

# Appendix A - Apportionment Options, Legal Analysis. Sonosky, Chambers, Sachse, Miller & Munson, LLP

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**December 28, 2006**

**MEMORANDUM NO. 18J-2006**

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**TO: Sheinberg Associates**

**FROM: Sonosky, Chambers, Sachse, Miller & Munson, LLP**

**RE: Glacier Bay Chatham Borough Reapportionment**

This memorandum sets forth the basic equal protection principles that govern apportionment of a borough in Alaska. A potential Glacier Bay Chatham Borough would include seven communities, ranging in population from 861 persons to 29 persons. The question is whether the borough assembly could be apportioned to provide representation to communities as such, regardless of population, by analogy to the Federal congressional model where each State has two Senators, regardless of population.

The first section below sets forth general Federal equal protection standards that are made applicable to borough reapportionment by Alaska statutory law (and which, in any event, apply of their own force). The second section discusses whether those principles can be tailored to ensure representation to individual communities within a borough, regardless of population. The next section discusses whether state statutory law could be modified by the Alaska Legislature to provide for representation for separate communities. And the final section discusses the use of an at-large plan, with residency districts, as an alternative to single-member districts as a means of providing some representational voice to individual communities.

For the reasons set forth below, the memorandum concludes:

First, that as a matter of Federal constitutional law, a borough must be apportioned on the basis of population into districts of substantially equal numbers of people, with a “maximum” population deviation between the largest and smallest districts of no more than about 16 percent. Population deviations in excess of that magnitude are *per se* unconstitutional.

Second, the U.S. Supreme Court has definitively rejected the analogy of the Federal congressional model as a basis for providing representation on state legislative bodies, such as borough assemblies, by geographic area or community, where so doing would result in otherwise impermissible deviations from population equality among districts.

Third, Alaska law governing borough reapportionment explicitly incorporates Federal constitutional standards, but those standards apply of their own force, and state law cannot be modified to provide for apportionment of a borough by community, where doing so would violate Federal equal protection requirements for equi-populous districts.

Finally, the borough could have at-large elections, in which all voters cast ballots for all seats. In order to ensure that each community has some representation, the borough could be divided into “residency districts,” in which candidates run for a seat in a district they reside in, even though the seat is elected by all of the voters in the borough. Since equal protection requirements do not apply to the size of residency districts, those districts could be of unequal population, and each community could form a residency district, with the representative from that district elected at large.

**I. General equal protection principles require that the maximum population deviations among districts in a state or local legislative body be no greater than about 16 percent.**

AS 29.20.060 requires that a borough apportionment plan “be consistent with the equal representation standards of the Constitution of the United States.” This is the only *state statutory* standard that applies to borough apportionment.<sup>31</sup>

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<sup>31</sup> Thus, a borough reapportionment plan is not subject to additional standards such as compactness, contiguity or socio-economic integration that are imposed on Alaska state legislative districts under Art. 6, sec. 6 of the Alaska Constitution. A borough apportionment plan is still subject to Federal statutory requirements, such as the federal Voting Rights Act, and in particular, would have to receive “preclearance” from the U.S. Department of Justice under section 5 of the Act. In addition, a plan would be subject to any applicable state or federal constitutional requirements.

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The “equal representation standards” of the Federal Constitution arise from the Equal Protection Clause of the 14<sup>th</sup> Amendment. As first construed in the foundational case of *Reynolds v. Sims*, 377 U.S. 533 (1964), the Equal Protection Clause provides a general guarantee of “one person, one vote” that requires representatives to an elected body be chosen from voting districts of substantially equal population. Jurisdictions must “make an honest and good faith effort to construct districts ... as nearly of equal population as is practicable...” *Id.* at 568. The U.S. Supreme Court has specifically imposed this requirement on units of local government as well as statewide legislative bodies. *E.g. Board of Estimate of City of New York v. Morris* 489 U.S. 688, 692 (1989) (“Both state and local elections are subject to the general rule of population equality between electoral districts. No distinction between authority exercised by state assemblies, and the general governmental powers delegated by these assemblies to local, elected officials, suffices to insulate the latter from the standard of substantial voter equality.”); *Abate v. Mundt*, 403 U.S. 182, 185 (1971) (the “general principle of population equality .... applies to state and local elections...”); [\*Hadley v. Junior College District\*, 397 U.S. 50, 58, 90 S.Ct. 791, 796, 25 L.Ed.2d 45 \(1970\)](#) (“[T]he guarantee of equal voting strength for each voter applies in all elections of governmental officials.”); *Avery v. Midland County*, 390 U.S. 474 (1968).

