ALASKA LEGISLATURE COMMITTEE FILES 1983-1984 8672

2172 HCRA HB 172 (FILE 4) 2/22

authorized by law, money received from the disposal of land in a service area created under AS 29.63.090(f);

(10) to acquire membership in organizations which promote legislation for the good of the municipality;

(11) to expend funds for community purposes for the good of the municipality;

(12) to borrow money and issue evidences of indebtedness.

Sec. 29.48.030. MUNICIPAL FACILITIES AND SERVICES.

(a) A municipality may exercise the powers necessary to provide the following public facilities and services:

(1) streets and sidewalks;

(2) sewers and sewage treatment facilities;

(3) harbors, wharves, and other marine facilities;

(4) watercourse and flood control facilities;

(5) health services and hospital facilities;

(6) cemeteries;

(7) police protection and jail facilities;

(8) cold storage plants;

(9) telephone systems;

(10) light, power and heat;

(11) water;

(12) transportation systems;

(13) community centers;

(14) libraries, visual or performing arts centers, or museums;

(15) recreation facilities;

(16) airport and aviation facilities;

(17) garbage and solid-waste collection and disposal service and facilities subject to AS 29.48.033;

(18) fire protection service and facilities, not in conflict with AS 18.70.075, but not limited to AS 18.70.075;

(19) parking and parking facilities;

(20) housing and urban renewal, rehabilitation and development;

(21) preservation, maintenance and protection of historic sites, buildings and monuments;

(22) consumer protection;

(23) emergency medical services and facilities.

(b) First and second class boroughs may exercise the powers conferred by (a) of this section or sec. 33(a) of this chapter only after they have been assumed in the manner required under AS 29.33.250 - 29.33.290 for areawide exercise or in the manner required under AS 29.38.010 - 29.38.050 for exercise in the borough area outside cities, or are conferred by sec. 20 of this chapter for exercise in the borough area outside cities. However, as to powers conferred under (a) (12) of this section, exercise of the powers areawide or in the borough area outside

cities is at the option of the borough and is not subject to those restrictions on acquisition of additional borough powers. With respect only to boroughs which on September 10, 1972 are not exercising powers conferred under (a) (12) of this section on an areawide basis, objection which a city may raise to areawide exercise of the powers by a borough shall be reviewed by the Alaska Transportation Commission. The commission shall decide whether exercise of the powers exclusively by the borough areawide is to be approved as in the public interest under the particular facts and circumstances at issue.

Sec. 29.48.035. REGULATORY POWERS.

(a) A municipality may regulate the operation and use of its public rights-of-way, public facilities and services. It may also regulate the following:

(1) vehicle, pedestrian, and other traffic, and licensing and operation of motor vehicles, including snow vehicles and off-highway vehicles, and operators not inconsistent with AS 28.01.010;

(2) licensing of drivers of taxicabs, for-hire automobiles, motor buses, or other vehicles for the transportation of passengers or baggage not inconsistent with AS 28.01.010;

(3) vehicle parking not inconsistent with AS 28.01.010;

(4) transportation fares;

(5) licensing, impounding and disposition of animals;

(6) selling of goods;

(7) selling of food;

(8) abandoned property;

(9) dangerous and disorderly conduct;

(10) alcoholic beverages as provided by AS 04.21.010;

(11) recreational devices as provided by AS 05.20.100;

(12) control of insects and rodents;

(13) offering for sale, exposure for sale, sale, use, or explosion of fireworks;

(14) building, housing and related codes, which may be provided by cities within cities or, in the manner required in (b) or (c) of this section, by first or second class boroughs in the borough area outside cities or areawide, subject to the following:

(A) exceptions to requirements of the codes may be made in the codes among other reasons, in order to provide for the preservation, maintenance and protection of historic sites, buildings and monuments;

(B) codes may not be used to prohibit or restrict the development or use of solar or wind energy unless the assembly or council finds that the development or use of solar or wind energy would endanger the health or safety of the public;

(15) condemnation and abatement of public nuisances and hazards;

(16) garbage and solid-waste collection and disposal;

(17) water pollution control;

(18) air pollution control as provided in AS 46.03.140 - 46.03.240;

(19) other powers and functions affecting the general health, safety, well-being and welfare of its inhabitants;

(20) licensing of day care facilities.

