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-21-08869CI
	)	

ORDER RE: MOTION TO DISMISS

I. INTRODUCTION

Before this court are five consolidated challenges to the final redistricting plan adopted by the Alaska Redistricting Board ("Board") on November 10, 2021. Four of those challengers[1] ("Plaintiffs") brought claims that the Board violated Article VI, Section 10 of the Alaska Constitution by failing to hold adequate public hearings on the proposed plans. The Board then filed a motion to dismiss the Section 10 claims. The Board argues that Section 10 only requires public hearings on the proposed plans and not the final plan. The Board also asks this court to judicially notice a number of publicly available documents, including several of the Board's earlier proposed plans, to support its argument that the public hearing requirement was met. The Plaintiffs respond that by attaching documents outside the pleadings the Board is effectively moving for summary judgment, which is not permitted under this court's earlier pretrial order. The Plaintiffs also assert that Section 10 does not preclude their challenges, and in the alternative they ask this court to allow the claims to proceed due to the expedited nature of this suit.

For the reasons stated below, this court **DENIES** the Board's motion to dismiss.

[1] The challengers involved in this motion are Felisa Wilson, George Martinez, and Yarrow Silvers ("Wilson"); City of Valdez and Mark Detter ("Valdez"); Matanuska-Susitna Borough and Michael Brown ("Mat-Su"); and Municipality of Skagway Borough and Brad Ryan ("Skagway"). Only challengers Calista Corporation, William Naneng, and Harley Sundown ("Calista") did not bring a Section 10 claim and are not parties to this motion to dismiss.

II. BACKGROUND

Upon receipt of the 2020 decennial census data on August 12, 2021, the Board convened to begin the constitutionally mandated process of redistricting.[2] On September 9, the Board adopted two draft plans: Board Composite Version 1 and Version 2. The Board then solicited feedback and additional draft plans from the public. On September 20, at the last meeting for presenting draft plans, the Board adopted at least two more proposed redistricting plans, including Board Proposed Version 3 and Version 4. The Board continued to receive public testimony and written comments through October, and it held a number of in-person meetings across the state. From November 2 through November 5, the Board held work sessions in Anchorage open to the public and took statewide public testimony. On November 9, the Board adopted senate seat pairings. The Board then issued its final proclamation of redistricting on November 10.

The Plaintiffs filed applications to compel the Board to correct various errors in the final plan in early to mid-December. The Board subsequently moved to dismiss the Plaintiffs' Article VI, Section 10 claims on December 21.

III. STANDARD OF REVIEW

Alaska Civil Rule 12(b)(6) permits a party to seek dismissal of any claims for "failure to state a claim upon which relief can be granted." However, "'motions to dismiss are disfavored' and should be granted only if 'it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief.'"[3] The reviewing court

---

[2] The facts in this section are taken from the Plaintiffs' amended complaints, which this Court accepts as true on a motion to dismiss. *See Clemensen v Providence Alaska Med. Ctr.*, 203 P3d 1148, 1151 (Alaska 2009).

[3] *Alleva v. Municipality of Anchorage*, 467 P.3d 1083, 1088 (Alaska 2020) (footnote omitted) (quoting *Adkins v. Stansel*, 204 P.3d 1031, 1033 (Alaska 2009)), *reh'g denied* (Aug. 12, 2020).

"must presume all factual allegations of the complaint to be true and make all reasonable inferences in favor of the non-moving party."[4]

IV. ANALYSIS

A. The Plaintiffs' Factual Allegations Are Sufficient To State A Claim As To Whether The Requirements Of Article VI, Section 10 Have Been Met.