Through a series of cases, the U.S. Supreme Court has implemented the Equal Protection requirement by evaluating the degree of “population deviation” in a plan, judged as the sum of the percentage deviation (from an ideal district, the size of which is derived by dividing the jurisdiction’s total population by the number of seats) of the largest district and the smallest district. The Equal Protection standard articulated in *Reynolds* requires substantial, albeit not perfect, equality, so “minor” deviations are tolerable. As the rule has been summarized by the Supreme Court:

Our decisions have established as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State.

*Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) (citations omitted). Thus, plans with a deviation of less than 10 percent have generally been viewed as permissible because the population disparities are considered *de minimis*. *E.g. Connor v. Finch*, 431 U.S. 407, 418 (1977) (“under 10% deviations....[have been] considered to be prima facie constitutionally valid ...in the context of legislatively enacted apportionments.”); *White v. Regester*, 412 U.S. 755 (1973) (deviation of 9.9% held valid); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (deviation of 7.83% held valid).<sup>32</sup>

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<sup>32</sup> But this is not absolutely so. Several lower federal courts have held that even plans with deviations of less than 10 percent can be challenged on Equal Protection grounds where there is evidence of arbitrariness or discrimination in the plan. *E.g., Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004) (three-judge court) *aff’d sub nom. Cox v. Larios*, 542 U.S. 947 (2004). In concurring in the Supreme Court’s summary affirmance, Justices Stevens and Breyer said, “[A]ppellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than ten percent, Memo 18J-2006 re Glacier Bay Chatham Borough Reapportionment.doc

A maximum deviation of greater than 10 percent, on the other hand, is *prima facie* evidence of an Equal Protection violation, and shifts the burden to the jurisdiction to justify the population disparities by showing a rational and legitimate state policy, consistently applied, necessitates the deviations. *E.g. Voinovich v. Quilter*, 507 U.S. 146, 161-2 (1993). But the Court has indicated that deviations beyond a certain size – about 16-17 percent – are *per se* impermissible because they exceed constitutional limits, and cannot be justified under any rationale. In *Mahan v. Howell*, 410 U.S. 315, 326, 329 (1973), the Court upheld a deviation of 16.4 percent, but did so noting that this “may well approach tolerable limits.” The Court said that “a State’s policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality.”

All relevant Equal Protection jurisprudence is consistent with this *de facto* ceiling on the magnitude of a constitutionally permissible deviation. In *Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989), the Supreme Court reviewed a local government plan with a population deviation of 78 percent and said, “We note that no case of ours has indicated that a deviation of some 78% could ever be justified.” 489 U.S. at 702. In *Connor v. Finch*, 431 U.S. 407, 418 (1977), the Court invalidated a state Senate plan with a deviation of 16.5 percent and a state House plan with a deviation of 19.3 percent, because such deviations “can hardly be considered *de minimis*; they substantially exceed the ‘under-10%’ deviations the Court has previously considered to be of *prima facie* constitutional validity....” In *Chapman v. Meier*, 420 U.S. 1 (1975), the Court invalidated a court-drawn plan with a deviation of 20.14 percent, and in *Kilgarlin v. Hill*, 386 U.S. 120 (1967), it invalidated a plan with a deviation of 26.48 percent. *See also Swann v. Adams*, 385 U.S. 440, 442 (1967) (invalidating a state senate plan with a 30 percent deviation and a state house plan with a 40 percent deviation).

