DATE:      FEBRUARY 20, 2018

TO:        CITY MANAGER/CITY COUNCIL

FROM:      A. PATRICK MUNOZ, CITY ATTORNEY

SUBJECT:   POTENTIAL TRANSFER TO BY-DISTRICT CITY COUNCIL ELECTIONS

RECOMMENDED ACTION:

That the City Council 1) hold a public meeting adopt a Resolution of Intention pursuant to Election Code section 10010(e)(3)(A), to consider the transition from an at-large to district-based elections entitled:

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA, EXPRESSING THE CITY COUNCIL’S INTENTION, PURSUANT TO ELECTIONS CODE SECTION 10010(e)(3)(A), TO INITIATE PROCEDURES FOR ESTABLISHING AND IMPLEMENTING BY-DISTRICT ELECTIONS FOR CITY COUNCIL MEMBERS

BACKGROUND AND DISCUSSION:

On February 2, 2018, the City received a letter from attorney Russell D. Myrick of the law firm RDM Legal Group threatening to sue the city for alleged violations of the California Voting Rights Act ("CVRA") (Elec. Code §§ 14025-14032) unless the city voluntarily converts to a by-district election system. The CVRA only applies to jurisdictions, like the City of Dana Point, that utilize an at-large election method, where voters of the entire jurisdiction elect each of the members of the City Council. Similar letters have been served and lawsuits have been filed in recent years against dozens of cities and other public agencies for alleged CVRA violations, including many nearby cities. Every public agency defendant in the history of the CVRA that has challenged the conversion to district elections has either lost in court or settled/agreed to implement district elections, and been forced to pay at least some portion of the plaintiffs’ attorneys’ fees and costs. A copy of Mr. Myrick’s letter is attached to this staff report (Attachment B).
The CVRA was enacted in 2002 with the specific intent of facilitating private suits to force public entities to shift from "at-large" to "by-district" elections. It does so by eliminating several key burden of proof requirements that exist under the federal Voting Rights Act of 1965 ("FVRA") (52 U.S.C. § 10301 et seq.) after several jurisdictions in California successfully defended themselves in litigation brought under the FVRA. Under the FVRA, four factors must be met in order to establish a violation. The CVRA removes two of these factors: (1) the "geographically compact" FVRA precondition (e.g., can a majority-minority district be drawn?), and; (2) the "totality of the circumstances" or "reasonableness" test. Instead, under the CVRA, the only "element" a plaintiff must establish is that racially polarized voting occurs in a jurisdiction with at-large elections. This threshold for establishing liability under the CVRA is extremely low, and prevailing CVRA plaintiffs are guaranteed to recover their attorneys' fees and costs. As a result, the CVRA is tilted heavily in favor of plaintiffs' attorneys, which is no surprise, as it was enacted with that specific intent in mind. Despite its removal of key safeguards contained in the FVRA, the California courts have held that the CVRA is constitutional. (See Sanchez v. City of Modesto (2006) 145 Cal.App.4th 660.) An article that may be of interest on the background of the CVRA is attached (Attachment D).

Over the relatively short 15-year history of the CVRA, and only after an initial challenge to it was resolved in 2006, plaintiff public agencies have paid over $15 million to CVRA plaintiff attorneys, including a recent settlement in West Covina for $220,000. (See Table of Results of CVRA Litigation (Attachment C). The City of Modesto, which challenged the CVRA's constitutionality, ultimately paid $3 million to the plaintiffs' attorneys, and the cities of Palmdale and Anaheim, who also aggressively litigated CVRA claims, ultimately paid $4.5 million and $1.2 million in attorneys' fees, respectively. Importantly, these figures do not include the tens of millions of dollars spent by government agency defendants paying for their own attorneys and associated defense costs. Both these cities – like all other CVRA defendants – ultimately ended up converting to district elections.

Recognizing the heavy cost burden it had assigned under the CVRA to at-large jurisdictions facing challenge, in 2016, the California Legislature amended the Elections Code to simplify the process of converting to by-district elections and to provide a "safe harbor" process to protect agencies from litigation. If a city receives a demand letter, such as the case here, then the city is given 45 days of protection from litigation to assess its situation. If within that 45 days, the city adopts a resolution declaring the Council's intent to transition from at-large to district based elections, outlining the steps to be taken, the potential plaintiff is prohibited from filing a CVRA action for an additional 90 day period during which the process outlined below must occur. (Elec. Code § 10010(e)(3).)