(b) First and second class boroughs may exercise the powers conferred by (a) of this section only after they have been assumed in the manner required under AS 29.33.250 - 29.33.290 for areawide exercise or in the manner required under AS 29.38.010 - 29.38.050 for exercise in the borough area outside cities or are conferred by AS 29.48.020 for exercise in the borough area outside cities. However, as to powers conferred under (a)(5), (17), (18) and (20) of this section, exercise of the powers areawide or, as to (a)(5), (17) and (20), in the borough area outside cities is at the option of the borough and is not subject to those restrictions on acquisition of additional borough powers. Upon adoption of a borough ordinance to provide for areawide exercise of the powers specified, no home rule or general law city within the borough may exercise the powers, unless the borough ordinance provides otherwise or the borough by subsequent ordinance ceases to exercise the power.

(c) The provisions of (b) of this section notwithstanding, boroughs which on September 10, 1972 are exercising building, housing or related code powers, except as those code powers relate to flood control, on an areawide basis or in the borough area outside cities shall, subject to acquisition of the powers on an areawide basis by transfer or election as provided in (b) of this section, exercise the powers in the borough area outside

cities and, upon agreement of the city and borough, within any city, home rule or otherwise, in which the powers are being exercised on September 10, 1972; if the city does not agree to continue borough exercise of the powers within the city, the city shall exercise the powers within the city.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

FEB 25 1983

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

M E M O R A N D U M

February 24, 1983

SUBJECT: Recall of municipal officials
(Work Order No. 13-0837)

TO: Representative Barbara Lacher

FROM: Tamara Brandt Cook
Legislative Counsel

TBC

You have asked what the responsibility of the clerk is in reviewing recall petitions for sufficiency.

What a recall petition must contain and the method of determining the sufficiency of a petition depends on the specific statute involved and these types of laws vary from state to state. Some statutes require only a general statement of the grounds for recall and an official may be recalled for purely political reasons. However, other statutes require grounds for recall that are more than simple disagreement with matters of policy and the grounds stated must actually constitute misfeasance, malfeasance or nonfeasance in office. McQuillan, Municipal Corporations, vol. 4, sec. 12.251b: Noel v. Oakland County Clerk, 284 N.W.2d 761 (Michigan 1979); Bent v. Ballantyne, 368 S.2d 351 (Florida 1979); Tolar v. Johns, 147 S.2d 196 (Florida 1962); Jacobsen v. Nagel, 96 N.W.2d 569 (Minnesota 1959).

Where petitioners are required to state only general grounds, the recall petition need not state the cause for removal with the same particularity as where the requirement is that reasons for removal be stated clearly. The purpose of a general statement of grounds is to furnish information to electors upon which a political and not a legal issue may be raised. Under statutes providing that a statement of grounds for recall is for the information of the electors, the question of the sufficiency of those grounds is also for the electors, but under provisions authorizing recall for malfeasance or similar language, the sufficiency of the grounds provided is a legal question. 63 Am. Jur.2d, Public

Officers and Employees, sec. 245; Pybus v. Smith, 141 P. 203 (Washington 1914).

Statutory provisions as to recall are to be liberally construed in favor of the electorate's right to exercise recall. Hazelwood v. Saul, 619 P.2d 199 (Colorado 1980). Under this principle and in the absence of statutory language limiting the recall to specific, indicated reasons, the adequacy of grounds stated in a petition is treated as a political matter and courts refuse to enjoin recall petitions on complaints that charges are insufficient. However, where recall is limited to specified grounds of malfeasance or similar language it is generally held that

> . . . petitions are inadequate when they indicate only disagreement on matters of policy or political criticism. Antieau, Municipal Corporation Law, sec. 22.200, pages 22-304 - 22-305.

The officer designated to ascertain the sufficiency of a petition in a particular statute may be required to determine legal sufficiency rather than matters of form only. Unless an appeal is specifically provided for, the officer's determination as to sufficiency of a recall petition is final and subject only to judicial correction if the determination is capricious, arbitrary, or plainly erroneous as a matter of law. McQuillan, supra., vol. 4, sec. 12.251(d); Hold v. Trantham, 575 S.W.2d 83 (Texas 1979).

