

**JEFFREY M. WICE
461 EAST OLIVE STREET
LONG BEACH, NY 11561
JMWice@gmail.com**

MEMORANDUM

November 9, 2023

To: Harris Beach PLLC

From: Jeffrey M. Wice

Subject: Mount Pleasant NYS Voting Rights Challenge

Overview:

The John R. Lewis New York State Voting Rights Act allows for a local government to be challenged over certain vote dilution allegations, including those enacted by the locality before the state law’s effective date. The new state law expands the “causes of action” that can be brought beyond those covered by the federal Voting Rights Act.

The new law requires a challenging party to demonstrate one of the “causes of action” described in more detail below. In the current situation facing the Town of Mount Pleasant (the “Town”), the challengers argue that Hispanic residents are not able to elect their preferred candidates under the Town’s at-large town board election system¹. As Hispanic residents now comprise a percentage of the Town’s population, the newly enacted state law requires a remedy where it can be demonstrated that there is racially polarized voting or that minority voters can demonstrate other factors that dilute their voting power. The state law does not provide further definition.

As a point of background, in 1982, the U.S. Congress amended the federal Voting Rights Act of 1965 to require a challenger to demonstrate that the “effects” of an electoral law dilutes minority voting strength. The 1982 change no longer required that a challenger demonstrate “intentional discrimination” in its law. In essence, despite the fact that a local government may have established an at-large town board decades ago, quite possibly before the locality had many minority voters, the federal law now requires that the “effects” or “results test” requires the town to consider a new way of electing the town board.

Even though the Town has never had any allegations of racial discrimination or vote dilution in the past related to its at-large voting system, the newly enacted state law permits an action against

¹ An at-large voting system permits voters to cast their ballots for all candidates in the jurisdiction. To address dilutive at-large electoral systems, single-member districts can be created that provide minority voters with an opportunity to elect their preferred candidate. These districts must also satisfy all other relevant federal and state laws.

the Town due to the level of racially polarized voting even though the Town has never taken overt action against minority voters; essentially a result of the decades old at-large voting system.

Dr. Lisa Handley has analyzed all recent contested town elections using long-accepted statistical methods approved by numerous federal and state courts over the several decades since the U.S. Supreme Court developed standards for federal law challenges. Dr. Handley's report is provided as an attachment to this memorandum. Her report, which is attached, explains her methodologies and conclusions.

In 2022, New York state developed and enacted the new state law to further expand federal protections at the state level to hold local governments more accountable for vote dilution situations (i.e., when an at-large system that has been in place impacts the voting preference of a minority group), even if the local government itself is not at fault for continuing to implement old laws that, over time, lead to vote dilution.

Definitions:

Vote Dilution: prohibits methods of election that diminishes the voting strength of a protected class and establishes legal protections.

Voter Suppression: prohibits election-related laws and practices from being implemented in ways that deny members of a protected class the right to vote and establishes legal protections for violations.

Districting

The following sections of the state election law in Title 2, Section 17-206 apply to electoral bodies:

Vote Dilution Rights of Action

A right of action against vote dilution is created by section 17-206(2) of the law. Vote dilution can result when voting practices, elected legislative bodies, or redistricting plans minimize or cancel out a minority group's voting strength. No board of elections or political subdivision shall use any method of election, having the effect of impairing the ability of members of a protected class to elect candidates of their choice or to influence the outcome of elections, as a result of vote dilution.

Violations are established based on the specific voting system.

- 17-206(2)(b)(i): An at-large method means a method of electing members to the governing body where all of the voters of the entire political subdivision elect each of the members.
 - A violation is established if a political subdivision uses an at-large method of election and it is shown that either (a) voting patterns of members of the protected class within the political subdivision are racially polarized or (b) under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcomes of elections is impaired.

According to 17-206(2)(c), to demonstrate that a violation has occurred, evidence shall be weighed and considered:

- Elections conducted prior to the filing of an action are more probative than elections conducted after the filing of the action;
- Evidence concerning elections for members of the governing body of the political subdivision are more probative than evidence concerning other elections;
- Statistical evidence is more probative than non-statistical evidence;
- Where there is evidence that more than one protected class of eligible voters are politically cohesive in the political subdivision, members of each of those protected classes may be combined;
- Evidence concerning the intent on the part of the voters, elected officials, or the political subdivision to discriminate against a protected class is not required;
- Evidence that voting patterns and election outcomes could not be explained by factors other than racially polarized voting, including but not limited to partisanship, shall not be considered;
- Evidence concerning whether members of a protected class are geographically compact or concentrated shall not be considered, but may be a factor in determining the appropriate remedy; and
- Evidence concerning projected changes in population or demographics shall not be considered, but may be a factor in determining the appropriate remedy.

