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ATTORNEY-CLIENT PRIVILEGED AND ATTORNEY WORK PRODUCT

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FROM: Katherine L. McKnight

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SUBJECT: Memorandum Concerning Subsections 9 and 14 of Art. IV, § 6

This memorandum provides initial impressions on the legal questions facing the Commission, which will, in turn, inform more granular questions concerning recent resolutions the Commission has adopted and future steps. We recognize that there are additional questions that flow from these initial views, but we believe it helpful to frame the discussion with an initial overview on cross-cutting issues. Specifically, we see the Commission grappling with ambiguity in the drafting of Article IV, Section 6 (Section 6), and we seek to provide a framework for resolving that ambiguity so the Commission's important and time-sensitive work may proceed. We have addressed these issues on an expedited basis given current proceedings before the Commission. Further input, provision of information, and discussion may alter our initial positions.

A. Commissioner Proposals of Plans for Notice and Comment

We understand that the Commission faces questions over the extent to which Commissioners are restricted in proposing maps for notice and comment under Subsection 14(b) by the scope of their proposed-map submissions at public hearings under Subsection 9. We believe there is ambiguity in the interplay between Subsection 9 and Subsection 14(b). The Commission would have a defensible position that new maps not presented at public hearings under Subsection 9 may be presented for notice and comment under Subsection 14(b), but the issue is not free from doubt. At a minimum, Commissioners would have a strong basis, in our view, to amend proposals presented at hearings under Subsection 9 based on comments from those hearings, prior to the notice-and-comment process of Subsection 14(b).

1. *New Plans*

We start with the broader question of whether new maps may be permitted at this time. This question seems close.

Subsection 14(b) does not expressly make a given map's publication under Subsection 9 a prerequisite to a vote of the Commission on that map. Subsection 14(b) establishes a specific "procedure" for "adopting a plan" and does not identify publication of a given map in Subsection 9 hearings as a part of that process or as a prerequisite for adoption. Under the *expressio unius* canon, and the principle that "a limitation that is not within the express language" of a provision governing a governmental body will not be added judicially, *see Mich Charitable Gaming Ass'n v Michigan*, 310 Mich App 584, 600-01; 873 NW2d 827 (2015), such requirements arguably cannot be read in. And Subsection 14(b) clarifies that the "following" process governs adoption of maps; but Subsection 9 comes *before* Subsection 14(b) and does not *follow* it.

Further, Subsection 14(b) contains a phrase of art, "each plan that will be voted on," signaling that notice and comment is an eligibility requirement for each and every plan the Commission desires to vote on. That language is absent from Subsection 9, which refers only to "proposed redistricting plans." Nothing in Subsection 9 matches Subsection 14(b)'s clarity in requiring any plan subject to a vote to go through its processes. Moreover, Subsection 14(b) provides that "[e]ach plan that will be voted on shall include…the map and legal description required in part (9) of this section." That provision would seem to be redundant if new plans, not published under Subsection 9 hearings, were not contemplated, because that information would already be available and provided in the public-hearing process of Subsection 9 itself. All of these are textual arguments in support of the view that Commissioners may present new plans at the Subsection 14(b) phase.

Additionally, there would seem to be substantial structural arguments to permit new proposals, given that the hearing process informs the Commissioners' views, and the Constitution self-evidently contemplates that Commissioners will take those views into consideration and implement them in plans. We note that the opportunity for public input was a central advocacy point advanced by proponents of the constitutional amendment, and we also understand that the absence of public input perceived in some legislative redistricting process is a point of concern for redistricting-reform advocates. For example, advocates often feel that even public input that is entertained is not actually taken into consideration in crafting plans.

A cogent argument can be made that frustrating the Commission's ability to implement comments received would work contrary to the overall structure and purpose of the amendment. In particular, the Commission has a strong argument that limiting Commissioners' ability to implement public comments would neuter the utility of Subsection 9 hearings. And, although countervailing concerns regarding public notice may be advanced, those concerns are mitigated insofar as Subsection 14(b) requires public notice and comment of plans that will be voted on. Subsection 9, in other words, does not seem to be doing the "heavy lifting" of public notice in the constitutional scheme, given the subsequent 45-day notice period. There would be a compelling theme in court that more maps, and more opportunity to present, is better, not worse, and that new maps at this stage would cause no harm.