Lower federal courts, as well, have understood the Supreme Court’s Equal Protection Clause jurisprudence as imposing a *de facto* ceiling on the maximum permissible deviation in a state or local reapportionment plan. In *Daly v. Hunt*, 93 F.3d 1212 (4<sup>th</sup> Cir. 1996), the federal Court of Appeals for the Fourth Circuit stated the rule as follows:

If the maximum deviation is less than 10%, the population differential will be considered *de minimis* and will not, by itself, support a claim of vote dilution. If

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within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation.” *See also Daly v. Hunt*, 93 F.3d 1212, 1220 (4<sup>th</sup> Cir. 1996) (“The 10% *de minimis* threshold recognized in *Brown* does not completely insulate a state’s districting plan from attack of any type. Instead, that level serves as the determining point for allocating the burden of proof in a one person, one vote case. A maximum deviation of greater than 10 % automatically establishes a *prima facie* violation of the one person, one vote principle. If the plaintiff establishes this level of disparity in population among the districts, the burden of proof shifts to the state to justify the deviations by showing a rational and legitimate state policy for the districts. On the other hand, if the maximum deviation is less than 10%, the population disparity is considered *de minimis* and the plaintiff cannot rely on it alone to prove invidious discrimination or arbitrariness. To survive summary judgment, the plaintiff would have to produce further evidence to show that the apportionment process had a ‘taint of arbitrariness or discrimination.’ *Roman v. Sincok*, 377 U.S. at 710, 84 S.Ct. at 1458.”); *Rodriguez v. Pataki*, 308 F.Supp. 2d 346, 364 (S.D.N.Y. 2004) (“[A] plan within the ‘ten percent rule’ is not *per se* immune from judicial review.”)

the maximum deviation is greater than 10%, it is *prima facie* evidence of a one person, one vote violation, and the state must justify the population disparity by showing a rational and legitimate state policy for the districting plan. *Finally, there is a level of population disparity beyond which a state can offer no possible justification.* Although it is not clear precisely what that upper level is, the Court has stated in dictum that a maximum deviation of 16.4% “may well approach tolerable limits.”

*Id.* at 1218 (citations and footnotes omitted) (emphasis added). In *Regensburger v. City of Bowling Green, Ohio*, 278 F.3d 588, 596 (6<sup>th</sup> Cir. 2002), the federal Court of Appeals for the Sixth Circuit invalidated a city apportionment scheme with a deviation of 66.85 and in so doing noted that “[t]he City’s failure to cite even one case in which a reviewing court has upheld a population deviation as high as 66.85 percent is especially revealing in light of the overwhelming authority to the contrary.”<sup>33</sup>

Although we do not have the population data for every community to calculate the deviation if every community in the proposed Glacier Bay Chatham Borough were to be given one seat in a plan with single-member districts, such a plan would meet Federal equal protection standards only if the maximum deviation between the most populated and least populated districts were under 10 percent, or if justified by a legitimate state interest, under about 16.4 percent.

## **II. The U.S. Supreme Court has rejected reliance on the Federal congressional model as a justification for otherwise impermissible population deviations.**

In *Reynolds v. Sims, supra*, the U.S. Supreme Court considered – and explicitly rejected – the Federal congressional model as a basis for state reapportionment. At the time of the *Reynolds* decision, many States – including Alabama, whose plan was at issue in *Reynolds* – had apportionment schemes based on the Federal model, where one body of the legislature (the state Senate) was apportioned on the basis of assigning legislators by geographic area, regardless of the population in the area, much as each State in the Federal Congress is assigned two Senators, regardless of population differences among States. This analogy was asserted as a principal defense for the high population deviation in the Alabama plan.

