are in the process of converting) to by-district elections. The move toward by-district

election systems is not surprising in light of the cost of litigating under the CVRA. For example, Palmdale settled a CVRA lawsuit in 2015 for \$4.5 million, Modesto paid \$3 million to settle a similar case in 2008, and Anaheim settled in 2014 for an amount reported to be possibly as high as \$2 million. These numbers do not include the cities' costs in paying their own attorneys to defend the lawsuits. In recent months, the City of Santa Monica has attempted to defend its at-large election system in the Los Angeles Superior Court. Though the final judgment has not been issued, the tentative decision of the Court is against the City and it has been reported that the City spent \$10 million on the matter.

In 2016, the California legislature adopted AB 350 amending Elections Code section 10010 to cap the attorneys' fees a prospective plaintiff may recover if a public agency adopts a resolution of intention to change to a by-district system of elections within 45 days following the receipt of a letter from that prospective plaintiff alleging a CVRA violation.

On January 2, 2019, the Town received a letter from Kevin Shenkman of Shenkman & Hughes, PC, alleging that the Town's at-large election system diluted the ability of certain protected classes of persons within the Town to elect candidates of their choice. The Town Council must seriously consider Mr. Shenkman's letter and the current state of the law under the CVRA. If the Town desires to avoid the high costs and legal risks associated with a CVRA lawsuit, the Town must initiate the process of transitioning to a by-district election system. The deadline to adopt a resolution of intent under Elections Code section 10010 is February 16, 2019.

## **ANALYSIS**

The members of the Town Council are currently elected through an at-large election system, which means that the electors from the entire Town vote for the council members. Under Government Code Section 34886, the Town Council may adopt an ordinance that requires the Town Council to be elected by district. If the Town were to select a by-district election system, that transition cannot result in reducing the term of any incumbent city council member. (Gov. Code, § 34873.) Therefore, the transition process will include not only the drawing and establishment of district boundaries, but also the sequencing of the elections so that an incumbent's term is not adversely affected.

If adopted, the steps required to transition to a by-district system include:

- (1) Conducting public outreach to explain the districting process and to encourage public participation;
- (2) Holding at least two public hearings at which the public is invited to provide input regarding the composition of the districts and to consider district boundaries as provided in Elections Code Section 10010;
- (3) Publishing draft maps based on those hearings;
- (4) Holding at least two more public hearings at which the public is invited to provide input regarding the content of the draft map or maps and the proposed sequence of elections;

- (5) Holding a public hearing at which the Town Council will consider the introduction of an ordinance establishing district elections, including the adoption of a district boundary map and the sequence of the district elections; and
- (6) Adopting the ordinance at a regular meeting of the Town Council.

The above steps will also require the retention of a demographic expert to draw the maps and assist with the possible transition to by-district elections. The Town Manager has the requisite authority to engage such consultant as necessary.

In addition to the foregoing, a recent change to Elections Code section 10010 permits the Town to enter into an agreement with the potential plaintiff to extend the 90-day period in which to accomplish the public consultation and adopt the necessary ordinance. Town staff believes the potential plaintiff may be amenable to such an agreement and believes that an additional 90 days would allow for more robust public discussion on the potential transition and, if adopted, district maps which better reflect the community. Therefore, Town staff is requesting authority to negotiate and execute such an agreement.

### **FISCAL IMPACT**

None associated with the adoption of this Resolution alone. However, the cost of transitioning to by-district elections is estimated to be approximately \$60,000, including the cost of payments made to plaintiffs' attorneys in accordance with Elections Code section 10010. This cost is insignificant in comparison to the cost of defending a lawsuit over the Town's at large election, which would likely cost the Town several millions even if the Town were to be successful.

### **ATTACHMENTS**

1. Resolution No. 2019-04 A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN OF APPLE VALLEY DECLARING ITS INTENTION TO TRANSITION FROM AT-LARGE TO DISTRICT-BASED ELECTIONS PURSUANT TO CALIFORNIA ELECTIONS CODE SECTION 10010 (e)(3)(A).
2. Letter from Kevin Shenkman dated December 21 ,2018, received by the Town on January 2, 2019.