According to 17-206(3), under the totality of the circumstances, the following factors *may* be considered:

- (a) the history of discrimination in the political subdivision, geographic region, or the state;
- (b) the extent to which members of the protected class have been elected to office in the political subdivision;
- (c) the use of any voting law or procedure that may enhance the dilutive effects of the current elective scheme;
- (d) the denial of access of voters or candidates of the protected group to the ballot;
- (e) the extent to which members of the protected groups contribute to political campaigns at lower rates;
- (f) the extent to which members of the protected class vote at lower rates;
- (g) the extent to which members of the protective class are disadvantaged in areas including but not limited to education, employment, health, criminal justice, housing, land use, and environmental protection;
- (h) the extent to which members of the protected class are disadvantaged in other areas which might hinder their ability to participate in the political process;
- (i) the use of overt or subtle racial appeals in political campaigns;
- (j) a significant lack of response by political officials to the needs of the protected class; and
- (k) whether the political subdivision has a compelling justification for the particular adoption.

No one factor is dispositive or necessary to establish a violation. Evidence of these factors concerning the state, private actors, or other political subdivisions may be considered but is less relevant than that concerning the subdivision itself.

According to 17-206(4), any person who was negatively impacted, any organization whose membership includes or is likely to include those negatively impacted, any organization whose mission would be frustrated by a violation of this law, any organization that would expend resources in order to fulfill its mission as a result of a violation of this law, or the attorney general may file an action described above.

Court Remedies for Vote Dilution Violations

According to 17-206(5), the court may institute a remedy upon a finding of a violation. Remedies for a violation may include but are not limited to a district-based method of election, an alternative method of election, **new or revised districting or redistricting plans**, elimination of staggered elections, increasing the size of the governing body, moving the dates of election to concurrent with the primary or general election dates for the state, county or, city office, transferring authority for conducting political subdivision's elections to the board of elections for the county in which the political subdivision is located, additional voting hours or days, additional polling locations, additional means of voting such as by mail, ordering of special elections, requiring expanded opportunities for voter registration, requiring additional voter education, modifying the election calendar, the restoration or addition of persons to registration lists, or retaining jurisdiction for such period of time on a given matter as the court may deem appropriate, during which no redistricting plan shall be enforced unless and until the court finds that such plan does not have the purpose of diluting the right to vote on the basis of protected class membership or in contravention of the voting guarantees set forth in the law. The court can only adopt a remedy that will not diminish the ability of minority groups to participate in the election or elect their candidates of choice.

Procedural Guidelines for Future Redistricting Plans

17-206(6) outlines procedures for implementing new or revised districting or redistricting plans. Before drawing a draft plan, the political subdivision must hold at least two public hearings over a period of no more than 30 days. The political subdivision shall publish at least one draft plan. The political subdivision shall also hold at least two additional hearings over a period of no more than 45 days to allow the public to provide input regarding the content of the draft plan.

Mount Pleasant Analysis

Based on the analysis of the Town of Mount Pleasant voting conducted by Dr. Handley, voting is racially polarized in the township. Dr. Handley analyzed the Town's recent (beginning with 2015) contested Town elections. Her analysis of these election contests (Supervisor, council members, and local justice) indicates that Non-Hispanic white voters and Hispanic voters prefer different candidates. In these races, the Non-Hispanic candidates almost always win. This pattern alone, minus any additional totality of the circumstances evidence, is very likely to warrant remedial action.

The federal Voting Rights Act holds local governments to a different standard. Under federal law, when jurisdictions are found to dilute minority voting strength according to federal tests, they are required to create an effective minority district with at least a 50% minority voting age population. The state law has no similar requirement and requires the creation of a minority-based district after a violation has been established when minority-preferred candidates are defeated by white bloc voting. Such a district can include one or more protected group of minority voters (if they vote cohesively, or for the same candidates).

The Town should proceed with public hearings to consider testimony from residents on this issue and develop, as may be necessary, a remedial plan for the Town Board to consider. The challengers can bring a costly and time-consuming action in State Supreme Court unless a mutually agreed upon solution is reached.