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<sup>33</sup> As a matter of state constitutional law, the Alaska Supreme Court has mirrored the Federal standard and adopted the so-called “ten percent rule.” In *Hickel v. Southeast Conference*, 846 P.2d 38, 47 (Alaska 1992), the Court noted that a deviation of under 10 percent “falls within the category of minor deviation” but the state “must provide justification for any greater deviation.” *Id.* at 47 quoting *Kenai Peninsula Borough v. State of Alaska*, 743 P.2d 1352, 1366 (Alaska 1987). The Court also noted that the 16.4 percent deviation approved in *Mahan, supra*, “has been seen by many as the outer limit which the Supreme Court will allow.” *Hickel*, 846 P.2d at 48 n. 16. In *Egan v. Hammond*, 502 P.2d 856 (1972), the Supreme Court invalidated the 1971 state reapportionment plan because it had total deviations of 69 percent for House districts, and 33 percent for Senate districts. *Id.* at 868. By contrast, the Alaska Supreme Court in *Kenai* upheld a maximum deviation of 14.8 percent in the State’s 1984 plan – a deviation within the outer limits of the *Mahan* rule – because it found the deviation necessary to effectuate legitimate state policies. 743 P.2d at 1361.

The Court first noted that the plan for state Senate representation:

...at least superficially resembles the scheme of legislative representation followed in the Federal Congress. Under this plan, each of Alabama's 67 counties is allotted one senator, and no counties are given more than one Senate seat. Arguably, this is analogous to the allocation of two Senate seats, in the Federal Congress, to each of the 50 States, regardless of population.

377 U.S. at 571. The Alabama House plan was based on population. *Id.* The Court said of this scheme:

[We] find the federal analogy inapposite and irrelevant to state legislative districting schemes. Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements.

*Id.* at 573.

The Court went to great lengths to explain the difference in principles behind the composition of the Federal Congress and a state's Legislature. The Court noted that "at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government." The Federal model developed as "a compromise between the larger and smaller States on this matter [and] averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation." *Id.* at 574. By contrast:

Political subdivisions of States – counties, cities, or whatever – never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions....The relationship of the States to the Federal Government could hardly be less analogous.

Thus, we conclude that the plan contained in the 67-Senator Amendment for apportioning seats in the Alabama Legislature cannot be sustained by recourse to the so-called federal analogy. Nor can any other inequitable state legislative apportionment scheme be justified on such an asserted basis.... We conclude simply that such a plan is impermissible for the States under the Equal Protection Clause, since perforce resulting, in virtually every case, in submergence of the equal population principle in at least one house of a state legislature.

Since we find the so-called federal analogy inapposite to a consideration of the constitutional validity of state legislative apportionment schemes, *we necessarily hold that the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis.* The right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens in the election of members of one house of a bicameral state legislature would amount to little if States could effectively submerge the equal-population principle in the apportionment of seats in the other house.

*Id.* at 575-6 (emphasis added); *see also Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 675 (1964) (“[A]ppellees’ reliance on the so-called federal analogy as a sustaining principle for the Maryland apportionment scheme, despite significant deviations from population-based representation in both houses of the General Assembly, is clearly misplaced.”); *Lucas v. Forty-Fourth General Assembly of State of Colo.*, 377 U.S. 713, 738 (1964) (“[A]ny attempted reliance on the so-called federal analogy is factually as well as constitutionally without merit.”); *Roman v. Sincock*, 377 U.S. 695 (1964).

Having rejected the analogy to the Federal model, the Court in *Reynolds* nonetheless considered whether there was a legitimate state interest in having a reapportionment scheme based on “insuring some voice to political subdivisions, as political subdivisions,” that could in itself justify a departure from principles of population equality. *Id.* at 580. Although the Court found that there are “more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature,” *id.*, it found this to be an insufficient justification for large population deviations:

[P]ermitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body....Such a result, we conclude, could be constitutionally impermissible...[I]f, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.

*Id.* at 581. The Court concluded that “the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in

weight to that of any other citizen in the State.” *Id.* at 579. In the post-*Reynolds* line of cases discussed in Part I, above, this principle has become embodied in the so-called “10 percent rule.”

