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Memorandum

To: **Tony Cerreto**

From: **Jason Torchinsky**
Holtzman Vogel Josefiak PLLC

Concurring: **Paul DerOhannesian**
DerOhannsian & DerOhannesian

Date: **April 10, 2018**

Re: **Clarification of Questions and Answers from memorandum dated March 13, and emails dated April 3 and 4.**

Introduction

You provided an e-mail dated April 3, 2018 from the co-chair of the advisory committee and have requested clarification of the initial memorandum dated March 13, 2018 that had been provided to the committee.

This memorandum clarifies the answers included therein and addresses the additional questions from you for the benefit of the Board of Trustees in anticipation of the April 16 meeting. I will be in attendance, joined by our New York Counsel, Paul DerOhannesian.

Based on our analysis, we reiterate our opinion that, absent a demonstrative change in factual circumstances, the adoption of at-large voting by the Village of Port Chester will risk violating the Voting Rights Act in light of the District Court's 2008 and 2010 findings of fact and conclusions of law.

Answers and Responses

- ***"They did not republish their first letter stating that the DOJ "injunction" has expired as Richard requested. Indeed, the question remains: is the Village still under the shadow of a permanent injunction? Dr. Smith seems to believe that we are."***

  Respectfully, Dr. Smith is not an attorney.

As explained in our March 13 memorandum, the 2010 Consent Decree has expired and therefore it no longer binds the Village of Port Chester. A copy of that memo is attached hereto as "Attachment A."

Further, based on our research, no other order or opinion from the litigation contains, or is accompanied by, a permanent injunction. The 2007 preliminary injunction only technically enjoined the holding of the March 2007 election. The 2008 and 2010 court opinions did not technically contain injunctions, and were not accompanied by injunctions or orders with injunctive language.

However, the lack of a permanent injunction is not the end of the inquiry. As set forth in our March 13 memorandum, the United States District Court for the Southern District of New York determined, on multiple occasions, that the Village of Port Chester's at-large election system violated Section 2. These determinations were memorialized in three separate published opinions— in 2007, 2008, and 2010 respectively. Because court decisions carry the force of law, and have precedential value to other courts (or in this instance the same court), the court's 2007, 2008, and 2010 opinions are still relevant and binding. Accordingly, in order to no longer be in violation of federal law, any at-large voting scheme must be accompanied by a demonstrative change in legally significant facts.

Absent a significant change in factual circumstances, the adoption of an at-large voting system by the Village of Port Chester will risk violating the Voting Rights Act in light of the District Court's findings of fact and conclusions of law.

- ***"His response to the question: "under what circumstances can the Village move the Trustee election to November" was "ask the County Board of Elections". We expected and hoped to receive a more definitive answer."***

Under State law, the Village has the option to prospectively move its Election Day to sometime other than the March general village Election Day provided for in its Charter. Election Law, Section 15-104. There are, in fact, a good number of villages across the state that have done so. Pursuant to the Election Law, the Village would need to adopt a resolution, subject to a referendum.

However, it is not possible to move the next election to any date earlier than March of 2019 since such action would cut short the term of an elected official.

Our response was simply to advise that the Village should consult with the Westchester County Board of Elections for confirmation of the statutory process and any additional local requirements it may have.

- ***"No answer to: does NY State law permit Cumulative Voting or Ranked Choice Voting ballots?"***

The New York Attorney General has provided his opinion that New York law would permit the use of cumulative or ranked choice voting if adopted in a referendum. We have no reason to question the Attorney General's opinion. However, we also note that the Appellate Division of the Supreme Court of New York, Third Department, recently noted in a concurring opinion, "An

opinion of the Attorney General is an element to be considered but is not binding on the courts." *In the Matter of Brennan Center for Justice v. New York State Board of Elections*, 2018 NY Slip Op. 02228 an Fn 1 of Concurring Opinion (internal quotations omitted). (March 29, 2018) (Egan, J., concurring). If a plaintiff were to bring a lawsuit challenging Cumulative or Ranked Choice voting as a violation of state law by the Village, the state courts would be required to hear any such challenge and it is not certain whether the Attorney General's opinion would be followed.

