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Heartbeat of Homer

IN THE 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.

Case No. 3AN-17-06227 CI

**MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE**

With this litigation, Plaintiffs Donna Aderhold, David Lewis, and Catriona Reynolds seek to invalidate a determination made by the Homer City Clerk that the proposed petition was sufficient, certifiable, and appropriate for placement on a City special election ballot. Heartbeat of Homer, a ballot proposition group registered with the Alaska Public Offices Commission in support of the recall election, has an interest in this litigation and is entitled to intervene as a matter of right under Alaska R. Civ. P. 24(a).

FACTS

Intervenor is a group organized in support of the petition, dated March 6, 2017, to recall Plaintiffs from their elected office on the Homer City Council for the City of Homer,

Alaska (“Petition”).¹ The Petition was signed by thirteen Homer residents, and alleges that Plaintiffs engaged in misconduct in office which has adversely affected the public, violated the oath of office, and failed to perform their elected duties prescribed by law.²

The Petition was filed with Jo Johnson, the City Clerk, on March 31, 2017.³ After a preliminary review, the City Clerk found that that Petition was sufficient and certified the Petition on April 5, 2017.⁴ Thereafter, the Petition was returned to the sponsors and circulated for signatures.⁵ The City Clerk issued Memorandum 17-057 to Mayor Bryan Zak and the Homer City Council on April 5, 2017, documenting her decision.⁶ Pursuant to AS 29.26.320, the City Clerk scheduled a special election to be held on June 13, 2017 for a public vote on the recall initiative.⁷

Plaintiffs filed their verified complaint in this action on April 24, 2017.⁸ The same date, Plaintiffs filed their Motion for Declaratory Judgment and Injunctive Relief, a Non-Opposed Motion to Establish Expedited Proceedings, and a Non-Opposed Motion for Expedited Consideration.⁹ On April 25, 2017, this Court issued an Order on Plaintiffs’ Non-Opposed Motion to Establish Expedited Proceedings, and an Order granting Plaintiffs’ Non-Opposed Motion for Expedited Consideration. The Court set oral argument on Plaintiffs’ Motion for Declaratory Judgment and Injunctive Relief for May 17, 2017.

¹ Exhibit A.

² *Id.* at 1.

³ Exhibit B.

⁴ *Id.* at 1.

⁵ *Id.*

⁶ *Id.*, generally.

⁷ *Id.* at 5.

⁸ See the Verified Complaint for Declaratory and Injunctive Relief, dated April 24, 2017.

⁹ See Case Motion #1.

LEGAL AUTHORITY AND ANALYSIS

Alaska R. Civ. P. 24(a) provides that anyone with an interest in an action “shall be permitted to intervene” as a matter of right. If the requirements of Rule 24(a) are met, a court does not have discretion to deny intervention. *Brown v. Cook Inlet Region, Inc.*, 569 P.2d 1321, 1322 (Alaska 1977).

A four-part test is employed to determine when a court is required to grant intervention as a matter of right. *State v. Weidner*, 684 P.2d 103, 113 (Alaska 1984) (citation omitted). The test’s four requirements are as follows: (1) the motion to intervene must be timely; (2) the party moving for intervention must show an interest in the subject matter of the action; (3) the moving party must show that the interest may be impaired as a consequence of the action; and (4) it must be shown that the interest is not adequately represented by an existing party.

Id. When applying this test, courts are to “liberally construe” its requirements in favor of granting intervenors access to the process. *Alaskans for a Common Language v. Kritz*, 3 P.3d 906, 911-12 (Alaska 2000).

Application of Rule 24(a), and this four-part test, to the facts underlying the present litigation make evident that Intervenor can satisfy the four factors and should be permitted to intervene as a matter of right. First, this motion to intervene is timely. Plaintiffs’ Complaint was filed on April 24, 2017, meaning that the time to file an Answer in this matter has not yet run. Intervenor was not served with a copy of the verified complaint, or otherwise informed of the existence of this litigation, until after it was filed.

Second, Intervenor can demonstrate that it has an interest in the subject matter of this litigation. Intervenor is the group formed as a ballot proposition group in support of the Petition by the sponsors of the Petition. Accordingly, the Intervenor has a sufficient “interest”

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to intercede on behalf of their initiative. In fact, they are duty bound by their statutory obligations to do so. The Alaska Supreme Court made clear that the sponsors of an initiative have a “heightened, constitutionally based, and statutorily bolstered interest” in any litigation challenging their initiative’s legality. *Kritz*, 3 P.3d at 912-13. Furthermore, the Court specifically held that such an interest is “direct, substantial and significantly protectable” as required for intervention as of right under Rule 24(a). *Id.* at 913. Because the primary purpose of Plaintiffs’ litigation is to invalidate the Petition, and to prevent the special election for a public vote on the recall questions of the Petition, there is no dispute that the Intervenor, as prime sponsor, has a sufficient interest in this action to intervene as a matter of right.

