



SAN RAFAEL CITY COUNCIL AGENDA REPORT

Department: City Attorney

Prepared by: Lisa Goldfien
Assistant City Attorney

City Manager Approval: _____

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TOPIC: DISTRICT-BASED CITY ELECTIONS

SUBJECT: CONSIDERATION OF TRANSITION FROM AT-LARGE ELECTIONS TO DISTRICT-BASED ELECTIONS

RECOMMENDATION:

Receive public comments and discuss changing the City's elections from an at-large system to a district-based system.

BACKGROUND:

In 2002, the Legislature enacted the California Voting Rights Act (CVRA) (Elec. Code §§14025 – 14032), which prohibits California public agencies from imposing or applying an at-large election method “that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election.” (Elec. Code §14027) A protected class is defined by the CVRA as “a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965.”

The CVRA defines an at-large method of election to include the election method used by the City of San Rafael, in which the voters of the entire City elect all the members of the City Council. In a lawsuit brought pursuant to the CVRA, a plaintiff who establishes a history of “racially polarized voting” under a city’s at-large election system can require a city to change to a district-based election system.

Since 2015, the City’s Latino Civic Leadership Initiative Group has been working to increase minority representation on San Rafael’s boards, commissions and ultimately the City Council, and the City is committed to working collaboratively with all of its residents to address any voting or representation concerns. Despite this work, on November 20, 2017 the City received a letter from Malibu attorney Kevin Shenkman urging the City to change its at-large voting system to a district-based voting system, asserting that “San Rafael’s at-large system dilutes the ability of Latinos (a ‘protected class’) - to elect candidates of their choice or otherwise influence the outcome of San Rafael’s council elections.” (See Attachment 1)

FOR CITY CLERK ONLY

File No.: 9-4 District Elections

Council Meeting: 12/04/2017

Disposition: Accepted report and returned to 12/18/2017 meeting

According to the CVRA, receipt of this letter starts a 45-day timeline for the City “to pass a resolution outlining its intention to transition from at-large to district-based elections, specific steps it will undertake to facilitate this transition, and an estimated time frame for doing so.” (Elec. Code §10010) A potential plaintiff may not file a lawsuit under the CVRA until this 45-day period has elapsed, which in San Rafael’s case will be on January 4, 2018. Moreover, if the City passes such a resolution, it will have a further 90 days to adopt an ordinance implementing district-based elections before a lawsuit may be filed under the CVRA.

Having been alerted the previous week that Mr. Shenkman had sent his letter to the City, the City Council [held a study session on November 20, 2017](#) on the subject of the CVRA. At that meeting, the City’s outside legal counsel, Christopher Skinnell from the San Rafael law firm Nielsen Merksamer, provided a general briefing on the federal and California Voting Rights Acts, as well as an overview of the City’s voter demographics to set the stage for further conversation on the subject. The City Council took questions from the public and committed to responding to public inquiry, along with a list of pros and cons for moving to district elections, at the City Council meeting of December 4, 2017.

ANALYSIS:

For the convenience of the City Council and public as they discuss the issue of district-based elections, Staff has attempted to answer questions posed to date and to develop a preliminary list of pros and cons if the City Council determines to act to change the City’s election method to a district-based method rather than at-large.

Pros/Cons of Changing to District-based Elections System: The list below is a preliminary list based on information to date and will be expanded during/following public comment and City Council discussion.

PROS	CONS
<ol style="list-style-type: none">1. Avoidance of litigation expenses likely to range from hundreds of thousands of dollars to over a million dollars, because of liability for payment of prevailing plaintiffs’ attorney’s fees, expert witness fees, and other costs.2. Enhancement of impact of minority votes on election results, making accurate representation of the community more likely.3. Decrease in cost of individual election campaigns, thus making it more likely that minority and non-minority candidates will choose to run for City Council.4. Increased minority participation in local government is more likely.5. Increased chance for election of minority Councilmembers.	<ol style="list-style-type: none">1. Catering to their own district’s voters, potential that City Councilmembers will advocate/vote more for their own districts rather than acting for the good of the City as a whole.2. If Office of Mayor remains separately elected, potential for enhanced role of Mayor who can be the swing vote on issues in any district.3. If City litigates and loses, districts will be established by the judge, with input from plaintiffs and the City, rather than by the City, possibly resulting in less optimal districts.4. Possible negative impact on minority interests if nonminority candidate prevails in election in district with the most minority voters.

