

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

**Donna Aderhold, David Lewis,
and Catriona Reynolds,**

Plaintiffs,

v.

City of Homer,

Defendant.

No. 3AN-17-_____CI

**Verified Complaint for
Declaratory and Injunctive
Relief**

INTRODUCTION

1. Plaintiffs Donna Aderhold, David Lewis, and Catriona Reynolds, three sitting members of the Homer City Council, bring this action to challenge the certification of a petition to hold a recall election of them. The conduct alleged as grounds for recall is Plaintiffs' sponsorship and publication of two resolutions proposing that the City Council express support for the Standing Rock Sioux Tribe and condemn expressions of intolerance or hate.

2. Defendant reviewed the petition, and concluded that the petition for recall states two legally sufficient grounds to recall Plaintiffs.

Defendant thus certified the petition and scheduled a special recall election.

3. Contrary to Defendant's conclusions, the petition fails to state any sufficient legal ground to justify recall of Plaintiffs. Thus, the petition was certified in error, and Plaintiffs request this court enjoin the special election now scheduled for June 13.

JURISDICTION AND VENUE

4. This is a complaint for declaratory and injunctive relief brought pursuant to AS 22.10.020(c) and (g) and Alaska Rule of Civil Procedure 57(a).

5. This court has jurisdiction over the parties and over the subject matter of this dispute pursuant to AS 09.05.015 and AS 22.10.020.

6. Venue in this court is proper pursuant to Alaska Rule of Civil Procedure 3(c) because the acts complained of occurred within the Third Judicial District.

PARTIES

7. Each Plaintiff is a resident of the City of Homer and an elected member of the Homer City Council.

8. Each Plaintiff is subject to a recall vote on June 13, pursuant to a petition certified by the Homer City Clerk on April 5, 2017.

9. Defendant City of Homer is a first-class municipality incorporated under AS 29.05.011.

FACTS

10. On November 21, 2016, Council Member Lewis introduced Resolution 16-121, which expressed support for the Standing Rock Sioux Tribe and opposition to construction of the Dakota Access Pipeline. A copy of the Resolution is attached as Exhibit A.

11. Council Members Aderhold, Lewis, and Reynolds voted in favor of Resolution 16-121, which the City Council adopted when the mayor cast a vote to break a 3–3 tie.

12. In January and February 2017, a Homer resident contacted Council Member Aderhold and on February 2, proposed that she introduce a resolution that the resident had drafted.

13. The draft expressed, in several “Whereas” clauses, disapproval of President Donald J. Trump, the tone of his election campaign, and several of his apparent policies.

14. The draft contained several “Be Here Resolved” clauses, concluding with: “the City of Homer calls on all its citizens to stand against intolerance and resist expressions of hate toward any members of the community, and thus to set an example for the rest of the nation, demonstrating that Homer residents and Alaskans adhere to the principle of live-and-let-live.”

15. Council Member Aderhold shared the draft with Council Members Lewis and Reynolds.

16. On February 3, Council Member Aderhold sent an email with the draft to the City Clerk, explaining that she and Council Members Lewis and Reynolds were sponsoring it and would like it included on the agenda and in the packet prepared for the next City Council meeting.

17. The City Clerk sent a version of the draft to Council Members Aderhold, Lewis, and Reynolds, formatted for inclusion in the packet. Because Plaintiffs had missed the deadline to be included in the packet for the next Council meeting, the Resolution was prepared for City Council meetings a few weeks later. The substance remained unchanged from the text drafted by the resident who proposed it. A copy is attached as Exhibit B.

18. After receiving the packet from the Clerk, Council Member Reynolds shared the “packet-ready” formatted version of the draft with a constituent.

19. On or shortly after February 16, the constituent posted the “packet-ready” formatted version of the draft to a group called “Homer Connections” on the Facebook website.

20. On February 19, Council Member Aderhold sent an email with a revised draft to the Clerk. Council Member Aderhold informed the Clerk that she and Council Members Lewis and Reynolds wanted the revisions made to the draft before it was introduced.

21. On February 21, the Clerk sent an email to Council Member Aderhold informing her that the requested revisions would be reflected in the resolution as it would appear in the next City Council meeting packet.

22. On February 23, the Clerk published the packet of information for the next City Council meeting. It included Resolution 17-019, sponsored by Council Members Aderhold, Lewis, and Reynolds. Resolution 17-019 accurately reflected the revisions requested by Plaintiffs. A copy is attached as Exhibit C.

23. Unlike the original draft, the “Whereas” clauses of Resolution 17-019 did not specifically reference President Trump, his election campaign, or any of his apparent policies. The “Be Here Resolved” clauses were essentially identical to those of the draft.

