

KELLY & BERENS, P.A.

ATTORNEYS AT LAW
3720 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MINNESOTA 55402

OFFICE OF
APPELLATE COURTS

OCT 17 2001

FILED

TIMOTHY D. KELLY
tkelly@kellyandberens.com

October 17, 2001

TELEPHONE
(612) 349-6171

FAX
(612) 349-6416

Via Messenger

Mr. Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Re: Susan B. Zachman, et al. v. Mary Kiffmeyer, et al.
Minn. Special Redistricting Panel, No. C0-01-160
Our File No. 6088.01

Dear Mr. Grittner:

Enclosed for filing in the above-entitled matter please find the original and nine (9) copies of The Zachman Plaintiffs' Statement of Unresolved Issues.

Very truly yours,



Timothy D. Kelly

TDK:dme

Enclosure

cc: Alan I. Gilbert (via facsimile and U.S. Mail)
Mark B. Levinger (via facsimile and U.S. Mail)
Brain J. Asleson (via facsimile and U.S. Mail)
Tom Kelly (via facsimile and U.S. Mail)
John D. French (via facsimile and U.S. Mail)
Brian Melendez (via facsimile and U.S. Mail)
Marianne B. Short, Esq. (via facsimile and U.S. Mail)
Alan W. Weinblatt (via facsimile and U.S. Mail)

STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL

OFFICE OF
AFFILIATE COURTS
OCT 17 2001

FILED

C0-01-160

Susan M. Zachman, Maryland Lucky R.
Rosenbloom, Victor L.M. Gomez, Gregory G.
Edeen, Jeffrey E. Karlson, Diana V. Bratlie, Brian
J. LeClair and Gregory J. Ravenhorst, individually
and on behalf of all citizens and voting residents of
Minnesota similarly situated,

Plaintiffs,

vs.

***THE ZACHMAN PLAINTIFFS'
STATEMENT OF UNRESOLVED
ISSUES***

Mary Kiffmeyer, Secretary of State of Minnesota;
and Doug Gruber, Wright County Auditor,
individually and on behalf of all Minnesota county
chief election officers,

Defendants.

I. A REDISTRICTING PLAN SHOULD BE ISSUED BY THIS PANEL NO LATER THAN FEBRUARY 14, 2002 TO ALLOW MUNICIPALITIES TO ESTABLISH PRECINCT BOUNDARIES BEFORE THE MARCH 5, 2002 PRECINCT CAUCUSES.

Minnesota municipalities and counties are solely responsible for drawing "election precincts" which serve as the boundaries for partisan precinct caucuses.¹ Under Minnesota law, these precinct caucuses *shall* be held the first Tuesday after the first Monday in March, i.e., March 5, 2002. However, Minnesota municipalities and counties are statutorily *barred* from

¹The Zachman Plaintiffs submitted to this Panel on July 31, 2001, a Memorandum of Law in Support of Scheduling Order, and a Reply Memorandum regarding the same on September 21, 2001. Said memoranda as well as the affidavits submitted therewith, are incorporated herein by reference.

initiating redistricting activities until a congressional or legislative plan is adopted. *See* Minn. Stat. §204B.135.²

A realistic deadline for adoption of a plan, to give municipalities and counties sufficient time to act, is February 14, 2002, nineteen days prior to March 5, 2002.

The precinct caucuses produce the delegates who select each political party's endorsed candidates for the Minnesota Legislature at subsequent legislative conventions. If precinct boundaries are not in place before March 5, 2002, prospective candidates will not know the district in which they live. Political party leaders and voters who are potential precinct caucus attendees will not know the precinct lines, making it difficult to publish notice to voters as to the location of the caucus meetings.

Past redistricting practice in Minnesota illustrates the importance of this Panel acting quickly.³ In the 1970s, the Federal District Court of Minnesota drew Minnesota's legislative district boundaries in December, 1971, and January, 1972, because the governor had vetoed a legislatively-enacted redistricting plan. *Beens v. Erdahl*, 336 F.Supp. 715 (D.Minn.1972). In *Beens*, the court adopted criteria on November 26, 1971, submitted plans by December 7, 1971,

²Minnesota Statutes §204B.135, provides:

A city that elects its council members by wards ***may not redistrict those wards before the legislature has been redistricted in a year ending in one or two.*** The wards must be redistricted *within 60 days after the legislature has been redistricted* or at least 19 weeks before the state primary election in the year ending in two, whichever is first (emphasis added).

Minnesota Statutes §202A.14 provides:

At 7:00 p.m. ***on the first Tuesday in March*** in every state general election year there ***shall be held for every election precinct*** a party caucus in the manner provided in sections 202A.14 to 202A.19. . (emphasis added)

Minnesota Statutes §204B.14 provides

Subd. 1. Boundaries. The governing body of each municipality shall establish the ***election precincts*** in the municipality. The governing body of a county shall establish the boundaries of precincts in unorganized territory in the county. (emphasis added)

³In the 1991 *Cotlow* case, criteria was adopted September 13, 1991; plans were submitted in November, 1991 and the plan was finally approved on January 31, 1992.

and the court's plan was announced on January 25, 1972. *Id.* at 719. The court established its schedule

in light of the nearly total agreement of the parties that a plan of apportionment would have to be ready by the end of January if the electoral process was to proceed in an orderly fashion (emphasis added).

