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CAPE COD
COMMISSION

Memorandum

To: Paul Niedzwiecki, Executive Director
From: Jessica Wielgus, Commission Counsel
Re: Weighted Voting in the County Charter
Date: July 2, 2013

Question Presented

Whether the weighted voting as presented in the Barnstable County would survive constitutional challenge based upon the development of the law since its adoption?

Brief Answer

It may not, given the qualitative requirement of the constitutional test, which requires that a population based voting model does not overvalue the votes of any particular population group, or deny the smaller political units an effective voice in government.

Background

Barnstable County is governed by an Assembly of Delegates pursuant to a special act, St. 1989, c. 163 (the "County Charter"). Section 206(b) of the County Charter provides as follows:

(b) Voting – Except on procedural matters, all votes shall be taken by a call of the roll if requested by any member. The vote of each delegate shall be weighted in the same proportion as the population of the municipality such delegate represents bears to the whole population of Barnstable County as determined by the most recent federal census, or decennial census.

According to the 2010 United States Decennial Census, the population of each municipality, and the corresponding weighted vote of each municipality's delegate, are as follows.

Municipality	Population	Weighted Vote (%)
Barnstable	45,193	20.92
Bourne	19,754	9.15
Brewster	9,820	4.55
Chatham	6,125	2.84
Dennis	14,207	6.58

Municipality	Population	Weighted Vote (%)
Eastham	4,956	2.30
Falmouth	31,531	14.61
Harwich	12,243	5.67
Mashpee	14,006	6.49
Orleans	5,890	2.73
Provincetown	2,942	1.36
Sandwich	20,675	9.58
Truro	2,003	0.93
Wellfleet	2,750	1.27
Yarmouth	23,793	11.02
Total	215,888	100
Average	14,393	6.67

The question is whether the weighted vote required by the County Charter violates the constitutions of the United States of America or the Commonwealth of Massachusetts in view of the line of court decisions frequently cited for the “one person, one vote” principle. *See, e.g., Reynolds v. Sims, 377 U.S. 533, 568 (1964)* (“[A]n individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State”).

The Law

The Equal Protection Clause of the 14th Amendment requires that all voters have the right to an equally weighted vote. *Reynolds, 377 U.S. at 555*. This applies not only to congressional and state legislative districting plans, but also to local government apportionment. *Avery v. Midland County, 390 U.S. 474, 479-481 (1968)*. To protect this right to an equally weighted vote, courts developed the “one person, one-vote” rule. *Gray v. Sanders, 372 U.S. 368, 381 (1963)*. In theory, the rule requires that each district represented by a legislator have equal population.

The only foolproof way to satisfy the “one person, one vote” rule is to have more-or-less equally populated districts, each with a single elected representative. At the local government level, however, this is often not how things work. Courts have allowed the use of weighted voting systems and multi-member districts where those methods approximate the effect of having equal representation per person. In a weighted voting system, single representatives have differently weighted votes (*e.g.*, representative A may be worth 20 votes toward a majority of 50 votes, whereas representative B may be worth 5 votes). In a multi-member system, the more populated districts have more representatives, usually in accordance with their percentage of the overall population. Thus, if district A has 50% of the population and districts B and C each have 25%, then district A will have two representative and districts B and C will have one representative each. The current method utilized by Barnstable County gives each Assembly member a percentage by which his/her vote is “weighed” toward the total of a vote as outlined in the above chart.

In addition to allowing deviations from the ideal population, courts have also upheld other methods of attempting to create voter equality. Examples are weighted (or fractional) voting and multi-member districts. Weighted voting “essentially refers to ‘the assignment of differential weights to the votes of representatives’ (6 J.L. & Pol. 93, at n. 95) as distinct from the former practice of giving additional weight to certain segments of voters, particularly those from rural areas, which was held to be unconstitutional....” *Jackson v. Nassau County Bd. of Supervisors, 818 F.Supp. 509, 530 (E.D. New York 1993)*.