The Alaska Supreme Court has implemented the view set forth in *Reynolds*. In *Wade v. Nolan*, 414 P.2d 689 (Alaska 1966), the Court struck down the original apportionment of the Alaska Senate, which was based on geographic area, not population. As the Alaska Court noted:

The decision in *Reynolds v. Sims* immediately posed the question of whether the Alaska State Senate was constitutionally apportioned on a population basis since Section 2, Article VI of the Alaska Constitution provides that members of the Senate shall be elected by the voters of the senate districts as set forth in Section 2 of Article XIV, which latter section establishes senate districts based on area...and prescribes the number of senators to be elected from each senate district.

414 P.2d at 690. The Court noted that “[i]t is clear therefore that representation in the Senate is determined by area rather than population, with no specific provision made for changing this plan.” *Id.* at 692. But, because of *Reynolds*, “[u]nanticipated changes in the law of the land have invalidated the Senate apportionment and now require that the Senate be expeditiously reapportioned on a population basis.” *Id.* at 700.

The Governor took the position that he had authority under the Alaska Constitution to reapportion the state Senate to conform with equal protection requirements. The Alaska Supreme Court did not question the Governor’s determination that the state Senate was malapportioned; the issue in the case was one of remedy: whether the Governor (or the Legislature) had the constitutional authority to reapportion. The Court concluded the Governor did. *Id.*

Since *Wade*, the Alaska Senate (like the Alaska House) has been apportioned on a population basis, in accord with the population deviation guidelines that have been developed in the post-*Reynolds* line of cases. *E.g.*, *Groh v. Egan*, 526 P.2d 863, 880 (Alaska 12974) ( State Senate districts G, J and O “exceed permissible constitutional limits as to population variances”).

### **III. The Legislature cannot enact a law that would allow boroughs to reapportion in derogation of constitutionally mandated equal population requirements.**

As noted above, AS 29.20.060 requires that a borough reapportionment plan “be consistent with the equal representation standards of the Constitution of the United States.” This statutory mandate, however, is something of a redundancy: Federal constitutional requirements apply of their own force to local government reapportionment, whether mandated by state statute or not. *Abate v. Mundt, supra.*

Conversely, it is equally true that a state statute cannot waive Federal (or indeed, state) constitutional requirements. Thus, if the Alaska Legislature enacted a statute that permitted a borough reapportionment plan to allocate seats by community, rather than by population, that statute (or more precisely, any reapportionment plan drawn on the basis of that statute) would

nonetheless be unconstitutional if the plan exceeded permissible population deviations under the rules set forth above. A contrary state law requirement cannot defeat a Federal constitutional mandate.

**IV. A borough may hold at-large elections, and may also use “residency districts” (which may be of unequal size) to ensure each community has a voice in the legislature.**

In an at-large voting scheme, there are no single-member districts. Rather, all representatives are elected by all voters in the borough. A variant of an at-large system would be to divide the borough into “residency districts.” In this scheme, candidates run from particular districts, in which they reside, but are elected by all voters in the borough at large.

A. At-large systems generally. At-large voting schemes, by definition, are consistent with the one-person, one-vote standard of *Reynolds v. Sims*, 377 U.S. 533 (1964). In an at-large scheme, by definition, all voters have an equally weighted vote. Based on this, the U.S. Supreme Court has repeatedly stated that at-large districting schemes are not *per se* illegal. *E.g. Fortson v. Dorsey*, 379 U.S. 433 (1965); *Whitcomb v. Chavis*, 403 U.S. 124, 142 (1971) (a multi-member district “is not *per se* illegal under the Equal Protection Clause.”); *Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (“While multimember districts have been challenged for ‘their winner-take-all aspects, their tendency to submerge minorities and to over represent the winning party,’ this Court has repeatedly held that they are not unconstitutional *per se*.”).

On the other hand, at-large districts will violate the Equal Protection clause “where the circumstances of a particular case may ‘operate to minimize or cancel out the voting strength of racial or political elements of the voting population.’” *Whitcomb, supra* at 143. In *Rogers*, the Court said that “multimember districts violate the Fourteenth Amendment if ‘conceived or operated as purposeful devices to further racial discrimination’ by minimizing, canceling out or diluting the voting strength of racial elements in the voting population.”” *Rogers*, 458 U.S. at 417. The Court explained:

At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of a district. A distinct minority, whether it be a racial, ethnic, economic or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts. The minority’s voting power in a multimember district is particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines.

