

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

ORAL CLARKE, ROMANCE REED, GRACE
PEREZ, PETER RAMON, ERNEST TIRADO, and
DOROTHY FLOURNOY

Plaintiffs,

- against -

TOWN OF NEWBURGH and TOWN BOARD OF
THE TOWN OF NEWBURGH,

Defendants.

Index No. EF002460-2024

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

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PRELIMINARY STATEMENT

Plaintiffs Oral Clarke, Romance Reed, Grace Perez, Peter Ramón, Ernest Tirado, and Dorothy Flournoy (collectively, “Plaintiffs”) respectfully submit this memorandum of law in opposition to the motion by Defendants Town of Newburgh and Town Board of the Town of Newburgh to dismiss the complaint pursuant to CPLR 3211.

SUMMARY OF ARGUMENT

This lawsuit is among the first filed under the newly enacted John R. Lewis Voting Rights Act of New York, or New York Voting Rights Act (“NYVRA”). *See* Election Law § 17-200 *et seq.* It seeks to remedy the longstanding disenfranchisement of minority communities residing within the Town of Newburgh resulting from the Town’s at-large system of electing Town Board members. NYVRA expressly prohibits vote dilution through the use of at-large voting systems where there is racially polarized voting or “under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired.” Election Law § 17-206(2)(b)(i). Such systems have been struck down in other jurisdictions under similar statutes. *See Portugal v. Franklin Cnty.*, 530 P.3d 994, 1004 (Wash. 2023), *cert. denied sub nom. Gimenez v. Franklin Cnty., WA*, No. 23-500, 2024 WL 1607746 (U.S. Apr. 15, 2024); *Higginson v. Becerra*, 786 F. App’x 705, 706 (9th Cir. 2019), *cert. denied* 140 S. Ct. 2807 (2020); *Sanchez v. City of Modesto*, 145 Cal.App.4th 660, 667 (2006), *cert. denied* 552 U.S. 974 (2007). The complaint here alleges, and Plaintiffs are prepared to prove, both species of illegal vote dilution.

NYVRA requires that these proceedings be expedited. The Town has chosen, however, to pursue delay by moving to dismiss the complaint on the ground that Plaintiffs have failed to abide the “safe harbor” provision of NYVRA, which prohibits a party from suing over a NYVRA

violation for 90 days if the political subdivision adopts a resolution committing to cure the violation. The resolution on which the Town bases its argument, however, was not duly adopted, is substantively insufficient to invoke the “safe harbor” provision, and has since been “suspended” by the Town Board.

The Town did not do what the statute requires to invoke the safe harbor provision. The statute gives the Town the benefit of the safe harbor provision if it passes a resolution affirming three things: “(i) the political subdivision’s intention to enact and implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy.” Election Law § 17-206(7)(b). The Town, however, did none of these things. It committed merely *to study* whether the minority communities in the Town were illegally disenfranchised. Committing to study the problem is not committing to fix it.

The statute gives the Town the benefit of the safe harbor only where the Town commits to fix NYVRA violations. Since the Town did not do that, Plaintiffs were within their rights to commence this proceeding before the safe harbor period had run and the motion to dismiss must be denied. In any event, the Town Board has now “suspended” even its commitment to study the situation. Because it did so, its motion to dismiss should be denied as academic.

STATEMENT OF FACTS

A. NYVRA.

NYVRA is historic legislation which safeguards the rights of minority voters to participate in the democratic process. Dissatisfied with the limitations of the Federal Voting Rights Act, the New York State Legislature adopted NYVRA in 2022, following and expanding upon voting rights legislation enacted by states such as California and Washington in proactively expanding the remedies available to disenfranchised voters. *See* Affirmation of Robert A. Spolzino (“Spolzino

Aff.”) Exhibit A, Introducer’s Memorandum in Support at p. 8-9. NYVRA formally declares that it is the public policy of the State of New York to “[e]ncourage participation in the elective franchise by all eligible voters to the maximum extent” and “[e]nsure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise.” Election Law § 17-200. NYVRA provides that “all statutes, rules and regulations, and local laws or ordinances related to the elective franchise shall be construed liberally in favor of (a) protecting the right of voters to have their ballot cast and counted; (b) ensuring that eligible voters are not impaired in registering to vote, and (c) ensuring voters of race, color, and language-minority groups have equitable access to fully participate in the electoral process in registering to vote and voting.” Election Law § 17-202.

