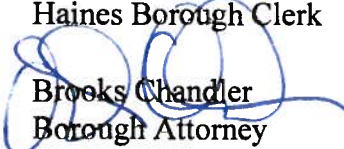


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MEMORANDUM

TO: Julie Cozzi
Haines Borough Clerk

FROM: 
Brooks Chandler
Borough Attorney

DATE: April 10, 2017

SUBJECT: Recall Petitions

We have reviewed three applications for recall petitions submitted April 4, 2017¹. The applications were signed by ten people who have listed an address in the Haines Borough. Based on our review of the contents of the applications, state law, borough code, and relevant Alaska Supreme Court decisions, we recommend you certify each application with revisions. The reasons for this recommendation are discussed in greater detail below.

FACTS

On April 4, 2017, three applications for recall petitions were submitted. The petition applications submitted identify a contact person and alternate. The applications request issuance of recall petitions seeking to recall Heather Lende, Tom Morphet, and Tresham Gregg from their seats on the Borough Assembly. Ms. Lende and Mr. Morphet were elected to the Assembly in an election held October 4, 2016. The 2016 election was certified on October 25, 2016, at an Assembly meeting which commenced at 6:30 p.m. Mr. Morphet and Ms. Lende were sworn into office right after the election results were certified. Their terms are due to expire in October of 2019. Mr. Gregg was elected to Assembly in 2015. His term is due to expire in October of 2018.

The applications for recall of Assembly members Lende and Morphet are identically worded. Ms. Lende and Mr. Morphet are alleged to have violated the Open Meetings Act on December 12, 2016, "by communicating on the 33' harbor extension by email and or phone" with two additional members of the Assembly. In addition, Mr. Morphet and Ms. Lende are alleged to

¹ You initially determined not all ten signatures on the applications were signatures of persons registered to vote in the borough. The petitions were resubmitted with sufficient signatures on April 5, 2017.

have violated HBC 2.10.200(A) on or before October 25, 2016, by contacting the borough manager and asking him not to open bids for a harbor project, and by appearing at the 2:00 p.m. bid opening on October 25, 2016, and telling the borough manager they did not want him opening the bids. The third allegation against Ms. Lende and Mr. Morphet claims they violated HBC 2.06.030 by “requesting HBPD to provide the blotter”. It is alleged this request occurred during the January 10, 2017 assembly meeting and during “several other encounters” with police chief Scott. The request is alleged to have constituted “coercion of a subordinate in an attempt to affect a personal or financial interest” of Mr. Morphet and Ms. Lende. The asserted financial interest is each of Ms. Lende’s and Mr. Morphet’s “connection” with the CVN (Chilkat Valley News) and a personal blog.

The application for recall of Assembly member Gregg repeats the alleged December 12, 2016 Open Meetings Act violation contained in the Lende and Morphet recall applications. It also adds an additional alleged Open Meetings Act violation based on emails of “Dec. 12/2015”. In addition, the application contains an allegation that Mr. Gregg failed “to uphold borough code”. This allegation references HBC 2.04.404. Exactly what Mr. Gregg did that failed to uphold borough code is not identified in this portion of the application. The final² allegation against Mr. Gregg is that at the “Dec.15/2015” assembly meeting Mr. Gregg stated “we can choose or not to choose to follow code”. This statement is alleged to constitute a misuse of official position in violation of HBC 2.06.300.

LAW

A. Charter.

Section 16.06 of the Borough Charter states:

An elected official may be recalled by the voters in the manner provided by Alaska Statutes, which among other provisions states that the clerk may allow petitions only on the basis of misconduct in office, incompetence, or failure to perform prescribed duties. A petition to place the recall of the elected official before voters shall be signed by a number of qualified voters as required by law.

B. Borough Code.

HBC 2.10.260 states, “[t]he mayor or any assembly member may be removed from office for any cause specified by applicable state law for the removal of officers, and in the manner prescribed thereby, or recall as provided by statute.”

² The allegations have not been discussed in the order they appear in the application.

C. 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 has provided procedures and grounds by state statute.

D. Alaska Statutes.

AS 29.26.240 states an elected official may be recalled after the official has served the first 120 days of the term for which they were elected. The grounds for recall are misconduct in office, failure to perform prescribed duties or incompetence. AS 29.26.250. An application for a recall petition must contain the names and signatures of at least ten (10) registered voters who will sponsor the petition, and a designated “contact person and alternate to whom all correspondence relating to the petition may be sent”. The grounds for recall must be stated “with particularity” and “in 200 words or less”. AS 29.26.260(a). The statutes offer the recall target an opportunity to make a rebuttal statement of 200 words or less which will be placed on the recall ballot alongside the statement of the charges. AS 29.26.330(2).