Questions/Answers:

See Attachment 2.

COMMUNITY OUTREACH:

The City is partnering with community groups to communicate information throughout the community. A website, www.cityofsanrafael.org/district-elections has been created to provide information about the topic, a schedule of meetings, and an online form for public feedback. This meeting was announced via the City's website, email notifications, the City Manager's newsletter and via social media. The City Council considered this issue at a Study Session on November 20, and will be considering this matter again at its December 4 and 18 Council meetings, and additional outreach will be conducted.

FISCAL IMPACT:

The fiscal impact of a change to district elections is unknown at this time.

RECOMMENDED ACTION:

Staff recommends that the City Council receive public comments and deliberate further on the issue of district-based elections in San Rafael.

ATTACHMENTS:

1. November 10, 2017 letter to City from attorney Kevin Shenkman
2. Draft Questions and Answers

SHENKMAN & HUGHES

ATTORNEYS

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VIA CERTIFIED MAIL

November 10, 2017

Esther Beirne, City Clerk
City of San Rafael
1400 Fifth Ave., Rm. 209
San Rafael, CA 94901

Re: Violation of California Voting Rights Act

I write on behalf of our client, Southwest Voter Registration Education Project. The City of San Rafael (“San Rafael”) relies upon an at-large election system for electing candidates to its City Council. Moreover, voting within San Rafael is racially polarized, resulting in minority vote dilution, and therefore San Rafael’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.*

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

The entire election history of San Rafael over several decades is illustrative: not a single Latino candidate competed in any of the council contests. 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 San Rafael 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 comprise approximately 30% of the population of San Rafael. However, there are currently no Latino representatives on the San Rafael City Council. This lack of Latino representation is perpetuated by the City of San Rafael -- it appears that only *one* of the City’s 82 appointed officials is Latino, and city council candidates often get their start in municipal government through such appointed positions. Not only is the contrast between the significant Latino proportion of the electorate and the total absence of Latinos to be elected to the City Council outwardly disturbing, it is also fundamentally hostile towards Latino participation.

The overwhelming majority of San Rafael's Latinos reside in the Canal Area, which is located in the central part of the city. As of 2013, a substantial 80% of residents in the Canal Area were Latino. Housing in the Canal Area has not increased, nor has it become any less expensive than other areas in San Rafael; however, in the Canal Area, overcrowding goes largely ignored and unregulated, and so low-income, Latino families are all but forced to live there. The Canal Area has been largely neglected and, as a result, is ranked the lowest in community well-being in Marin County (*Marin County Human Development Report 2012*). The City Council is simply not reflective of the people of the Canal Area, the majority of whom work low-income, service-industry jobs in order to support their families and afford overcrowded homes in the poorest part of San Rafael.¹ Canal Area residents and the Latino community that largely resides there would greatly benefit from a district-based election, which would allow them to elect candidates that understand the issues facing their neighborhood.

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

Given the historical lack of Latino representation on the city council in the context of racially polarized elections, we urge San Rafael to voluntarily change its at-large system of electing council members. Otherwise, on behalf of residents within the jurisdiction, we will be forced to seek judicial relief. Please advise us no later than December 31, 2017 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

¹ Councilman Andrew McCullough apparently resides in East San Rafael, the eastern portion of the Canal Area; however, East San Rafael comprises the small, *affluent* portion of the Canal Area, which is culturally and socially different from the rest of the Canal Area.

