

City Council Agenda Special Meeting

Thursday, June 20, 2019

6:30 p.m. - Closed Session

7:00 p.m. - General Session

Christine Marick, Mayor

Marty Simonoff, Mayor Pro Tem

Cecilia Hupp, Council Member

Glenn Parker, Council Member

Steven Vargas, Council Member

This agenda contains a brief general description of each item Council will consider. The City Clerk has on file copies of written documentation relating to each item of business on this Agenda available for public inspection. Contact the City Clerk's Office at (714) 990-7756 or view the Agenda and related materials on the City's website at www.cityofbrea.net. Materials related to an item on this agenda submitted to the Council after distribution of the agenda packet are available for public inspection in the City Clerk's Office at 1 Civic Center Circle, Brea, CA during normal business hours. Such documents may also be available on the City's website subject to staff's ability to post documents before the meeting.

Procedures for Addressing the Council

The Council encourages interested people to address this legislative body by making a brief presentation on a public hearing item when the Mayor calls the item or address other items under **Matters from the Audience**. State Law prohibits the City Council from responding to or acting upon matters not listed on this agenda.

The Council encourages free expression of all points of view. To allow all persons the opportunity to speak, please keep your remarks brief. If others have already expressed your position, you may simply indicate that you agree with a previous speaker. If appropriate, a spokesperson may present the views of your entire group. Council rules prohibit clapping, booing or shouts of approval or disagreement from the audience. PLEASE SILENCE ALL PAGERS, CELL PHONES AND OTHER ELECTRONIC EQUIPMENT WHILE COUNCIL IS IN SESSION. Thank you.

Special Accommodations

In compliance with the Americans with Disabilities Act, if you need special assistance to participate in this meeting, please contact the City Clerk's Office at (714) 990-7757. Notification 48 hours prior to the meeting will enable City staff to make reasonable arrangements to ensure accessibility. (28 CFR 35.102.35.104 ADA Title II)

Important Notice

The City of Brea shows both live broadcasts and replays of City Council Meetings on Brea Cable Channel 3 and over the Internet at www.cityofbrea.net. Your attendance at this public meeting may result in the recording and broadcast of your image and/or voice as previously described.

CLOSED SESSION
6:30 p.m. - Executive Conference Room
Level Three

CALL TO ORDER / ROLL CALL - COUNCIL

1. Public Comment

Closed Session may convene to consider matters of purchase / sale of real property (G. C. §54956.8), pending litigation [G.C. §54956.9(d)(1)], potential litigation [G.C. §54956.9(d)(2)(3) or (4)], liability claims (G. C. §54961) or personnel items (G.C. §54957.6). Records not available for public inspection.

2. Conference with Real Property Negotiators Pursuant to Government Code Section 54956.8.

Property: Birch Hills Golf Course

City of Brea Negotiators: City Manager Bill Gallardo and Public Works Director Tony Olmos

Negotiating Parties: Chevron Land and Development, Birch/Kraemer, LLC

Under Negotiation: Price and Terms of Payment

GENERAL SESSION
SPECIAL MEETING
7:00 p.m. - Council Chambers
Plaza Level
and
Via Teleconference - Front Desk, Navy Lodge North Island
Building 1401-A, Hangar Road, Coronado, CA 92135

CALL TO ORDER/ ROLL CALL - COUNCIL

3. Matters from the Audience

4. Response to Public Inquiries - Mayor / City Manager

ADMINISTRATIVE ITEM - *This agenda category is for City Council consideration of a wide variety of topics related to the City's operations. Public comments regarding items in this section should be presented during "Matters from the Audience."*

5. District-Based Elections for City Council - Adopt Resolution No. 2019-049, a Resolution declaring the intent to transition from at-large elections for City Council to district-based elections pursuant to Elections Code Section 10010 after receipt of the 2020 Census results.

ADMINISTRATIVE ANNOUNCEMENTS

6. City Manager

7. City Attorney

8. Council Requests

ADJOURNMENT

City of Brea

COUNCIL COMMUNICATION

TO: Honorable Mayor and City Council Members

FROM: Bill Gallardo, City Manager

DATE: 06/20/2019

SUBJECT: Resolution declaring the intent to transition from at-large elections for City Council to district-based elections pursuant to Elections Code Section 10010 after receipt of the 2020 Census results.

RECOMMENDATION

Adopt Resolution No. 2019-049, a Resolution declaring the intent to transition from at-large elections for City Council to district-based elections pursuant to Elections Code Section 10010 after receipt of the 2020 Census results.

BACKGROUND/DISCUSSION

The City of Brea currently elects its City councilmembers through an “at-large” election system in which each councilmember can reside anywhere in the City and is elected by the voters of the entire City to provide citywide representation.