Among other things, NYVRA prohibits a “political subdivision,” including a town, from utilizing a method of election which “impair[s] the ability of members of a protected class to elect candidates of their choice or influence the outcome of elections, as a result of vote dilution.” Election Law §§ 17-204, 17-206(2)(a). A “protected class” is defined as “a class of eligible voters who are members of a race, color, or language-minority group.” Election Law § 17-204(5). NYVRA specifically provides that the use of at-large system of electing Town Board members, such as the electoral system used by the Town, constitute illegal vote dilution where there is racially polarized voting or “under the totality of the circumstances, the ability of members of the protected class to elect candidates of their choice or influence the outcome of elections is impaired.” Election Law § 17-206(2)(b)(i).

Recognizing the irreparable harm to voters resulting from holding elections under unlawful conditions, actions brought pursuant to NYVRA are subject to expedited pretrial and trial

proceedings as well as an automatic calendar preference, Election Law § 17-216, to ensure that incumbent officials who benefit from the unlawful conditions challenged in the lawsuit do not expend public funds to delay correcting the disenfranchising conditions. *See id.*

NYVRA does recognize, however, a brief opportunity for local governments that want to end disenfranchising voters to do so without the cost of defending litigation. NYVRA requires that before commencing a lawsuit under NYVRA against a political subdivision, such as a town, a prospective plaintiff must send a notification letter to the clerk of that political subdivision asserting that the political subdivision may be in violation of NYVRA. Election Law § 17-206(7). The prospective plaintiff must wait 50 days before suing. *Id.* § 17-206(7)(a). If, during those 50 days, the political subdivision adopts a “NYVRA resolution” which affirms “(i) the political subdivision’s intention to enact and implement a remedy for a potential violation of [NYVRA]; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy,” *Id.* § 17-206(7)(b), the political subdivision is given the benefit of a “safe harbor” during which the political subdivision has another 90 days to enact and implement a remedy before the prospective plaintiffs may commence a lawsuit. *See id.* § 17-206(7).

B. The Town of Newburgh.

The Town of Newburgh is a political subdivision located in Orange County with a population of approximately 32,000. *See* Complaint ¶¶ 6, 8. The Town Board, consisting of one supervisor and four councilmembers, is the legislative and policy-making authority within the Town.¹ *See id.* ¶¶ 7, 36. Members of the Town Board are elected in “at-large” elections, meaning

¹ The Town Supervisor is Gil Piaquadio. At this time, only three seats on the Town Board are occupied because former Town Board member Betty Greene passed away after this lawsuit was

that every registered voter residing within the Town is eligible to vote for every office which is up for election. *See* Election Law § 17-204(1). The four members are elected to staggered, four-year terms held every two years, so that at each town election there are two Town Board seats on the ballot. Complaint ¶ 38.

According to the most recently available census data, the Town's racial composition is approximately 61 percent White, 25 percent Hispanic, and 15 percent Black. *Id.* ¶ 32. Hispanic and Black voters of the Town both qualify as a "protected class" which NYVRA protects. *See* Election Law § 17-204(5). Despite the substantial and growing diversity among the Town's residents, however, all current members of the Town Board are White. Complaint ¶ 39. In fact, it does not appear that there has *ever* been any person of color elected to the Town Board. *Id.* ¶ 40.

C. Plaintiffs give notice to the Town of its violation of NYVRA and the Town's March 15, 2024 resolution.

Plaintiffs are Hispanic and Black voters in the Town who, for years, have been without any voice in Town government due to the at-large system of electing Town Board members. As required by NYVRA, Plaintiffs gave the Town notice of their allegations and intent to commence a lawsuit by letter dated January 26, 2024. *See* Complaint Exhibit A. The Town Board held regular meetings on February 13th and March 11th but made no mention of Plaintiffs' notice letter or Plaintiffs' claim that the Town is violating NYVRA. At noon on March 15, 2024, however, one day before the 50-day waiting period for Plaintiffs to commence an action under NYVRA expired, the Town Board apparently held a special meeting to pass what it claims is a NYVRA resolution.