**RESOLUTION NO. 2019-04**

**A RESOLUTION OF THE TOWN COUNCIL OF THE TOWN  
OF APPLE VALLEY DECLARING ITS INTENTION TO  
TRANSITION FROM AT-LARGE TO DISTRICT-BASED  
ELECTIONS PURSUANT TO CALIFORNIA ELECTIONS  
CODE SECTION 10010 (e)(3)(A)**

**WHEREAS**, the Town Council of the Town of Apple Valley is an elected legislative and deliberative public body serving the citizens of the Town of Apple Valley; and

**WHEREAS**, the Town presently has an at-large election system (where the entire jurisdiction votes for each member of the public agency's governing body) rather than a by-district election system (where the jurisdiction is divided into districts and only voters within a given district vote for that district's representative); and

**WHEREAS**, in 2003, the California Voting Rights Act ("CVRA") became law; and

**WHEREAS**, the CVRA, in an attempt to prevent the disenfranchisement of protected classes of persons, establishes a low bar for attorneys seeking to force cities and other public entities to convert from at-large to by-district elections; and

**WHEREAS**, public agencies that have been sued under the CVRA have typically been forced to pay large sums to settle with plaintiffs' attorneys; and

**WHEREAS**, in late 2016, the California legislature adopted AB 350 amending Elections Code section 10010 to cap the attorneys' fees a prospective plaintiff may recover if a public agency adopts a resolution of intention to change to a by-district system of elections within 45 days of the receipt of a letter from that prospective plaintiff alleging a CVRA violation and then, following several procedural steps, adopts an ordinance transitioning to by-district elections within the next 90 days; and

**WHEREAS**, in 2018, the California legislature adopted AB 2123 again amending Elections Code section 10010 to permit the local agency and prospective plaintiff to enter into a written agreement to extend the 90-day period following the adoption of a resolution of intention to 180 days; and

**WHEREAS**, on January 2, 2019, the Town received a letter from Kevin Shenkman of Shenkman & Hughes, PC, alleging that the Town's at-large election system diluted the ability of certain protected classes of persons within the Town to elect candidates of their choice; and

**WHEREAS**, the deadline to adopt a resolution of intent under Elections Code section 10010 is February 16, 2019; and

**WHEREAS**, the Town Council desires to avoid the high costs and legal risks associated with a CVRA lawsuit; and

**WHEREAS**, the Town Council has determined that it is in furtherance of the purposes of the CVRA to transition from at-large to district-based elections; and

**WHEREAS**, the Town Council desires to declare its intention to adopt an ordinance pursuant to Government Code section 34886 transitioning from at-large to district-based elections for the next general municipal election, establish specific steps it will undertake to facilitate this transition, and establish an estimated time frame for doing so.

**NOW, THEREFORE, THE APPLE VALLEY TOWN COUNCIL DOES HEREBY RESOLVE:**

**SECTION 1.** The recitals stated above are true and correct and are incorporated herein by reference.

**SECTION 2.** Intention to Transition to a By-District Election System. The Town Council intends to adopt an ordinance, pursuant to Government Code section 34886 to transition the election of its Town Council Members from an at-large electoral system to a by-district system.

**SECTION 3.** Instructions Related to Transition. As close as possible to 90 days following the effective date of this Resolution, or 180 days if a formal agreement is reached with the potential plaintiff, taking into consideration the time required for public outreach and input, and the timeframes established by Elections Code section 10010, the following actions shall be taken by the Town and the Town Council in accordance with Elections Code section 10010 (a):

- (i) Conduct public outreach to explain the districting process and to encourage public participation;
- (ii) Before drawing a draft map or maps of the proposed district boundaries, hold at least two public hearings at which the public is invited to provide input regarding the composition of the districts and to consider district boundaries as provided in Elections Code Section 10010;
- (iii) After drawing a draft map or maps, publish the draft map(s) and the potential sequence of the district elections, and hold at least two public hearings at which the public is invited to provide input regarding the content of the draft map or maps and the proposed sequence of elections; and
- (iv) Hold a public hearing at which the Town Council will consider an ordinance establishing district elections, including the adoption of a district boundary map and the sequence of the district elections.

**SECTION 4. CEQA.** Based upon the whole of the administrative record before it, the Town Council hereby finds that a transition from at-large to district-based elections is exempt from environmental review under the California Environmental Quality Act (“CEQA”) (Pub. Resources Code, § 21000 et seq.) pursuant to State CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.) sections 15061(b)(3), 15320, and 15378(b)(3). Adoption of this Resolution is an organizational and administrative activity of the Town, does not have the potential to result in either a direct or reasonably foreseeable indirect physical change in the environment, and is therefore not a project for purposes of CEQA. (State CEQA Guidelines, §§ 15061(b)(3); 15378(b)(5).) In the event adoption of this Resolution does constitute a project, it is categorically exempt under the Class 20 (Changes in the Organization of Local Governments) categorical exemption. (State CEQA Guidelines, § 15320.) Further, none of the exceptions to the exemptions found in State CEQA Guidelines section 15300.2 apply. Staff is hereby directed to prepare, execute and file with the San Bernardino County Clerk a CEQA Notice of Exemption within five (5) working days of the adoption of this Resolution.