24. Resolution 17-019 was introduced and defeated in a 5–1 vote on February 27.

25. On March 6, Michael Fell submitted to the Homer City Clerk an application for a petition for the recall of City Council Members

Aderhold, Lewis, and Reynolds based upon their preparation of and actions surrounding Resolutions 16-121 and 17-019. The application included the names, addresses, and signatures of twelve people in addition to Mr. Fell (collectively, “Sponsors”).

26. On March 10, Mr. Fell submitted an amendment identifying an alternate sponsor and an additional sponsor for the petition. The Clerk certified on that day that the application was in proper form under AS 29.26.260(a) and that she would prepare a recall petition.

27. The Clerk made several edits and several technical corrections and issued three recall petitions—one for each targeted Council member—on March 14. The petition forms issued by the Clerk each contained the following Statement for Recall, drawn from the application submitted by Sponsors, which is attached as Exhibit D:

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 text of which stands in clear and obvious Violation of Homer City Code, Title 1: 1.18.030 Standards and prohibited acts. n. Political Activities; §5. Oath of Office. 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 the 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.

28. Sponsors returned the petitions with signatures on March 31.

29. The Clerk determined that Sponsors had returned the petitions with a sufficient number of valid signatures.

30. The Clerk further determined that two of the three alleged grounds for recall were legally sufficient, and that one was not. The Clerk issued Memorandum 17-057 on April 5, stating her reasoning, which is attached as Exhibit E.

31. The first allegation the Clerk deemed sufficient asserts, as rephrased in Memorandum 17-057, "Council members are unfit because they violated their oaths of office in sponsoring Resolutions 16-121 and 17-019."

32. The second allegation the Clerk deemed sufficient asserts, as rephrased in Memorandum 17-057, "Council members at issue engaged in misconduct surrounding draft resolution 17-019 due, in part, to the irreparable economic harm it caused the City."

33. The Clerk set June 13, 2017, as the date of the Special Election that will present the recall questions to voters.

34. On April 14, the Clerk notified Plaintiffs that the language presented to voters would state:

Shall Homer City Council Member [name] be recalled?

Statement for Recall: 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 text of which stands in clear and obvious Violation of Oath of Office. 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 the 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.

CLAIMS

Count I: Insufficiency of Petition

35. Alaska permits the recall of elected officials only for cause. AS 29.26.250 provides only three legitimate causes that can constitute grounds for recall: “misconduct in office, incompetence, or failure to perform prescribed duties.”

36. AS 29.26.290(c) provides, “A petition that is insufficient shall be rejected.”

37. The first alleged ground for recall the Clerk certified as sufficient was, in fact, insufficient because the actions attributed to Plaintiffs are paradigmatic of elected officials' fulfilling their duties as elected representatives.

38. The first alleged ground for recall the Clerk certified was legally insufficient because unfitness is not a ground for recall.

39. To the extent that any of the claims in the first alleged ground may have been interpreted as "misconduct," they are insufficient because they are based on Plaintiffs' exercise of their constitutionally protected rights to free speech.

40. The second alleged ground for recall the Clerk certified was legally insufficient because it does not include any claims that could be interpreted as misconduct and are based on Plaintiffs' exercise of their constitutionally protected rights to free speech.

41. Because the petition did not state legitimate grounds for recall with sufficient particularity, the petition was not sufficient and should have been rejected.

Count II: Freedom of Speech

42. Article I § 5 of the Alaska Constitution provides, “Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.”

43. The first ground for recall approved by the Clerk centers on the claim that Plaintiffs should be recalled because of their conduct in preparing and acting on the resolutions. The actions attributed to Plaintiffs are protected by Article I § 5 of the Alaska Constitution.

44. The second ground for recall approved by the Clerk centers on claims that Plaintiffs should be recalled because Resolution 17-019 was made public and widely distributed, and because it was promoted as though the draft spoke for the City of Homer. Publicly discussing and soliciting opinions about matters of public concern are central to the functioning of representative democracy and are protected by Article I § 5 of the Alaska Constitution.

45. Certification of the petition for recall violated the Free Speech Clause in Article I § 5 of the Alaska Constitution.