The system of voting required by the County Charter is fractional voting, which is a form of weighted voting. In a weighted voting system, one legislator may have 5 votes and another 1 vote. The same legislators in a fractional voting system would have 1 vote and 1/5th vote, respectively. Under the County Charter, Truro is given a 0.00973 vote (roughly a 1/100th vote) whereas Barnstable has a 0.2092 vote (roughly a 21/100th vote).

The Supreme Court's view on the constitutionality of weighted voting depends upon the methodology, and federal courts have split on the issue.¹ Some early decisions held that weighted voting violates state or federal constitutional requirements. See, e.g., *Brown v. State Election Bd.*, 3269 P.2d 140, 148-149 (Okla. 1962), *League of Nebraska Municipalities v. Marsh*, 209 F.Supp. 189, 195 (D. Neb. 1962). For instance, weighted voting diminishes the power of the most effective or knowledgeable representative on a certain issue if he or she has a small weighted vote. But the primary concern is whether a weighted voting system gives rise to extreme discrepancies in voting power.

There are four cases which are important to understand:

(1) *Bd. of Estimate of City of New York v. Morris*, 489 U.S. (1989)

The voting system in *Board of Estimate of City of New York v. Morris* was not a pure weighted voting system but offered some framework for analysis that is important to the Barnstable County discussion. In *Morris*, the Supreme Court ruled that the apportionment scheme for the New York City Board of Estimate was unconstitutional. The Board of Estimate consisted of the mayor, two members elected at large, and one representative from each of the city's five boroughs. The mayor and at-large representatives had two votes each, except that the mayor had no vote on budgetary matters. Each borough representative had one vote. Residents of the most populous borough, Brooklyn, asserted that this was unconstitutional because Brooklyn was underrepresented. The Supreme Court agreed.

Rather than concede that the Board of Estimate's voting scheme was unconstitutional, New York attempted to validate the scheme through a complex numerical approach that determined each representative's voting power – i.e., the percentage of matters in which the representative can determine the outcome. The Supreme Court deemed this methodology – known as the Bhanzaf Index – an “unrealistic approach to determining whether citizens have an equal voice in electing their representatives because the approach tends to ignore partisanship, race, and voting habits or other characteristics having an impact on election outcomes” and “stops short of examining the actual day-to-day operations of the legislative body.” 489 U.S. at 698. Instead, the Court reasoned, “In calculating the deviation among districts, the relevant inquiry is whether the ‘vote of any citizens is approximately equal in weight to that of any other citizen,’ ... the aim being to provide ‘fair and effect representation for all citizens.’” *Id.* at 700, citing *Reynolds*, 377 U.S. at 565-566, 579. The Court then found the deviation from the ideal voting population to be 78% (and larger in budgetary matters), far above the approximately 10% deviation that had been tolerated in other court decisions.

The Court also set forth two core constitutional requirements for a plan of apportionment:

- (1) a quantitative requirement that guarantees that the vote of any citizen is approximately equal in weight to that of any other citizen; and

¹ See Keith R. Wesolowski, *Remedy Gone Awry: Weighing in on Weighted Voting*, 44 Wm. & Mary L. Rev. 1883, 1905 (March 2003) (“Weighted voting, when applied as a short-term solution, would likely pass constitutional muster... Whether a weighted voting system used over the course of several years would withstand review at the appellate level, however, is far from clear.”)

(2) a qualitative requirement that the system provide fair and effective representation for all citizens. *Morris*, 489 U.S. at 701, 109 S. Ct. at 1442 (citing *Reynolds v. Sims*, 377 U.S. at 565-66, 576, 84 S.Ct. at 1383, 1389).

The court's language in *Morris* further described what it meant by quantitative and qualitative as follows:

Even if a plan is designed on a population based model, the plan will only be constitutional as long as

- (1) its deviation from population equality is within a constitutionally acceptable degree, *and*
- (2) it does not substantially circumscribe or overvalue the votes of any particular population groups, by, for example, granting a representative with 51% of the population 100% of the power, thereby denying the smaller political units an effective voice in government.

