CITY OF CITRUS HEIGHTS

CITY COUNCIL STAFF REPORT MEMORANDUM

DATE: January 10, 2019

TO: Mayor and City Council Members

FROM: Christopher W. Boyd, City Manager

SUBJECT: **California Voting Rights Act Demand Letter and Proposed Actions**

Summary and Recommendation

On December 3, 2018, the City received a certified letter from Shenkman & Hughes, alleging the City's method of electing councilmembers through "at large", as opposed to "by district", violated the California Voting Rights Act ("CVRA").

Regardless of whether the City agrees with the allegations, there is no city or public agency that has successfully defended an "at large" method of election, when challenged under the CVRA. Public agencies which have litigated this issue have paid millions of dollars to prevailing plaintiff attorneys, as well as paying their own attorneys.

The City recently approved a line of credit as a "safety net" between the current fiscal year and fiscal year 2022-2023, when the City will finally begin to receive its property taxes. The City has a broad range of priorities, ranging from addressing issues of homelessness to street improvements, which require the City's financial support.

In light of the above, staff recommends that the City adopt a resolution declaring the Council's intent to initiate procedures to transition from at-large elections to district-based elections pursuant to California Elections Code Section 10010 and authorizing related actions including estimating a time frame of action.

Fiscal Impact

The fiscal impact is estimated to be between $50,000 and $100,000, or possibly more. This includes the increased, recurring cost of approximately $10,000 from the County Registrar of Voters for conducting a district-based, as opposed to at-large, election and a one-time payment to Shenkman & Hughes capped at a not-to-exceed $30,000 (and discussed below) and one-time costs for a demographer to assist with drawing boundaries for the voting districts, estimated between $30,000 and $65,000. There will also be time spent by City staff and the City Attorney

on this matter. In contrast, if the City decides not to transition and is sued, its own legal fees could be well over $1 million, with the related risk of having to pay plaintiffs' attorneys fees, which (based on other cases) would also be well over $1 million.

Background and Analysis

On December 3, 2018, the City of Citrus Heights (the "City") received a certified demand letter dated November 28, 2018 from the law firm of Shenkman & Hughes ("Shenkman Letter"), alleging that the City's method of at-large voting violated the California Voting Rights Act ("CVRA") and demanding the City move away from its current method of at-large voting. The Shenkman Letter claimed the City's current at-large election system diluted the ability of Latino voters (a "protected class" under the CVRA) to elect candidates of their choice or otherwise influence the outcome of City Council elections. The Shenkman Letter stated the City's population is 16.5% Latino, claimed that no Latino has ever served on the City Council, and concluded that "the absence of Latinos to be elected to the Citrus Heights City Council [is] outwardly disturbing [and] it is also fundamentally hostile towards Latino participation."

The City's current at-large election system allows voters from the entire City to choose each of the five councilmembers. In a district-based election system, the City would be divided into separate districts with one councilmember residing in each district. Therefore, with a by-district election process, voters would vote every four years for a single councilmember residing in their district, rather than voting every two years for either two or three councilmembers representing the entire City.

The California Voting Rights Act

The CVRA took effect in 2003. The CVRA prohibits at-large election systems from impairing the ability of a protected class (e.g. members of a race, color, or language minority group) to elect candidates of its choice or its ability to influence the outcome of an election. Modeled after the Federal Voting Rights Act ("FVRA"), the CVRA was specifically enacted to make it easier for plaintiffs to challenge at-large voting systems employed by many public agencies. To prove a violation of the CVRA, plaintiffs need only show the existence of racially polarized voting—that there is a difference between the candidates or ballot measures preferred by the voters in the protected class compared to voters generally. (Elections Code §§ 14026(e), 14028(a).) Plaintiffs are not required to show that members of a protected class live in a geographically compact area or to prove an intent to discriminate on the part of voters or officials.

Safe Harbor Under Elections Code Section 10010

Effective January 1, 2017, AB 350 amended California Elections Code Section 10010 and provided public agencies a "safe harbor" against a CVRA lawsuit. A public agency's liability to plaintiffs' counsel is capped at $30,000 if the agency acts rapidly to take two key steps. The first step is adoption of a resolution of intent to switch to district-based elections. For Citrus Heights,

this 45-day period ends on January 17, 2019. Adopting the resolution bars the prospective plaintiff from filing suit for another 90 days, during which the agency must conduct at least *five* public hearings to draw district maps to adopt an ordinance transitioning to district elections. If, within 90 days of adopting its resolution of intent, the public agency adopts an ordinance establishing district-based elections, the prospective plaintiff will be limited to recovery of the costs it incurred in preparing the CVRA demand letter, not to exceed $30,000. Furthermore, if the agency voluntarily chooses to transition to by-district elections under the safe harbor, it retains control over determining district boundaries with input from communities of interest through the public hearing process. The purpose of the public hearings is to give the community an opportunity to weigh in on the composition of the districts and to provide input regarding the content of the draft maps and the proposed sequence of elections.