**SECTION 5. Severability.** The provisions of this Resolution are severable and if any provision of this Resolution is held invalid, that provision shall be severed from the Resolution and the remainder of this Resolution shall continue in full force and effect, and not be affected by such invalidity.

**SECTION 6.** This Resolution shall become effective upon its adoption.

**SECTION 7.** The Town Clerk shall certify to the adoption of this Resolution.

PASSED, APPROVED, AND ADOPTED this 15th day of February, 2019.

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Mayor Larry Cusack

ATTEST:

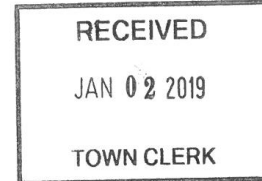
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La Vonda M-Pearson  
Town Clerk

## Attachment 2



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(310) 457-0970  
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VIA CERTIFIED MAIL

December 21, 2018

La Vonda M-Pearson, Town Clerk  
Apple Valley Town Council  
14955 Dale Evans Parkway  
Apple Valley, CA 92307

*Re: Violation of California Voting Rights Act*

I write on behalf of our client, Southwest Voter Registration Education Project and its members. The Apple Valley Town Council (“Apple Valley” or “Town”) relies upon an at-large election system for electing candidates to its Town Council. Moreover, voting within Apple Valley is racially polarized, resulting in minority vote dilution, and, therefore, the Town’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.4<sup>th</sup> 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. 4<sup>th</sup> 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.*

The Apple Valley Town Council’s at-large system dilutes the ability of Latinos (a “protected class”) – to elect candidates of their choice or otherwise influence the outcome of the Town’s elections. As of the 2010 Census, Apple Valley had a population of 69,135. According to this data, Latinos comprise approximately 30%. However, prior to 2018, there had not been a single Latino Town Councilmember. Therefore, not only is the contrast between the significant Latino proportion of the electorate and the virtual absence of Latinos to be elected to the Apple Valley Town Council outwardly disturbing, it is also fundamentally hostile towards participation by members of this protected class.

The Town of Apple Valley’s at-large election system has also impeded the emergence of Latino candidates from the community. In 2004, 2008 and 2014, there were zero Latinos who emerged as candidates for the Apple Valley Town Council. Opponents of fair, district-based elections may attribute the lack of Latinos vying for elected positions to a lack of interest in local government from these communities. On the contrary, the alarming absence of Latino candidates seeking election to the Town Council reveals vote dilution. *See Westwego Citizens for Better Government v. City of Westwego*, 872 F. 2d 1201, 1208-1209, n. 9 (5<sup>th</sup> Cir. 1989).

The City’s election history is additionally illustrative. In 2006, two Latino candidates emerged - Herb Calderon and Elliotte Fajardo. Both lost, despite significant support from the Latino community. In 2014, notwithstanding the fact that there still had not ever been one Latino to serve on the Apple Valley Town Council, Salvador Ortiz-Lopez announced his candidacy. Despite support from the local Latino community, Mr. Ortiz-Lopez lost that election. Again, in 2016, Mr. Ortiz-Lopez tried to secure a seat on the Town Council and lost a second time, again despite the significant support he received from Latino voters. These elections evidence vote dilution which is directly attributable to the Town of Apple Valley’s unlawful at-large election system.

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 city council, with districts that combine all incumbents into one of the four districts.

More recently, this month, after a 7-week trial, we also prevailed against the City of Santa Monica, after that city needlessly spent millions of dollars defending its illegal election system – far in excess of what was spent in the Palmdale litigation - taxpayer dollars which could have been more appropriately spent on indispensable municipal services and critical infrastructure improvements. Just prior to the trial in that case, counsel for the City of Santa Monica – Kahn Scolnick, a partner at Gibson Dunn & Crutcher LLP proclaimed that, “the reality is that if Santa Monica fails the CVRA test, then no city could pass, because Santa Monica is doing really well in terms of full representation and success of minority candidates.” (“In Rare California Voting Rights Trial, Gibson Dunn Steps Up for Santa Monica”, Law.com, August 1, 2018). Notwithstanding Mr. Scolnick’s prediction, Plaintiffs succeeded in proving that Santa Monica’s election system was in violation of the CVRA and the Equal Protection Clause of the California Constitution.

Given the historical lack of Latino representation on the Apple Valley Town Council in the context of racially polarized elections, we urge the Town to voluntarily change its at-large system of electing its Town Council members. Otherwise, on behalf of residents within the jurisdiction, we will be forced to seek judicial relief. Please advise us no later than February 12, 2019 as to whether you would like to discuss a voluntary change to your current at-large system.

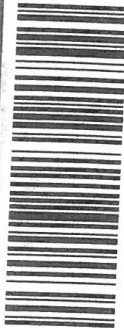
We look forward to your response.

Very truly yours,



Kevin I. Shenkman

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