In light of the foregoing, staff recommends that the City Council consider taking advantage of the above-described "safe harbor" provisions by adopting the attached draft resolution of intention (Attachment A) and commence to process of voluntarily implementing a by-district election system. This is the safest course of action to protect the City's taxpayers from the risk of future litigation costs.

This recommendation is not based on any admission or concession that the City would
ultimately be found to have violated the CVRA; rather, the risks and costs associated with protracted CVRA litigation – particularly in light of the adverse results in all other cities that have fought to retain at-large voting – cannot be ignored. The public interest may be ultimately better served by a by-district electoral system if converting to that system avoids a significant attorneys' fees and cost award.

The attached resolution, if approved, would affirm Council's intent to adopt a by-district election system. The draft resolution also includes, as an attachment, the tentative timeline for implementing transition to by-district elections, including the schedule for the required public hearings. The timeline proposes holding public hearings on March 6, 2018, March 20, 2018, April 3, 2018, April 17, 2018 and May 1, 2018.

If the City Council adopts the attached resolution, pursuant to Elections Code 10010(a), the Council must hold a total of five public hearings (to which the above noted proposed schedule would apply) before a by-district electoral system can be adopted: two must be held before any proposed district boundaries have been drawn (March 6 & March 20), two must be held after proposed district maps have been generated (April 3 & April 17) and finally, the Council must consider the actual ordinance that would establish district based elections at a fifth public hearing (May 1). The proposed schedule, if followed, would result in the completion of the transition to district based elections within the 90 day “safe harbor” period.

The City has also in the process of retaining an expert districting consultant and demographer to evaluate the City's position under the CVRA and to advise on risks and potential liabilities. If the City Council elects to transition to by-district elections, the demographer will draw proposed districts after the first two public hearings, and present the maps to the Council, along with any legally adequate maps submitted by members of the public. The Council will have the ability to request modifications to the options presented or a different option. A representative from the demographer's office will be present at all of the hearings set forth in Exhibit 1 to the proposed resolution (Attachment C) to present demographic data and proposed districts, as well as address questions from the Council and the public.

ALTERNATIVE ACTIONS:

Other Council-directed action.

ACTION DOCUMENTS:

A. Draft Resolution of Intention .................................................................5
SUPPORTING DOCUMENTS:

B. Letter from RDM Legal Group (hard copy attached)
C. Table of Results of CVRA Litigation (hard copy attached)
D. Article on CVRA (hard copy attached)
RESOLUTION NO.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA, EXPRESSING THE CITY COUNCIL’S INTENTION, PURSUANT TO ELECTIONS CODE SECTION 10010(e)(3)(A), TO INITIATE PROCEDURES FOR ESTABLISHING AND IMPLEMENTING BY-DISTRICT ELECTIONS FOR CITY COUNCIL MEMBERS

WHEREAS, the City of Dana Point, California ("City") is a general law city, duly organized under the constitution and laws of the State of California; and

WHEREAS, the members of the Dana Point City Council are currently elected in at-large elections, in which each City Council member is elected by all registered voters of the entire City; and

WHEREAS, Section 34886 of the Government Code authorizes any city to change to a by-district system or by-district system with an elective mayor without the need to put such a change to voters; and

WHEREAS, the City Council has determined that it is in the best interest of the City to move from its current at-large electoral system to a by-district election for members of the City Council, in response to the provisions of the California Voting Rights Act; and

WHEREAS, the City intends to make this transition from an at-large system to a by-district system in accordance with the procedural rules outlined in Government Code Section 34886 and Elections Code 10010; and

WHEREAS, the City received a letter threatening action under the California Voting Rights Act on February 2, 2018 less than forty-five (45) days before the date of this Resolution; and

WHEREAS, the City will begin by working with an experienced demographer to assist the City in establishing maps for a by-district electoral system; and