The resolution states that the Town is availing itself of NYVRA's safe harbor provision

commenced. Paul Ruggiero, Scott Manley, and Anthony LoBiondo are the current members of the Town Board.

and directs the Supervisor and Town Attorney to work with outside counsel and “authorized experts it retains” to review and investigate the Town’s at-large election system “to determine whether any potential violation of the NYVRA may exist and to evaluate potential alternatives to bring the election system into compliance with the NYVRA should a potential violation be determined to exist.” Spolzino Aff. Exhibit B § 1. The resolution requires the findings of the investigation to be reported to the Town Board within 30 days and provides that if after considering those findings “and any other information that may become available to the Town . . . the Town Board concludes that there may be a violation of the NYVRA, the Town Board affirms that the Town intends to enact and implement the appropriate remedy(ies).” *Id.* § 2. The resolution sets forth no schedule by which Town Board must make its determination, providing only that if the Town Board finds that “there may be violation of the NYVRA . . . the Town Board shall cause a written proposal of the selected remedy(ies) ... to be prepared and presented to the Town Board within ten (10) days of the Town’s finding of the potential violation.” *Id.* § 3. Within 30 days thereafter, the Town Board “shall conduct at least two (2) public hearings within a thirty (30) day timeframe at which the public shall be invited to provide input regarding the NYVRA Proposal and the proposed remedy(ies) set forth therein.” *Id.* § 4. Following the last public hearing, “the Town Board shall approve the completed NYVRA Proposal” within 90 days of the March 15, 2024 resolution. *Id.* § 5.

D. Plaintiffs commence this lawsuit, and the Town moves to dismiss.

Plaintiffs commenced this lawsuit by filing a complaint with this Court on March 26, 2024. The complaint acknowledges that the Town Board purportedly adopted the March 15, 2024 resolution but asserts that the resolution was insufficient to trigger NYVRA’s safe harbor provision because it did not commit the Town Board to do anything other than consider the findings of its investigation and did not contain an adequate “schedule” for acting on the evaluation, and because

the resolution “is void and of no effect because, upon information and belief, it was not duly adopted at a duly called meeting of the Town Board.” Complaint ¶¶ 60-65. On April 8, 2024, the Town suspended its investigation. *See* Memorandum of Law in Support of Defendants Town of Newburgh and Town Board of the Town of Newburgh’s Motion to Dismiss the Complaint (“Town’s Brf.”) at p. 8.

The Town now moves to dismiss the complaint pursuant to CPLR 3211.

ARGUMENT

“On a motion to dismiss pursuant to CPLR 3211, the pleading is be afforded a liberal construction.” *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The motion court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Id.* at 87-88. The motion must be denied “if from the pleadings’ four corners ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002), quoting *Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 54 (2001) (additional citations omitted). “[T]he standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action.” *Thaw v. North Shore Univ. Hosp.*, 129 A.D.3d 937, 938 (2d Dep’t 2015) (internal quotation marks omitted), and “the burden of establishing that the complaint fails to state a cause of action” is on the defendants. *Connolly v. Long Is. Power Auth.*, 30 N.Y.3d 719, 728 (2018).

This motion does not challenge substantive allegations in the complaint of voter disenfranchisement. Rather, the Town’s argument is that the complaint should be dismissed as premature because the resolution purportedly passed by the Town Board at a special meeting on March 15, 2024 was sufficient to invoke NYVRA’s safe harbor provision. *See* Election Law § 17-

206(7)(b). The Town's argument has no merit for three reasons. First, the Town Board's resolution fails to satisfy NYVRA's requirement for invoking the safe harbor provision because it fails to commit the Town to remedy the violation. Second, the resolution was not duly adopted because the meeting at which the Town Board voted to adopt it was not duly called. Finally, the Town Board has since suspended the resolution, so an argument for dismissal based on the resolution is academic. The motion is nothing more than a blatant attempt to delay these proceedings for as long as possible which should not be countenanced by this Court. The motion should be denied.