A district-based election system is one in which the City is physically divided into separate districts each with one councilmember who resides in the district and is chosen by the electors residing in that particular district.

The California Voting Rights Act of 2001 (“CVRA”) provides a private right of action to members of a protected class where, because of “dilution or the abridgment of the rights of voters,” an at-large election system “impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election.” The CVRA defines a “protected class” broadly as a class of voters who are members of a race, color, or language minority group.

To establish a violation under the CVRA, a plaintiff must show that racially polarized voting occurs in an at-large election system, impairing the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election.

The CVRA is based in part on the Federal Voting Rights Act of 1965 (“FVRA”) but is intended to expand the protections of the FVRA by making it easier for potential plaintiffs to successfully claim a violation of their voting rights. For example, the CVRA eliminates the requirement applied in FVRA cases of showing that a protected class can form a majority of one of the districts.

As a result of the lower threshold established by the CVRA, cities and other jurisdictions throughout the State of California have been facing challenges to their at-large election system. Many of these jurisdictions have voluntarily switched to district-based elections instead of facing litigation. None of the jurisdictions that have defended CVRA actions have prevailed on the merits. The CVRA contains an attorney’s fees provision that entitles a prevailing plaintiff to an award of its reasonable attorney’s fees and litigation expenses, including expert witness fees and costs. By contrast, a prevailing defendant jurisdiction is not entitled to recover any costs, unless the court finds the action to be frivolous.

On May 6, 2019, the City received a demand letter from the law firm of Shenkman & Hughes, PC (“Shenkman Firm”) alleging that the City’s at-large election system violates the CVRA and demanding that the City change its election system or face litigation. On June 18, 2019, the City and the Shenkman Firm executed an Extension Agreement to enable the City to avoid duplicative costs and efforts of establishing district boundaries and then adjusting such boundaries in less than two years upon receiving the results of the 2020 Census.

The Extension Agreement will be implemented in accordance with Elections Code Section 10010 and has three key terms. First, by June 20, 2019, the City must consider adopting a resolution of intent to transition to district-based elections pursuant to Elections Code Section 10010. Second, the Extension Agreement allows the City to begin the 90-day process for changing to district-based elections once the 2020 Census results have been received. Finally, the Extension Agreement requires the City to reimburse the Shenkman Firm for the cost of the work product generated to support the demand letter, subject to the \$30,000 statutory limit.

FISCAL IMPACT/SUMMARY

There is no direct fiscal impact on the General Fund associated adoption of the proposed resolution. Once the 2020 Census results have been received, there will be significant staff time needed to transition to district-based elections and to administer the process including the need for at least four public hearings. The City will also incur the costs of a professional demographer and other potential consultants. Finally, if a claim for attorneys' fees is made by the Shenkman Firm, the maximum potential liability for the City is \$30,000.

RESPECTFULLY SUBMITTED:

William Gallardo, City Manager
Prepared by: Terence Boga, City Attorney

Attachments

Resolution
Letter from Shenkman & Hughes, PC received on May 6, 2019
Extension Agreement

RESOLUTION NO. 2019-049

A RESOLUTION OF THE BREA CITY COUNCIL DECLARING ITS INTENT TO TRANSITION FROM AT-LARGE ELECTIONS FOR CITY COUNCIL TO DISTRICT-BASED ELECTIONS FOR CITY COUNCIL PURSUANT TO ELECTIONS CODE SECTION 10010 AFTER RECEIPT OF THE 2020 CENSUS RESULTS

A. RECITALS:

(i) City Council Members are currently elected in “at-large” elections, in which each City Council Member is elected by the registered voters of the entire City.

(ii) On May 6, 2019, the City received a claim from Shenkman & Hughes, P.C. (“Shenkman Firm”) alleging that the City’s at-large election system violates the California Voting Rights Act.

(iii) Government Code Section 34886 authorizes the legislative body of a city of any population to adopt an ordinance to change its method of election from an “at-large” system to a “by-district” system in which each Council Member is elected only by the voters in the district in which the Council Member resides.

(iv) Elections Code Section 10010 establishes a process by which a jurisdiction can change to a district-based election system through the legislative approval process and avoid the high cost of litigation under the California Voting Rights Act.