PRAYERS FOR RELIEF

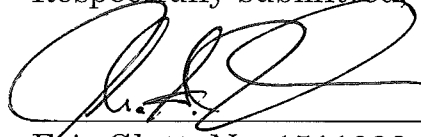
Plaintiffs Aderhold, Lewis, and Reynolds respectfully request that this court:

1. Enter a declaratory judgment that the recall petition was certified in error;
2. Enjoin Defendant City of Homer from holding a special election to present the recall questions to voters;
3. Declare that the Plaintiffs are prevailing parties and are constitutional or public interest litigants under AS 09.60.010(c) and Alaska Rule of Civil Procedure 82;
4. Award Plaintiffs their full and reasonable costs and attorneys' fees, as the law allows for public interest litigants who enforce constitutional rights;
5. Tax all other costs to Defendant City of Homer; and
6. Award Plaintiffs all other just and equitable relief.

ACLU OF ALASKA
FOUNDATION
1057 W Fireweed Ln
Suite 207
Anchorage, Alaska
99503
TEL: 907.258.0044
FAX: 907.258.0288

Dated: April 24, 2017

Respectfully submitted,



Eric Glatt, No. 1511098

Tara A. Rich*

Joshua A. Decker, No.1201001

ACLU OF ALASKA FOUNDATION

1057 W. Fireweed Lane, Ste. 207

Anchorage, AK 99503


Tel: (907) 258-0044

* Motion to admit *pro hac vice* forthcoming.

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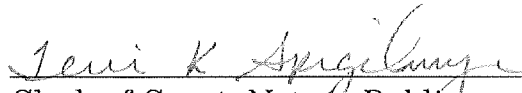
VERIFICATION

I, Donna Aderhold, having been duly sworn, depose and state that I have read the Verified Complaint for Declaratory and Injunctive Relief, and the information stated therein is factual and true, and those factual matters which are stated upon information and belief are believed to be true.



Donna Aderhold

Subscribed and sworn to or affirmed before me in Homer, Alaska on April 24, 2017.



Clerk of Court, Notary Public, or other
person authorized to administer oaths.


My commission expires: 10-22-2020

I, David Lewis, having been duly sworn, depose and state that I have read the Verified Complaint for Declaratory and Injunctive Relief, and the information stated therein is factual and true, and those factual matters which are stated upon information and belief are believed to be true.



David Lewis

Subscribed and sworn to or affirmed before me in Homer, Alaska on April 24, 2017.



Clerk of Court, Notary Public, or other
person authorized to administer oaths.

My commission expires: 10-22-2020

I, Catriona Reynolds, having been duly sworn, depose and state that I have read the Verified Complaint for Declaratory and Injunctive Relief, and the information stated therein is factual and true, and those factual matters which are stated upon information and belief are believed to be true.

Catriona Reynolds
Catriona Reynolds

Subscribed and sworn to or affirmed before me in Homer, Alaska on April 24, 2017.

Jenni K. Spigelman
Clerk of Court, Notary Public, or other
person authorized to administer oaths.

My commission expires: 10-22-2020

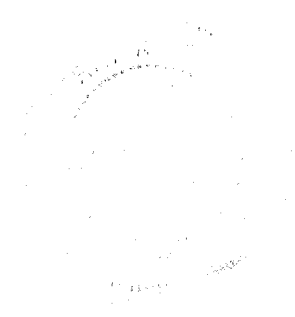


EXHIBIT A

Resolution 16-121

**CITY OF HOMER
HOMER, ALASKA**

Lewis

RESOLUTION 16-121

A RESOLUTION OF THE CITY OF HOMER SUPPORTING THE
STANDING ROCK LAKOTA TRIBE AND OPPOSING THE DAKOTA
ACCESS PIPELINE (DAPL).

WHEREAS, The proposed Dakota Access Pipeline (DAPL) is a 1,168-mile, 30-inch diameter pipeline being developed by the Energy Transfer Partners and its affiliates, which would carry as much as 570,000 barrels per day of Bakken crude from western North Dakota to Illinois; and

WHEREAS, The DAPL would run across or beneath 209 rivers, creeks and tributaries, including the Missouri River, which provides drinking water and irrigates agricultural land in communities across the Midwest, serving nearly 10 million people; and

WHEREAS, The DAPL would also run through the ancestral lands and waters reserved for the traditional use of the Standing Rock Sioux Tribe by the Treaty of Ft. Laramie, include the Missouri River, burial grounds and gravesites, and other sacred sites of cultural, religious, and historical significance; and

WHEREAS, Indian Treaties such as the Treaty of Ft. Laramie are recognized by the U.S. Constitution as "the supreme law of the land," and require consultation and cooperation by the United States with the Indian Treaty partner before any federal action is taken that affects Treaty lands, territories, water or other resources; and

WHEREAS, The American Indian Religious Freedom Act of 1978 affirms the need to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions," particularly in American Indian sacred places; and