Article XI, section 8 of the Constitution of the State of Alaska provides:

> 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. Procedure and grounds for recall shall be prescribed by the legislature. (Emphasis added)

In carrying out this constitutional responsibility the legislature has provided under AS 29.28.140 that misconduct in office, incompetence, and failure to perform prescribed duties are the grounds for recall. In addition, under AS 29.28.150(a)(3), a petition for recall must contain ". . . a statement of the grounds of the recall stated with particularity as to specific instances". (Emphasis added)

The municipal clerk is required to review the petition ". . . for content and signatures . . ." under AS 29.28.160.

These statutory provisions dealing with recall have not been judicially construed by the Supreme Court in this state, so it cannot be determine with certainty whether the clerk is required to review the petition for signatures and form only or whether the clerk must determine as a legal matter whether the specific instances set out in a petition, if true, constitute misconduct in office, incompetence or failure to perform prescribed duties. Under the principles set out previously in this memorandum it appears that the clerk is required to determine whether the specific instances set out support a claim of misconduct in office, incompetence or failure to perform prescribed duties because AS 29.28.150 demands more than just a general statement of the grounds for recall and does not specifically indicate that the stated grounds are for the information of the voters only.

Under both versions of the bill revising Title 29, SB 1 and HB 172, the grounds for recall remain unchanged although the procedure for recall has been substantially changed. Nevertheless, an applicant for a recall petition under Sec. 29.26.260(a)(3) is still required to set out the grounds ". . . with particularity". The clerk must prepare a recall petition only if the clerk determines that the application for the petition meets the requirements of AS 29.26.260, including the requirement that grounds be ". . . stated with particularity" (Sec. 29.26.280). After a petition is filed the clerk must again determine whether the petition is sufficient and, if insufficient, ". . . identify the insufficiency and notify the sponsors. . ." (Sec. 29.-26.290). It seems clear that since the clerk must identify the insufficiency, a determination of sufficiency is not limited to review of signatures, even though (b) and (c) of the section only provide for correcting a petition insufficient for lack of signatures. It appears under these sections that the clerk would still be required to determine whether the grounds stated, if true, actually constitute misconduct in office, incompetence, or failure to perform prescribed duties.

I believe that this interpretation conforms to the intent of the policy committee that produced the original version of a Title 29 revision bill. There was considerable discussion of the recall provisions by that committee and at one point

the committee considered requiring only a general statement of reasons for recall and allowing recall to proceed upon purely political grounds. It was even suggested that grounds for recall be eliminated entirely. That approach was specifically rejected by the committee. Consequently, I would recommend that HB 172 be amended to clearly reflect the fact that the clerk is to review a recall petition for form and signatures only, and not to determine whether grounds stated actually constitute misconduct in office, incompetence, or failure to perform prescribed duties, if that is the result intended by the legislature.

TBC:ljb

Municipality of Anchorage

MEMORANDUM

DATE: January 11, 1983

TO: Municipal Clerk

FROM: Municipal Attorney

SUBJECT: Petition for Recall of Gerry O'Connor, Assemblyman, Section 2, Seat C

ISSUE PRESENTED

Are the grounds set forth in the above referenced recall petition sufficient as a matter of law under the provisions of AS 29.28.150 to permit a submission by the Clerk to the Municipal Assembly for the purpose of calling an election pursuant to AS 29.28.200?

CONCLUSION

The above referenced petition is legally insufficient and no recall election may therefore be called. Under AS 29.28.160 - .170, the Municipal Clerk is required within 10 days of submission to examine the sufficiency of the recall petition, both as to the adequacy of signatures and for content with respect to compliance with AS 29.28.130 - .150. On the basis of the authorities and the reasoning referenced below, it is my opinion that an individual assembly member's vote on an ordinance approving the municipal budget cannot, as a matter of law, constitute misconduct in office, incompetence, or failure to perform prescribed duties under the meaning of AS 29.28.140, if that vote was in compliance with state and municipal law governing ethics and conflicts of interest and if the measure passed was in all respects a lawful action.