Id. This language is important to the Barnstable County discussion because inherent in the makeup of the votes is the reality that four towns may control the majority of every vote on Cape Cod. The mathematical makeup of the weighted votes for them is as follows:

Barnstable	20.92
Falmouth	14.61
Yarmouth	11.02
Bourne (9.15) or Sandwich	<u>9.58</u>
	56.13

These four towns potentially may control every vote on Cape Cod, and have 100% of the power. Smaller towns, even though they may be more greatly affected by a particular issue or have specialized knowledge on an issue, may not have a voice on many issues, thereby "denying the smaller political units an effective voice in government" as is barred by the United States Supreme Court in the *Morris* decision.

(2) *Abate v. Mundt*, 403 U.S. 182 (1971)

The apportionment scheme at issue in *Abate* was not weighted voting but rather multi-member districting. Nonetheless, *Abate* is important because it sets some of the ground rules that come up in later, weighted voting cases. In *Abate*, the Supreme Court upheld the constitutionality of the voting scheme for Rockland County, New York. The county legislative body was composed of 18 members from five legislative districts that corresponded to the county's five towns. Each member was not elected as a county representative but rather as a town supervisor and served as a county representative by virtue of his or her supervisor position. Each district had a number of representatives that was a multiple of the population of the smallest town: Stony Point, population 12,114. Stony Point had one representative. The number of legislators in the other towns was determined by dividing a town's population by 12,114 and rounding to the nearest integer. Thus, Haverstraw had 2 representatives; Orangetown, 4; Clarkstown, 5; and Ramapo, 6.

The issue was the deviation from pure population equality. Because not every town population was a multiple of 12,114, some towns ended up with more than one representative per 12,114 people, and other towns with less. These discrepancies were as follows: Stony Point, 0.3% overrepresented; Haverstraw, 2.5% overrepresented; Orangetown, 7.1% underrepresented; Clarkstown, 4.8% overrepresented; and

Ramapo, 0.2% underrepresented.² Thus, the total deviation between the most overrepresented district (Clarkstown) and the most underrepresented district (Orangetown) was 11.9%. The court found this system constitutional because (1) it did not contain a “built-in bias tending to favor particular geographic area or political interests”; and (2) there was a long history of and need for close cooperation between the county and the towns by having the same individuals who occupied the position as town supervisors also occupy the position as county representatives. However, the Court offered no opinion as to whether the plan would remain constitutional if “substantially greater deviations” came to exist. 403 U.S. at 186 n. 3.

**(3) *Jackson v. Nassau County Bd. of Supervisors*,
818 F.Supp. 509 (E.D. New York 1993)**

Jackson v. Nassau County Board of Nassau County held that the weighted voting system used in Nassau County, New York, was unconstitutional as violating the “one-person, one-vote” rule. The case was a direct result of *Morris* because the apportionment scheme used by Nassau County was based on the Banzhaf Index³ that *Morris* discredited. This scheme allocated two representatives to the largest municipality in Nassau County (Hempstead) and one representative to each of the other four municipalities, but each representative was given a differently weighted vote.

The system resulted in the following weights: Hempstead (1st representative), 30 votes; Hempstead (2nd representative), 28 votes; Oyster Bay, 22 votes; North Hempstead 15 votes; Long Beach, 7 votes; and Glen Cove, 6 votes. To pass a resolution, 65 votes were required, which meant that Hempstead alone could not (through its two representatives) pass a resolution, even though it had more than half the county population. 818 F. Supp. at 524-525. However, although it did not draw any discussion from the Court, Hempstead could, alone, cause a resolution not to pass.

Much of the District Court’s discussion focused on the ramifications of these weights, particularly by reference to the number of critical coalitions that the various municipalities could form. For instance, the Court noted that Long Beach, although it had only one vote more than Glen Cove (7 and 6, respectively), could form a critical coalition with other towns in three times as many situations.