WHEREAS, before drawing a draft map of the proposed boundaries of the districts, the City will hold at least two (2) public hearings over no more than thirty (30) days, at which time the public is invited to provide input regarding the composition of the districts; and
WHEREAS, the City will then publish and make available for release at least one (1) draft map of the new electoral districts, including the potential sequence of elections shown; and

WHEREAS, once the draft map(s) have been publicized for at least seven (7) days, the City will hold at least two (2) additional public hearings, over no more than forty-five (45) days, at which time the public is invited to provide input regarding the content of the draft map and the proposed sequence of elections prior to the public hearing at which the City Council adopts a map; and

WHEREAS, if a draft map is revised at or following a public hearing, the revised map will be published and made available to the public at least seven (7) days before the City chooses to adopt it; and

WHEREAS, in determining the final sequence of staggered district elections, the City Council will give special consideration to the purposes of the CVRA, and will take into account the preferences expressed by the members of the districts; and

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Dana Point, California, as follows:

1. The above recitals are true and correct and are incorporated herein by this reference.

2. The City Council hereby resolves, pursuant to Elections Code section 10010, to consider adopting a by-district election system by ordinance as authorized by California Government Code section 34886, for use in the City’s General Municipal Election for City Council Members.

3. The City Council further resolves to retain a qualified demographer, hold at least five (5) public hearings and publish at least one (1) draft map and staggering sequence, pursuant to the proposed tentative hearing schedule attached hereto as Exhibit “1”.

4. The city’s redistricting/demographic consulting firm, acting under the supervision of the City Manager, is hereby authorized to direct and formulate one or more electoral district scenarios for review by the public and City Council at two or more public hearings if necessary, in accordance with the city’s proposed tentative timeline.
5. Working with the demographic consulting firm, staff is directed to publicize relevant maps, information, notices, agendas and other materials regarding by-district elections and to establish means of communication to answer questions from the public.

6. All public hearings shall be noticed on the City's website, and in addition, as follows: posting on the city's website at least ten (10) calendar days in advance of the hearing and publication at least ten (10) days in advance of the hearing in the newspaper adjudicated to provide notice within the City.

7. The City Manager is authorized to take any and all other necessary actions to give effect to this Resolution.

8. This Resolution shall become effective immediately upon its adoption.

PASSED, APPROVED AND ADOPTED at a Regular Meeting of the City Council of the City of Dana Point on the 20th day of February, 2018, by the following vote:

_______________________________
RICHARD A. VICZOREK, MAYOR

ATTEST:

_______________________________
KATHY M. WARD, CITY CLERK
I, Kathy M. Ward, City Clerk of the City of Dana Point, California do hereby certify that the foregoing Resolution No.18-01-16-__ was duly adopted and passed at a regular meeting of the City Council on the 16th day of January, 2018, by the following vote to wit:

AYES:

NOES:

ABSTAIN:

ABSENT:

KATHY M. WARD, CITY CLERK
## EXHIBIT 1
TENTATIVE TIMELINE

<table>
<thead>
<tr>
<th>PROPOSED DATE</th>
<th>CITY ACTION</th>
<th>NOTES</th>
</tr>
</thead>
</table>
| 02/20/18      | **Public Meeting:** Adopt Resolution of Intent to Convert to District Voting | • Demand letter sent: 02/02/18  
• Must adopt resolution within 45 days (03/19/19)  
• If adopted, City gets additional 90 days of legal immunity (05/21/18) |
| 03/06/18      | **Public Hearing #1:** First of two public hearings before maps drawn | • PH 1 and PH 2 must be held within 30 days of each other  
• Notice for all PH must be published and posted 10 days prior |
<p>| 03/20/18      | <strong>Hold Public Hearing #2:</strong> Second of two public hearings before maps drawn |   |</p>
<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>03/23/18</td>
<td><strong>Release Draft Map(s):</strong> Post on City website</td>
<td>• This must occur 7 days prior to public hearing</td>
</tr>
<tr>
<td>04/03/18</td>
<td><strong>Public Hearing #3:</strong> First of two public hearings after maps drawn</td>
<td>• PH 3 and PH4 must occur within 45 days of each other</td>
</tr>
<tr>
<td>04/06/18</td>
<td><strong>Release Revised/Amended/New Draft Map(s):</strong> Post on City website</td>
<td></td>
</tr>
<tr>
<td>04/17/18</td>
<td><strong>Public Hearing #4:</strong> Second of two public hearings after maps drawn</td>
<td></td>
</tr>
<tr>
<td>05/01/18</td>
<td><strong>Public Hearing #5:</strong> Final public hearing; introduce ordinance establishing districts</td>
<td></td>
</tr>
<tr>
<td>05/15/18</td>
<td><strong>Public Meeting:</strong> Second reading of ordinance establishing districts</td>
<td>• Effective Date: 06/15/18</td>
</tr>
</tbody>
</table>
February 2, 2018