DISCUSSION

The necessity and sufficiency of specific grounds to support a recall petition is a matter governed by applicable constitutional or statutory provisions. For this reason, the weight given to various legal precedents from other jurisdictions depends on an examination of the specific legal framework involved. Generally, there would be no examination of the legal sufficiency of grounds where the governing statute permits removal from office for any reason or where grounds must be stated in a general manner. This is the case in many states, including, for example, Colorado, Michigan, Oklahoma and Wisconsin. In those states, it is held that recall can be based merely on a disagreement with the policies of the officeholder. A different rule applies, however, where, as in Alaska, the governing statute dictates that only certain grounds are suf-

ficient and that those grounds must be stated "with particularity" and be based on "specific instances". The rule is well stated by Antieau in his treatise on the Law of Municipal Corporations:

> Generally, courts refuse to allow recall proceedings to go forward where the grounds or charges stated in the petition do not satisfy local constitutions or legislation. Where local constitutions, statutes or charters limit the recall to malfeasance, misfeasance, nonfeasance in office or comparable grounds, it has been held that the petitions are inadequate when they indicate only disagreement on matters of policy or political criticism. Antieau, Local Government Law, § 22.20.

The statute in question clearly applies to home rule municipalities. AS 29.28.130. It is equally clear that the remedy of recall is only available for certain specified reasons comparable to malfeasance, misfeasance, or nonfeasance in office:

> AS 29.28.140 Grounds. Grounds for recall are misconduct in office, incompetence, or failure to perform prescribed duties.

This degree of particularity coupled with the stated limitation on grounds constitutes by itself a strong implication that it is insufficient to rely merely on a disagreement with the officeholder's policies. The cited statutes would be superfluous if, as under the governing laws of some states, recall could be applied at any time to test the political strength of the legislator. This principle was well articulated by the Supreme Court of West Virginia in the case of State ex rel Perkins v. City Council of City of Parkersburg, 121 S.E. 489:

> To adopt the view of petitioner [that it is sufficient to allege mere political disagreement] would make it unnecessary for the petition to contain any real grounds. The official could be recalled as well on account of his religious beliefs or political affiliations, as for corruption or malfeasance in office; and if those who desire his removal were unsuccessful in one election the process might be continued inde-

> finitely at the expense of the taxpayers. And suppose the faction seeking power through recall of those in office should be successful in the first, second, or third attempt, then the ousted faction could then in turn employ the same in repeated trials to regain its lost prestige, and the interminable wrangle and turmoil would go on. This would result in the fostering and maintaining of political feuds to the detriment of society and the great expense of the taxpayers. 121 S.E. at 493.

Additional support for this conclusion is found in AS 29.28.160 entitled, EXAMINATION FOR SUFFICIENCY. That section requires that the Municipal Clerk review a recall petition for content as well as for signatures. Since a petition is required to contain only dated signatures with addresses and a statement of grounds, the term "content" could refer only to the statement of grounds. Any other conclusion would make the use of the term "content" superfluous. On this point, note that AS 29.28.170(a) provides for a supplemental petition if, and only if, it is rejected on the basis of insufficient signatures. The statute also provides that "if the petition is insufficient for any other reason, it shall be rejected and filed as a public record." (emphasis added). Obvious from the emphasized language, the legislature contemplated that the Clerk's duties include an examination of the petition for compliance with other requirements. This interpretation of the Clerk's authority is consistent with the Alaska Supreme Court's decision in Warren v. Boucher, 543 P.2d 731. In that case, the Court approved the Lt. Governor's determination that an initiative petition was "substantially the same" as a measure passed by the legislature and therefore barred from the ballot. The Court's approval of the Lt. Governor's authority in that case involved a statute which, like the one under analysis here, permitted the highest election officer of the jurisdiction to make certain threshold decisions on the validity of a petition. This is not an unusual position. In the case of Steadman v. Halland, 641 P.2d 448, the Supreme Court of Montana addressed the same issue; "We agree that the statement of grounds for recall to be included in the petition is 'part of the form of the petition' and find that the filing officer not only is 'empowered to' but is required to reject the petition when it does not comply with statutory requirements." (emphasis added) 641 P.2d at p. 453.

The inquiry need not be confined to the governing statute alone as there exists precedent from other states with similar statutory language.

In Jacobsen v. Nagle, 96 N.W.2d 569, the Supreme Court of Minnesota was called upon to apply constitutional and charter provisions similar to those applicable here. That court found that where recall is founded on specific grounds relating to misconduct in office, the allegations must state more than criticism of the officeholder's policies or positions.