A. The Town's resolution is not sufficient to trigger NYVRA's safe harbor provision.

The Town Board's March 15, 2024 resolution does not meet the requirements of Election Law § 17-206(7)(b) because it does not commit the Town to implement a remedy, it does not identify specific steps that the Town will take to implement that remedy, and it does not provide a schedule for doing so. The plain text of the resolution commits the Town only to investigate whether it is in violation of NYVRA, not to remedy that violation. It is therefore insufficient to trigger NYVRA safe harbor.

"The primary consideration of courts in interpreting a statute is to ascertain and give effect to the intention of the Legislature." *Riley v. Cnty. of Broome*, 95 N.Y.2d 455, 463 (2000) (internal quotation marks omitted). "[W]hen the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used." *People v. Williams*, 19 N.Y.3d 100, 103 (2012), quoting *People v. Finnegan*, 85 N.Y.2d 53, 58 (1995) (additional citations omitted), *reargument denied* 85 N.Y.2d 968 (1995), *cert. denied* 516 U.S. 919 (1995). A court may consider extrinsic evidence of the legislature's intent, such as legislative history, only where the legislative intent cannot be discerned from the plain language of a statute. *See People v. Cypress Hills Cemetery*, 208 A.D.2d 247, 251 (2d Dep't 1995). The same rules apply to resolutions adopted by local governments. *See Town of Massena v. Niagara Mohawk Power Corp.*, 45 N.Y.2d

482, 490 (1978) (“Words employed in the resolution will be construed according to their ordinary and plain meaning in the absence of a clear intent to the contrary expressed in the enactment”).

The Legislature’s intent in enacting NYVRA clear. Recognizing that among all the rights secured to citizens of the United States, the right to vote is unique because it is ““preservative of all rights,”” *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966), quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), the statute unequivocally states that the public policy of the state is both to “[e]ncourage participation in the elective franchise by all eligible voters to the maximum extent” and “[e]nsure that eligible voters who are members of racial, color, and language-minority groups shall have an equal opportunity to participate in the political processes of the state of New York, and especially to exercise the elective franchise.” Election Law § 17-200.

To achieve its purpose, NYVRA expressly requires expedited proceedings. *See* Election Law § 17-216. This is because, as the Legislature recognized, disenfranchised voters are irreparably harmed every time an election is held under unlawful conditions. *Id.* Another reason for expedited proceedings is that because public officials often benefit from unlawful conditions, they may expend significant public resources defending unlawful conditions and delay the litigation for as long as possible. *See id.* (“Because of the frequency of elections, the severe consequences and irreparable harm of holding elections under unlawful conditions, and the expenditure to defend potentially unlawful conditions that benefit incumbent officials, actions brought pursuant to this title shall be subject to expedited pretrial and trial proceedings and receive an automatic calendar preference). The Legislature thus included the notification letter and safe harbor procedure in NYVRA not to delay the determination of NYVRA claims, but to facilitate the avoidance of protracted and costly litigation where a local government has committed in response to the notice letter to remedy the disenfranchisement that has been brought to its attention.

See Election Law § 17-206(7). The safe harbor procedure must be construed in that light, as the canons of construction require.

The safe harbor provision requires the political subdivision to pass a resolution affirming three things: “(i) the political subdivision’s intention to enact and implement a remedy for a potential violation of this title; (ii) specific steps the political subdivision will undertake to facilitate approval and implementation of such a remedy; and (iii) a schedule for enacting and implementing such a remedy.” *Id.* § 17-206(7)(b). A NYVRA safe harbor resolution must, therefore, be a commitment “to enact and implement a remedy.” It is not sufficient, contrary to what the Town argues here, for a municipality to commit only to investigate whether a violation has occurred.

The Town’s March 15, 2024 resolution does not comply with any of the three requirements. First, the resolution does not actually commit the Town “to enact and implement a remedy.” Rather, it commits the Town only “to determine whether any potential violation of the NYVRA may exist and to evaluate potential alternatives to bring the election system into compliance with the NYVRA should a potential violation be determined to exist.” Spolzino Aff. Exhibit B § 1. Second, because the Town has not actually committed to implementing a particular remedy, or any remedy at all, it does not identify specific steps the Town will take to implement a remedy. Third, for the same reason, the resolution does not establish a schedule for implementing a remedy.