RE: VIOLATION OF CALIFORNIA VOTING RIGHTS ACT

Dear Ms. Ward:

I write on behalf of several concerned citizens residing in the City of Dana Point ("Dana Point"). Dana Point relies upon an at-large election system for electing candidates to its City Council. Moreover, voting within Dana Point is racially polarized, resulting in minority vote dilution, and therefore Dana Point’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. Modesto (2006) 145 Cal.App.4th 660, 667 ("Sanchez"). For example, if the U.S. Congress were elected through a nationwide 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 selected. 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

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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 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 elections 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 the 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 (2001-2001 Reg. Sess.)* as amended Apr. 9, 2002, p.2.

The California Legislature dispensed with the requirement in *Gingles* that a minority group demonstrate that is is sufficiently large and geographically compact to constitute a “minority-majority 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 CBRA, 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); see also Assem. Com. on Judiciary, *Analysis of Sen. Bill No. 976 (2001-2001 Reg. Sess.)* as amended Apr. 9, 2002, p.3 (“Thus, this bill puts the voting rights horse (the discrimination issue) back where is 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 voters of the political subdivision.” Elec. Code § 14028(a). The CVRA specifies the elections that are the 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 “[c]elections 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 an action.” *Id.*

Factors other than “racially polarized voting” that are required to make out a claim under the FVRA – under the “totality of 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 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

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effectively in the political process, and the use of overt or subtle racial appeals in political
campaigns.” Id.

Dana Point’s at-large system dilutes the ability of Latinos (a “protected class”) – to elect
candidates of their choice or otherwise influence the outcome of Dana Point’s council elections.

The last ten elections are illustrative. During that twenty-year period, three Latinos ran
for City Council – and only one of them, Carlos Olvera – was actually elected. Raquel Olamendi
and Mario Melendez were not elected in 1998 and 2006 respectively, despite garnering support
from Latino voters, due to the bloc voting of the non-Latino majority. Besides the three
aforementioned individuals, no other Latino candidates have sought positions on the Dana Point
Council in the last twenty years. Opponents of fair district-based elections may attribute the lack
of Latinos vying for City Council positions to a lack of Latino interest in local government. On
the contrary, the alarming absence of Latino candidates seeking election to the Dana Point 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).

According to recent data, Latinos compromise 17.8% of the population of Dana Point.
However, there are no Latinos on the City Council – and there is only one single candidate in the
last twenty years who has been able to successfully secure a City Council seat. The contrast
between the significant Latino proportion of the electorate and the near absence of Latinos
elected to the City Council is telling.

As you may be aware, in 2012, a similar lawsuit was brought against the City of
Palmdale for violating the CVRA. That lawsuit was successful after an eight-day trial. After
spending millions of dollars, a district-based remedy was ultimately imposed upon the Palmdale
City Council, with districts that combined all four incumbents into one of the four districts.

Given the historical lack of Latino representation on the City Council in the context of
racially polarized elections, we urge Dana Point to voluntarily change its at-large system of
electing council members. Otherwise, on behalf of several concerned residents of the City of
Dana Point, we will be forced to seek judicial relief. Please advise us no later than March 19,
2018 as to whether you would like to discuss a voluntary change to your current at-large system.

We look forward to your response.

Regards,

[Signature]

RUSSEL MYRICK, ESQ.