The courts of Florida have also ruled that there must be a statement of facts charging specific misdeeds related to performance of office. In the case of Piuer v. Stallman, 198 So.2d 859, for example, the court specifically stated that the valid exercise of a legislative judgment was not grounds for recall. In another case, the court stated that "errors in judgment cannot be sufficient grounds for recall, nor can legitimate and authorized actions, no matter how unpopular they are." Taines v. Galvin, 279 So.2d 9. In Richard v. Tomlinson, 49 So.2d 798, the court held a charge did not sufficiently comply with the statutory language when it merely alleged activities that were "inimical to the best interest of the citizens".

The basis for recall in Washington, like here, is related to malfeasance, misfeasance and nonfeasance in office. The Washington Supreme Court has observed: "Misfeasance or malfeasance...have been held to be comprehensive terms that include any wrongful conduct that affects, interprets, or interferes with the performance of official duties....Additionally, we have held that 'misfeasance' means 'the improper doing of an act an officer might lawfully do; or, in other words, it is the performance of a duty in an improper manner.' Malfeasance means the commission of an unlawful act, or the doing of an act which the person ought not to do at all." Bocek v. Bayley, 505 P.2d 814; State ex rel LaMon v. Westport, 438 P.2d 200.

In addressing the petition in question relating to Assemblyman Gerry O'Connor, it is apparent that the petitioners have alleged two of the three grounds specified in AS 29.28.140, namely incompetence and a failure to perform prescribed duties. With respect to compliance with AS 29.28.150(a)(3) (which requires that the listed grounds be based on a specific instance of conduct) the petition lists only Mr. O'Connor's vote on the 1983 municipal budget. A vague reference is also made to "his other past actions" and "dereliction of duty of his representation of Eagle River and Chugiak", but these later two items are not sufficiently specific to comply with the statute and should therefore be ignored in any analysis of the sufficiency of petition.

In states where the law permits recall to be based on political grounds alone, the above referenced statement (or any statement for that matter) would be sufficient. It is, however, insufficient to support the grounds of incompetence or failure to perform prescribed duties.

Relative to removal from public office, the terms "incompetence" and "dereliction of duty" have well established meanings. 63 Am.Jur.2d, Public Officers, §§ 191-192. The petition describes one act allegedly constituting incompetence. The allegation does not meet judicially defined standards for "incompetence" as that term has been defined by the courts. "Incompetence" means "some demonstrated lack of capacity or ability to perform the professional functions of office", Vivian v. Examining Board of Architects, 213 N.W.2d 359 (Wisc. 1974), including physical handicap inability to perform official functions; Tafoya v. New Mexico State Police Board, 472 P.2d 973 (N.M. 1970), or other legal disqualification, incapacity, or fitness to discharge the required duty. It means want of physical, intellectual, or moral ability, insufficiency, inadequacy, want of legal qualifications. Appeal of School District of Bethlehem, 30 A.2d 726 (Pa. Super. 1943); Hughes v. Hughes, 271 P.2d 172 (C.A. 4th 1954). The allegation in the petition falls short of claiming lack of capacity, ability, or physical, educational or mental ability to perform official functions; rather the allegation merely recites an action of the Assembly to which petitioners object. Failure to perform prescribed duties means a failure to carry out those responsibilities of the office set out in state or local law. Prescribed duties are numerous, from the obligation to attend assembly meetings unless excused to voting on matters for which one is not excused on the basis of a conflict of interest. A prescribed duty may be created by implication, as for example, when the assembly as a whole is required to perform a function. It is the implicit duty of each official who is a member to aid in the performance of that function. It is not, however, a prescribed duty of each assembly person to take every conceivable action which might make that official more informed or a more popular representative. Thus, it is not a prescribed duty to attend meetings which are not official or are sponsored by other nonmunicipal organizations. It is not a prescribed duty of an assembly person to inform all constituents of the basis of his or her political decisions, nor is it a prescribed duty to follow the popular will of ones constituency on any particular issue.