WHEREAS, Alaska recognizes that Native burial grounds and historic graves are "a finite, irreplaceable, and nonrenewable cultural resource, and are an intrinsic part of the cultural heritage of the people of Alaska;" and

WHEREAS, Articles, 11, 12, and 25 of the United Nations Declaration of the Rights of Indigenous People (UNDRIP), as endorsed by the United States in 2010, affirms that indigenous people like the Standing Rock Sioux Tribe possess the right to maintain and protect their culture, religion, practices, and relationship with their "traditionally owned and otherwise occupied and used lands, territories [and] waters;" and

WHEREAS, The UNDRIP Article 32 further provides that governments shall consult with indigenous peoples "in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources;" and

WHEREAS, The U.S. Army Corps of Engineers failed to consult with or obtain the free, prior, and informed consent of the Standing Rock Sioux Tribe as required by the Treaty of Fort Laramie, Executive Order 13175, the UNDRIP Article 10, and other federal and international laws, before issuing a "Mitigated Finding of No Significant Impact" that would result in an easement for horizontal directional drilling for the DAPL; and

WHEREAS, Any spill of oil into the Missouri River would irreparably harm the Standing Rock Sioux Tribe's Treaty reserved lands, territories, waters and other resources; burial grounds, gravesites and other sacred sites of cultural, religious, and historical significance; and spiritual relationships and indigenous ways of life; and

WHEREAS, The Mayor of the City of Seattle, City Councils of Portland, Oregon, St. Paul and Minneapolis, Minnesota, Affiliated Tribes of Northwest Indians comprised of 59 Indian Nations in the Northwest, and nearly 200 Indian Nations, are among the governmental bodies that have taken formal action to support the Standing Rock Sioux Tribe and oppose the DAPL.

NOW, THEREFORE, BE IT RESOLVED that the City Council of Homer, Alaska, supports the Standing Rock Lakota Tribe and opposes the Dakota Access Pipeline (DAPL).

BE IT FURTHER RESOLVED by the City Council of Homer, Alaska, that:

Section 1. The City of Homer stands in support of the Standing Rock Sioux Tribe's opposition to construct the Dakota Access Pipeline (DAPL) across the Tribe's ancestral lands, water and sacred sites.

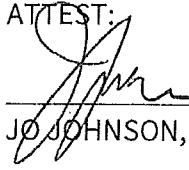
Section 2. The City of Homer call upon the United States and the Army Corps of Engineers to obtain the free, prior and informed consent of the Standing Rock Sioux Tribe, prior to taking any federal action regarding the DAPL that would harm or destroy the Tribe's ancestral lands, waters and sacred sites.

PASSED AND ADOPTED by the Homer City Council this 21st day of November, 2016.

CITY OF HOMER


BRYAN ZAK, MAYOR

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to Verified Complaint
Page 2

88 ATTEST:
89 
90 _____
91 JO JOHNSON, MMC, CITY CLERK
92
93 Fiscal Note: N/A

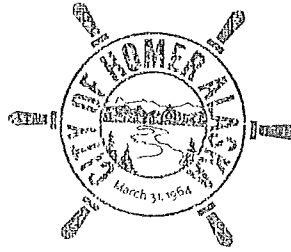


EXHIBIT B

Draft Resolution 17-XXX

CITY OF HOMER
HOMER, ALASKA

Aderhold/Reynolds/Lewis

RESOLUTION 17-xxx

A RESOLUTION OF THE CITY COUNCIL OF HOMER, ALASKA,
STATING THAT THE CITY OF HOMER ADHERES TO THE
PRINCIPLE OF INCLUSION AND HEREIN COMMITTING THIS
CITY TO RESISTING EFFORTS TO DIVIDE THIS COMMUNITY
WITH REGARD TO RACE, RELIGION, ETHNICITY, GENDER,
NATIONAL ORIGIN, PHYSICAL CAPABILITIES, OR SEXUAL
ORIENTATION REGARDLESS OF THE ORIGIN OF THOSE
EFFORTS, INCLUDING FROM LOCAL, STATE OR FEDERAL
AGENCIES.

