

MEMORANDUM 17-037

**TO: HOMER CITY COUNCIL
HOMER CITY CLERK JO JOHNSON
CITY MANAGER KATIE KOESTER**

FROM: HOLLY C. WELLS

**RE: MEMORANDUM REGARDING CERTIFICATION OF PETITION FOR
RECALL APPLICATION**

CLIENT: CITY OF HOMER

FILE NO.: 506,742.223

DATE: MARCH 9, 2017

I. INTRODUCTION

On March 6, 2017, a petition for recall application was filed with Homer City Clerk Jo Johnson (the "Recall Petition Application"). City Manager Katie Koester and City Clerk Johnson have requested a legal analysis regarding the Recall Petition Application and the recall issuance/certification process. Given the significant interests and rights at issue, City Manager Koester requested that I expedite my initial considerations and prepare this preliminary analysis for presentation to the public so that the public and the City Council had information regarding the recall process.

After analysis of the Recall Petition Application and the relevant laws, I recommend issuance of the Recall Petition once all technical requirements are met. That said, I recommend that certification of the Recall Petition be done in a manner that limits the grounds for the recall to those based in law and stated with particularity.

The City should also be aware that issuance of the Recall Petition on the grounds provided by the sponsors exposes the City to constitutional challenges based upon protections afforded speech under the Alaska and United States Constitutions. In an effort to minimize these risks, I researched the City's options for seeking court guidance prior to or shortly after certification. Unfortunately, I could find no avenue that did not require the City to identify an adverse party, even if the City filed a complaint for declaratory action. Further, any attempt to engage the court requires the City to take a position on the legality of the alleged grounds of the Recall Petition and expose the City to attorney's

fees in the event the court does not share its position. Thus, the City Council should be aware that the grounds asserted in the Recall Petition require the City Clerk to take action but the laws governing the issuance/certification process are woefully unclear. Consequently, regardless of the action taken by the City, it has significant exposure to challenge.

II. BACKGROUND

On March 6, 2017, a petition application to recall Homer City Council Members Donna Aderhold, Catriona Reynolds, and Dave Lewis was filed with the Homer City Clerk (the "Recall Petition Application" or the "Application"). That same day, City Clerk Johnson forwarded the Application to me requesting assistance with the review and certification determination.

The Application included a statement for recall that states, in part:

Be here advised that Homer City Council members Aderhold, Lewis and Reynolds are each proven unfit for public office, as evident by their individual efforts in preparation of Resolution 16-121 and 17-019, the test of which stands in clear and obvious Violation [sic] of Homer City Code, Title 1....

The statement includes the full text of Homer City Code 1.18.030(n) and the language of the Alaska Constitution art XII, section 5, which requires an oath of office of all public officials by which such officials vow to uphold the United States and Alaska Constitutions.

The statement also alleges:

Whereas the use of City Council office as a platform for broadcasting political activism is unlawful, unethical, and outside the bounds of permissible conduct in public service.... Misconduct in office is further claimed by irreparable damage done by draft Resolution 17-019 being made public and widely distributed on social and news media, and publicly promoted as conspicuously drafted by and representing the City of Homer. This action has further caused economic harm and financial loss to the City of Homer.

III. ANALYSIS

In order to understand the recall issuance/certification process and how it is applied to the Recall Petition, it is necessary to understand the derivation of the recall process in the State of Alaska as well as the requirements and procedures surrounding a recall petition.

The Recall Petition Process

The recall process is similar to an initiative/referendum process and has been laid out by the Alaska legislature as authorized by the Alaska Constitution.

Article XI, section 8 of the Alaska Constitution states:

All elected public officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by the legislature.

The legislature prescribed the grounds for recall in article 3 of AS 29.26. The City fully incorporates and wholesale adopts article 3 of AS 29.26 in HCC 4.26.020.

An application for recall is filed with the city clerk and must contain:

- 1) Name and resident addresses of at least ten sponsors who are municipal voters;
- 2) Name of the contact person and an alternate to whom all correspondence may be sent; and
- 3) Statement of 200 words or less of the recall grounds stated with particularity.

If the municipal clerk determines that a recall petition application meets these requirements, the clerk must prepare a recall petition. The petition as prepared by the clerk must contain:

- (1) the name of the official sought to be recalled;
- (2) the statement of the grounds for recall as set out in the application for petition;
- (3) the date the petition is issued by the clerk; [and]
- (4) notice that signatures must be secured within 60 days after the date the petition is issued;

.....

The statutory grounds for recall are “misconduct in office, incompetence, or failure to perform prescribed duties.” AS 29.26.250.