E. Alaska Supreme Court Decisions.

The Alaska Supreme Court has established the framework for determining whether an application for a recall petition meets the legal requirements. There are two important decisions of the Alaska Supreme Court that provide guidance about recall petitions. The names of the cases are Meiners³ and von Stauffenberg⁴. The Supreme Court told municipal clerks in these cases that the facts stated in a petition for recall are not to be investigated by the clerk. Instead, those facts are to be accepted as true.

The Supreme Court also said in those cases that the clerk is supposed to figure out if the facts which are assumed to be true are “misconduct in office”, or a “failure to perform prescribed duties”, or “incompetence”. When the “misconduct” alleged is a violation of a law, the clerk is to figure out whether the law would be violated assuming the facts are true. In order to figure out

³ Meiners v. Bering Strait School District, 687 P.2d 287 (Alaska 1984).

⁴ von Stauffenberg v. Committee for an Honest and Ethical School Board, 903 P.2d 1055 (Alaska 1995). Some residents may be familiar with this case which involved efforts to recall members of the Haines Borough school board.

these things, it is important to divide each allegation in the applications into facts and legal conclusions. The facts are accepted as true. The legal conclusions are not accepted as true.

There is conflict between the decisions in the Meiners and von Stauffenberg cases. The Meiners case held that allegations of conduct which, if true, would violate the Open Meetings Act meet the statutory requirements for recall. But the von Stauffenberg case held that an allegation that a school board met in an “improper” executive session to discuss a school superintendent’s decision to retain an elementary school principal did not meet the requirements for recall. The court reached this conclusion because of a previous court decision which held that a city council was authorized “to meet in executive session while discussing the personal characteristics of city manager applicants”. von Stauffenberg, 903 P.2d at p. 1060. In addition, the school board in von Stauffenberg was requested by the principal (who apparently had notice her retention would be discussed at the Board meeting), to discuss the matter in executive session rather than in public. This means it is not sufficient to state conduct violated the Open Meetings Act. The allegations in a recall application must also be “particular” enough to allow the clerk to determine if any exception to the Open Meetings Act applied. von Stauffenberg, 903 P.2d at 1060.

The Clerk also needs to determine if the charges have been made with the legally required “particularity”. The Supreme Court has indicated “[t]he purpose of the requirement of particularity is to give the office holder a fair opportunity to defend his conduct in a rebuttal limited to 200 words”. Meiners, 687 P.2d at 302.

According to the Alaska Supreme Court these determinations are supposed to be made to further two broadly stated policies; 1) the people’s right to recall their elected officials is to be liberally construed in favor of recall, and 2) recall is a political process not a legal process.

ANALYSIS

A. Sufficiency of Allegations.

We first discuss the allegation common to each petition. The petitions allege that each assembly member violated the Open Meetings Act by participating in a group telephone call or electronic mail on December 12, 2016, which pertained to “the 33’ harbor extension”. As stated above, you must assume this purported email and telephone communications occurred as alleged. Based on this assumption you must determine if this would constitute a violation of the Open Meetings Act.

Open Meetings Act. AS 29.20.020(a) states in part “ [m]eetings of all municipal bodies shall be public as provided in AS 44.62.310.” AS 44.62.310(a) states, “[a]ll meetings of a governmental body of a public entity of the state are open to the public except as otherwise

provided by this section or another provision of law.” The assembly is a governmental body. “Meeting” is defined as, “ a gathering of members of a governmental body when (A) more than three members or a majority of the members, whichever is less, are present, a matter upon which the governmental body is empowered to act is considered by the members collectively, and the governmental body has the authority to establish policies or make decisions for a public entity”. AS 44.62.310(h)(2).

1. *Dec. 12, 2016 E-mail/Telephone Call.*

The application alleges that the topic of a conversation was “the 33' harbor extension”. Based on the von Stauffenberg case, in which the court went outside the application for a recall petition to figure out details of whether the allegations if true would be a violation of the Open Meetings Act, we recommend you review Assembly agendas and minutes to determine if “the 33' harbor extension” was something on which the Assembly was “empowered to act” as of December 12, 2016. The most obvious indication is whether authorizing or not authorizing this extension was on the agenda for consideration at a time after December 12, 2016.

The other legal issue is whether the four assembly members were “present”. There is no Alaska Supreme Court decision specifically addressing whether group emails mean those sending the emails are “present”. AS 44.62.310(a) specifically provides for governmental bodies to meet by teleconference. Therefore if you do determine the 33' harbor extension was a topic on which the Assembly was “empowered to act” as of December 12, 2016, in our opinion, the allegation common to all three petitions does allege misconduct in office i.e. a violation of AS 44.62.310.