Id. at 718. The U.S. Supreme Court agreed that judicial relief in this manner was appropriate because the Minnesota Legislature had failed to act.⁴ See *Minnesota State Senate v. Beens*, 406 U.S. 187, 195 (1972).

While the Minnesota Legislature has been unable to effect a political solution to the present malapportionment, the law is clear that this Court must give the legislature every reasonable opportunity to do so before the Court imposes a judicial resolution. As a practical matter that means that there should be a period, necessarily brief, between the time the Legislature reconvenes and the time this Court issues its order in which the Legislature has an opportunity to do its job. The existence of this action and the ultimate schedule to be issued by the Court should have an admonitory effect on the Legislature such that unless the Legislature does its job *in time for the 2002 election process to work in the customary fashion*, this Court will perform its constitutionally mandated task.

As a practical matter that means the order release date for this Court should be February 14, 2002. While a two-week period is short, the Legislature itself has put the Court in this time bind. A February 14 release date also give city clerks and others a brief period of time to do their jobs before the March 5, 2002 precinct caucuses and gives candidates a similarly brief time to decide whether to run.

⁴The Court overturned *Beens I* in large part because the federal court decision reduced the number of Minnesota senate districts from 65 to 35.

And a February 14, 2002 release date allows this Court, if legislative progress appears to be occurring, to relax its scheduled release date so the Legislature can complete its efforts. If the Court adopts this date it will also have an opportunity to stay the effect of its order for the customary 30 day period. That will also serve the abiding purpose of incenting the Legislature to act in the interim.

II. THE SCHEDULING ORDER SHOULD PROVIDE FOR EXPERT DEPOSITIONS BETWEEN THE FILING OF THE PARTIES' PROPOSED REDISTRICTING PLANS AND THE WRITTEN SUBMISSIONS TO THE COURT COMMENTING ON THOSE PLANS.

The exercise this Court is conducting essentially resolves to two steps: first, the court needs to select criteria that are appropriate for constitutional redistricting under the developed caselaw, the 2000 Census, and the circumstances now present in Minnesota. Second, the Court needs to examine the various plans to be submitted by the parties and determine which of the plans best fulfills the criteria.

Under the current tentative schedule the second step will essentially consist of the parties extolling their own plans and criticizing the plans of the other parties. Each side's submissions in these respects will be entirely self-serving and free of cross examination.

We suggest that between December 28, 2001, or such other date that the Court ultimately selects as the closing date for submissions of proposed redistricting plans and supporting justification, the Court require each party who has submitted a plan to present for deposition and cross-examination under Minn. R. Civ. P.30.02(f) the person most knowledgeable about the plan. Any deposition should exceed no more than one-half day by each party opponent and should take place between December 28, 2001 and January 7, 2002, or such other date as the Court may ultimately determine.

The preparation of a redistricting plan is in part a demographic exercise for which there are modern electronic tools. But one needs to know which assumptions have been used and how much emphasis on those assumptions has been fed into computer applications to generate a plan. Those assumptions and emphasis may not be fully disclosed in the plans presented by the parties. To the extent any plan incorporates "trade offs," those trade offs should be disclosed in a deposition format.

III. THE COURT SHOULD NOT ALLOW POST JANUARY 16, 2002 SUBMISSIONS.

After the October 9, 2001 order was issued by the Court counsel discussed various ways to streamline the procedure that this Court will follow. One of the suggestions on which the parties could not agree was whether after January 16, 2002, the date for oral argument on the redistricting plan, each side should be free to submit to the Court any subsequent plan which may be thereafter adopted by *either* the House or the Senate, but not passed by both bodies or signed by the Governor.

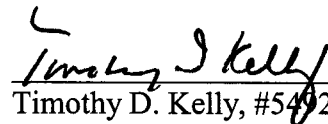
Obviously if a constitutionally permissible redistricting plan is adopted by the Legislature and becomes law while this matter is under advisement it moots out the efforts of this Court. But having this Court entertain a post-oral argument plan that may be passed by only one of the two legislative bodies does not serve that end. It merely serves to entangle this Court in partisan politics.

Courts are not accustomed or well suited to dealing with moving targets. And Courts typically rely upon the closing of the record at some point so a decision may be reached. If, hypothetically, after January 16, 2002 the Minnesota House passed a plan and the undersigned submitted it to this Court for consideration there would have to be a reasonable period of time for the other parties to comment on it and for us to reply. Oral argument may also may necessary.

All such efforts would detract from the goal of the Court of issuing its order on the scheduled date.

Dated: October 17, 2001

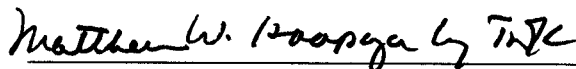
KELLY AND BERENS, P.A.



Timothy D. Kelly, #54926
3720 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 349-6171

Dated: October 17, 2001

TRIMBLE & ASSOCIATES, LTD.



Tony P. Trimble, #122555
Matthew W. Haapoja, # 268033
11700 Wayzata Blvd.
Minnetonka, MN 55305
(952) 797-7477

Attorneys for Plaintiffs