WHEREAS, A new administration is in power in Washington, D.C. without a popular
mandate;

WHEREAS, During his campaign, President Donald Trump made statements offensive
and harmful to the rights of women; immigrants; religious, racial, and ethnic minorities;
veterans; the disabled; LGBTQ citizens; and the general public; and that such statements have
continued since his election; and

WHEREAS, The President on numerous occasions has stated clearly his disregard for
freedom of speech; freedom of the press; freedom of assembly; and freedom of religion,
particularly with regard to Muslim Americans; and

WHEREAS, The President has not disavowed his intention to create a registry of Muslim
Americans and now intends to ban Muslims from entering the United States; and

WHEREAS, The President now is following through on his promises to deport millions of
undocumented immigrants, including millions brought here as children who have grown up to
know no other life than that of an American; and

WHEREAS, The President now is following through on plans to build a wall on the border
separating the United States from Mexico without apparent regard to its cost, its effects upon
our nation's economy, or its sociological ramifications, and to impose an ideological test for
entry into our country; and

WHEREAS, The President has promised to repeal federal regulations protecting LGBTQ
citizens; and

WHEREAS, The President already has issued executive orders to effect the repeal of the Affordable Care Act, which provides tens of millions of Americans with health care insurance coverage; and

WHEREAS, The President has issued executive orders to rescind certain women's reproductive rights; and

WHEREAS, The President has promised to withdraw from the Paris Climate Agreement and to remove other environmental protections instituted under the previous administration, and has begun a process to dismantle the Environmental Protection Agency; and

WHEREAS, Before and especially since the election, some citizens have been emboldened to express overtly an intolerance of diversity that is opposed to the views of most Homer residents and most Americans; and

WHEREAS, The President's cabinet nominees have expressed views similar to those laid out in the whereas clauses above and thus are largely out of step with the attitudes of most Homer residents; and

WHEREAS, The presidential election has exposed deep social and political divisions among Americans and these divisions threaten the general peace as expressions of intolerance rise; and

WHEREAS, The City of Homer recognizes that while the minority community here may be relatively small, it may be vulnerable, and that if those residents feel in any way threatened simply because they are minorities, the City should be on record as opposing all such intolerance; and

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Homer unequivocally rejects expressions of fear and hate wherever they may exist, and specifically rejects harassment of women, immigrants, religious minorities, racial and ethnic minorities, and LGBTQ individuals.

BE IT FURTHER RESOLVED that the City of Homer embraces all people regardless of skin color, country of birth, faith, sex, gender, marital status, or abilities; and that the City of Homer will not waver in its commitment to inclusion and to continuing to create a village safe for a diverse population.

BE IT FURTHER RESOLVED that the City of Homer will resist any and all efforts to profile undocumented immigrants or any other vulnerable population.

BE IT FURTHER RESOLVED that the City of Homer will cooperate with federal agencies in detaining undocumented immigrants when court-issued federal warrants are delivered.

BE IT FURTHER RESOLVED that the City of Homer shall steadfastly defend the United States and Alaska constitutions, especially with regard to the former's precedent-backed right of privacy and the latter's specified right of privacy (Article 1, Section 22), and safeguard the rights declared in the Bill of Rights.

BE IT FURTHER RESOLVED that the City of Homer will continue its staunch support of our local police in their ongoing efforts to enforce law and protect our community and its visitors in a just, unbiased and transparent manner.

BE IT FURTHER RESOLVED that the City of Homer will declare itself a safety net for the most vulnerable members of and visitors to our community.

BE IT FURTHER RESOLVED that the City of Homer calls on all its citizens to stand against intolerance and resist expressions of hate toward any members of the community, and thus to set an example for the rest of the nation, demonstrating that Homer residents and Alaskans adhere to the principle of live-and-let-live.

PASSED AND ADOPTED by the Homer City Council this 27th day of February, 2017.

CITY OF HOMER

BRYAN ZAK, MAYOR

ATTEST:

JO JOHNSON, MMC, CITY CLERK

Fiscal Note: N/A

EXHIBIT C

Resolution 17-019

**CITY OF HOMER
HOMER, ALASKA**

Aderhold/Reynolds/Lewis

RESOLUTION 17-019

A RESOLUTION OF THE CITY COUNCIL OF HOMER, ALASKA,
STATING THAT THE CITY OF HOMER ADHERES TO THE PRINCIPLE
OF INCLUSION AND HEREIN COMMITTING THIS CITY TO
RESISTING EFFORTS TO DIVIDE THIS COMMUNITY WITH REGARD
TO RACE, RELIGION, ETHNICITY, GENDER, NATIONAL ORIGIN,
PHYSICAL CAPABILITIES, OR SEXUAL ORIENTATION REGARDLESS
OF THE ORIGIN OF THOSE EFFORTS, INCLUDING FROM LOCAL,
STATE OR FEDERAL AGENCIES.