1. The resolution does not declare the Town’s intention to enact and implement a remedy.

The plain text of the March 15, 2024 resolution demonstrates that the Town has not declared its “intention *to enact and implement a remedy* for a potential violation of [NYVRA].” Election Law § 17-206(7)(b) (emphasis added). All the resolution says is that the Town will investigate the allegations and *might* implement a remedy after conducting an “investigation” of

its at-large method of election. *See* Spolzino Aff. Exhibit B § 1. What that investigation would entail, or who the “authorized experts” are who would carry out that investigation, are not specified. *See id.* Then, the resolution states:

If, after considering the findings and evaluation and any other information that may become available to the Town—including, without limitation, any analysis that Abrams Fensterman may provide following the adoption of this Resolution, the Town Board concludes that there may be a violation of the NYVRA, the Town Board affirms that the Town intends to enact and implement the appropriate remedy(ies).

See id. § 2 (emphasis added).

This language is not a commitment to remedy the NYVRA violation. It is, at most, a conditional statement of the Town’s Board’s intention to implement any remedy if the Town Board first finds that there may be a violation of NYVRA. By retaining unfettered discretion to determine whether a violation of NYVRA may exist and, consequently, whether the Town will do anything about it, the Town Board has carefully avoided making the actual commitment to remedy the faulty election system that NYCRA requires for the safe harbor. If the resolution were a contract, it would be unenforceable because the promise it purports to contain is illusory. *See Chiapparelli v. Baker, Kellog & Co.*, 252 N.Y. 192, 200 (1929) (“Where a promisor retains an unlimited right to decide later the nature or extent of his performance, the promise is too indefinite for legal enforcement. The unlimited choice in effect destroys the promise and makes it merely illusory”), citing Williston on Contracts, § 43; *cf. Matter of Brown & Guenther v. North Queensview Homes, Inc.*, 18 A.D.2d 327, 330 (1st Dep’t 1963) (“A promise that is too uncertain in terms for possible enforcement is an illusory promise”) (internal quotation marks omitted).

Courts should not allow local governments to avoid prompt compliance with NYVRA by making illusory promises. Because the Town’s commitment to enact and implement a remedy is made wholly contingent on the Town Board first finding that a violation of NYVRA may exist,

the Town has not actually made any commitment at all and is not entitled to the safe harbor NYVRA provides to those who seek to comply.

2. The resolution does not identify specific steps the Town intends to take to implement a remedy.

Nor can the Town claim that it has identified in the resolution any “specific” steps for implementing remedies. Because, as previously stated, the resolution commits the Town only to investigate whether a violation of NYVRA exists, and not to remedying the violation, the resolution does not specify anything that the Town Board is required to do to effectuate a remedy. Those later steps, which are conditioned upon the Town Board first finding that a violation may exist, are also not nearly specific enough to trigger the safe harbor. Because the Town Board did not undertake any proactive analysis of its method of election prior to the March 15, 2024 resolution, the resolution does not even suggest what remedies might be considered or identify experts to assist in developing remedies. And the only specific steps for which the resolution provides are the hearings that NYVRA already requires. *See* Election Law § 17-206(6). Essentially, the resolution provides only that if the Town Board finds that there might be a violation of NYVRA, the Town intends to follow the procedure set forth by statute.² Such empty platitudes are not the “specific steps” to comply with the law that the Town is required to take to receive the benefit of NYVRA’s safe harbor.

3. The Town’s purported schedule does not comply with NYVRA.

Finally, the schedule provided in the Town’s purported NYVRA resolution does not satisfy Election Law § 17-206(7)(b). To begin with, because the Town has made no genuine commitment

² Nonetheless, as discussed in the next section, the Town’s stated timeframe for holding public hearings would be untimely if the remedy chosen involved drawing districts.

to implementing a remedy, the Town has no obligation to act in accordance with the timeline specified in the March 15, 2024 resolution. But even if the Town had made that commitment, the schedule still would not satisfy the requirements of NYVRA. NYVRA gives the Town 90 days from the date of the resolution to implement the remedy. The resolution does not come close to requiring a resolution within that time. It provides, first, that the findings and evaluations of the Town's investigation into NYVRA claim must be reported to the Town Board within 30 days. *See Spolzino Aff. Exhibit B § 2.* No time frame is then specified, however, for the Town Board to evaluate those findings, along with any other information, and reach a conclusion about whether there may be a violation of NYVRA. Then, if the Town Board determines that there may be such a violation, a NYVRA proposal would have to be submitted to the Town Board within 10 days, *see id.* § 3, and, within 30 days of receiving that proposal, the Town Board would hold at least two public hearings on the proposal. *See id.* § 4.