I understand that the Village is seeking special state legislation to ensure that the option of using cumulative voting will comply with state law. I support this approach based on my understanding of this text of that legislation. It would resolve any potential state law challenges to cumulative voting or any other alternative voting method.

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March 13, 2018

Memorandum

To: **Tony Cerretto**

From: **Jason Torchinsky**
Holtzman Vogel Josefiak PLLC

Concurring: **Paul DerOhannesian II**
DerOhannesian & DerOhannesian

Re: **Effect of Consent Decree and Voting Rights Act Litigation on Implementation of At-Large Elections**

Introduction

You asked whether the Village of Port Chester, New York, may permissibly return to at-large elections for members of the Board of Trustees in light of the Consent Decree, which expired in June 2016, and the accompanying litigation. This memorandum sets forth the relevant portions of federal law, along with our understanding of the consent decree and opinions of the United States District Court for the Southern District of New York.

Based on our analysis, we believe that, the terms of the Consent Decree itself do not prohibit a return to at-large elections. However, absent a demonstrable change in factual circumstances in demographics and voting behavior, return to at-large voting by the Village of Port Chester will risk violating the Voting Rights Act in light of the District Court's 2008 and 2010 findings of fact and conclusions of law.

Assuming the methodology and analysis so far conducted of recent election returns by the engaged political scientist, it does not appear that the Village has the factual basis to justify a return to at-large elections at this time. The reports produced and made public so far demonstrate that there are no substantial changes in voting patterns in the Village from prior to the Voting Rights Act litigation.

Legal Background

Section 2 and the Gingles Preconditions

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 ("Section 2") prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in a language minority group. The U.S. Supreme Court construed Section 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986), an action challenging a multi-member at-large districting scheme. In *Gingles*, the Supreme Court set out three "preconditions" that must be met for a successful Section 2 challenge:

(1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district;

(2) the minority group must be politically cohesive and vote as a bloc; and

(3) the White majority must vote sufficiently as a bloc to enable it, in the absence of special circumstances, to defeat the minority's preferred candidate.

The Supreme Court has also held that a Court must "consider whether, under the totality of the circumstances, the challenged practice impairs the ability of the minority voters to participate equally in the political process." *Goosby v. Board. of the Town of Hempstead*, 956 F. Supp. 326, 329 (E.D.N.Y. 1997) (citing *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1007 (2d Cir. 1995)). No specific showing of discriminatory intent is required to prove a Section 2 violation. *Gingles*, 478 U.S. at 70-73 (Brennan, J. plurality op.); *Coleman v. Board. of Educ. of the City of Mt. Vernon*, 990 F. Supp. 221, 227 (S.D.N.Y. 1997) (internal citation omitted); cf. *Goosby v. Board. of the Town of Hempstead*, 180 F.3d 476, 498-504 (2d Cir. 1999) (Leval, J. concurring).

United States District Court for the Southern District of New York

On December 15, 2006, The U.S. Department of Justice (the "Government") filed a Complaint against the Village of Port Chester alleging that it's at-large voting system violated Section 2. Specifically, the Government claimed that the at-large scheme denied the Hispanic population of the Village an equal opportunity to participate in the political process and to elect representatives of their choice.

On January 17, 2008, the United States District Court for the Southern District of New York determined that the at-large voting scheme violated Section 2 because it prevented Hispanic voters from participating equally in the political process in the Village. The court found that the Hispanic community of the Village is sufficiently large and geographically compact to constitute a majority in a single-member district because experts were able to create models demonstrating that Hispanics could constitute a majority of the Citizen Voting Age Population ("CVAP") in a hypothetical district. The court also found that the Hispanic population of Port Chester is politically cohesive and votes as a bloc to support its preferred candidate as evidenced

by prior elections where virtually 100% of Hispanic who voted in that election cast one of their votes for the Hispanic candidate. Further, the court found that Hispanic voters and non-Hispanic voters in Port Chester prefer different candidates, and that non-Hispanic voters generally vote as a bloc to defeat Hispanic-preferred candidates 75% of the time. Finally, the court buttressed these determinations by finding that (a) historically, there has been official discrimination against Latinos in Westchester County; (b) the Village experiences a significant degree of racially polarized voting; (c) Port Chester's Caucus system greatly favors non-Hispanics over Hispanics; and (d) various other circumstances hinder the ability of Hispanics to participate effectively in the political process. Accordingly, the court invalidated the Village's at-large election scheme and ordered the parties to submit proposed remedial plans.