If the clerk determines that an application meets the requirements of AS 29.26.260, he or she then “issues” a recall petition. AS 29.26.270. After the petition is circulated by its sponsors, the clerk determines whether the signatures obtained meet the signature requirements under State law. AS 29.26.280. After determining if the signature

requirements under State law have been met, the City Clerk determines if a petition is sufficient and certifies sufficient petitions. Petitions deemed to be sufficient are then submitted to the municipal governing body, which schedules a recall election. AS 29.26.310–.320.

The statutes permit the council members who are subject to a recall petition an opportunity to defend themselves against the recall in a statement of 200 words or less that is placed on the ballot along with the statement of the charges. AS 29.26.330(2).

Pursuant to AS 29.26.270(a), if the municipal clerk determines that an application for a recall petition meets the requirements of AS 29.26.260, the clerk shall prepare a recall petition. All copies of the petition must contain:

- (1) the name of the official sought to be recalled;
- (2) the statement of the grounds for recall as set out in the application for petition;
- (3) the date the petition is issued by the clerk; [and]
- (4) notice that signatures must be secured within 60 days after the date the petition is issued;

....

(b) The clerk shall notify the contact person in writing when the petition is available. That person is responsible for notifying sponsors. Copies of the petition shall be provided by the clerk to each sponsor who appears in the clerk's office and requests a petition, and the clerk shall mail the petition to each sponsor who requests that the petition be mailed.

The grounds for recall are misconduct in office, incompetence, or failure to perform prescribed duties. AS 29.26.250. "Misconduct in office" is not defined in the recall statutes. It is, however, defined in Black's Law Dictionary 1089 (9th ed. 2009), which is often relied upon by courts in defining terms. Black's Law defines "misconduct" as "[a] dereliction of duty; unlawful or improper behavior;" and "official misconduct" as "[a] public officer's corrupt violation of assigned duties by malfeasance, misfeasance, or nonfeasance." The term "embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act." See 1988 Inf. Op. Att'y Gen. at 3 (Apr. 22; 663-88-0462) (quoting Black's Law Dictionary (5th ed. 1979)) (recall of Copper River School District Board Chairman).

Recall Petitions: History, Policy, and the Law

Although the recall petition process is fairly straight forward when it comes to the technical requirements, the requirements regarding determination of sufficiency or review of the grounds for recall and whether or not such grounds are stated with particularity are

vague. In the absence of much needed legislative or judicial guidance on the issuance/certification of recall petitions, the history and policy underlying the recall petition process as applied by the Alaska courts plays a more central role in determining what standards a city clerk applies when reviewing a petition.

The recall option entered into American laws alongside initiatives and referendums. These processes are all designed to provide voters a heightened check over their elected officials that exceed the power to reelect or pass over that official upon the expiration of his or her term. *Meiners v. Bering Strait School Dist.*, 687 P.2d 287 (Alaska 1984).

The states have varying perspectives on the recall process. As summarized by the Alaska Supreme Court:

At one end of the spectrum is the view that recall is ‘special, extraordinary, and unusual,’ and produces the ‘harsh’ result of removing an official prior to the expiration of the fixed term to which he was elected. From this perspective, one emphasizes the legal as opposed to the political character of the recall process. The statutory grounds for recall are construed narrowly, in favor of the officeholder. All doubts are resolved against forcing the officer to face the voters in a recall election. Likewise, procedural statutes are strictly construed. There is no doctrine that “substantial compliance” with the procedures is sufficient and that technical errors will be overlooked after-the-fact. Any violation of the prescribed procedures is sufficient to invalidate the recall effort. *Id.*

At the other end of the spectrum, recall can be seen as an essentially political process in which the role of judicial or administrative review is minimal and all doubts are resolved in favor of placing the recall question before the voters. Influenced by this philosophy, some states have no statutory grounds for recall; disagreement with an officeholder’s position on questions of policy is sufficient. *Id.* (citations omitted).

Here in Alaska, the court determined that the Alaska legislature intended to take a position in the middle of the spectrum, only permitting recall for cause but liberally applying the standards for showing cause. The court also cautioned itself against interpreting the statutes in a manner that would require “municipal clerks to make significant discretionary decisions of a legal nature.” *Id.* (citations omitted).

Ultimately, after a detailed review of the constitutional convention minutes and other evidence of legislative intent, the court summarized its interpretation as follows:

...we conclude that statutes relating to the recall, like those relating to the initiative and referendum, ‘should be liberally construed so that ‘the people [are] permitted to vote and express their will’ Like the initiative and

referendum, the recall process is fundamentally a part of the political process. The purposes of recall are therefore not well served if artificial technical hurdles are unnecessarily created by the judiciary as parts of the process prescribed by statute. *Id.*

The Alaska Supreme Court reaffirmed their interpretation about a decade later, stating that:

This court stated in *Meiners* that it will not determine the truth or falsity of allegations in a recall petition: “We emphasize that it is not our role, but rather that of the voters, to assess the truth or falsity of the allegations in the petition.” *Von Stauffenberg v. Committee for Honest and Ethical School Board*, 903 P.2d 1055 (Alaska 1995).