This schedule is completely unrealistic. It provides that 70 days will be taken up to investigate the claims, prepare and submit a NYVRA proposal, and conduct public hearings. It fails to account for any time necessary for the Town Board to consider the results of the investigation and determine whether there is a possible violation of NYVRA. It also does not leave any time or create any mechanism for the Town Board to modify NYVRA proposal based on issues raised by voters during the public hearings. Deliberations on both the initial determination of whether there is a potential NYVRA violation and modifications to NYVRA proposal after the public hearings would almost certainly require more than 20 days. If not, there would surely be no time for additional public hearings on a modified proposal.

Drawing districts, a potential remedy for NYVRA's violations arising from at-large election systems, would not just be unlikely under the Town's schedule, it would be impossible.

When a political subdivision implements a new or revised districting plan as a remedy under NYVRA, four public hearings are required as opposed to two. *See* Election Law § 17-206(6). Before drawing a districting plan, “the political subdivision shall hold at least two public hearings over a period of no more than thirty days.” *Id.* § 17-206(6)(a). A political subdivision must then publish at least one plan and “hold at least two additional hearings over a period of no more than forty-five days, at which the public shall be invited to provide input.” *Id.* § 17-206(6)(b). If there are any revisions, the revised plan must be published at least seven days before it is adopted. *Id.* The Town’s schedule does not account for or allow any time to hold two meetings both before and after drawing a districting plan. Therefore, the Town’s schedule would never be able to implement a districting plan within 90 days of the resolution.

The 90-day period is not for the purpose of a preliminary investigation. Preliminary investigation into the merits of allegations raised in a notification letter should be carried out during the initial 50 days a municipality has to avail itself of the safe harbor. Otherwise, that initial 50 day waiting period would be meaningless as every municipality could simply pass a noncommittal resolution in response to every NYVRA notification letter. The only reading of NYVRA’s safe harbor provision which is consistent with the statute’s clear legislative purpose is one which requires a firm commitment from the municipality to enact a remedy within 50 days after the receipt of a notification letter. *See* Spolzino Aff. Exhibit A, Introducer’s Memorandum in Support, at p. 8 (“The bill also contains notification requirements and provides a safe harbor for judicial actions[so] that political jurisdictions *can make necessary amendments to proposed election changes* without needing to litigate in court”) (emphasis added). Doing so encourages municipalities to be proactive in their responses to allegations of voter disenfranchisement, with the incentive of avoiding litigation if they do so. By further requiring that political subdivision

identify specific steps it will take and create a schedule for implementing a remedy, the statutory scheme forces municipalities to be diligent in their efforts.

Ultimately, the inherently unreasonable timeline set forth in the Town's NYVRA safe harbor resolution only establishes its intention not to remedy NYVRA violations that are the subject of this lawsuit. The conditional nature of the resolution, the absence of any specific remedial measures and the schedule that makes it impossible to adopt any remedy within the statutory time frame all evidence the Town's intent not to comply with NYVRA. This is not at all the scenario the Legislature contemplated when it enacted the safe harbor provision of NYVRA. The purpose of the safe harbor provision is to give a political subdivision time within which to remedy the violation. It was not intended merely as an additional delay. A 90-day safe harbor here would have served that purpose if the Town had already conducted its investigation and committed to implementing a remedy. But it is simply not feasible both to investigate and implement a remedy in 90 days. It is, therefore, insufficient to invoke the safe harbor provisions of NYVRA.

B. The Town's resolution purporting to avail itself of NYVRA's safe harbor provision is void and without effect because it was never duly adopted.

Even if the substance of the resolution were sufficient to satisfy NYVRA's safe harbor provision, the resolution is void and of no effect, and cannot serve that purpose, because the March 15, 2024 meeting at which the resolution was adopted was not duly noticed.