ATTACHMENT 2

DRAFT QUESTIONS AND ANSWERS RE DISTRICT-BASED ELECTIONS

The following is a preliminary list of questions and answers concerning district-based elections, for discussion by the City Council and the public.

The questions below were asked of staff prior to the City Council's November 20 Study Session:

1. Did the City receive a letter from attorney Kevin Shenkman?

RESPONSE: *Yes, Kevin Shenkman's letter dated November 10, 2017, addressed to the City Clerk was received by her on November 20, 2017.*

2. What made the City decide to take proactive action on district elections rather than just wait for pressure from the various groups? What does the City hope to accomplish?

RESPONSE:

The City began to do research, hired outside counsel, and started to schedule public hearings on the issue of district-based elections when it learned of the impending receipt of Mr. Shenkman's letter. The City hopes to provide an opportunity for all interested persons to provide input to the City Council on the issue of district-based elections, and to ensure that the City's electoral system best serves the entire City, in compliance with state and federal law.

3. Is the City considering forming a citizens committee to look at the issue?

RESPONSE:

Given the very strict timelines that the Legislature has imposed for this process under the CVRA, and the substantial number of hearings that must be had in a short time, a citizen commission is impractical at this point. Nothing would prevent the Council from appointing such a committee in 2021, when lines are redrawn following the next Census.

4. Assuming the City moves to district elections and set the districts in 2018, what districts will be open in the next election in 2020? For example, if the Mayor and two Councilmembers are up for reelection in 2020, will it be the districts the two incumbents are in that get to vote? What if there is another district with no Councilmembers currently living there? If the Mayor runs for re-election and he lives in a district that has no Councilmember, is that district Councilmember seat up for election as well?

RESPONSE: *(See response to No. 8.)*

5. Under what circumstances would a vote of the people be required when setting up districts and at-large versus rotating Mayor?

RESPONSE:

Article IV, Section 2 of the Charter provides that “all elections to fill public offices and elections on measures shall be made, held and conducted in the manner provided by law.” Thus, Staff has concluded that under this provision, a vote of the people is not required to change to district-based elections for the four Councilmember seats. Staff has not determined whether converting the office of Mayor to a fifth district-based seat would require a vote.

6. How does the timing of the City’s decision play into likely outcomes?

RESPONSE: *If the City transitions to district-based elections within the timeline established by the CVRA, the City will be liable for the attorney’s fees of the potential plaintiffs, capped at \$30,000. If the City chooses not to make the transition within that timeline but does so after being sued, it is possible that the City will be liable for substantially higher litigation costs and attorneys’ fees of the plaintiffs, and the expense of the City’s own defense attorneys will also likely be higher. The amounts are unknown but will increase the longer the action is litigated prior to settlement.*

Sued in 2008, Madera Unified School District ended up paying plaintiffs’ counsel over \$100,000 for six weeks of uncontested litigation, and that was after a substantial reduction of the fees that were requested (which exceed \$1 million).

An additional consideration is that the Council may have less control over the districting process if a court is involved.

7. If the City is sued, could the City appeal to the judge to give us a five year period to come into compliance and demonstrate increased diversity on the Council?

RESPONSE: *Once a lawsuit is filed under the CVRA, we do not believe there is any authority for a judge to stay the case for five years; even if a judge is willing to approve a five-year transition period, it seems unlikely that this would be a basis for refusing to award the plaintiffs their attorney’s fees and costs.*

8. Do we need to collapse the 2020 and 2022 elections? How does it work when only three of the 5 positions are up in 2020?

RESPONSE:

No. The seats just rotate in. Each current member of the Council serves out the rest of the term to which he or she was elected, and then must run for re-election in the districts. It potentially gets a little more complicated if two councilmembers are paired in a single district, but everybody still serves out his or her full current term.

9. Could this process force the City to do a 2018 election under any scenario?

RESPONSE:

Staff is not aware of any circumstance that would require the City to hold an election for City Council in 2018.