Applying the Law to the Recall Petition

Based upon the liberal interpretation applied by the Alaska Supreme Court to recall petitions in light of the court’s acknowledgement that there must be grounds for certification, I recommend the following the following approach to the Recall Petition:

Step 1: Issue the Recall Petition.

The City Clerk identified two requirements in AS 29.26.270(a) that the Application for Recall Petition failed to address. Those insufficiencies were explained to the applicants in a letter sent on March 10, 2017. If the amended application includes the omitted requirements, issuance appears appropriate. The petition should then be prepared by the City Clerk.

Step 2: Determine the Sufficiency of the Petition.

The much more difficult question facing the City Clerk will be whether or not the Petition is sufficient as to the grounds on which it is based. Although these determinations are most appropriately made after the Petition has been issued and the Clerk has determined that the signature requirements have been met, I have serious concerns regarding the legal bases for the grounds stated.

The Recall Petition appears to raise two separate allegations:

- 1) Council members at issue are unfit because they violated HCC 1.18, their oaths of office, and the Alaska Constitution oath requirements in sponsoring Resolutions 16-121 and 17-019; and
- 2) Council members at issue engaged in misconduct by drafting resolution 17-019 due, in part, to the irreparable economic harm it caused the City.

The first allegation alleges that the resolutions violated HCC 1.18, which prohibits “political activity” and the oath requirements under the Alaska Constitution. Specifically HCC 1.18 states that:

A City official may not take an active part in a political campaign or other *political activity* when on duty. Nothing herein shall be construed as preventing such officials from exercising their voting franchise, contributing to a campaign or candidate of their choice, or expressing their political views when not on duty or otherwise conspicuously representing the City. (Emphasis added.)

Presumably, the Recall Petition Application sponsors are alleging that the accused Council Members have engaged in prohibited “political activity.” However, Homer City Code 1.18.020 defines “political activity” as:

any act for the purpose of influencing the nomination or election of any person to public office, or for the purpose of influencing the outcome of any ballot proposition or question. Informing the public about a ballot proposition or question without attempting to influence the outcome of the ballot proposition or question is not political activity. (Emphasis added.)

HCC 4.01.110 “Oath of Office” states:

Oaths of office shall be administered for City offices including Councilmen and Mayor, which shall affirm in writing that they will honestly, faithfully and impartially perform their duties. These oaths will be kept on file at City Hall by the City Clerk.

Similarly, the Alaska Constitution, art. XII, § 5 provides:

All public officers, before entering upon the duties of their offices, shall take and subscribe to the following oath or affirmation: “I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Alaska, and that I will faithfully discharge my duties as to the best of my ability.” The legislature may prescribe further oaths or affirmations.

The resolutions at issue were drafted and presented after the certification of the national election and were not directed at any candidate or pending ballot proposition or question. The Code does not prohibit speech on federal policies, elected politicians, politics, or any other type of policy-based or political commentary outside the election/campaign realm. Based on my review of the allegation, it does not appear that the Recall Petition Application states a violation of the Council members’ oaths of office.

The Recall Petition Applicant’s second allegation, which asserts misconduct because of the irreparable economic harm caused by Draft Resolution 07-19 also creates

difficulty. While the Council members subject to recall under the Recall Petition Application certainly took action by sponsoring the resolution, it is unclear if the circulation, distribution, and reaction to that resolution can be identified as conduct by them directly. If the dissemination of the Draft Resolution can be blamed on the Council members, there is a question as to whether an accusation of “misconduct” must arise from the violation of some law or state policy.

As noted above, “Misconduct in office” is not defined in the recall statutes. Black’s Law defines “misconduct” as “[a] dereliction of duty; unlawful or improper behavior;” and “official misconduct” as “[a] public officer’s corrupt violation of assigned duties by malfeasance, misfeasance, or nonfeasance.” The term “embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act.” See 1988 Inf. Op. Att’y Gen. at 3 (Apr. 22; 663-88-0462) (quoting Black’s Law Dictionary (5th ed. 1979)) (recall of Copper River School District Board Chairman). Using this definition, sponsors statement may be sufficient to survive the Clerk’s review for certification because “improper behavior” is a very subjective standard.

Despite the concerns raised in this memorandum, certification is the second step of the Recall Petition process and this memorandum need not make a determination or recommendation regarding certification at this time.

IV. CONCLUSION

In conclusion, the recall process is mired in confusion. Once the technical requirements are met, the Recall should be issued by the Clerk. The City Clerk then has a difficult task in deciding whether to certify the Recall Petition at issue given the nature of the speech of the Council members that are subject to recall.

HCW/PSC