WHEREAS, The City of Homer recognizes that American politics has become polarized,
which has led to divisiveness in our community; and

WHEREAS, Violent acts targeting religious groups, minorities, and members of the
LGBTQ community have become more frequent in and outside of the United States; and

WHEREAS, Before and especially since the election, some citizens on both extremes of
the political spectrum have been emboldened to express overtly an intolerance of diversity
that is opposed to the views of most Homer residents and most Americans; and

WHEREAS, The City of Homer recognizes that our community is diverse in regards to
religion, political ideologies, sexual identity or orientation, and ethnicity, and that no citizen
should feel in any way threatened for their beliefs or physical appearance, and the City should
be on record as opposing all intolerance towards those individuals.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Homer
unequivocally rejects expressions of fear and hate wherever they may exist, and specifically
rejects harassment of women, immigrants, religious minorities, racial and ethnic minorities,
and LGBTQ individuals, and non-violent political groups.

BE IT FURTHER RESOLVED that the City of Homer embraces all peoples regardless of
skin color, country of birth, faith, sex, gender, marital status, political ideology, or abilities; and
that the City of Homer will not waver in its commitment to inclusion and to continuing to create
a village safe for a diverse population.

BE IT FURTHER RESOLVED that the City of Homer will resist any and all efforts to profile
vulnerable populations.

BE IT FURTHER RESOLVED that the City of Homer will cooperate with federal agencies in detaining undocumented immigrants when court-issued federal warrants are delivered.

BE IT FURTHER RESOLVED that the City of Homer shall steadfastly defend the United States and Alaska constitutions, especially with regard to the former's precedent-backed right of privacy and the latter's specified right of privacy (Article 1, Section 22), and safeguard the rights declared in the Bill of Rights.

BE IT FURTHER RESOLVED that the City of Homer will continue its staunch support of our local police in their ongoing efforts to enforce law and protect our community and its visitors in a just, unbiased and transparent manner.

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PASSED AND ADOPTED by the Homer City Council this 27th day of February, 2017.

CITY OF HOMER

BRYAN ZAK, MAYOR

ATTEST:

JO JOHNSON, MMC, CITY CLERK

Fiscal Note: N/A

EXHIBIT D

Petitions for Recall

3/6/2017

Alaska Statutes Sec. 29.26.260. Application for recall petition

Request for petition for recall of Homer City Council members Donna Aderhold, David Lewis and Catriona Reynolds.

Contact person: Michael Fell, Box 149 Homer Alaska 99603 907-299-2800

Sec. 29.26.250. Grounds for recall are misconduct in office which has adversely affected the public; conduct which has violated the oath of office; and failure to perform duties prescribed by law. .

Statement for recall:

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 text of which stands in clear and obvious Violation of Homer City Code, Title 1:

1.18.030 Standards and prohibited acts.

n. Political Activities – Limitations of Individuals. 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.

§ 5. Oath of Office 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.

Whereas the use of City Council office as a platform for broadcasting political activism is unlawful, unethical, and outside the bounds of

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permissible conduct in public service..

Misconduct in office is further claimed by the 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.

Signed:

Printed Name	Address	Signature
1. Michael Fell	Box 149 Homer	<i>Michael Fell</i>
2. LARRY ZUCCARO	Box 340 HOMER	<i>Larry Zuccaro</i>
3. LARRI FANCHER	P.O. Box 340 HOMER AK	<i>Larri Fancher</i> <i>Joe J Singleton</i>
4. JOE SINGLETON	1895 MISSION RD HOMER, AK 1625 MISSION RD	
5. Tony DUNTEARY	1601 1st St	
6. Bryan DAHLHAME	1625 MISSION RD HOMER 1945 mission Rd.	
7. Jack Niemi	P.O. Box 1582 Homer AK	<i>Jack Niemi</i>
8. BETTY L. SNOW	4013 SVEDLUND ST #3, HOMER, AK, 99603	<i>Betty L. Snow</i>
9. JACK PACKER	4013 SVEDLUND APT 3 HOMER AK 99603	<i>Jack Packer</i>
10. Justin Wickstrom	4253 Svedlund Cir, Homer, AK 99603	
11. Mark Zeiset	4406 Homer Spit Rd Homer, AK 99603	<i>Mark Zeiset</i>
12. Randall Parrett	1201 Jeffery, Homer AK 99603	<i>Randall Parrett</i>
13. Cindy Frazier	168 Skyline Dr Homer, AK 99603	<i>Cindy Frazier</i>