*Id.* at 416.

The challenger in such a case “carr[ies] the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements.” *Whitcomb, supra* at 144; *see also Burns v. Richardson*, 384 U.S. 73, 98 (1966). Also, the

challenger must prove a discriminatory *purpose* behind the voting scheme when asserting a constitutional claim under the Equal Protection Clause. *Rogers, supra* at 417.

Absent a showing that the at-large system is being used in an invidious or discriminatory fashion to minimize the voting strength of a racial or political group, however, at-large voting systems are lawful.

B. The use of “residency districts”. Some at-large plans have “residency districts” in order to ensure that representatives are elected from different communities or geographic regions within a jurisdiction, even though they are elected at-large by all voters in the jurisdiction.

Absent a showing that the plan impermissibly dilutes “the voting strength of an identifiable element of the population,” residency districts need not be equipopulous.

The Supreme Court has established that where a jurisdiction holds at-large elections, but requires that a member be elected from each of several residency districts, there is no requirement that the population of the districts be equal. *Dallas County v. Reese*, 421 U.S. 477 (1975), *Dusch v. Davis*, 387 U.S. 112 (1967); *see also Fortson v. Dorsey*, 379 U.S. 433 (1965).

In *Dusch* and in *Reese*, the Court considered and rejected a challenge to at-large elections with residency requirements for representatives. In both cases, the Court observed that the districts were used “merely as the basis of residence for candidates, not for voting or representation.” *Dusch*, 387 U.S. at 116. In both cases the population of the residency districts “varie[d] widely.” *Id.*; *Reese*, 421 U.S. at 478. In both cases, however, the representatives were elected by the voters in the entire jurisdiction in at-large elections. The Court observed that when the elected official’s “tenure depends upon the [jurisdiction]-wide electorate, he must be vigilant to serve the interests of all the people in the [jurisdiction], and not merely those of people in his home district.” *Id.* at 479-80. As a result, “each official represents the citizens of the entire county and not merely those of the district in which he resides.” *Id.* at 480. Because representation was not based on districts, the Court ruled, the divergence in population between the residency districts did not render the scheme unconstitutional.

The Court noted that this principle – that residency districts need not be equipopulous – “does not entirely insulate a plan . . . from constitutional attack.” *Id.* Where a residency-district plan “in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population,” the plan would violate the constitution. *Id.*

Under *Dusch* and *Reese*, residency districts of widely divergent populations are constitutionally permissible provided that no identifiable segment of the population is effectively disenfranchised.

## V. Conclusion

A reapportionment plan for the proposed Glacier Bay Chatham Borough is subject to Federal equal protection standards, and the districts within the plan may not deviate more than 10 percent in population from largest to smallest, unless any greater deviation is justified by a consistently applied and legitimate governmental interest, but even in that event, the maximum deviation may not exceed about 16.4 percent.

Representation in the borough assembly cannot be awarded on the basis of communities, if doing so would cause the population deviation to exceed the maximum permissible limit, as it apparently would in the case of the proposed borough. An argument based on an analogy to the “apportionment” of the United States Senate as the basis for a borough reapportionment plan that provides representation to geographic areas, communities, or governmental units is inapplicable as a justification for an otherwise impermissible deviation. And the population equality requirements imposed by Federal equal protection law cannot be waived or modified by state statute.

On the other hand, the borough assembly could be elected at-large by all voters in the borough voting for all seats. The seats could be drawn on the basis of “residency districts,” so that each community is a separate district. This would ensure that a resident of each community serves on the borough assembly, even though the representative would be elected by all voters of the borough at large, and would thus be politically responsive to the needs of the voters borough-wide, not just to the voters in his residency district or community. Nonetheless, the use of residency districts in an at-large system is a way to afford some voice to individual communities within the confines of Federal equal protection requirements.

We would be pleased to provide any additional information on these matters that might assist you.

Respectfully submitted,

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/s/

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