Importantly, a preference for more maps at the Subsection 14(b) stage would also be supported by the unique circumstances of this redistricting, as the census data was delayed by nearly five months and limited the time available to Commissioners to draft plans. A restrictive set of rules limiting Commissioners' ability to propose plans after Subsection 9 hearings, by preventing the proposal of new maps after those hearings, would arguably force Commissioners to rush plans into draft form and then tie them to those initial, hurried proposals even if they realize better options are available. The census delay thus provides an argument in support of allowing "new" plans at the Subsection 14(b) phase that is unique to this unusual year and may not exist in future redistricting cycles.

There are, to be sure, contrary positions, and we recognize that this novel issue is not free from doubt. A first read of Subsections 9 and 14 together does frequently seem to yield the initial reaction on the part of lawyers (including many members of our team) that permitting new maps at the Subsection 14(b) stage would read Subsection 9 out of the Constitution. It is plausible to argue that Subsection 9 contemplates that public hearings are intended to publicize any map that might actually become law, thereby necessitating that any map to be voted on go through the Subsection 9 hearing process. Similarly, Subsection 9 requires that "[e]ach commissioner may only propose one redistricting plan for each type of district," but Subsection 14(b) does not repeat that requirement. Arguably, that reflects intent that Subsection 14(b) impliedly incorporate Subsection 9's limitations—as it would arguably be odd for Commissioners to be limited to one map at the public-hearing stage but be allowed more at the comment and adoption stages. One could certainly contend, further, that Section 6 "is a process comprised of various stages," *Mich Charitable Gaming*, 310 Mich App at 602, such that Subsection 14(b) assumes Subsection 9 operates to funnel out plans on the path through notice and comment and to adoption.

Nevertheless, there are responses. As noted, neither Subsection 9 nor Subsection 14 explicitly state that presentation under Subsection 9 is an eligibility prerequisite for *specific* plans under Subsection 14, and differences in the text between the two seem to imply that it is not. One does not read Subsection 9 out of the Constitution by not adding language to it (e.g., that all maps must go through the Subsection 9 process) that does not exist. Further, the Commission would seem to have a solid argument that it *did* adhere to Subsection 9 by holding five public hearings presenting specific proposals, and that restricting Commissioners' ability to implement comments raised in those hearings would do more to read that provision out of the Constitution than permitting Commissioners to efficaciously use the information gained in those hearings. It seems reasonable—and contemplated under Subsection 9—for Commissioners to determine after hearings that their proposals needed substantial reworking, or even total scrapping, and for Commissioners who previously did not submit maps to arrive at a framework for drafting. Redistricting is a difficult creative process. Most Commissioners begin their service with no experience in redistricting. And the Constitution seems to have been purposefully structured to both place the redistricting power with a slate of ordinary citizens and afford them the opportunity to learn, take public comments, and revise their work. Ambiguities in the Constitution should be construed to support, not stifle, that process.

As stated, Subsection 9 arguably exists, not so much to make all possible future laws public, but rather to aid the Commission in gathering information to help craft those future laws. Importantly,

it bears repeating that Subsection 14(b)'s notice and comment provisions serve the purpose of publicizing all plans that will be subject to a vote, so it is doubtful whether Subsection 9 also needs to serve that purpose. Rather, Subsection 9's information-gathering purpose would seem to support permitting broad discretion in making changes based on what the Commission learns.[1] Along those lines, the one-map-per-commissioner rule is not repeated in Subsection 14(b), and that may be on purpose, to provide a limited scope of information at hearings to focus discussions and input. And any argument about the "various stages" of the process could cut either way.

Our initial view is that the Commission should be advised that opening up the process to new maps now presents a risk. It is defensible, but, were the Commission to adopt a plan not subject to Subsection 9 public hearings, there could be a lawsuit (assuming a plaintiff would have standing to challenge the resulting map[2]), there would be good arguments on both sides, and the result would be impossible to predict at this stage. In addition, it is worth noting that a Commissioner who is denied the ability to present a new plan at this stage might also mount a legal challenge (or proponents of such a plan may mount one), creating a litigation risk cutting in the other direction. Addressing these risks is ultimately a client choice that we would pose to the Commission.