EXHIBIT E

Memorandum 17-057



City of Homer

www.cityofhomer-ak.gov

Office of the City Clerk

491 East Pioneer Avenue

Homer, Alaska 99603

clerk@cityofhomer-ak.gov

(p) 907-235-3130

(f) 907-235-3143

Memorandum 17-057

TO: MAYOR ZAK AND HOMER CITY COUNCIL

FROM: JO JOHNSON, MMC, CITY CLERK

DATE: APRIL 5, 2017

SUBJECT: RECALL PETITION – COUNCILMEMBERS ADERHOLD, LEWIS, AND REYNOLDS

On March 31, 2017 sponsors filed petitions to recall Homer City Council members Aderhold, Lewis, and Reynolds. Pursuant to AS 29.26.270, once a timely recall petition has been filed, the City Clerk has ten days to determine whether or not the petition is sufficient. In determining the sufficiency of a recall petition, the Clerk must confirm that sufficient signatures have been submitted and that the statement for recall is sufficient. After reviewing the petitions, and consulting with the City Attorney, I have determined that sufficient signatures have been submitted for each of the petitions. I have also found that some of the allegations in the statements for recall were sufficient. As a result, I certified the petitions on April 5, 2017. Please be aware that my determination that the petitions are sufficient and thus subject to certification in no way reflects the merits of the statement of recall in the petitions, as the City Clerk is prohibited from considering the truth or falsity of the allegations contained in a recall petition.

Sufficiency of Signatures

The petitions for recall were filed timely on March 31, 2017 by sponsors Michael Fell, Larry Zuccaro, and Larri Fancher. In all, 15 booklets were received for Aderhold, 15 for Lewis, and 15 for Reynolds. The number of names on the sufficient booklets totaled 437 for Aderhold, 436 for Lewis, and 436 for Reynolds.

A current list of registered voters within the City of Homer ("City") limits was requested by the City Clerk's office on March 14, 2017. I reviewed the names on each petition and determined the following:

For Councilmember Aderhold, 24 signatures were insufficient because the name was not listed on the current voter roll, the name was illegible, a signature was not included, or the person signed the petition more than once.

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For Councilmember Lewis, 23 signatures were insufficient because the name was not listed on the current voter roll, the name was illegible, a signature was not included, or the person signed the petition more than once.

For Councilmember Reynolds, 27 signatures were insufficient because the name was not listed on the current voter roll, the name was illegible, a signature was not included, or the person signed the petition more than once.

Pursuant to AS 29.26.280(b), the petition must bear a number of voter signatures equal to 25 percent of the number of votes cast in the October 4, 2016 regular City election which is 373. I find the petitions proposing the recall of Councilmembers Aderhold, Lewis, and Reynolds all bear sufficient signatures.

Relevant Laws in Determining the Sufficiency of the Statement of Recall

Given the sufficiency of the signatures, I next examined the sufficiency of the statement for recall, with substantial assistance from the City Attorney in interpreting the relevant statutes and common law principles. In the State of Alaska, there are three grounds for recall, 1) misconduct in office; 2) incompetence; and 3) failure to perform prescribed duties.¹

A sufficient statement for recall must state one of the three grounds for recall with sufficient particularity. The right to recall in Alaska is limited to recall for cause.² However, the grounds for recall prescribed by statute are to be liberally construed, in favor of access to the recall process. Taking into account that the recall should be accessible to citizens who cannot afford the assistance of a lawyer in drafting a statement of grounds for recall, the Alaska Supreme Court has stated:

Taking all these factors into account, 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.³

Thus, it is not necessary that a recall application cite the specific laws that it alleges an official violated, provided that the allegations are clear enough so that the legal provisions at issue may be identified.⁴ Moreover, while the legal duty allegedly violated must actually exist, where interpretation of the parameters of that duty is debatable, the allegation should be presented to the voters:

Finally, and perhaps most importantly, the statutes offer the targeted official an opportunity to make a rebuttal, which will be placed on the ballot alongside the petitioners' statement of charges. This rebuttal statement is the proper forum in which accused officials may defend against the charges. Where the petition merely characterizes the law in a way different than the

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¹ AS 29.26.250

² *Von Stauffenberg v. Committee for Honest and Ethical School Board*, 903 P.2d 1055, 1059 (Alaska 1995).

³ *Meiners v. Bering Strait School District*, 687 P.2d 287, 296 (Alaska 1984) (citations and footnote omitted).

⁴ *Meiners*, 687 P.2d at 300-301.

official (or his or her attorney) would prefer, he or she has an opportunity to put his or her rebuttal before the voters, alongside the charges contained in the petition. It is not the place of the municipal clerk...to decide legal questions of this kind.⁵

In reviewing the legal sufficiency of the grounds for recall, clerks must take the facts alleged in the statement for recall as true, and determine whether those facts, if true, "constitute a prima facie showing" of misconduct in office, incompetence, or failure to perform prescribed duties.⁶ In addition, an application must state grounds for recall "with particularity."