In finding Nassau County’s apportionment unconstitutional, the District Court relied on *Morris*, characterizing it as an indictment of weighted voting. For instance, the Court wrote:

[T]he Supreme Court firmly rejected weighted voting, not only because of the mathematical quagmire such a system engenders, but just as importantly because the methodology fails to take into account other critical factors related to the actual daily operations of a governing body.

Jackson, 818 F. Supp. at 532. Elsewhere, the Court wrote, “The Supreme Court has left no doubt that the *Reynolds-Abate* equal population approach should not be put aside in favor of the theoretical Banzhaf Index.” 818 F. Supp. at 532.

² The equation for figuring out these percentages is to divide the total county population by the total number of representatives to come up with an average of 12,156 persons per representatives, and then to figure out the percentage by which a town deviated from this average. For instance, for Stony Point you divided 12,114 by the average population per representative (12,156) to come up with a 0.3% deviation. For Haverstraw, you calculate the population per representative (population of 23,676 divided by 2 representatives equals 11,838 persons per representative) and divide this by the average of 12,156 persons per representative.

³ The court noted, “Using the Banzhaf Index, a citizen’s voting power through each representative is calculated by dividing the representative’s voting power by the square root of the population represented.” 818 F.Supp. at 524.

The court then applied the Abate calculation: $(x - y)/y = z$, where x is a municipality's population, y is the ideal population, and z is the percentage of deviation from the ideal calculation. It concluded that the range of deviation (in the hundreds) was impermissibly large. Finally, the court summed up the inadequacy of the apportionment scheme as follows:

The [Nassau County] Board [of Supervisors] cannot work on the basis of a simple majority, usually the standard in most legislative bodies, because allocating 55 votes to the Town of Hempstead insures that Hempstead would control every vote taken. Conversely, creating a 'supermajority' of 65 votes insures that the residents of Hempstead will forever be underrepresented on the basis of population in any vote taken. There are basic flaws in the structure of this system.

818 F. Supp. at 535.

(4) *Roxbury Taxpayers Alliance v. Delaware County Bd. of Supervisors*,
886 F. Supp. 242 (N.D. New York 1995)

Roxbury Taxpayers Alliance v. Delaware County Board of Supervisors upheld the constitutionality of the weighted voting scheme used in Delaware County, New York. Under the Delaware County system, each town elected one member to the board of supervisors, and that member cast a vote in the same proportion that the population of his or her town bore to the total county population. The system was similar to, but more complicated than, the system mandated by the County Charter. However, the disparity in population among municipalities was substantially less than in Barnstable County: the smallest municipality (Bovina) had 1.1656% of the population, whereas the largest (Sidney) had 14.1175%, and the majority were in the 3% to 5% range.

The key discussion in *Roxbury* is the focus upon the quantitative and qualitative requirements essential to constitutionality:

As for the quantitative inquiry, if the analysis reveals a degree of deviation from population equality, this part of the inquiry should also test to see if the degree of deviation from population equality can be justified by legitimate governmental interests.

As for the qualitative inquiry, factors to be considered in this analysis include evidence of built-in bias against any particular political interest or group; whether the method of apportionment is so complex as to confuse and alienate the voters; **whether one representative has greater than 50% of the votes and effectively 100% of the power, or alternatively, whether the smaller political units are denied an effective voice in board decisions.**

Roxbury Taxpayers Alliance v. Delaware County Bd. of Supervisors, 886 F. Supp. 242, 253 (N.D. New York 1995)(emphasis added).

If the towns of Barnstable, Falmouth, Yarmouth and Bourne/Sandwich vote as a block, the result is that the remaining smaller populated towns are essentially being denied an effective voice in Assembly of Delegates decisions. This is true even if the ordinance being voted upon applies specifically to a smaller town or that delegate has specialized knowledge on an issue.

Based upon the developments in the law since the adoption of the charter, careful consideration should be given to alternative approaches to weighted voting in the County review process.