While the Alaska Supreme Court has not ruled on the precise question addressed here, at least one Superior Court Judge has

stated that under AS 29.28.130-.170, the legal sufficiency of stated grounds should be examined and that allegations of "misconduct" cannot be based on "discretionary" items, but rather must be founded on an unlawful or unethical act. White v. Baker, 3KO-80-263. The opinion stated here is also consistent with several that have been given to the Matanuska-Susitna Borough Assembly by various attorneys retained or employed by that body.

DEPARTMENT OF LAW

Jerry Wertzbaugher
Municipal Attorney

JW:gml
cc: Members of Anchorage Assembly

from Ray Plummer
Chevron
2/28/83

MEMORANDUM

FEB 28 1983

Re: Proposed Municipal Code Revisions;
Planning, Platting and Zoning Authority
of Local Governments

A. SUMMARY.

There are no significant differences between SB 180 as it passed the House and the October 1982 redraft with regards to the planning, platting and zoning authority of municipal governments. As with Senate Bill 180, the October 1928 redraft would greatly expand the land use planning authority of municipalities. The use or misuse of this authority could lead to arbitrary or unreasonable exclusion or restriction of natural resource development, particularly on state or fee lands.

Amendatory language to limit this authority may be proposed to either Title 29 or Title 38. The selection of which of the two titles to amend depends largely upon industry perception of the likelihood of success before the legislature.

B. HISTORY OF SB 180

As the culmination of approximately 3 years of work by a special joint committee, Senate Bill 180, which completely rewrote the municipal code of Title 29, was adopted by the House on May 26, 1982. The Governor vetoed the bill on July 15, 1982. The veto message issued by the Governor (published in the Senate Journal on July 22, 1982

at 1788-1792 (copy attached)) set forth seven reasons for the veto, none of which relate to the land use planning chapter of the bill.

Bills vetoed after the adjournment after the last regular session of the legislature can be reconsidered only in a special session of that same legislature. Alaska Constitution Art. II, Sec. 16; AS 24.30.100. Therefore, Senate Bill 180 cannot now be reconsidered and is dead. In October of 1982, the Department of Community and Regional Affairs produced a rewrite of Senate Bill 180. The redraft is substantially the same as the bill which passed the legislature, but several of the last minute house amendments have been deleted, apparently in response to the Governor's veto message.

With regard to the planning, platting and zoning authority of municipalities, there are only three differences between the October 1982 redraft and SB 180 as it passed the legislature, all of which are minor. They are as follows:

1. On page 87, lines 9 and 14, the word "comprehensive" has been added to clarify the term "planned" as used in those sections.

2. On page 89, line 27, subpart 1 of AS 29.40.090(a) has been reinstated, after elimination by a house amendment to SB 180. This subpart requires that the abbreviated plat procedure apply only to subdivisions

containing four lots or less.

3. On page 89 at line 2, the October 1982 redraft has deleted a sentence at the end of AS 29.40.060(b) as it appeared in SB 180 which read as folows: "A proceeding under this section has preference over all other civil actions and proceedings."

C. THE PROBLEM.

The bill provides virtually unlimited planning, platting and zoning powers to home rule municipalities, and greatly expands the powers given to other municipalities. An elucidation of this matter is given in the attached memorandum which discusses the same provisions in House Bill 170 and Senate Bill 180.

It is our opinion that such a sweeping grant of power to the municipalities, particularly to the North Slope Borough, would allow the municipalities to severely inhibit the development of natural resources, particularly oil and gas. An attempt to do this has already been made in the North Slope Borough's proposed zoning ordinance. In fact, the North Slope Borough has adopted an interim zoning ordinance which requires oil and gas facilities to be permitted by the Borough.

The problem is not perceived to be quite as severe on federal lands, in view of a Ninth Circuit Court of Appeals decision which holds that municipal governments may

not impede the development of natural resources on land owned by the federal government. Ventura County v. Gulf Oil Corporation, 601 F.2d 1080 (9th Cir. 1979), aff'd per curiam, 100 S.Ct. 1593 (1980). However, state and fee land may be at the mercy of municipalities. See the attached memorandum.

D. PROPOSED SOLUTIONS.

The intent of Chapter 40 of the proposed municipal code revision is to increase the authority of local governments with regard to planning, platting and zoning within their respective jurisdictions. Planning, platting and zoning are tools used by local governments to regulate the growth of the urban environment. Unfortunately, in Alaska, municipal government has been expanded to cover vast regions of open and unoccupied space. Zoning was never intended to be a method by which use of the non-urban environment could be regulated.