10. Are the districts set by population or registered voters? If population, wouldn't that create significant disparity of registered voters over the districts?

RESPONSE:

*Districts are set by total population. It can create a significant disparity, but that is the basis that has been approved by the courts, including—most recently—the Supreme Court in *Evenwel v. Abbott*. The chief exception is that prisoners can be excluded from the population base.*

11. The City of Encinitas spent \$150K on the attorneys and \$45K on the demographer and \$30K to reimburse plaintiff. Should we expect similar costs? Any others?

RESPONSE:

The City's outside counsel advises that those figures appear to be realistic for the demographer and the plaintiff. Fees for the City's attorneys would likely be less, since minimal travel time would be required.

12. Will attorney Shenkman be required to prove that he spent \$30K before the City is required to reimburse him?

RESPONSE:

Mr. Shenkman must provide documentation to back up the demand, but in past cases the documentation has not been very specific and the fees have been negotiated.

The questions below were asked by the public at the City Council's November 20 Study Session:

13. The cost of running for office disadvantages certain members, in particular Latino members, of the community. Will the cost of running for office in either a district or citywide election be one of the considerations in court and is that something the City will also consider?

RESPONSE:

This is a matter for further public input and discussion by the City Council.

14. What sets San Rafael apart from the rest of the County with regard to an at large mayor as opposed to a rotating mayor? What benefit to the City transition to 5 districts and rotating mayor vs current to 4 districts and at large mayor?

RESPONSE:

The Mayor's office in San Rafael is elected pursuant to Article VI, Section 2 of the City's Charter, which was approved by the voters in 1912. Other cities in Marin County governed by general state law, rather than by a charter city; however, general law cities may also put a measure before their voters to have a separately elected mayor. Generally speaking, the larger the city, the more likely it is that the city will have a separately elected mayor, although there is no formal size requirement.

15. Does the City have a choice between 4 or 5 districts? What input can community give regarding 5 districts? What input can we make to ensure City investigates 5 districts thoroughly, as opposed to 4 districts?

RESPONSE:

See response to No. 5.

16. Can the City delay creating district voting until the census and can that decision be negotiated? What would the cost be to delay? Has it been done in other jurisdictions? How would the Council handle delaying implementing districts and any related cost? What is the optics of waiting until the 2020 census to create districts? What is the community opinion? And are there examples of other communities that have done similar?

RESPONSE:

The City's outside counsel advises that the City has the option to delay implementing district-based elections until after the 2020 Census, and a number of jurisdictions took this approach preceding the last Census (in 2010). However, litigation under the CVRA has become substantially more active since that time, and this approach would not necessarily avoid litigation. In the course of litigation, a judge might deem this to be a reasonable course of action for the City rather than having to redistrict for two successive elections. There is case law under the federal Voting Rights Act recognizing that redrawing districts for two successive elections would be confusing and disruptive.

17. What is the real candidate's cost to run a citywide election vs. a district wide election? Can we project cost to run for a contested district seat?

RESPONSE:

The costs vary based upon the candidate's approach. There are no City-mandated costs under either system.

18. Is there data that can evaluate the pluses and minuses of a less homogenous council? For example, data that would show if you have regional or district elections do you have a much more contentious council advocating for its own district rather than the entire city?

RESPONSE:

City staff is not aware of any quantitative data that addresses this, though there is qualitative scholarship and case law recognizing the possibility that districts could lead to more concern for one's district at the expense of a "big-picture" view. However, the extent to which this is true varies by jurisdiction. Staff

19. Can information be translated into Spanish from meetings?

RESPONSE:

Yes, the City is arranging for Spanish translations of written agenda materials on this matter, and for the presence of a Spanish-speaking translator at the public meetings.

20. Can you provide a summary of pros and cons from the Palmdale decision to go to trial? Can we apply those to our community?