Examining the Statement of Recall in the Petitions

The statement for recall at issue is as follows:

Statement for Recall: 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 text of which stands in clear and obvious Violation of Homer City Code, Title 1: 1.18.030 Standards and prohibited acts. n. Political Activities; §5. Oath of Office. 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 the 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.

This statement for recall includes several allegations, each of which I reviewed separately for sufficiency. In essence, the statement alleges:

- 1) Council members at issue are unfit because they violated HCC 1.18 in sponsoring Resolutions 16-121 and 17-019 ("Allegation 1");
- 2) Council members are unfit because they violated their oaths of office in sponsoring Resolutions 16-121 and 17-019 ("Allegation 2"); and
- 3) Council members at issue engaged in misconduct surrounding draft resolution 17-019 due, in part, to the irreparable economic harm it caused the City ("Allegation 3").

I find that Allegation 2 and Allegation 3 are sufficient but Allegation 1 is not sufficient and fails to state grounds for recall with particularity. I discuss each of these allegations in turn.

⁵ *Meiners*, 687 P.2d at 301.

⁶ *Von Stauffenberg*, 903 P.2d at 1059-1060.

Allegation 1

Allegation 1 accuses the targeted Council members of violating a legal duty that does not exist. Thus, that allegation is not sufficient. More specifically, Allegation 1 asserts that the Council members were unfit for office because they violated HCC 1.18, which prohibits “political activity” and the oath requirements under the Alaska Constitution. Homer City Code 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).

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. Thus, there is no violation of HCC 1.18.

Allegation 2

Allegation 2 asserts that the targeted Council members are unfit because they violated the oath of office by drafting Resolutions 16-121 and 17-019. The oaths of office mandated under the Homer City Code and Alaska Statute requires officials to “honestly, faithfully, and impartially” perform their duties.⁷ Based upon the allegations in the statement of recall, it appears that petitioners are accusing Council members of acting partially rather than impartially in supporting the resolutions.

There is no legal definition for impartial that would clarify the scope of the Council member’s oath. The City Attorney advised that the definition of “impartially” likely requires officials to perform their official duties without regard to their own personal interests but does not require officials to legislate “neutrally.” The City Attorney argued

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⁷ HCC 4.01.110; AS 29.20.600.

that defining “impartially” to require Council members to act “neutrally” makes little sense given that council members are elected precisely to advocate for and/or fight against laws and policies on behalf of their constituents. Despite the City Attorney’s interpretation of “impartially,” she acknowledged that there was no clear definition of “impartially” in the oath of office provisions and if the oath was interpreted to require neutral governance, the statement of recall would be sufficiently particular. Thus, construing the allegation liberally in favor of certification, I find Allegation 2 sufficient.

Allegation 3

Allegation 3 states that the council members committed "misconduct in office" through the "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." It further alleges that such action caused economic harm and financial loss to the City of Homer.

"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). Homer City Code 1.18.030(h) which prohibits Council members from “implying their representation of the whole [Council] by the use of their title.” Thus, if the allegations are taken as true, the members may have violated HCC 1.18.030(h) and thus engaged in misconduct. Although the City Attorney advised that there was no evidence the targeted Council members ever represented that the draft resolution reflected Council’s position as a whole, the attorney reiterated that the voters, and not the City Clerk, are tasked with determining the truth or falsity of petition allegations. Thus, I find Allegation 3 sufficient.

Based upon the above analysis, the statement of recall will be revised to remove the insufficient allegations identified in this memorandum.

Scheduling a Special Election

Pursuant to AS 29.26.320, a Special Election will be held Tuesday, June 13, 2017. The Election Canvass Board will meet on Friday, June 16, 2017, and a Special Meeting of the City Council will be scheduled on June 19, 2017 to certify the election results.

As outlined in the attachment in the March 28th City Attorney’s report titled “Understanding the Recall Petition Process,” if majority vote favors recall, the office becomes vacant upon certification of the recall election. (AS §29.26.350(a))

Further, the process for filling a vacant office is as follows:

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- 1) Nominations for successors or appointees can be filed only after certification of the recall election. (AS 29.26.350(a))
- 2) Remaining members shall appoint a qualified person to fill vacancy within 30 days of recall election certification.
- 3) If membership is reduced to fewer number required for a quorum, remaining members shall appoint qualified person(s) to constitute a quorum within 7 days (AS 29.20.180)

Recommendation: Information only.