Third, Intervenor can demonstrate that its interest in the Petition will be impaired by this litigation. The Supreme Court has previously held that, if an action seeks to invalidate an initiative and the initiative’s sponsors stand to have their interests impaired, those sponsors should be allowed to intervene. *Id.* As the ballot group organized by the sponsors of the Petition, Intervenor’s very purpose is to promote the passage of the measure. Should Plaintiffs succeed in their litigation, the Petition will be declared insufficient and unlawful, will not appear on a special election ballot, and the work of the Petition’s supporters in drafting and proposing the measure will be rendered moot. Such an event will prevent the passage of the initiative and frustrate the efforts of the Intervenor. Accordingly, the third factor is met.

Finally, Intervenor can demonstrate that its interests are not adequately represented by an existing party. Plaintiffs have filed their verified complaint against the City of Homer. Accordingly, at present, those are the only parties to the case that can defend the Petition. With respect to the Petition, these parties have no interest in whether the measure appears on

the special election ballot. The City Clerk has merely acted in her administrative role by certifying the initiative as facially valid, providing petition signature booklets to the Petition's supporters, and ordering the special election for a public vote. However, until and unless the law is enacted, the City of Homer has no duty or interest to defend the Petition itself. In this situation, it is clear that the entity with an affirmative interest in the passage of the Petition, Intervenor, should be allowed to litigate on its behalf. Plaintiffs have filed a Motion for Declaratory Judgment and Injunctive Relief, for which oral argument has been set on expedited consideration. Thus, the impending motion practice could seriously affect Intervenor's interests.

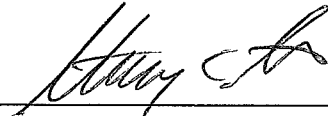
In short, prior case law makes evident that Intervenor's "direct interest in legislation enacted through the initiative process and the concomitant need to avoid the appearance of adversity will ordinarily preclude courts from denying intervention as of right to a sponsoring group." *Id.* at 914 (emphasis added). Furthermore, where, as here, it is evident that the party requesting intervention has an unrepresented interest in the action, it is an abuse of discretion for a court to deny the party's motion to intervene. *Laborers Local No. 942 v. Lampkin*, 956 P.2d 422, 439 (Alaska 1998). Intervenor has a direct interest in the Petition that is not adequately represented by the current parties to this action. Accordingly, the Intervenor's Motion to Intervene should be granted.

CONCLUSION

As the prime sponsor of the Petition, Intervenor has a direct interest in the outcome of this litigation. And, as explained above, Intervenor's interest will not be adequately defended unless it is allowed to participate as a party. Accordingly, Intervenor respectfully requests that the Motion to Intervene be granted.

DATED this 26th day of April, 2017, at Anchorage, Alaska.

HOLMES WEDDLE & BARCOTT, P.C.
Attorneys for Intervenor

By: 
Stacey C. Stone
Alaska Bar No. 1005030

CERTIFICATE OF SERVICE

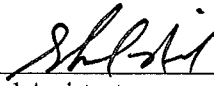
The undersigned certifies that on this 26th day of April, 2017, a true and correct copy of the foregoing document was served via:

- E-Mail
- U.S. Mail
- Facsimile
- Hand-Delivery

to:

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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



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. JOHN SINGLETON	1625 MISSION Rd	
6. William Williamson	1625 MISSION Rd HOMER 1945 Mission Rd.	<i>William Williamson</i>
7. Jack Niemi	P.O. Box 1582 Homer AK 99603	<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	<i>Justin Wickstrom</i>
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>



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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.

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

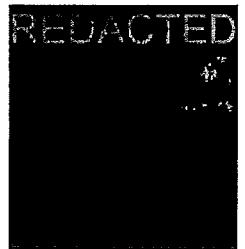
Given the sufficiency of the signatures, I next examined the sufficiency of the statement for recall, with substantial assistance from the City Attorney in interpreting the relevant statutes and common law principles. In the State of Alaska, there are three grounds for recall, 1) misconduct in office;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



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

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:



- 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.

REDACTED