On April 1, 2010, the court evaluated the parties' proposed remedial plans adopted Port Chester's current cumulative voting scheme because it was deemed legally acceptable under the Voting Rights Act, the Constitution, and New York law.

Consent Decree

The Court's April 2010, order also approved the parties' agreed upon Consent Decree. In addition to setting forth the details of the cumulative voting system, the Consent Decree detailed the education and outreach programs that ensured its effective and non-discriminatory implementation. The Consent Decree clearly states that it, along with the accompanying Voter Education Program "shall remain in effect through June 22, 2016 or three [months after the third Trustee] election cycle[], whichever is longer."

Analysis

There is little doubt that the terms of the 2010 Consent Decree no longer bind the Village of Port Chester. Based on the express language of the Consent Decree, it only remained in place "through the next three Trustee elections and expire[s] three months after the last Trustee Election. If the Trustee's terms of office remain three years, the Decree would expire on June 22, 2016." Furthermore, neither the United States nor Ruiz sought to vacate the Decree upon a showing that the cumulative voting program failed to cure the violation of Section 2. Therefore, since more than three months have passed after the third post-Consent Decree Trustee election, the terms of the Consent Decree likely no longer bind the Village of Port Chester. *See Terminal R.R. Ass'n v. United States*, 266 U.S. 17, 29 (1924) ("[A] decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought ….").

Notwithstanding the expiration of the Consent Decree, federal law continues to bind the Village of Port Chester. Pertinent federal law, in this instance, includes the provisions of Section 2 and its interpretation by the Federal Courts.

As noted above, in January 2008, the United States District Court for the Southern District of New York determined that the Village of Port Chester's at-large election system violated Section 2. Since the issuance of that decision, there appears to have been no demonstrable change in either applicable federal law or legally significant facts.

For example, in Dr. Lisa Handley's Presentation to the Board of Trustees on January 2, 2018, she indicated that polarized voting continues in Trustee Elections, Hispanic voters have been increasingly cohesive in support of their preferred candidates, and white voters provide little support for Hispanic-preferred candidates.[1]

Because this would result in a "situation[] where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged" the Village would likely be unsuccessful in its defense. *See Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948).

The legal matters determined in the April 2010, decision would not differ from those raised in a potential challenge to an at-large election system, the situation would not be vitally altered between the time of the first judgment and the second, and there have been no judicial declarations intervening between the two proceedings which change the legal atmosphere. *See Id.; Travelers Ins. Co. v. Commissioner*, 161 F.2d 93 (2d Cir. 1947); *State Farm Ins. v. Duel*, 324 U.S. 154, 162 (1945); 2 Freeman on Judgments (5th ed. 1925) § 713; *Blair v. Commissioner*, 300 U.S. 5, 9 (1937).

Therefore, because the expiration of the Consent Decree has no effect on federal law, and the legally significant facts appear to remain unchanged since the April 2010, federal court decision, adopting an at-large voting scheme would likely risk violating Section 2 again.

Conclusion

Absent a legally significant change in factual circumstances, the return to an at-large voting scheme by the Village of Port Chester will risk violating the Voting Rights Act in light of the District Court's 2008 and 2010 findings of fact and conclusions of law.

[1] Dr. Lisa Handley, *Presentation I to Village of Port Chester BOT* (January 2, 2018), http://www.portchesterny.com/sites/portchesterny/files/uploads/presentation_village_of_port_chester_january_2_2018.pdf.