The Board seeks dismissal under Rule 12(b)(6) of the Plaintiffs' claims based on Article VI, Section 10 of the Alaska Constitution. In particular, the claims that the Board seeks to dismiss revolve around Section 10's public hearing requirements:

> Within thirty days after 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. *The board shall hold public hearings* on the proposed plan, or, if no single proposed plan is agreed on, *on all plans proposed by the board.* No later than ninety days after the board has been appointed and the official reporting of the decennial census of the United States, the board shall adopt a final redistricting plan and issue a proclamation of redistricting. The final plan shall set out boundaries of house and senate districts and shall be effective for the election of members of the legislature until after the official reporting of the next decennial census of the United States.[5]

The Alaska Supreme Court has yet to provide detailed guidance on this constitutional provision, and the legislative history does little to clarify the intended meaning of "public hearings."[6]

The Board points this court to *In re 2001 Redistricting Cases*,[7] one of the previous Alaska redistricting challenges. The superior court there heard several Section 10 challenges, but ultimately agreed with the defendants "that Article VI, Section 10 requires that public hearings be held only on the plan or plans adopted by the Board within thirty

---

[4] *Adkins*, 204 P.3d at 1033 (quoting *Belluomini v. Fred Meyer of Alaska, Inc.*, 993 P.2d 1009, 1014 (Alaska 1999)).
[5] Alaska Const. art. VI, § 10(a) (emphasis added).
[6] *See generally* 1998 Ballot Measure No. 3; 1998 Legislative Resolve 74; House Joint Resolution (H.J.R.) 44, 20th Leg., 2d Sess. (1998) (proposing constitutional amendments relating to redistricting).
[7] No. 3AN-01-8914 CI, 2002 WL 34119573 (Alaska Super., Feb. 01, 2002).

days of the reporting of the census." [Motion Ex. A 24] The superior court reasoned that "any other requirement would likely discourage the Board's consideration of plans submitted after the initial thirty day time period," due to "the extraordinary time constraints imposed by Article VI, Section 10." [Motion Ex. A 24] But the superior court carved out an exception for situations where "the Board adopt[s] 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." [Motion Ex. A 25 n.40] On appeal, the Alaska Supreme Court did not directly discuss the Section 10 challenges, instead holding that: "Except insofar as they are inconsistent with this order, the orders of the superior court challenged by the petitioners are AFFIRMED."[8]

The Board thus seeks dismissal of the Section 10 claims here because the plain text "does not mandate public hearing on the final redistricting plan." [Motion 7] The Board contends that *In re 2001 Redistricting Cases* "affirmed this plain reading of Section 10." [Motion 9] But the Plaintiffs respond that the lack of any public hearing on the final plan is not actually what they challenge. Wilson alleges that "no proposed plan including the East Anchorage/Eagle River Pairings was properly and timely presented to the public before its adoption." [Wilson Am. Compl. 10] Wilson further asserts that the Board intentionally "precluded mention of senate pairings at its statewide public hearings," resulting in a lack of "meaningful opportunity to provide input." [Wilson Opp. 13] Valdez and Skagway likewise allege that "the Board's redistricting plan was not included in the public hearing process," and that "the testimony and evidence submitted to the Board was largely ignored." [Valdez Am. Compl. 13; Skagway Am. Compl. 8] They assert that "multiple

[8] *In re 2001 Redistricting Cases*, 44 P.3d 141, 143 (Alaska 2002). The opinion does not state whether the superior court's Section 10 orders were appealed.

factual issues" remain contested, including "whether modifications to prior plans are considered minor or . . . a serious departure." [Valdez-Skagway Opp. 7] Only Mat-Su actually bases its claim on an allegation that "the Board failed to hold requisite public hearings on the Final Plan." [Mat-Su Am. Compl. 7] But even then, Mat-Su's claim does not actually allege a violation of Section 10—its challenge is framed under the Due Process Clause, [Mat-Su Opp. 3] and the Board seemingly acknowledges as much. [Rep. Br. 7]

The Board is correct that plain language of Section 10 appears to exempt the *final plan* from further public hearings.[9] However, the text clearly prescribes "public hearings . . . on all plans proposed by the board," which would appear to include any plans proposed later in the process.[10] And that is precisely what the Plaintiffs challenge. Rather than limiting their Section 10 challenges to the final plan, the Plaintiffs challenge many aspects of the public hearings, including whether the Board purposefully prevented meaningful feedback on certain portions of the proposed plans prior to incorporation into the final

[9] The Board does not argue that *In re 2001 Redistricting Cases* is binding on this court, nor does it appear that the Court intended to create binding precedent on Section 10 through its summary disposition. *See, e.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (concluding that an issue not raised "nor discussed in the opinion . . . is not a binding precedent on this point"); 21 C.J.S. COURTS § 215, Westlaw (database updated Nov. 2021) ("Thus, a prior decision is not a binding precedent on points or propositions that were not raised in briefs or argument nor considered by the court or discussed in the opinion."). While not binding precedent, the superior court's opinion in that case is nevertheless "entitled to consideration." 21 C.J.S. COURTS § 206, Westlaw (database updated Nov. 2021).

