BUSINESS OF THE COUNCIL OF THE CITY OF HALF MOON BAY

AGENDA REPORT

For the meeting of: **April 3, 2018**

TO: Honorable Mayor and City Council

VIA: David Boesch, Interim City Manager

FROM: Jessica Blair, City Clerk
Catherine Engberg, City Attorney

TITLE: **DISCUSSION OF DISTRICT-BASED ELECTIONS**

RECOMMENDATION:

Receive a report on allegations of violation of the California Voting Rights Act and direct staff as appropriate.

FISCAL IMPACT:

There is no fiscal impact associated with this action.

STRATEGIC ELEMENT:

This recommendation supports the Inclusive Governance Element of the Strategic Plan.

BACKGROUND:

Election Systems

Most public agencies in California conduct elections for their governing board in one of two formats: at-large or district-based. In the at-large election system, the governing board members are elected by vote of the entire voting population of the jurisdiction and each voter may cast one vote for each open seat. In the district-based system, the jurisdiction is divided into separate districts and each voter may cast a vote only for a candidate seeking election within that district. Since its incorporation, the City of Half Moon Bay has utilized an at-large elections system for City Council elections.

Notice of Violation

On March 6, 2018, the City received a Notice of Violation of the California Voting Rights Act from attorney Kevin Shenkman (attached). The notice asserts that City elections are characterized by racially polarized voting and minority vote dilution. The notice demands that the City transition to district-based elections. Further, if the City declines to voluntarily

transition, the Mr. Schenkman states his intention to seek legal action to compel district-based elections.

California Voting Rights Act

The California Voting Rights Act (CVRA) was signed into law in 2002 with an effective date of January 1, 2003. It made fundamental changes to minority voting rights in California, making it easier for plaintiffs in California to challenge the at-large voting system employed by many local jurisdictions as resulting in dilution of voting power for minority groups. In 2016, the CVRA was amended to provide a safe harbor against lawsuits where the local jurisdiction follows procedures to switch to district elections as outlined below.

The CVRA provides that "[a]n at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgement of the rights of voters who are members of a protected class…" (Elections Code Section 14027). A protected class generally includes racial minority groups.

In order to prevail in a suit brought for a violation of the CVRA, the plaintiff must show evidence of "racially polarized voting" within the jurisdiction. Proof of racially polarized voting patterns are established by examining voting results of: elections where at least one candidate is a member of a protected class, elections involving ballot measures; or other "electoral choices that affect the rights and privileges" of protected class members (Elections Code Section 14028 (b)). Courts have used a variety of factors in considering whether the plaintiff has established a violation of the CVRA, including: voting patterns correlate with the race of the voter, minority-preference candidates are not elected, and 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. Proof of intent on the part of the voters or elected officials to discriminate against a protected class is not required (Elections Code Section 14028(d)).

It is important to note that allegation of a CVRA violation does not imply that the City Council is acting in a discriminatory manner, but rather is an allegation that the overall electoral system within the city is resulting is the disenfranchisement of minority voters.

Under the law, if a plaintiff prevails in a CVRA lawsuit, he or she is entitled to recovery of attorney fees. A defendant public agency is not entitled to attorney fees if it prevails.

After survey of reported case law concerning litigation based on violation of the CVRA, there is no reported case where the defendant public agency prevailed on the merits. According to research conducted by other cities, attorney fee awards to plaintiffs have ranged from $400,000 to $4.7 million. Statewide, approximately 90 cities and 165 school districts have switched to district elections since 2006, with the overwhelming majority occurring in the last

two years. The majority of the switches by cities were prompted by a notice of violation of the CVRA.

In San Mateo County, Menlo Park and South San Francisco have also received notices. Menlo Park is currently going through the process of transitioning to district-based elections. South San Francisco received its letter roughly around the same time as Half Moon Bay.

Comparable cities in size and / or demographics which have switched to district-based elections include Big Bear Lake, Carlsbad, Carpinteria, Cathedral City, Chino Hills, Costa Mesa, Dixon, Encinitas, Eureka, Goleta, Martinez, San Juan Capistrano, San Rafael, Santa Barbara, and Temecula.

Pros and Cons of District-Based Elections

Advocates of district-based elections argue that officials elected by districts are more responsive to the constituents in the district. As is being asserted by the notice, advocates argue that district-based voting makes it easier for members of a protected class to elect candidates of their choice. Additionally, some argue that non-incumbents fare better in district-based elections. District elections are typically utilized in large cities with distinct neighborhoods that have distinct needs and concerns.

Advocates of at-large elections argue that governance is improved when elected officials answer to the entire community and not the interests of their district alone. They further contend that officials elected by districts tend to have too much influence over decisions affecting their district and that the district election system encourages deal making between councilmembers to benefit their individual districts rather than the community as a whole. Some argue that districts are unnecessary in small cities, where it is relatively easy and inexpensive to reach out to the entire electorate, such as by door-to-door campaigning.

Procedural Issues

The CVRA provides a process that a public agency may follow in order to avoid a lawsuit and cap attorney fees.

Within 45 days of receiving the notice alleging a violation, the agency must adopt a resolution outlining its intention to transition from at-large to district-based elections, specific steps it will undertake to facilitate this transition, and an estimated time frame for doing so. The City's deadline for adopting the resolution is April 20, 2018.

Within 90 days of adopting the resolution (July 19, 2018), the agency must adopt an ordinance officially making the switch to district-based elections and outlining certain procedures for such elections. If an agency follows these steps, plaintiffs may not file suit against the agency for violation of the CVRA based on utilization of an at-large election system and prospective

plaintiffs are limited to recovering a maximum of $30,000 for reimbursement of costs to prepare the notice.