(v) Prior to the City Council's consideration of an ordinance to establish district boundaries for a district-based election system, Elections Code Section 10010 requires that all of the following be completed within a 90-day period:

1. Prior to drawing a draft map or maps of the proposed boundaries of the districts, the City shall hold at least two public hearings over a period of no more than 30 days, at which the public will be invited to provide input regarding the composition of the districts;

2. After all draft maps are drawn, City shall publish and make available for release at least one draft map and, if members of the City Council will be elected in their districts at different times to provide for staggered terms of office, the potential sequence of the elections shall also be published. The City Council shall also hold at least two additional public hearings over a period of no more than 45 days, at which the public shall be invited to provide input regarding the content of the draft map or maps and the proposed sequence of elections, if applicable. The first version of a draft map shall be published at least seven days before consideration at a public hearing. If a draft map is revised at or following a public hearing, it shall be published and made available to the public for at least seven days before being adopted; and

(vi) On June 18, 2019, the City and the Shenkman Firm executed an Extension Agreement to enable the City to avoid duplicative costs and efforts of establishing district boundaries and then adjusting such boundaries in less than two years upon receiving the results of the 2020 Census. Pursuant to the Extension Agreement, the City and the Shenkman Firm have agreed that the 90-period set forth in Elections Code Section 10010 shall start to run on the day that the City receives the results of the 2020 Census.

B. RESOLUTION:

NOW, THEREFORE, it is found, determined and resolved by the Brea City Council as follows:

1. The facts as set forth in the Recitals are true and correct.
2. The City Council hereby resolves to consider, within 90 days of receipt of the 2020 Census results, adoption of an ordinance to transition to a district-based election system in accordance with applicable laws including Government Code Section 34886 and Elections Code Section 10010.
3. The City Council directs staff to work with the City Clerk, City Attorney, demographer, and other appropriate consultants as needed, to provide a detailed analysis of the City's current demographics and any other information or data necessary to prepare a draft map that divides the City into voting districts in a manner consistent with the intent and purpose of the California Voting Rights Act and the Federal Voting Rights Act.
4. The City Council directs staff to post information regarding the proposed transition to a district-based election system, including maps, notices, agendas, and other information and to establish a means of communication to answer questions for the public.
5. The City Clerk shall certify to the passage and adoption of this resolution.

RESO NO. 2019-049
June 20, 2019

APPROVED AND ADOPTED this 20th day of June, 2019.

Christine Marick, Mayor

ATTEST: _____
Lillian Harris-Neal, City Clerk

I, Lillian Harris-Neal, City Clerk of the City of Brea, do hereby certify that the foregoing Resolution was adopted at a meeting of the City Council of the City of Brea held on the 20th day of June, 2019, by the following vote:

AYES: COUNCIL MEMBERS:

NOES: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

ABSTAIN: COUNCIL MEMBERS:

DATED: _____

Lillian Harris-Neal, City Clerk

RESO NO. 2019-049
June 20, 2019

SHENKMAN & HUGHES, PC

Attorneys

Malibu, California

28905 Wight Road
Malibu, California 90265
(310) 457-0970

kishenkman@shenkmanhughes.com

RECEIVED

MAY 06 2019

OFFICE OF THE
CITY CLERK

VIA CERTIFIED MAIL

May 1, 2019

Lillian Harris-Neal, City Clerk
City of Brea
1 Civic Center Circle
Brea, CA 92821

Re: Violation of California Voting Rights Act

I write on behalf of voters within the City of Brea. The City of Brea ("Brea" or "City") relies upon an at-large election system for electing candidates to its City Council. Moreover, voting within the City of Brea 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.*

The City of Brea’s at-large system dilutes the ability of Latinos and Asians (both “protected classes”) – to elect candidates of their choice or otherwise influence the outcome of the City’s elections. As of the 2010 Census, Brea had a population of 39,282. According to this data, Latinos comprise 25% and Asians encompass over 18% of the City’s population. Both of these communities have experienced significant growth in recent years. Between 2000 and 2010, the Latino population grew by 5% and the Asian population doubled, increasing from 9% to over 18%. Despite this notable growth, these two communities have been historically underrepresented on the Brea City Council. In fact, in the City’s history, there has never been a single Asian City Councilmember in Brea. Therefore, not only is the contrast between the significant Latino and Asian proportions of the electorate and the limited Latinos and absence of Asians to be elected to the Brea City Council outwardly disturbing, it is also fundamentally hostile towards participation by members of these protected classes.

The City’s at-large election system has also impeded the emergence of Latino and Asian candidates from these protected communities. For instance, in the past 20 years, there has been only one Asian to emerge as a candidate for the City Council. Opponents of fair, district-based elections may attribute the lack of protected class members vying for elected positions to a lack of interest in local government from these communities. On the contrary, the alarming absence of Latino and Asian candidates seeking election to the 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).

The City’s election history is additionally illustrative. In 2014, notwithstanding the fact that there still had never been one Asian to serve on the Brea City Council, Michael Kim announced his candidacy. Despite significant support from the Asian voters of Brea, Mr. Kim lost that election. Similarly, in 2004, Mr. Richard Rios sought a seat on the Brea City Council and, despite significant support from the Latino community, Mr. Rios lost that election. These elections evidence vote dilution which is directly attributable to the City’s unlawful at-large election system.