[10] Viewed in the light most favorable to the Plaintiffs, the Board's argument would effectively permit the Board to circumvent the public hearing requirement entirely by withholding the real plans until after the 30-day deadline. Although the *In re 2001 Redistricting Cases* court held that Section 10's public hearing requirements only applied to those "plans adopted by the Board within thirty days of the reporting of the census," [Motion Ex. A 24] that was in part due to technological limitations of the day. The court identified a number of "technological problems" that put rural areas "at a disadvantage" and acknowledged that "the Board's process can and should be improved." [Motion Ex. A 27] The court opined that "future technological advances will cure some of these problems." [Motion Ex. A 27] That was 20 years ago, and what sufficed for public hearings in 2001 is not what suffices in 2021. The Board has not identified any technological constraints limiting its ability to provide full public hearings on late-adopted plans in 2021, although it may yet attempt to do so at trial.

plan. *In re 2001 Redistricting Cases* even recognized an exception for scenarios involving similar allegations of malfeasance.

This court must accept the Plaintiffs' allegations as true on a motion to dismiss. In this case, the Board's motion seeks to reinterpret or narrow the Plaintiffs' Section 10 claims. Under the facts as alleged, the court cannot say it is "beyond doubt" that Plaintiffs may be entitled to some relief. The Plaintiffs therefore appear to sufficiently state a claim for which relief can be granted under Article VI, Section 10.[11]

B. Judicial Notice Without Conversion To Summary Judgment Is Proper For Undisputed Public Records Attached To A Plaintiff's Complaint.

In its motion to dismiss, the Board asks this court take judicial notice of certain facts. For motions to dismiss under Rule 12(b)(6), if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment."[12] But in certain circumstances, courts may consider "[d]ocuments whose contents are alleged in a complaint and whose authenticity no party questions . . . without converting the motion to one for summary judgment."[13] Likewise, "courts may consider materials outside the pleadings on a motion to dismiss if those materials are subject to "strict judicial notice," such as "matters of public record," so long as the court provides "notice to the opposing party" and "an opportunity to dispute the facts judicially noticed."[14] Judicial notice is generally proper for facts that are "not subject to reasonable

---

[11] This Court is less confident, however, in what the appropriate relief would be for a violation of Article VI, Section 10. *Cf. In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) (agreeing with the superior court's conclusion "that no remedy is appropriate" for violations of the Open Meetings Act). In this regard, supplemental briefing may be helpful.

[12] Alaska R. Civ. P. Rule 12(d).

[13] *Adkins*, 204 P.3d at 1088-89 (quoting *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002)).

[14] *Pedersen v. Blythe*, 292 P.3d 182, 185 (Alaska 2012) (first quoting *Martin v. Mears*, 602 P.2d 421, 426 n.6 (Alaska 1979); then quoting *Schwartz v. Com. Land Title Ins. Co.*, 374 F. Supp. 564, 579 (E.D. Pa. 1974)).

dispute" and are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[15]

The Board seeks judicial notice "of all the maps that make up the Board's Final Plan and the maps of the proposed plans adopted by the Board." [Motion 21] The Board includes several images of those plans throughout its motion. [Motion 10-19] The Board argues that those maps "are available online and included within the administrative record," and thus constitute "public records under the law." [Motion 20] The Plaintiffs oppose, primarily arguing that the motion "is by its nature a motion for 'summary judgment,' not dismissal." [Wilson Opp. 4] They assert that the Board's motion violates this court's December 15, 2021 pretrial order, establishing that "no motions for summary judgment" are permitted. [Wilson Opp. 4 n.6; Mat-Su Opp. 1; Valdez-Skagway Opp. 4]