2. *Amendments*

At a minimum, there is a compelling basis for Commissioners who submitted maps at the Subsection 9 hearing stage to amend those maps as a result of comments received without triggering a requirement of new public hearings, at least if those amendments are the logical outgrowth of the comment process. To begin, nothing in Subsection 14(b) or otherwise in Section 6 discusses amendment of maps submitted under Subsection 9, prior to notice and comment under Subsection 14(b). However, as explained, Subsection 9 *does* contemplate an effective hearing process designed to gather input from the public. A rule forbidding Commissioners from amending their plans between the Subsection 9 hearing process and the Subsection 14(b) notice-and-comment process would frustrate the opportunity for public input, and it would seem to make the Subsection 14(b) notice-and-comment process redundant, as the same plans would be publicized again without change. As noted above, these arguments also provide support for the view that new maps, regardless of whether they were submitted under Subsection 9, may be presented at this stage. But, at a bare minimum, they provide a compelling basis in support of permitting amendments to plans that were published under Subsection 9.

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[1] The information-gathering purpose of Subsection 8 might arguably overlap with a construction of Subsection 9 that is also information-gather in scope, but that is not a particularly compelling argument. There is a material difference between gathering abstract information and gathering information by reference to working proposals. Subsection 9 does not need to be read to freeze working proposals into place to effectuate the independent efficacy of Subsection 8

[2] *But cf.*, *Lance v Coffman*, 549 US 437, 441; 127 S Ct 1194; 167 L Ed 2d 29 (2007) (no standing of voters to challenge process by which redistricting plan was enacted, in the absence of vote dilution or other concrete and individualized harm).

In reviewing this issue, we observed that the public-hearing process resembles some administrative-law procedures, and we also observed references to administrative hearings in the legislative history of Section 6 as an analogy to the public-input process the Commission utilizes. Notably, however, those references pertain to the notice-and-comment period of Subsection 14(b),[3] which is another argument in support of the position above that Subsection 14(b) serves the notice function and Subsection 9 serves and information-gathering function. Nevertheless, we assume for present purposes that the Subsection 9 process is analogous to an administrative notice-and-comment process.

Under the body of law governing notice and comment, it is established that agencies "can obviously promulgate a final regulation that differs in some respects from its proposed regulation." *Nat Res Def Council, Inc v Thomas*, 838 F2d 1224, 1242 (CA DC, 1988). "A hearing is intended to educate an agency to approaches different from its own; in shaping the final rule it may and should draw on the comments tendered." *S Terminal Corp v EPA*, 504 F2d 646, 659 (CA1, 1974). As a leading administrative-procedure treatise explains, "[i]f an agency were required to issue a second notice and provide an opportunity for a second set of comments every time it decided to make a change in response to the first round of comments, the rulemaking process would be endless." I Hickmand & Pierce, Administrative Law Treatise § 5.3, p 565 (6th ed). The text courts apply is whether the final rule is a "a 'logical outgrowth' of [the] proposed rule." *Nat Res Def Council*, 838 F2d at 1242 (citation omitted). Michigan case law appears to be in accord. *See Mich Charitable Gaming*, 310 Mich App 584 at 601 ("[T]he rulemaking process is intended to be responsive to comments and suggestions offered at the public hearing.").

We, of course, cannot be sure that these principles would carry over into Section 6. But the deadline for an enacted plan, the absence of any mention of new rounds of hearings and comment periods, and the Michigan courts' functional approach to constitutional interpretation would all seem to support the view that amendments can be changed in response to public comments, at least under something like a "logical outgrowth" test. Indeed, for reasons already discussed, a logical outgrowth test is arguably too restrictive on Commissioners and best applied at the Subsection 14(b) stage rather than at the Subsection 9 stage. It seems, however, that the test applies the minimal protection necessary to give Subsection 9 meaningful effect.

3. *Commissioner Submissions*

We also understand the Commission to be weighing the question whether a single Commissioner may submit two proposed plans of the same type (e.g., two proposed state house plans) for publication and notice-and-comment pursuant to Subsection 14(b). This, we believe, poses a close question and turns on whether Subsection 9 strictures control the Subsection 14(b) notice-and-comment procedure. Section 6 imposes a one-map-per-Commissioner limitation in only two provisions: first, in Subsection 9 and, second, under Subsection 14(c)(1) in the event that the initial-

[3] *See* Van Beek, *Proposal 2 of 2018: An Explainer and Key Arguments*, Mackinac Center for Public Policy (Oct. 5, 2018), p 6 ("The commission must issue a public notice and provide 45 days for the public to review and submit comments on each plan it will vote on. A similar procedure is used by other public agencies that propose and implement state regulations and policies.")

adoption vote under Subsection 14(c) fails to produce an enacted plan. Section 14(b) itself contains no limitation on the number of maps a Commissioner may submit for notice and comment.

