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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the 2021 Redistricting Plan.	)	Case No. 3AN-21-08869 CI (Consolidated Cases)

Non-Anchorage Case No. 3VA-21-00080 CI
Non-Anchorage Case No. 1JU-21-00944 CI

OPPOSITION TO ALASKA REDISTRICTING BOARD'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Plaintiffs, the City of Valdez (Valdez) and Mark Detter (Detter), and the Municipality of Skagway (Skagway) and Brad Ryan (Ryan), (collectively Plaintiffs), through their attorneys, Brena, Bell & Walker, P.C., file their Opposition to the Alaska Redistricting Board's (Board's) Motion to Dismiss the City of Valdez and Detter's Third Claim and the Municipality of Skagway Borough and Ryan's Third Claim for Failure to State a Claim (Motion to Dismiss). For the reasons set forth below, Plaintiffs respectfully request that the Court deny the Board's Motion to Dismiss.

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INTRODUCTION

Article VI, Section 10 of the Alaska Constitution requires the Board to hold public hearings on any proposed redistricting plan.[1] If no single proposed plan is agreed upon, the Board is required to hold public hearings on all plans proposed by the Board. Under Alaska law, however, Article VI, Section 10 does not permit the Board to completely disregard public hearings for plans that were not proposed plans.

While there is no constitutional requirement that the Board hold public hearings on plans that were not proposed plans, including the Board's Final Plan, this Court has recognized that there are limits to the Board's ability to adopt a final plan without public hearings—even if the final plan was not a proposed plan.[2] Those limits are discussed below and they preclude dismissal of Plaintiffs' third claims based solely upon the language of Article VI, Section 10.

FACTUAL BACKGROUND

Plaintiffs' basic factual allegations are set forth in their respective Complaints.[3] The Board does not dispute that it did not hold public hearings on any redistricting plans that were not proposed plans, including the Final Plan.

LEGAL STANDARD

Alaska Civil Rule 12(b)(6) allows for dismissal of a claim for failure to state a claim

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1 Alaska Const. art. VI, § 10.

2 *In re 2001 Redistricting Cases*, 2002 WL 344119573 at 24-25 (Alaska Super.).

3 Valdez's and Detter's Complaint at 4; Skagway's and Ryan's Complaint at 4. Both Complaints were filed on Dec. 10, 2021.

upon which relief can be granted.[4] Motions to dismiss, however, are viewed with disfavor and should rarely be granted.[5] More specifically, motions to dismiss should be only granted if it appears beyond doubt that the plaintiff can prove no set of facts that would entitle it to relief.[6]

Civil Rule 12(b)(6) also provides that if materials outside the pleadings are presented to and not excluded by the court, "the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56[.]"[7] The court must "expressly" exclude the materials or convert the motion to dismiss into a motion for summary judgment.[8]

ARGUMENT

I. BECAUSE THE BOARD'S MOTION TO DISMISS IS ESSENTIALLY A MOTION FOR SUMMARY JUDGMENT, THE COURT SHOULD DENY THE MOTION

The Board relies upon this Court's decision in the 2001 redistricting cases (2001 Decision) to support its Motion to Dismiss, but the 2001 Decision involved a motion for summary judgment—not a motion to dismiss.[9] The legal standards applicable to a motion to dismiss, however, are different than the legal standards applicable to a motion for summary judgment. As set forth above, a motion to dismiss should only be granted if

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4 Alaska R. Civ. P. 12(b)(6).

5 *Neese v. Lithia Chrysler Jeep of Anchorage, Inc.*, 210 P.3d 1213, 1217 (Alaska 2009).

6 *Alleva v. Municipality of Anchorage*, 467 P.3d 1083, 1088 (Alaska 2020).

7 Alaska R. Civ. P. 12(b)(6) (emphasis added).

8 *Richardson v. Municipality of Anchorage*, 360 P.3d 79, 84 (Alaska 2015).

9 *In re 2001 Redistricting Cases*, 2002 WL 344119573 at 24.

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it appears beyond doubt that the plaintiff can prove no set of facts that would entitle it to relief.[10] In contrast, a motion for summary judgment will only be granted if there is no genuine issue as to any material fact such that the movant is entitled to judgment as a matter of law.[11]

The Board's Motion to Dismiss is a thinly veiled motion for summary judgment, crafted to circumvent the Court's Pretrial Order that precludes summary judgment motions in this proceeding.[12] The Board makes multiple factual assertions in its Motion to Dismiss before any discovery has been exchanged. With respect to Valdez, Detter, and House District 29, the Board asserts facts about opportunities for public comment, when the Board notified the public, what it notified the public about, and what certain maps purportedly show.[13] With respect to Skagway, Ryan, and House Districts 3 and 4, the Board similarly asserts facts about opportunities for public comment, when the Board notified the public, what it notified the public about, and what certain maps purportedly show.[14] These are factual issues for trial, not the basis for a motion to dismiss. It would be improper for the Court to grant dispositive motions on facts asserted by the Board and disputed by Plaintiffs before any discovery.

In support of these factual assertions, the Board relies upon maps from its website

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10 *Alleva*, 467 P.3d at 1088.