If an agency chooses to switch to district-based elections, it must hold a total of five public hearings during the 90-days after adoption of the resolution. The purpose of the first two public hearings is to give the public an opportunity to provide input regarding the composition of districts. These two hearings must be held within a span of no more than 30 days. Subsequently, draft district maps will be drawn and two additional public hearings must to be held to allow the public an opportunity to provide input regarding the content of the draft maps and the proposed sequence of elections. These two additional hearings must be held within a span of no more than 45 days. The final public hearing would be held when the Council votes to consider an ordinance establishing district-based elections.

By agreement with the plaintiff's attorney, some cities have extended the 90-day period to maximize the opportunity for public input and/or receive updated census data.

DISCUSSION:

The decision to move to district elections or litigate under the California Voting Rights Act involves substantial costs. If the Council were to elect to switch to district elections, costs would include fees for a consultant to assist the City in drawing appropriate district boundaries and legal fees associated with complying with required procedures. If the City were to litigate, it would be necessary to pay consultant and legal fees to defend the City in the action, which fees would not be recoverable even if the City prevailed. If the City were to lose in litigation, the City would be liable for paying the plaintiff's attorney fees and costs.

The City has contracted with the National Demographics Corporation (NDC) to prepare demographic and election history profiles. Since receiving the letter, the City has asked NDC to prepare a racially polarized voting analysis. Staff anticipates the results of this analysis prior to April 17, 2018. If desired, NDC can work with the City on drafting district maps. NDC has worked with a majority of the cities who have switched to district elections over the past few years.

Regarding timing of a potential transition to district elections, the first district election for Half Moon Bay would be in 2020. The County of San Mateo's Elections Division has a deadline of July 3, 2018 for the November 2018 election. Given the 90-day safe harbor for adoption of district maps, the transition would not be complete prior to the County's deadline for 2018. Additionally, per Elections Code, district maps must be redrawn after each census. With a 2020 census, district maps may change slightly for the 2022 election versus those used for the 2020 election.

Potential next steps include directing staff to return with a Resolution of Intent. If adopted, staff would begin scheduling the series of public meetings required. Certain cities have used various methods for this process. The City of Lake Forest was granted an extended safe harbor

to allow for additional community outreach and input. They, along with a few other cities, created a dedicated webpage for the districting process with various information as well as a tool which allowed the public to submit draft maps for consideration. Additionally, some cities have created districting commissions or committees. Menlo Park, for example, has an online draft submittal tool as well as an Advisory Districting Committee. The Menlo Park Committee is tasked with presenting two recommendations to the City Council – one for dividing the city into five voting districts, and one for dividing the city into six voting districts with an at-large elected Mayor. There are many options for ensuring maximum community outreach during this process and depending on Council's desire, staff can return with further information on any possible scenarios.

ATTACHMENT:

March 6, 2018 Notice of Violation of CVRA from Kevin Shenkman

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VIA CERTIFIED MAIL

February 28, 2018

City Clerk - Jessica Blair
City of Half Moon Bay
501 Main Street
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Re: Violation of California Voting Rights Act

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

Half Moon Bay's at-large system of electing its city council dilutes the ability of Latinos (a "protected class") – to elect candidates of their choice or otherwise influence the outcome of the City's council elections.

The City's election history is illustrative: during the past 20 years, there has been only one (1) Latino/a that has emerged as a candidate for the Half Moon Bay City 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 the Latino community. On the contrary, the alarming absence of Latino candidates seeking election to the Half Moon Bay City Council reveals vote dilution. *See Westwego Citizens for Better Government v. City of Westwego*, 872 F. 2d 1201, 1208-1209, n. 9 (5th Cir. 1989). That one Latina candidate, Eliana Rivera, enjoyed significant support from the Latino community but was defeated due to the bloc voting of the non-Latino electorate.

As of the 2010 Census, the City of Half Moon Bay has a population of 11,324. According to recent data, Latinos comprise approximately 31.5% of the City's population. However, for the past 20 years there has not been a single Latino/a to actually serve on the Half Moon Bay City Council. In that entire 20-year period only one Latina – Eliana Rivera – emerged as a candidate in 2001, but was unable to secure a seat on the City Council. Therefore, not only is the contrast between the significant Latino proportion of the electorate and the total absence of Latinos to run for or be elected to the Half Moon Bay's City Council outwardly disturbing, it is also fundamentally hostile towards Latino participation.

The lack of representation for Latinos has been a long-standing issue for the City of Half Moon Bay. Tensions in the City have historically been high amongst Latino residents who feel that they do not have a voice in City governance. This fact became especially evident in 2014, when 18-year-old Yanira Serrano-Garcia, a mentally ill Hispanic teenager, was shot and killed by a San Mateo sheriff's deputy in Half Moon Bay. The shooting took place at Moonridge Housing Complex which houses many of the areas agricultural workers, most of whom are Latino. This incident sparked outrage across the

Latino community. In fact, in the aftermath of the shooting, Yanira's brother said, "as a member of the (Serrano) family we have seen nothing from the government…and for the community of Moonridge we don't see services, we don't see support." Sadly, to date, little has changed in terms of the Latino representation in the City of Half Moon Bay.

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.

Given the historical lack of Latino representation on the Half Moon Bay City Council in the context of racially polarized elections, we urge the City to voluntarily change its at-large system of electing City Council members. Otherwise, on behalf of residents within the jurisdiction, we will be forced to seek judicial relief. Please advise us no later than April 20, 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