As a result, we view this question as controlled by the question addressed above: whether the Constitution limits the plans that can be submitted for notice and comment under Subsection 14(b) to plans that were proposed at public hearings under Subsection 9. If the Commission adopts the view that Subsection 9 limitations apply under Subsection 14(b), then, by necessary implication, each Commissioner would be limited to one map of each type, since Subsection 9 imposes that requirement. If not, there would be no such restriction under Subsection 14(b), which does not itself impose that requirement. As discussed below (§ C), in that event, it would be within the Commission's discretion to set limits (if any) to the number of maps each Commissioner may propose. We note that under the first motion adopted on November 4, 2021, each Commissioner is limited to one map each.

B. Majority Vote

Another question we understand to be in play is whether the Commission is required to conduct a majority-rule vote to determine which plans will be subject to notice and comment under Subsection 14(b). We think the answer is no.

Subsection 14(b) addresses what happens "[b]efore voting to adopt a plan," and it repeatedly refers to plans subject to notice and comment as those "that *will* be voted on." We see no language in Subsection 14(b) establishing that only those plans subject to a majority vote are eligible for notice and comment. And that would seem to be an odd rule—at least as a constitutional matter—given that a majority vote is the means by which plans are *adopted* as law. Meanwhile, Subsection 12 provides that "a final decision of the commission requires the concurrence of a majority of the commissioners." But it seems that a provision governing a "final" decision would not govern the process of *proposing* plans for public notice and comment. Put differently, a proposal for notice-and-comment is not likely a "final" decision. Further, these other references to a majority vote in Section 6 would seem to be powerful evidence that no majority-vote rule applies to Subsection 14(b), given that the framers of the amendment knew how to require a majority vote and did not in Subsection 14(b).

As noted below, however, the Commission's prerogative to establish rules governing its internal proceedings may arguably permit it to adopt a majority-vote requirement for proposals. We do not understand the Commission to be planning on adopting such a rule and therefore express no view on whether one would be valid.

C. Other Questions

We understand that there are a host of questions related to these issues, often at a granular level, such as how plans are to be proposed under Subsection 14(b) and what precisely constitutes notice and comment. We have not had a chance to digest these issues in full, much less those pertaining to the Commission's internal rules, but as an initial matter we note that the Commission stands in the shoes of the legislature for purposes of redistricting, as Subsection 22 makes explicit.

Legislatures generally have discretion to set and amend their internal rules, *Anderson v Atwood*, 273 Mich 316, 319; 262 NW 922 (1935), and their choices are often deemed nonjusticiable, *cf. Nixon v United States*, 506 US 224, 230–31; 113 S Ct 732; 122 L Ed 2d 1 (1993). As our last memorandum noted, there is authority that a legislative body in Michigan enjoys a degree of discretion in implementing constitutional directives governing it. *Goldstone v Bloomfield Twp Pub Libr*, 479 Mich 554, 565; 737 NW2d 476 (2007). That discretion would seem to be at its apex, though not unlimited, in governing its own internal processes.

Within the framework we have suggested, and accepting those risks it chooses to accept on an informed basis, the Commission should be able to establish rules providing order to its process, so long as they do not conflict with the constitutional text. For example, a rule permitting Commissioners to propose maps under Subsection 14(b), one restricting Commissioners to a single map, and one setting an internal deadline to propose maps, would all seem reasonable and consistent with the Constitution, with the caveats above that, if Subsection 9 is viewed as restricting Subsection 14(b), the scope of permissible rules would be narrower than if it is not so viewed. Likewise, the Commission as a body is empowered to repeal and amend procedures that it formerly adopted. Once the Commission takes an informed position on the interplay between Subsections 9 and 14(b), it should be more or less apparent what implanting rules are legitimate—though, of course, not all proposals will be without difficulty.

We are available to discuss any issues and consider feedback, disagreements, or alternative views. As noted, addressing these larger issues is an important predicate to digging into the more granular issues.

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