



City of Palm Springs

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MEMORANDUM

To: California Voting Rights Act Working Group
Cc: Subcommittee Members Geoff Kors and Lisa Middleton, City Manager David Ready
From: City Attorney Edward Kotkin
Date: July 17, 2018
Re: Response to Working Group Inquiries

The City Council has authorized me to communicate the following general commentary to you, reserving all rights and privileges to which the City and my office are entitled.

a. Which changes related to the formation of districts and other related City governance matters are clearly permissible with validation only?

As I construe this question, the working group is asking what the City Council may do on its own, as opposed to identifying actions that the City Council could conceivably take and then proceed to “validate” either (i) in court, through a validation action, or (ii) through a Charter amendment presented to, and approved by the voters. The City Council may consider *any change* that it wants to consider to the *status quo*, with or without a validation action (or Charter amendment). Doing so does not make it “right.” Initiation of a validation action (or calling an election) will be a discretionary matter that the City Council will address after the formation of the City’s districts. Based upon the statutes of the CVRA as distinguished from our Charter, whether the City proceeds to form four (4) districts with a direct elect “citywide” Mayor, *OR* five (5) districts with a rotating Mayoral position, a validation action is a good idea. Conversely, a change in the total number of City Council members would require an amendment to the Charter.

Beyond the number of elected City Council members, it’s noteworthy that other “changes” would not require a Charter amendment. Switching to a district system that included a non-partisan blanket primary election, or weighted (or “ranked choice”) voting, are consistent with the Charter, at least insofar as they do not violate any particular provision. Article VIII of the Charter arguably allows municipal primaries (non-partisan, blanket and consistent with applicable CA law), and weighted voting since neither is prohibited by the Elections Code.

However, it’s at best unclear to me whether a voting rights advocacy group would view a municipal primary, or a weighted voting element in a proposed “change” as consistent with the CVRA. If a primary or weighted voting can reasonably be construed as limiting the impact of minority voters in a particular district, *e.g.*, remoteness/indirectness of vote with respect to outcome, protection of incumbents, *etc.*, a primary, or a weighted vote would likely not be acceptable to a voting rights advocacy group. We

simply don't know what a court would do with an allegation that one of these "changes" violates the

CVRA. I would want to visit with opposing counsel to ensure that such a "change" would not prompt a lawsuit before the Council moved in either of those directions.

Another potential "change" is not precluded by the CVRA or the Charter, and the Council can take action without the need for validation. A decision to pay Council Members more money could be made by ordinance without any necessity of a validation action, provided that the change, as implemented, is consistent with the Charter *See* Section 304. In fact, such a change might arguably advance CVRA goals, *e.g.*, higher salaries might encourage working people who require a living wage to consider elected office. In fact, this issue is included in this discussion only to ensure that questions about potential changes in City governance asked by third-parties can be answered.

Bottom line: there is no districting process outcome that is completely consistent with our charter, and districting itself is not "clearly permissible" unless one accepts the legal argument that state law, *i.e.*, the CVRA controls and supersedes the Charter. Generally speaking, a post-districting ordinance validation action is a good idea. Some changes would likely be confirmed by a court, *e.g.*, five (5) districts with a rotating Mayoral position. This change, concurrent with the process of district formation, is the most "like" our Charter which calls for five (5) Council Members, one (1) being the ceremonial Mayor who holds no distinct or unique powers under the Charter. Other changes would have a reasonable likelihood of being confirmed *via* validation, *e.g.*, four (4) districts with a direct elect Mayor. This change would retain the direct elect Mayor called for by the Charter, and not afford the Mayor any specific power or authority beyond that held by all Council Members. Further, at least one voting rights advocacy group appears to have settled its lawsuit against a general law city, and allowed that city's retention of a direct-elect Mayor. However, it can reasonably be argued that retention of the direct election of the Mayor creates a "mixed" at-large and district system that violates the CVRA in the case of racially polarized voting. *See* CA Elections Code Section 14026(a)(3). Primary and weighted/ranked choice districts are "changes" that can be made without validation, are not specifically addressed by the CVRA. While they can be implemented without a Charter amendment, they might not be acceptable to CVRA advocates. Finally, higher Council salaries is a "change" that can be made without validation or concern that CVRA advocates might be opposed.

1. Which areas may be conformed to the charter through a validation action?

Validation Action (without Charter amendment *per se* necessary): OK for five (5) districts with rotating Mayoral duties, or four (4) districts with a direct elect Mayor. This is based upon state law (CVRA statutes) and the Cucamonga case wherein one (1) voting rights advocacy attorney group agreed that retention of a direct elect Mayor was consistent (or at least acceptable) per the CVRA . That said, as is discussed above, four (4) districts with a direct elect Mayor could be argued to be a mixed district/at-large system, and illegal under the CVRA. The validation action would be more necessary in the case of that system being adopted by the Council *via* ordinance.

2. In which areas does the state constitution override the charter?

None. It is the CVRA itself that controls and provides the legal basis from which the City can contend that constitutional interests advanced by the CVRA necessitated action otherwise contrary to the Charter. While the goals underlying the CVRA are indeed constitutional in scope, the principle that state statutes override city charters if they are narrowly tailored to address an issue of statewide concern is applicable here. The CVRA applies to Charter cities. *Jauregui v. City of Palmdale* (2014) 226 Cal. App. 4th 781.

b. Which changes are prohibited with validation only and will require a vote (charter amendment)?

The City should not move to more districts than five (5), or to a system that included more or less Council members than five (5). Council action including a change in the number of City Council Members would necessitate a Charter amendment.

Bottom line: if a proposed “change” is specifically contrary to a Charter provision and it doesn’t advance a CVRA goal, that change should be the subject of a Charter amendment before it takes place.

c. Which changes may be permissible with respect to Council action to advance CVRA purposes, but not be addressed in court precedent?

None of the law regarding what is “permissible” with respect to Council action *via* ordinance is spelled out in case law. Elimination of *any* element of “at-large” voting may be addressed by ordinance.

d. Is the City required by law to go to even year elections?

In a word, yes. Although the strict letter of the law would require the City to do so in 2020, my assessment is that the Council may choose to make the change on its own terms, either in 2020 or 2022, with very little risk.