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<table>
<thead>
<tr>
<th>City/Political Subdivision</th>
<th>Defendant Settlement Conditions</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>City of Palmdale</td>
<td>Agreed to have voters choose elected officials by districts, including two with Latino majorities.</td>
<td>City lost trial on the merits, held an election that plaintiffs argued was illegal, and unsuccessfully challenged an injunction stopping the City from certifying the results of that election; settlement subsequently reached. $4,500,000 $3,000,000 $1,700,000 to defense attorneys.</td>
</tr>
<tr>
<td>City of Modesto</td>
<td>Moved to District elections; voters had already approved a move to districts before settlement.</td>
<td>Settlement: Additional $162,500 court award.</td>
</tr>
<tr>
<td>Madera Unified School District, Madera County Board of Education</td>
<td>Agreed to hold an election re changing to by-trustee area elections via ballot measure, keep mayor at large.</td>
<td>Settlement: $500,000.</td>
</tr>
<tr>
<td>City of Compton</td>
<td>Agreed to place a ballot measure before voters regarding a move to by-trustee district elections.</td>
<td>Settlement: $225,000.</td>
</tr>
<tr>
<td>Tulare Local Healthcare District</td>
<td>Agreed to move to by-district elections in 2012 and agreed to cancel 2010 elections.</td>
<td>Settlement: $10,000.</td>
</tr>
<tr>
<td>City of Tulare</td>
<td>Agreed to move to by-district elections.</td>
<td>Settlement: $400,000.</td>
</tr>
<tr>
<td>Hanford Unified School District</td>
<td>Agreed to move to by-district elections.</td>
<td>Settlement: $3,000.</td>
</tr>
<tr>
<td>College District</td>
<td>Agreed to move to by-district elections.</td>
<td>Settlement: $5,000.</td>
</tr>
<tr>
<td>Ceres Community College District</td>
<td>Agreed to move to by-district elections before litigation was filed.</td>
<td>Settlement: $5,000.</td>
</tr>
<tr>
<td>College District</td>
<td>Agreed to move to by-district elections.</td>
<td>Settlement: $5,000.</td>
</tr>
<tr>
<td>Location</td>
<td>Description</td>
<td>Amount</td>
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<tr>
<td>San Mateo County</td>
<td>County moved to by-District elections (through a ballot measure) and further agreed to redraw its previously-approved District boundaries by forming a nine-person redistricting committee</td>
<td>$650,000</td>
</tr>
<tr>
<td>City of Anaheim</td>
<td>Agreed to place ballot measure on November 2016 ballot re moving to by district elections</td>
<td>$1,200,000</td>
</tr>
<tr>
<td>City of Whittier</td>
<td>Case dismissed as moot when City changed voting system; unsuccessful post election challenge re at large mayor</td>
<td>$1,000,000</td>
</tr>
<tr>
<td>Santa Clarita Community College District</td>
<td>Agreed to conduct cumulative voting, and by trustees</td>
<td>$850,000</td>
</tr>
<tr>
<td>City of Garden Grove</td>
<td>Moved to by district elections via stipulated judgment</td>
<td>$290,000</td>
</tr>
<tr>
<td>City of Escondido</td>
<td>Settled via court order (consent decree) after vote of the people failed to adopt by district elections</td>
<td>$385,000</td>
</tr>
<tr>
<td>City of Santa Clarita</td>
<td>Agreed to move to cumulative voting method</td>
<td>$600,000</td>
</tr>
<tr>
<td>City of Visalia</td>
<td>Stipulated judgment, court ordered by districts</td>
<td>$125,000</td>
</tr>
<tr>
<td>City of Santa Barbara</td>
<td>Agreed to move to by district; mayor remains elected at large</td>
<td>$599,500</td>
</tr>
<tr>
<td>City of Fullerton</td>
<td>Agreed to pay attorneys fees - negotiate in good faith; required placing measure on November 2016 ballot to move to districts undisclosed</td>
<td>Settlement</td>
</tr>
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<tr>
<td>City of Merced</td>
<td>Settled before lawsuit filed; agreed to ballot measure</td>
<td>$43,000</td>
</tr>
<tr>
<td>City of Bellflower</td>
<td>Agreed to place ballot measure on November 2016 ballot; measure adopted</td>
<td>$250,000</td>
</tr>
<tr>
<td>Sulphur Springs School District</td>
<td>Agreed to move to by district elections</td>
<td>$144,000</td>
</tr>
<tr>
<td>City of Costa Mesa</td>
<td>Moved to districts before lawsuit was filed</td>
<td>$55,000</td>
</tr>
<tr>
<td>City of West Covina</td>
<td>Waited until after lawsuit was filed to hire demographer and voluntarily move to by district elections via ordinance</td>
<td>$220,000</td>
</tr>
<tr>
<td>City of Rancho Cucamonga</td>
<td>Ongoing; currently being litigated</td>
<td>ongoing</td>
</tr>
<tr>
<td>City of San Marcos</td>
<td>Moved to districts within safe harbor, before lawsuit could be filed</td>
<td>$0</td>
</tr>
<tr>
<td>City of Carlsbad</td>
<td>Moved to districts within safe harbor, before lawsuit could be filed</td>
<td>$0</td>
</tr>
<tr>
<td>City of Poway</td>
<td>Ongoing; moving to districts within safe harbor</td>
<td>ongoing</td>
</tr>
</tbody>
</table>