The final plan and several of the proposed plans are directly attached to Valdez's amended complaint. [Valdez Am. Compl. Exs. A-F] Although the plans themselves are not attached to the other amended complaints, each Plaintiff specifically references one or more of those plans therein. [Wilson Am. Compl. 8; Mat-Su Am. Compl. 4; Skagway Am. Compl. 3-4] And none of the Plaintiffs challenge the authenticity of the plans or the images used in the Board's motion.[16]

However, the Board goes beyond asking this court to judicially notice the publicly available plans. Instead, the Board seeks the added inference that those proposed plans were "timely noticed to the public," that the challengers "had numerous opportunities for public comment," [Motion 19] and that the challenged portions of the final plan "were all

[15] Alaska R. Evid. 201(b).
[16] At most Wilson contends that the Board selectively cropped one of the attached images, whereas in full context the images actually support Wilson's arguments. [Wilson Opp. 11]

included in at least one of the proposed plans." [Motion 9] The Board thus attempts to use images of the proposed plans to disprove the Plaintiffs' allegations as "demonstrably false." [Rep. Br. 8] But the Plaintiffs all contest those factual assertions. Indeed, there are numerous aspects of the process that the Plaintiffs challenge, including whether each of the proposed plans was "properly and timely presented to the public before its adoption." [Wilson Am. Compl. 10] And simply because a proposed plan exists does not necessarily mean that it was properly noticed or that the public hearings were meaningful.[17]

Although the plans themselves are proper subjects for judicial notice, as the Plaintiffs point out, [Valdez-Skagway Opp. 5] the timeliness of notice and adequacy of public hearings are not. This court can take judicial notice of the Board's final plan and the other proposed plans, and the images attached to the Board's motion appear to accurately depict aspects of those plans. Such judicial notice does not convert the motion to one for summary judgment, especially where one Plaintiff has already attached many of those plans to its amended complaint. Nor does judicial notice completely resolve the dispute, as the court is still obliged to accept the Plaintiffs' representations that the process surrounding adoption and presentation of the proposed plans was inadequate and "precluded the public from effectively or meaningfully informing or challenging the Board's proposed [plans]." [Wilson Am. Compl. 10] Accordingly, the Board's judicial notice request, while proper, does not alter this court's Section 10 analysis above.

This court therefore **GRANTS** the Board's request to take judicial notice of its proposed plans and the final plan as included in the administrative record. The court

[17] For example, the Board asserts that it adopted "four additional proposed plans that were presented by third parties" on September 20, 2021. [Motion 3] But the Plaintiffs do not reference any of the third-party plans in their complaints. [Wilson Opp. 5] Thus the extent to which the public was actually made aware of these additional plans is central to some of the Plaintiffs' claims.

declines to make any specific inference at this time from the materials in the administrative record.

C. The Time Constraints Of Expedited Proceedings In Redistricting Challenges Militate In Favor Of Allowing The Claims To Proceed.

In light of time constraints, the Plaintiffs also propose requiring the parties to address the Section 10 claims at trial even if dismissal might otherwise be proper. [Wilson Opp. 16] The Alaska Supreme Court recently approved of such an approach in *Pruitt v. Office of Lieutenant Governor.*[18] There, the losing candidate for a state House seat filed suit challenging the election results.[19] The governing statute required any challenge to be brought "within 10 days after the completion of the state review."[20] Although the superior court dismissed the complaint, it opted to hear testimony on one count "in light of the short time frame for resolving the election contest."[21] The superior court ultimately ruled against the challenger,[22] but on appeal the Alaska Supreme Court stated: "Given the expedited timeline of this case, we commend the superior court for its foresight in taking evidence in the alternative to ensure this case could be swiftly resolved."[23]

Citing *Pruitt*, the Plaintiffs each propose such an approach to allow their Section 10 claims to proceed regardless of how this court rules. [Wilson Opp. 16-17; Mat-Su Opp. 2; Valdez-Skagway Opp. 11] In its reply brief, the Board does not seriously contest the availability or wisdom of such an approach. The Board cites no case law and primarily reiterates its disagreement with the Plaintiffs' interpretation of Section 10. [Rep. Br. 9-10]

---

[18] 498 P.3d 591, 594 (Alaska 2021).
[19] *Id.*
[20] *Id.* at 599 n.25 (quoting AS 15.20.550).
[21] *Id.* at 595.
[22] *Id.* at 597.
[23] *Id.* at 594 n.1. The Court ultimately reversed the superior court's dismissal of the complaint, but it affirmed the superior court's conclusion on the merits. *Id.* at 608.