Effective January 1, 2019, AB 2123 amended Elections Code section 10010 to allow the 90 day period to be extended for up to another 90 days, for a total of 180 days, upon written agreement between the agency and the prospective plaintiff which sent the demand under the CVRA. Here, the additional time would allow the City to conduct greater public outreach, encourage more public participation, and receive greater public input on the proposed boundaries, before adopting an ordinance transitioning to by-district elections. The City would retain its immunity from litigation during this extended period. Within ten days of entering into such an agreement, the City must post on its website a tentative schedule of the public outreach events and the public hearings to be held. Mr. Shenkman has expressed his willingness to grant the City the additional 90 day period if the City adopts the resolution of intent recommended by this staff report.

Financial and Legal Implications

In a lawsuit challenging at-large elections under the CVRA, a prevailing plaintiff is entitled to reasonable attorneys' fees and litigation expenses, and a prevailing defendant usually cannot recover any costs. (Elections Code § 14030.) Additionally, if the court finds a CVRA violation, the court has authority to impose district-based elections and to determine district boundaries with input from the plaintiffs' attorney. (Elections Code § 14029.)

Further, even if the public agency successfully defends a CVRA lawsuit, that success does not bar a subsequent challenge under the CVRA by a different plaintiff. In CVRA-related litigation, when the plaintiffs prevail *or* if the parties settle, the courts have ordered the public agency to reimburse plaintiffs' attorney fees and legal costs, in addition to paying for the agency's own legal costs. When cities have defended a CVRA lawsuit, settlements to pay attorneys' fees have ranged from as little as $385,000 (Escondido) and $800,000, (Santa Barbara) to as high as $3,000,000 (Modesto) and $4,500,000 (Palmdale), depending on whether the superior court decision was appealed. The City of Santa Monica recently lost a CVRA lawsuit; it is not yet known whether that city will appeal. Estimates of that city's legal fees to date range from $2

million to $4 million; that estimate does not include the likely award requiring that city to pay plaintiffs' legal fees.

To date, City staff is unaware of any cities or other jurisdictions that have successfully defended their at-large election system after the initiation of a legal challenge. Rather, litigation and threats of litigation have led public agencies either to transition to a district-based method of election or to be forced to transition based on an adverse ruling by the court. In most instances, the agency chose not to litigate and to voluntarily initiate a change in its method of voting once a legal challenge was threatened through receipt of a demand letter.

In 2018, a number of cities in Northern California, which received letters from Shenkman & Hughes or other law firms raising CVRA issues, have transitioned, or are in the process of transitioning, from at-large voting to district voting. These cities include Half Moon Bay, Menlo Park, Martinez, Redwood City, Santa Rosa, Concord, Fremont, Brentwood, Antioch and South San Francisco.

There are only two published California cases analyzing the CVRA. The cities of Modesto and Palmdale unsuccessfully defended their at-large election systems in 2006 and 2014, respectively. (*Sanchez v. City of Modesto* (2006) 145 Cal.App. 4th 660, 665; *Jagueri v. Palmdale* (2014) 226 Cal.App.4th 781, 790.) A third published case dealt with the question of attorneys' fees. (See *Rey v. Madera Unified School District* (2012) 203 Cal. App. 4th 1223.)

Transition from At-Large to District-Based Elections

If the City initiates district elections, the City Council may determine the potential sequence of the elections. (Elections Code § 10010(a)(2).) Additionally, no councilmember's term may be cut short (Government Code § 34873; Elections Code § 21606(a)), but when his or her term ends, an incumbent can only run from the new district in which he or she resides. Thus, the three newly elected councilmembers, regardless of where districts may be drawn, will serve their full four year terms, or until 2022. The term of office for each councilmember remains four years. (Government Code § 34879.)

The district election sequence depends on a number of factors, such as the number of districts drawn, the number of incumbents located in each district, and the incumbents' existing terms. State law does not specifically prescribe the method for election sequencing when transitioning to district elections. However, the timing of a city council's exercise of discretion and the scope of its discretion is limited by other statutory requirements, which include:

- For each draft redistricting plan, a proposed election sequence must be specified at the time the plan is published.

- The expiration of terms of office can be considered in setting the election rotation.
- In determining the final sequence of the district elections, a city council "shall give special consideration to the purposes" of the CVRA.
- A city council shall take into account the preferences expressed by members of the districts.

For example only, a staggered election would occur every two years with two councilmembers elected in one election cycle and the residents of only those two districts voting. In the next election cycle, three councilmembers would be elected by only the residents of those three districts with open seats.