**TOTAL PAYMENTS TO PLAINTIFFS' ATTORNEYS**

$15,007,000
Lawyers Earn $4.3M in Fees From Law They Wrote

Published November 16, 2009

Associated Press

LOS ANGELES — Every lawsuit filed or even threatened under a California law aimed at electing more minorities to local offices — and all of the roughly $4.3 million from settlements so far — can be traced to just two people: a pair of attorneys who worked together writing the statute, The Associated Press has found.

The law makes it easier for lawyers to sue and win financial judgments in cases arising from claims that minorities effectively were shut out of local elections, while shielding attorneys from liability if the claims are tossed out.

The law was drafted mainly by Seattle law professor Joaquin Avila, with advice from lawyers including Robert Rubin, legal director for the Lawyers' Committee for Civil Rights of the San Francisco Bay Area. Avila, Rubin's committee and lawyers working with them have collected or billed local governments about $4.3 million in three cases that settled, and could reap more from two pending lawsuits.

That's only a fraction of what might come. Dozens of cities and school boards have been warned they could be sued under the 2002 California Voting Rights Act.

All the cases have been initiated by Rubin's committee or Avila, who also is a member of the lawyers' group, according to an Associated Press review of legal documents, correspondence and legislative records, and interviews with lawyers, school and government officials, current and former legislators and voting-rights experts.

There is nothing illegal about the lawyers profiting from a law they authored and state lawmakers approved. But it is unusual that after seven years all legal efforts are so narrowly focused, especially since Avila told lawmakers when he testified for the bill in 2002 that he expected other attorneys would take on cases because of favorable incentives written into the measure.

Avila said the complexity of the litigation and the fact few attorneys are experts in voting rights have limited the number involved so far.

"I anticipate there will be more cases filed by other parties," he said.

Avila and Rubin say their roles in creating the law shouldn't overshadow its importance and the need to use lawsuits and threats to end years of injustice at the polls. Those who target dispute the need for the law. The number of minority officeholders was climbing even before it was enacted, and they claim the lawyers are using the statute to shake down local governments.

"It's a money grab," charged John Stafford, superintendent of the Madera Unified School District that was slapped with a $1.2 million attorneys' bill even though it never contested a lawsuit.

The California statute targets commonly used "at-large" elections — those in which candidates run citywide or across an entire school district. Avila said that method can result in discrimination because whatever group constitutes the majority of voters can dominate the ballot box and block minorities from winning representation. As a remedy, the law empowers state courts to create smaller election districts favoring minority candidates.

Officials in several California communities said they never heard complaints of voter discrimination until the lawyers stepped forward. In one case, the Tulare Local Healthcare District, now known as Tulare Regional Medical Center, was sued even though its five-member governing board is a rainbow of diversity — two enigmas from India, a Hispanic, a black and a white. The lawsuit argues Hispanics, who make up about a third of local voters, have been shortchanged.

That case could go to trial as early as January and is being closely watched by communities around the state. If the law is upheld, it could lead to a massive recasting of local election district boundaries, or more lawsuits.

Critics like Stafford see themselves as railroaded by lawyers armed with a law that's flawed and unnecessary. They say even if there's no discrimination, cash-strapped communities see little choice but to settle, given the risks of costly litigation and unwelcome publicity that comes with it.