RESPONSE:

CVRA cases are highly fact- and jurisdiction-specific, so applying the result in one jurisdiction to another is very difficult. San Rafael has far different demographics and electoral history, and there were a number of unique aspects to the Palmdale case. This is especially the case as there is no Court of Appeal decision (on the merits) in Palmdale that would be binding on any lower court. Staff has developed a preliminary list of the pros and cons of transitioning to district-based elections as requested by Mr. Shenkman, which is included in the staff report for the December 4, 2017 City Council meeting. The City of Palmdale incurred expenses of approximately \$4.5 million litigating its case through trial and appeals. The high cost of litigation is the primary lesson of the Palmdale case and the argument for making the change during the statutorily allowed time period.

21. How will the City involve the entire community in the public process and keep them involved? How will the City ensure people affected, i.e. people of color, have opportunity to speak and be involved beyond just public comment?

RESPONSE:

The City held a study session on November 20 and has plans for two more public meetings on December 4 and December 18. Afterwards, if the City Council decides to transition to district-based elections, the City Council will hold multiple meetings over a period of not more than 90 days. The City will also be posting informational materials to its website and on sound recordings, and will be partnering with community organizations to get the word out.

22. Will there be an effort in the County to engage the Latino community to become citizens? i.e. People that may be eligible to become citizens.

RESPONSE:

Such engagement efforts are not a requirement of the CVRA, which only addresses the change from at-large elections to district-based elections, nor of the decision to be made by the City Council whether to transition to district-based elections during the time period allowed by the law. It is a related matter, however, which may be the subject of further discussion by the City Council either in connection with the current matter, or at a later date.



STAFF REPORT APPROVAL ROUTING SLIP

Staff Report Author: Lisa Goldfien		Date of Meeting: 12/04/2017	
Department: City Attorney			
Topic: District Elections			
Subject: District Elections			
Type: (check all that apply)		<input type="checkbox"/> Consent Calendar	<input type="checkbox"/> Public Hearing
<input checked="" type="checkbox"/> Discussion Item	<input type="checkbox"/> Resolution	<input type="checkbox"/> Ordinance	
<input type="checkbox"/> Professional Services Agreement	<input type="checkbox"/> Informational Report		
*If PSA, City Attorney approval is required prior to start of staff report approval process			
Was agenda item publicly noticed? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Date noticed:	<input type="checkbox"/> Mailed <input type="checkbox"/> Site posted <input type="checkbox"/> Marin IJ

Due Date	Responsibility	Description	Completed Date	Initial / Comment
DEPARTMENT REVIEW				
FRIDAY noon 11/17	Director	Director approves staff report is ready for ACM, City Attorney & Finance review.	11/28/2017	<input checked="" type="checkbox"/> LG
CONTENT REVIEW				
MONDAY morning 11/20	Assistant City Manager	ACM, City Attorney & Finance will review items, make edits using track changes and ask questions using comments. Items will be returned to the author by end of day Wednesday.	Click here to enter a date.	<input checked="" type="checkbox"/>
	City Attorney		11/28/2017	<input checked="" type="checkbox"/> LG
	Finance		Click here to enter a date.	<input checked="" type="checkbox"/>
DEPARTMENT REVISIONS				
WEDNESDAY noon 11/22	Author	Author revises the report based on comments receives and produces a final version (all track changes and comments removed) by Friday at noon.	Click here to enter a date.	<input checked="" type="checkbox"/>
ACM, CITY ATTORNEY, FINANCE FINAL APPROVAL				
MONDAY morning 11/27	Assistant City Manager	ACM, City Attorney & Finance will check to see their comments were adequately addressed and sign-off for the City Manager to conduct the final review.	Click here to enter a date.	<input checked="" type="checkbox"/>
	City Attorney		11/28/2017	<input checked="" type="checkbox"/> LG
	Finance		Click here to enter a date.	<input checked="" type="checkbox"/>
TUES noon 11/28	City Manager	Final review and approval	11/29/2017	<input checked="" type="checkbox"/> JS