1. The resolution passed at the special meeting was null and void because the Town failed to give the notice required by Town Law § 62(2).

Town Law § 62(2) permits a town supervisor to "call a special meeting of the town board by giving *at least two days' notice* in writing to members of the board of the time when and the place where the meeting is to be held." (emphasis added). Where less than two days' notice of the special meeting is provided, a resolution passed at that meeting is null and void. *See McGovern v. Tatten*, 213 A.D.2d 778, 780 (3d Dep't 1995) ("Only one day's notice of the special meeting was

given. Accordingly, the resolution to resume maintenance of the disputed road is null and void”); *Plumley v. Oneida Cnty.*, 57 A.D.2d 1062, 1062 (4th Dep’t 1977) (meeting called with insufficient notice “was a nullity and legislation passed at the meeting was void”). The exception to this general rule where all council members had actual notice of the special meeting, attended, and participated, *see Philips v. Cnty. of Monroe*, 18 Misc.3d 1127(A), at *1 (Sup. Ct. Monroe Cnty. [Kenneth R. Fisher, J.] 2007), is clearly not applicable here where the March 15, 2024 resolution identifies that two councilmembers were absent from the meeting. *See Spolzino Aff.* Exhibit B.

The complaint expressly alleges that the March 15, 2024 resolution was void because “it was not duly adopted at a duly called meeting of the Town Board.” Complaint ¶ 63. The Town submitted no documentary evidence in support of its motion to establish that due notice was given. Accepting the allegation in the complaint as true, as the Court is required to do on this motion to dismiss, *see Leon*, 84 N.Y.2d at 87-88, the Town’s motion to dismiss must be denied.

C. The Town’s motion is academic because the Town Board has effectively rescinded its resolution.

Even if the Town Board’s resolution had been duly adopted and sufficient to invoke NYVRA’s safe harbor provision, it is no longer sufficient for that purpose now that the Town Board has “suspended” it, eliminating any chance there might have been of implementing a remedy within the 90-day safe harbor period. The Town’s April 8, 2024 resolution expressly suspending the schedule set forth in the resolution eliminated any possibility whatsoever that the Town will implement a remedy by June 13—90 days after the March 15 resolution. Under these circumstances, it is futile to force Plaintiffs to wait until a deadline which the Town has made clear it has no intention of honoring. *See East End Resources, LLC v. Town of Southold Planning Bd.*, 135 A.D.3d 899, 901 (2d Dep’t 2016) (property owner need not pursue a variance application where they can establish that an application would be futile); *Kaplan v. Madison Park Group*

Owners, LLC, 94 A.D.3d 616, 619 (1st Dep’t 2012) (party to a contract may sue if the other party repudiates their obligations “without having to futilely ... wait for the other party’s time for performance to arrive”); *Papandrea-Zavaglia v. Arroyave*, 75 Misc.3d 541, (Civ. Ct. Kings Cty. [Bruce E. Scheckowitz, J.] 2022) (“Requiring landlord to wait 180 days ... is an unnecessary exercise in futility”). This would be an absurd application of NYVRA, which must be avoided. *People v. Schneider*, 37 N.Y.3d, 187, 196 (2021), *cert. denied* 142 S. Ct. 344 (2021). Accordingly, the Town’s resolution does not satisfy any of the three conditions necessary to invoke the safe harbor and, therefore, cannot force Plaintiffs to wait before vindicating their rights.

CONCLUSION

NYVRA’s safe harbor provision is not just a means to stall for time. It is an opportunity for a political subdivision that recognizes the faults in its electoral system to cure those faults without having to defend litigation at the same time. The Town of Newburgh could have taken that opportunity but instead has chosen delay. The prompt resolution of voter disenfranchisement claims envisioned by NYVRA should not be allowed to be derailed by a legally insufficient resolution that was not duly adopted and has since been “suspended.” The Town’s motion to dismiss should be denied in its entirety.

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April 25, 2024

CERTIFICATION OF COMPLIANCE WITH UNIFORM RULE 202.8-B

I, Steven Still, an attorney at law licensed to practice in the State of New York, certify that this document contains 5,614 words, as calculated by the Microsoft Word processing system, inclusive of point headings and footnotes, and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules and regulations, etc.

/s/ Steven Still
Steven Still