Elections for statewide propositions further demonstrate the racial polarization of voting in the City of Brea. For example, the election results for Propositions 187, 209 and 227, which were each ballot measures driven by divisive, racially charged campaigns and strongly opposed by the Latino and Asian communities, were each passed by overwhelming margins in Orange County and specifically in Brea. The election results for these initiatives demonstrate racially polarized voting in the City of Brea, further substantiating its violation of the CVRA.

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, 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 representation of Asians and Latinos on the Brea City Council in the context of racially polarized elections, we urge the City to voluntarily change its at-large system of electing its 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 June 20, 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

EXTENSION AGREEMENT

This Extension Agreement is being made by and among Shenkman & Hughes, P.C. ("Shenkman Firm"), on the one hand, and the City of Brea ("City"), on the other hand (collectively, "the Parties").

1. Recitals

- 1.1. The City is a municipal corporation, duly incorporated and existing under the Constitution and the laws of the State of California.
- 1.2. On May 6, 2019, the City received a notice letter ("Notice") from the Shenkman Firm on behalf of its clients alleging that the City's at-large election system violates the California Voting Rights Act of 2001 ("CVRA") and stating that it will seek judicial relief if the City does not voluntarily change its at-large system of electing its city council members.
- 1.3. If the City transitions to district based elections prior to the 2020 Census, it may be required to adjust the district boundaries again in approximately two years following the decennial federal census under Elections Code 21600, *et al.*
- 1.4. In order to avoid duplicative costs and efforts of establishing then adjusting the district boundaries in less than two years, it is now the mutual desire of the Parties hereto to allow the City to wait until after the results of the 2020 Census to conduct the process of transitioning to district-based elections.
- 1.5. The Parties hereto, and each of them, believe that the Extension Agreement contained herein constitutes a fair, reasonable, equitable, and good faith agreement with respect to the timeline for the City's transition to district-based elections.

2. Settlement

- 2.1. The City agrees to consider adopting a resolution of intent to transition to district-based elections pursuant to Elections Code Section 10010(e)(3)(A), within 45 days of receipt of the Notice, which day is June 20, 2019.
- 2.2. The 90-day period set forth in Elections Code Section 10010(e)(3)(B) shall only start to run on the day that the City receives the results of the 2020 Census.
- 2.3. Within ten (10) days of the City receiving the results of the 2020 Census, the City shall notify the Shenkman Firm in writing of the availability of the Census results.
- 2.4. The Shenkman Firm shall not file an action against the City under the CVRA unless the City (1) fails to adopt a resolution of intent within 45 days of receipt of the Notice, or (2) fails to adopt an ordinance establishing district-based elections within 90 days of receiving the results of the 2020 Census.
- 2.5. Except as set forth in Section 2.6, the City agrees to reimburse the Shenkman Firm for the cost of the work product generated to support the Notice as set forth in and in accordance with Elections Code Section 10010(f).

- 2.6. If the City receives another written notice from a prospective plaintiff that causes it to begin the process of transitioning to district-based elections before the timeline set forth in this Extension Agreement, the apportionment provisions of Elections Code Section 10010(f) shall apply.

3. General Settlement Provisions

- 3.1. The advice of legal counsel has been obtained by each of the Parties prior to the execution of this Extension Agreement. Each of the Parties hereby executes this Extension Agreement voluntarily and with full knowledge of its significance.
- 3.2. (a) Each of the Parties has read and understands the contents of this Extension Agreement.
- (b) This Extension Agreement shall be binding upon and inure to the benefit of the heirs, administrators, executors, successors, and assigns of the respective Parties hereto and to any parent, subsidiary, or affiliated entity of each of such Parties.
- (c) Each of the Parties of this Extension Agreement and their respective attorneys, hereby represent, warrant, and agree, each to the other, that they have full power and authority to execute this Extension Agreement, to execute and file all papers contemplated herein, to pay any sums provided for herein, and to do any and all things reasonably required to effectuate the terms of this Extension Agreement.
- 3.3. This Extension Agreement may be executed in counterparts and shall not become effective until all Parties required to execute this Extension Agreement have done so.
- 3.4. This Extension Agreement may not be amended, canceled, revoked, or otherwise modified except by written agreement executed by all of the Parties.

WHEREFORE, the Parties hereto have executed this Extension Agreement on the dates set forth opposite their respective signatures.

Dated: 6-18-19

SHENKMAN & HUGHES P.C.



Kevin Shenkman

Dated: 6-18-19


CITY OF BREA





Approved as to form:

RICHARDS, WATSON & GERSHON, A Professional Corporation

By: 

Terence Boga
City Attorney, City of Brea