A judge is reviewing the bill submitted to Madera. To pay, Stafford said the district would have to slash money for books and lunches for its mostly Hispanic students, an odd consequence for a law intended to aid Hispanics.

Though Hispanics constitute 76 percent of the city's population and a thin majority of its registered voters, according to court documents, the lawsuit claims Latinos are deprived of "the ability to meaningfully voice their preferences."

"To say that a majority can vote and say they have been discriminated against by a minority, when the minority has the power to elect whomever they want, is ridiculous," said Hans von Spakovsky, a former assistant attorney general for civil rights in the George W. Bush administration.

"The California law essentially requires that the ethnic group be guaranteed that its choices be elected. This is a clear violation of 14th Amendment. It makes race a predominant factor in elections."

Attorney Margaret Mary Leoni represented the Hanford Joint Union High School District in a lawsuit the community settled for about $100,000, which it saw as cheaper than a court fight.

"It's a baffling law," she said. "I'm not quite sure it does anything to remedy discrimination."

Avila and Rubin dispute that, saying the law ensures minority voices are heard on election day.

Avila said the provision under which plaintiffs' attorneys can collect fees, expenses and expert witness costs, but not pay them if they lose, is a needed incentive for lawyers to take on cases.

Avila, who bills at $725 an hour, wouldn't disclose his earnings from the lawsuits. Though he drafted "probably the whole" law, "I don't think that should preclude me from enforcement," Avila said.

Rubin is paid a salary by the committee and can bill his legal work at $700 an hour.

California is among the nation's most diverse states. The number of Hispanics, blacks and Asians have together outnumbered whites since 1998. And by 2020 the Hispanic population alone is expected to top whites.

Between 1996 and 2009, the number of Hispanic elected officials in California jumped 62 percent, from 693 to 1,265, according to the National Association of Latino Elected and Appointed Officials. The mayor of Los Angeles, Antonio Villaraigosa, is Hispanic, as were three of the last six speakers in the state Assembly.

But a study released by the Latino Issues Forum in 2007 that found dozens of school districts with a majority of Hispanic students had few, if any, Latino board members.

"When you look at the local elected leadership, most of it is still white," said Avila, who teaches at Seattle University School of Law.

There are other factors in play beyond the shape and racial composition of districts. Historically, Hispanics turn out on election day in smaller percentages than whites or blacks. While the state population is about one-third Hispanic, they comprise only about two in ten of voters likely to turn out to vote, though that rate has been increasing.

Modesto was the first community targeted by a lawsuit from the lawyers' committee, which noted only one Hispanic was elected to the City Council since 1911 despite a significant Latino population. Modesto fought the case and Superior Court Judge Roger Beauchesne declared the law unconstitutional, saying it created preferential treatment for minorities without evidence of need. He also ruled the provision on attorneys' fees and expert witness costs amounted to illegal gifts of public money.

That decision was overturned on appeal, however, and the city eventually paid Avila, the lawyers' committee and a law firm working with them $3 million in a settlement after the U.S. Supreme Court declined to hear the case.

In the Ceres Unified School District, about 60 percent of the students are Hispanic. The district had two Latinos on its seven-member board when it was contacted by the lawyers' committee, which sued, alleging violations of the law, school officials said.

Superintendent Walt Harline said the district decided to settle rather than fight.

"We said, 'We're not going to take textbook out of kids hands for this. Why battle this issue and take the risk of losing millions of dollars?'" Harline said.

The district has not been billed, but Rubin says he expects it only will be a few thousand dollars because it quickly agreed to change the way it conducts elections. He said the much larger settlement amount in the Modesto case reflected the extensive legal fight that ended at the Supreme Court.

Modesto, which is about one-quarter Hispanic, did not see a rush of minority candidates after new City Council districts were established. Mayor Jim Ridenour said. In a low-turnout election this month, one seat in a new Hispanic-majority district was won by David Geter, a 67-year-old federal security officer who is white.

Rubin concedes breaking up all-large elections doesn't guarantee more minorities immediately will be elected. What can be expected, he said, is a trend toward more diversity over time.

"Just because an African-American was elected president certainly doesn't mean that racial discrimination has sunsetted, just like Bill Cosby having his own TV show didn't bring the end of racial discrimination," Rubin said.
"There's still much work to be done."

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