Although the Board asserts that "[t]he extreme time limitations imposed in this matter militates against wasting time" on the Section 10 claims, [Rep. Br. 9] in reality the "expedited timeline" for election-related suits is precisely why the *Pruitt* Court approved of such a process. The time constraints here are just as if not more pressing.[24] Rule 12(d) additionally provides that motions to dismiss "shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial." Thus, it appears to be fully within this court's discretion to defer ruling on the Board's motion to dismiss and permit the Plaintiffs' Section 10 claims to proceed.[25] And considering that the Board does not seek dismissal of the Plaintiffs' other claims, any added burden seems minimal in comparison to the risk of erroneously dismissing Plaintiffs' Section 10 claims at this time.

Because the Board does not seriously oppose the Plaintiffs' proposal under *Pruitt*, this court finds in the alternative that deferring on the Board's motion to dismiss and allowing the Plaintiffs' Section 10 claims to proceed would also be appropriate.

V. CONCLUSION

For the reasons stated above, this court therefore **GRANTS** the Board's request for judicial notice, but in all other respects this court **DENIES** the Board's December 21, 2021 motion to dismiss.

In addition, this court **ORDERS** supplemental briefing from the parties on what the appropriate remedy should be for the Plaintiffs' Article VI, Section 10 claims, as well as

---

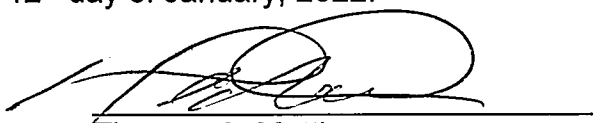
[24] *See, e.g.*, Alaska R. Civ. P. 90.8(c) (providing that redistricting challenges "shall be expedited" with "priority over all other matters pending before the court," and setting a strict time limit for rendering a decision).

[25] Even if this court did grant the Board's motion, it also retains the discretion to reconsider such a ruling later. *See* 5C WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 1373, Westlaw (database updated April 2021) ("The determination of a defense on a motion prior to trial is not so final that it prevents the court from reconsidering its ruling at any time prior to the entry of judgment.").

for the Plaintiffs' other alleged procedural violations under the due process clause and the Open Meetings Act.[26] This discussion of remedies should be included with the trial briefs.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 12th day of January, 2022.



Thomas A. Matthews
Superior Court Judge

I certify that 1/12/22 a copy of this Order was sent to the following:

A Murfitt	amurfitt@brenalaw.com	Mara Michaletz	mmichaletz@BHB.com
B Fontaine	bfontaine@hwb-law.com	Matthew Singer	msinger@schwabe.com
B Taylor	btaylor@schwabe.com	Michael Schechter	mike@anchorlaw.com
Ben Farkash	ben@anchorlaw.com	Nathaniel Amdur-Clark	NCLARK@SONOSKY.COM
E Houchen	ehouchen@brenalaw.com	P Crowe	pcrowe@bhb.com
Eva Gardner	Eva@anchorlaw.com	Robin Brena	rbrena@brenalaw.com
Gregory Stein	greg@baldwinandbutler.com	S Nichols	snichols@hwb-law.com
Heidi Wyckoff	heidi@anchorlaw.com	Sarah Clinton	sarah@anchorlaw.com
Holly Wells	hwells@bhb.com	Stacey Stone	sstone@hwb-law.com
J Huston	jhuston@schwabe.com	T Hardwick	thardwick@hwb-law.com
Jake Staser	jstaser@brenalaw.com	T Marshall	tmarshall@bhb.com
Kayla Tanner	ktanner@schwabe.com	Thomas Flynn	thomas.flynn@alaska.gov
Laura Gould	lgould@brenalaw.com	Whitney Leonard	whitney@sonosky.net
Lee Baxter	lbaxter@Schwabe.com	William Falsey	wfalsey@bhb.com
M Hodsdon	mhodsdon@brenalaw.com		
M Nardin	mnardin@brenalaw.com		

Judicial Assistant

[26] Only Calista, who is not a party to this motion, does not allege any procedural violations.