Criteria for Creating District Maps

Cities must comply with the following legally required criteria under federal law:

1. Each district must have equal populations or "shall be as nearly equal in population as may be," which is known as the one person, one vote rule. (Elections Code § 21601; Gov. Code § 34884(a)(1); Equal Protection Clause of the U.S. Constitution.)
2. Race cannot be the "predominant" factor or criteria when drawing districts. (*Shaw v. Reno* (1993) 509 U.S. 630; *Miller v. Johnson* (1995) 515 U.S. 900.)
3. The districting plan must comply with the FVRA, which prohibits districts from diluting minority voting rights and encourages a majority-minority district if the minority group is sufficiently large and such a district can be drawn without race being the predominant factor. (*Bartlett v. Strickland* (2009) 556 U.S. 1.)

Additionally, cities may, but are not required to, give consideration to the following factors: (a) topography, (b) geography, (c) cohesiveness, contiguity, integrity, and compactness of territory, and (d) community of interests of the council districts. (Elections Code § 21601; Government Code § 34884(a)(1).) When defining districts, other communities have considered natural and artificial physical/visual boundaries such as major roads/corridors, freeways, creeks, railroad lines, political subdivisions, or other barriers. Community of interests includes school district boundaries, neighborhood boundaries, established homeowner associations ("HOAs"), retail/commercial districts, voting precincts, and public transit stops. Cities may also plan for future growth based on anticipated housing developments.

Attachments

1. Letter from Shenkman & Hughes
2. Resolution Declaring the City Council's Intent to Initiate Procedures to Transition from At-Large Elections to District-Based Elections Pursuant to California Elections Code Section 10010 and Authorizing the City Manager and the City Attorney to Take Related Actions

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VIA CERTIFIED MAIL

November 28, 2018

Steve Miller, Mayor
Amy Van, City Clerk
City of Citrus Heights
6360 Fountain Square Drive
Citrus Heights, CA 95621

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 Citrus Heights ("Citrus Heights" or "City") relies upon an at-large election system for electing candidates to its City Council. Moreover, voting within Citrus Heights 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 Citrus Heights' at-large system dilutes the ability of Latinos (a "protected class") – to elect candidates of their choice or otherwise influence the outcome of the City's elections. As of the 2010 Census, the City of Citrus Heights had a population of 83,301. According to this data, Latinos comprise approximately 16.5% of the City's population. However, there has not been one Latino to ever serve on the City's Council. Therefore, not only is the contrast between the significant Latino proportion of the electorate and the absence of Latinos to be elected to the Citrus Heights City Council outwardly disturbing, it is also fundamentally hostile towards Latino participation.

The City's election history is additionally illustrative: during the past 20 years there has not even been one Latino who has emerged as a candidate for the Citrus Heights 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 communities. On the contrary, the alarming absence of Latino 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).

As you may be aware, in 2012, we sued the City of Palmdale for violating the CVRA. After an eight-day trial, we prevailed. After spending millions of dollars, a district-based remedy was ultimately imposed upon the Palmdale city council, with districts that combine all incumbents into one of the four districts.

More recently, this month, after a 7-week trial, we also prevailed against the City of Santa Monica, after that city needlessly spent millions of dollars defending its illegal election system – far in excess of what was spent in the Palmdale litigation - taxpayer dollars which could have been more appropriately spent on indispensable municipal services and critical infrastructure improvements. Just prior to the trial in that case, counsel for the City of Santa Monica – Kahn Scolnick, a partner at Gibson Dunn & Crutcher LLP proclaimed that, "the reality is that if Santa Monica fails the CVRA test, then no city could pass, because Santa Monica is doing really well in terms of full

representation and success of minority candidates." ("In Rare California Voting Rights Trial, Gibson Dunn Steps Up for Santa Monica", Law.com, August 1, 2018). Notwithstanding Mr. Scolnick's prediction, Plaintiffs succeeded in proving that Santa Monica's election system was in violation of the CVRA and the Equal Protection Clause of the California Constitution.

Given the historical lack of Latino representation on the Citrus Heights 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 January 17, 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

RESOLUTION NO. 2019- ___

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CITRUS HEIGHTS, CALIFORNIA, DECLARING ITS INTENT TO INITIATE PROCEDURES TO TRANSITION FROM AT-LARGE ELECTIONS TO DISTRICT-BASED ELECTIONS PURSUANT TO CALIFORNIA ELECTIONS CODE SECTION 10010 AND AUTHORIZING RELATED ACTIONS

WHEREAS, members of the City Council of the City of Citrus Heights ("City") are currently elected in "at-large" elections, in which each councilmember is elected by the registered voters of the entire City;

WHEREAS, California Government Code Section 34886, in certain circumstances, authorizes the legislative body of a city to adopt an ordinance to change its method of election from an at-large system to a by-district system in which each councilmember is elected only by the voters in the district in which the candidate resides;