11 Alaska R. Civ. P. 56(c).

12 Pretrial Order at 3, ¶ 10 (Dec. 15, 2021) ("The Court will permit no motions for summary judgment.").

13 Motion to Dismiss at 12-14.

14 Motion to Dismiss at 9-12.

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that counsel for the Board has indicated are in the administrative record he provided to the Court.[15] The Board then asks the Court to take judicial notice of all the maps that make up the Board's Final Plan and the maps of proposed plans adopted by the Board,[16] in an effort to rely upon materials outside the pleadings to support its Motion to Dismiss. The Board, however, is not simply relying upon maps—the Board is relying upon unsupported factual assertions regarding the evolution of those maps, including whether there was timely notice to the public of what the Board was considering with respect to those maps.[17]

This Court should recognize the Board's Motion to Dismiss for what it is—not by what it is titled. It is disingenuous on the part of the Board to attempt to circumvent the Court's Pretrial Order with respect to summary judgment motions by presenting its motion to this Court as a Motion to Dismiss, and then make unsupported factual assertions and rely upon a case that involves summary judgment rather than dismissal. The Court should not permit the Board to circumvent the preclusion of motions for summary judgment in this litigation by filing a Motion to Dismiss that is essentially a motion for summary judgment.

Moreover, dismissing claims in this litigation before Plaintiffs even receive relevant discovery would work an injustice to Plaintiffs. As noted above, motions to dismiss should rarely be granted.[18] This is not one of the rare instances in which dismissal should be

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15 Motion to Dismiss at 20.

16 Motion to Dismiss at 20-21.

17 Motion to Dismiss at 9-12, 12-14.

18 *See* n.4, *supra*.

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granted. This is a complex case with multiple parties and a very accelerated litigation schedule. To the extent the Court considers dismissing any claims, the Court should consider materials outside the pleadings as those materials become available in order to afford Plaintiffs the opportunity to develop a proper record to advance their cases. In doing so, however, the Court would be required to treat the Motion to Dismiss as one for summary judgment. As such, the motion for summary judgment would not properly be before this Court pursuant to the Pretrial Order.[19] As a result, the Court should deny the Board's Motion.

II. EVEN IF THE COURT CHOOSES TO CONSIDER THE MOTION TO DISMISS WITHOUT CONSIDERING MATERIALS OUTSIDE THE PLEADINGS, THE 2001 DECISION DOES NOT SUPPORT DISMISSAL IN THIS CASE

In its discussion of the 2001 Decision, the Board ignores the Court's comments regarding the evidence in that case. In the Court's discussion of Article VI, Section 10, immediately preceding the paragraph that the Board relies upon,[20] the Court stated:

> The evidence indicates the Full Representation Plan is a revision of the second AFFR [Alaskans for Fair Redistricting] plan which itself is a revision of the initial AFFR plan adopted by the Board as one of the four proposed plans that were the subject of the public hearings. The Full Representation Plan was discussed by the Board at its public meetings on June 7th and June 8th. Some minor modifications to Juneau districts were made to this plan while other modifications to Anchorage districts were discussed and rejected. On June 9 the Board voted to adopt the Full Representation Plan with the modifications that had been approved earlier.[21]

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19 Pretrial Order at 3, ¶ 10.

20 *In re 2001 Redistricting Cases*, 2002 WL 344119573 at 24.

21 *Id*.

The Court's comments highlight some of the factual issues in this case. Those factual issues include, but are not limited to: where the Final Plan came from, i.e. the evolution of the Final Plan over time; whether the Final Plan or a similar version of it was published for public comment and discussed by the Board at its public meetings; and if the Final Plan or a similar version of it was not discussed at public meetings, whether modifications to prior plans are considered minor or whether modifications constitute a serious departure from plans that had been the subject of public comment.

Contrary to the Board's argument that its Motion to Dismiss involves only a question of law, there are multiple factual issues involved in Plaintiffs' third claims that the Board seeks to dismiss. Those issues need to be resolved through discovery and trial. Until discovery is complete and until the factual situation is properly developed, Plaintiffs contest the facts asserted by the Board in its Motion to Dismiss. The Board's argument that Plaintiffs can prove no set of facts that would entitle them to relief is without merit. Unlike the 2001 case, this is not a case in which the final adopted plan was a plan discussed by the Board at public meetings with only minor modifications to plans previously discussed at public hearings.

The Board also ignores the Court's footnote at the end of the paragraph that the Board cites.[22] In that footnote, the Court stated:

> This case does not present the problem of the Board adopting an entirely new plan that has never been the subject of public hearings and which was a radical departure from plans that had been the subject of public comment. While some parts of the Full Representation Plan were unique and considered

[22] *Id*.

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> for the first time, this court finds that the Full Representation Plan was an evolution of various other plans . . . . The elements of the Full Representation Plan had been previously discussed by the Board or made available to the public although the entire Full Representation Plan was not made available to the public until June 6.[23]

The Court thus made clear that there are limits to what the Board can do without holding public hearings—and rightfully so. The Board's implicit argument that there are no limits to the Board's ability to adopt a plan that was not a proposed plan and was not the subject of public comment is without merit and leads to an untenable result. Whether or not the final plan is merely an "evolution of various other plans" is a key factual issue in this case.