2. *Dec 12/2015 email.*

This allegation is contained only in the application to recall Assembly member Gregg. Ms. Lende was not on the Assembly in 2015 so even taking the allegation as true - that Ms. Lende and Mr. Gregg exchanged emails on Dec. 12, 2015 - the allegation does not constitute a violation of the Open Meetings Act.

HBC 2.04.404

The application to recall Assembly Member Gregg references HBC 2.04.404. There is no HBC 2.04.404. In our opinion, while you have authority to delete allegations which do not meet recall requirements from a multiple allegation recall petition application, you do not have authority to rewrite the petition to change sections of the Borough code identified by the

voters submitting the application alleged to have been violated by the elected official⁵. Even if you did have such authority, the application does not say what Assembly member Gregg did that violated the referenced section of Borough code. Therefore this particular allegation is not stated “with particularity”. Absent a specific reference to alleged conduct it would not be possible for Mr. Gregg to intelligently respond to the allegation in the 200 word ballot response.

HBC 2.06.300

The application to recall Assembly member Gregg also alleges he violated HBC 2.06.300. There is no HBC 2.06.300. In our opinion, while you have authority to delete allegations which do not meet recall requirements from a multiple allegation recall petition application you do not have authority to rewrite the petition to change sections of the Borough code identified by the voters submitting the application alleged to have been violated by the elected official. Even if you did, the alleged misconduct references a general statement made during an Assembly meeting. In our opinion, making the alleged statement by itself is not “misconduct in office”. Instead, the persons applying for recall would need to identify an actual action by Mr. Gregg which did not follow borough code.

HBC 2.06.030

The applications to recall Assembly members Lende and Morphet allege violations of HBC 2.06.030. HBC 2.06.030(A) states in part “[a] public officer may not use, or attempt to use, an official position in order to gain a benefit”. Taking the allegation that Ms. Lende and Mr. Morphet both sought HBPD to provide the blotter in furtherance of their connections with personal blogs and the Chilkat Valley news as true (which you are required to do as explained above) this allegation references conduct which would constitute a violation of HBC 2.06.030(A). A violation of HBC 2.06.030(A) would constitute misconduct in office.

HBC 2.10.200(A)

The applications to recall Assembly members Lende and Morphet allege violations of HBC 2.10.200(A). HBC 2.10.200(A) states “[f]our assembly members constitute a quorum. Four affirmative votes, by either four assembly members or three assembly members on a tie vote, plus the vote of the mayor, are required for the passage of an ordinance, resolution, or motion, excepting the provisions for filling of vacancy and emergency ordinances provided for in this title.” Even if the allegations that Ms. Lende and Mr. Morphet asked the borough manager not to open the bids for the harbor expansion are true, this conduct would not violate HBC 2.10.200(A).

⁵ Meiners, 687 P.2d at 302. (Director of Elections does not have legal authority to rewrite the allegations of the recall petition because statute requires recall petition to contain “the grounds as stated in the petition”). The Meiners case did allow for legally insufficient grounds for recall to be deleted by the reviewing official.

In addition, the actions of Mr. Morphet and Ms. Lende are described in the application as occurring before the 2016 election was certified and they were sworn into office. HBC 2.04.040 requires oaths to be taken “before taking office”. HBC 2.08.030 states an Assembly member’s “term of office begins immediately following certification of the election”. AS 29.26.250 requires a recall petition to allege “misconduct in office”. Assembly members Lende and Morphet were not “in office” when the harbor expansion bids were opened at 2:00 p.m. on October 25. They were not “in office” until later that day. Therefore, even if they did ask the borough manager not to open the bids these requests can not possibly constitute misconduct in office.

RECOMMENDATIONS

The Meiners case identifies the proper procedure for a municipal clerk to follow when portions of an application meet statutory requirements and other portions do not. The clerk is to “sever” the improper portion from the proper portion and certify the application only as to the proper portion. Meiners, at 301-302.

We recommend you use this procedure and proceed to delete allegation 2 from the applications to recall Assembly members Morphet and Lende. We also recommend you delete allegations 1, 2 and 4 from the application to recall Assembly member Gregg. The remaining open meetings act allegation should remain in the Gregg recall petition (and the Morphet and Lende petitions) only if your investigation indicates the Assembly was empowered to act on the 33' harbor extension as of December 12, 2016. Allegation 1 should remain in the Morphet and Lende recall petitions. The applicants should be informed they may either; 1) circulate the petitions as issued for signatures, (2) resubmit modified applications, or 3) challenge your decision deleting some of the allegations.

If you have any further questions regarding this matter, please let me know. We also recommend you consider this memorandum a public document and provide a copy to any member of the public who asks for a copy.