WHEREAS, on December 3, 2018, the City received a certified letter from Kevin Shenkman of the law firm of Shenkman & Hughes, on behalf of his client the Southwest Voter Education Project, alleging that the City's at-large councilmember election system violates the California Voting Rights Act ("CVRA") and threatening litigation if the City did not voluntarily change to a district-based system for electing councilmembers;

WHEREAS, pursuant to California Elections Code Section 14028, a violation of the CVRA may be established if it is shown that racially polarized voting occurs in elections. Pursuant to California Elections Code Section 14026(e), "racially polarized voting" is voting in which there is a difference in the choice of candidates that are preferred by voters in a protected class and between the choice of candidates that are preferred by voters in the rest of the electorate;

WHEREAS, the letter itself was not accompanied by any evidence to support the claim of a CVRA violation, and the City Council denies that its election system violates the CVRA or any other provision of law, asserts that the City's election system is legal in all respects, and further denies any wrongdoing whatsoever in connection with the manner in which City Council elections have been conducted;

WHEREAS, the City is committed to diversity and inclusion with respect to its elections;

WHEREAS, the City Council is aware of the exorbitant cost that multiple cities and other public entities have faced in defending and/or settling CVRA litigation, and the impact that the expenditure of such costs could have on the City's ability to provide essential services to the City's residents and businesses;

WHEREAS, the California Legislature, in amendments to California Elections Code Section 10010, has provided a method whereby a jurisdiction can expeditiously transition to a district-based election system and thereby avoid the high cost and risk of litigation under the CVRA;

WHEREAS, the public interest would be served by Council consideration of a proposal to transition to a district-based election system because of the uncertainty of litigation and the potential extraordinary cost of defending a CVRA lawsuit, even if the City ultimately were to prevail;

WHEREAS, pursuant to California Elections Code Section 10010 as amended in 2016 and in 2018, if the City Council adopts a resolution outlining its intention to transition from at-large to district-based elections, the specific steps it will take to facilitate this transition, and an estimated time frame for doing so, then a prospective plaintiff may not bring a lawsuit within 90 days after the resolution's adoption (or, if the prospective plaintiff grants a 90-day extension as authorized by law, may not bring a lawsuit within 180 days after the resolution's adoption), and the attorneys' fees of the prospective plaintiff may not exceed $30,000;

WHEREAS, prior to the City Council's consideration of an ordinance to establish district boundaries for a district-based election system, California Elections Code Section 10010 requires all of the following:

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

2. After all maps are drawn, the 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, publish the potential sequence of the elections.

3. The City Council shall also hold at least two additional hearings over a period of no more than forty-five 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.

4. The first version of a draft map shall be published at least seven days before consideration at a hearing. If a draft map is revised at or following a hearing, it shall be published and made available to the public for at least seven days before adoption; and

WHEREAS, an experienced demographer will be retained to assist the City in developing a proposal for a district-based election system; and

WHEREAS, the adoption of a district-based election system will not affect the terms of any sitting Councilmember, each of whom will serve out his or her current term.

NOW, THEREFORE, BE IT RESOLVED, by the City Council of the City of Citrus Heights**:**

Section 1. The above Recitals are true and correct and are incorporated herein by reference.

Section 2. The City Council intends to and shall consider adoption of an ordinance to transition to a district-based election system as authorized by California Government Code Section 34886 for use in the City's general municipal election for councilmembers, beginning in November 2020, pursuant to California Elections Code Section 21066(c) and Section 10522. The City Council does not, at this

time, decide the nature of such district-based election. Rather, the details of such system shall be determined only after community outreach and appropriate public hearings.

Section 3. The City Council directs staff to retain and to work with a demographer, and with 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.

Section 4. The City Clerk is directed to post information regarding the proposed transition to a district based election system, including maps, notices, agendas and other information, to establish a means of communication to answer questions from the public, and to otherwise take the steps necessary to comply with the applicable provisions of the Elections Code.

Section 5. The City Council hereby approves the tentative timelines as set forth in Exhibit A, attached hereto and made a part of this resolution, for conducting a public process to solicit public input and testimony on proposed district-based electoral maps before the City Council adopts any such map.

Section 6. The timelines set forth in Exhibit A may be adjusted by the City Manager or designee as deemed necessary, provided that any such adjustments shall not prevent the City from complying with the timeframes specified in California Elections Code Section 10010.

Section 7. This resolution shall become effective immediately upon its passage and adoption.

The City Clerk shall certify the passage and adoption of this Resolution and enter it into the book of original resolutions.

PASSED AND ADOPTED by the City Council of the City of Citrus Heights, California, this 10th day of January 2019 by the following vote, to wit:

AYES: Council Members:
NOES: Council Members:
ABSTAIN: Council Members:
ABSENT: Council Members:

Jeannie Bruins, Mayor

ATTEST:

Amy Van, City Clerk