Moreover, whether the Board properly satisfied the requirements of Article VI, Section 10 when adopting V. 3 and V. 4 and third-party proposed plans raises numerous issues of fact. Article VI, Section 10(a) provides "[w]ithin thirty days of the official reporting of the decennial census of the United States or thirty days after being duly appointed, whichever occurs last, the board shall adopt one or more proposed redistricting plans." Because the decennial census data was provided to the Board on August 12, 2021, the Board's deadline for adoption of proposed plans was September 11, 2021. The Board adopted V. 1 and V. 2 as proposed plans on September 9, 2021. V.1 and V.2 contained identical versions of District 36 that combined Valdez with Richardson Highway and other rural communities in a manner that was acceptable to Valdez.

The Board did not hold another public meeting until September 17, 2021. From September 17, 2021 through September 19, 2021, the Board observed presentations for

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[23] *Id*. at 25, n.40.

third-party proposed plans and took public testimony related to those plans. On September 20, 2021, after the constitutional deadline for the adoption of proposed plans had passed, the Board adopted entirely new Board drawn plans identified as V. 3 and V. 4, which superseded V. 1 and V. 2, along with four plans created by third parties.[24] The Board failed to provide adequate public notice or receive public comment regarding V. 4 prior to its adoption despite the fact that it contained radically different districts than those included in either of the previously adopted Board drawn plans.[25] The substantial differences between V. 2 and V. 4 are readily apparent in the minutes for the September 20, 2021 Board meeting[26] and include the introduction of a new proposed district combining Valdez and Mat-Su Borough communities. V. 4 was not made available for public review until it was presented by Board Member Borromeo on September 20, 2021, immediately prior to adoption of the proposed plans.[27] Thus, the proposed plans the Board used to solicit public comment and frame the entire redistricting process were adopted after the deadline set forth in the Alaska Constitution, and V. 3 and V. 4 were adopted without proper public notice or comment.

The Board either misunderstands or misrepresents the scope of Article VI,

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24 ARB000190-ARB000192

25 *See* ARB000618-000855 (Board Packet for September 17–19, 2021 Board meetings omitting any mention of revisions to V. 1 or V. 2 or proposed revisions to Board drawn maps); ARB 000856-ARB000943 (Board Packet for September 20, 2021 omitting any proposed revisions to Board drawn maps or revised Board drawn maps).

26 *See* ARB000186-000192.

27 *Id*.

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Section 10 with respect to redistricting plans and public hearings. The Alaska Constitution specifically requires public hearings on proposed plans but this Court has held that there are limits to what the Board can do with plans that were not proposed.[28] Thus, as a matter of law, the Board does not have the authority to dispose of public hearings simply because a plan was not a proposed plan. The Board does, however, have a duty to adopt proposed plans within the constitutionally mandated time limits and to ensure that the underlying process in reaching its Final Plan is an adequate public process.

The Board's underlying process in reaching its Final Plan is a core issue in this litigation: whether that process passes constitutional and statutory muster, including the constitutional requirement of due process and the Open Meetings Act.[29] The constitutional and statutory requirements regarding process in this case must be considered collectively. If the Final Plan has been improperly presented to the public, then the process underlying the Final Plan fails and the Final Plan fails accordingly.

Dismissing claims in this litigation under disputed facts and before discovery is not in the interest of justice. Plaintiffs should have the opportunity to develop the record to advance their cases. The Court should allow for the facts be developed, especially in a case that only comes before the Court once every ten years. Regardless of how the Court chooses to rule on the Board's Motion, the Court should allow for the development of a full record for purposes of appeal, particularly given the accelerated schedule in this case.

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28 2001 Decision at 24-25.

29 Alaska Const. art VI, § 6; AS 44.62.310-320.

In a case involving an election contest, the superior court dismissed a count of the complaint for failure to state a claim "but, in light of short time frame for resolving election disputed, [the court] opted to take testimony, and thereafter issued findings and conclusions regarding malconduct."[30] On appeal, the supreme court found it was error for the superior court to grant dismissal.[31] This Court should similarly take testimony to preserve the record for appeal regardless of how it rules on the Board's Motion to Dismiss.

CONCLUSION

The Board's Motion to Dismiss is essentially a Motion for Summary Judgment, and this Court should recognize the Motion for what it is and deny it. Moreover, even if the Board's Motion were a motion to dismiss, the 2001 Decision does not support dismissal. Dismissing claims, in this litigation under disputed facts and before discovery is not in the interest of justice, particularly when those claims are related to the Board's underlying process in reaching its Final Plan.

To the extent the Court considers dismissing any claims, Plaintiffs respectfully request that the Court take testimony to ensure a complete record on appeal.

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30 *Pruitt v. Office of Lieutenant Governor*, 498 P.3d 591 (Alaska 2021).

31 *Id*. at 597-98.

DATED this 27th day of December, 2021.

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Certificate of Service
The undersigned hereby certifies that a copy of the foregoing document was e-mailed to the following attorneys/parties of record this 27th day of December, 2021:

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