However, with the North Slope Borough interim zoning ordinance, and proposed final zoning ordinance, it is clear that zoning will be used at least by that municipality to the maximum extent possible to restrict and exclude resource development in open spaces.

The objective of any amendment to the October 1982 municipal code revision, therefore, should be to limit municipal power in planning, platting and zoning with

respect to the development of natural resources in the non-urban environment. Such activities are fully regulated by federal and state agency, and an additional layer of local control will add significantly to the time and expense involved in developing ratural resources, with a de minimus contribution to environmental quality.

The objective is clear. The means to accomplish the objective are less than clear, mostly for political reasons.

Article 10, Sec. 1 of the Alaska Constitution provides that: "A home rule borough or city may exercise all legislative powers not prohibited by law or by charter." Although this constitutional provision applies expressly only to home rule municipalities, it appears that the Alaska Supreme Court applies the same test for state preemption to both home rule and general law municipalities. Liberati v. Bristol Bay Borough, 584 P.2d 1115 (Alaska 1978). The test set forth in the Liberati case requires either an express legislative direction or a direct conflict with a statute such that the municipal ordinance under consideration substantially interferes with the effective functioning of a

state statute or regulation or its underlying purpose. 584 P.2 at 1121-1122.*

The most logical way to accomplish an express prohibition would be the insertion of appropriate language in Title 29, Chapter 40 as proposed by the October 1982 revision of the municipal code. However, this may not be politically possible.

In the alternative, the only other logical place in the Alaska Statutes to put such an amendment would be Title 38, relating to natural resources. A limitation could be placed in the Alaska Lands Act, AS 38.05, but logically that limitation could only relate to development of natural resources on state land. A limitation could also be placed in the miscellaneous chapter of Title 38, AS 38.95, and, in such a context, could perhaps include fee lands as well as state lands.

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* An excellent discussion of home rule authority in Alaska is contained in Sharp, "Home Rule in Alaska: A Clash Between the Constitution and the Court," 3 UCLA-Alaska Law Review 1-54 (1978).

E. CONCLUSION.

The use of zoning powers to regulate the development of natural resources in non-urban environments constitutes a serious threat to the oil and gas industry in Alaska. The problem is exacerbated by the existence of a home rule borough which has approximately 5,000 permanent residents and yet occupies the entire North Slope of Alaska, and which utilizes, to a maximum extent possible, the broad authority granted home rule governments by the Alaska Constitution to restrict resource development within its boundaries.

AS 29.40 as proposed by the October 1982 municipal code revision would compound this problem by giving unlimited planning, platting and zoning authority to home rule governments, and by greatly expanding the land use planning authority of other municipalities. This chapter would

validate an otherwise questionable North Slope Borough zoning ordinance, and result in yet another layer of regulatory bureaucracy with little benefit to the public interest.

For these reasons, it is imperative that modifications be made to the October 1982 redraft, or amendments be made to Title 38 in order to protect oil and gas interests. Five alternatives are proposed in this memorandum. The oil and gas industry should strive for a consensus among its members and push for passage of the consensus by the Alaska legislature. Failure to do so may be disasterous.

SB 515 (Cont.)

changing court rules. However, even if a two-thirds vote was necessary, the Senate's vote to concur in the House amendments was not affected by the subsequent failure to adopt the rule changes. The vote to concur passed by the required 11 votes, and that vote was to adopt the identical bill that had passed the House. Under Rule 39(c) the failure of the Senate to take a separate vote on the rule change simply meant only that secs. 43 and 44 (and potentially their respective companions -- 18 and 40) are now "void and without effect."

The issue that is presented is very similar to one which has arisen when one house votes to concur in amendments made by the other house, but then fails to adopt, for example, an immediate effective date included in the bill by a two-thirds vote as required by Rule 39(f). The procedure specified in Rule 39 (c) pertaining to votes on court rule changes is virtually identical to the language in Rule 39 (f) pertaining to votes on special effective date clauses. There is ample authority in support of the rule that a failure to adopt a special effective date by a two-thirds vote after concurring in a bill by a majority vote means that the bill has been adopted with an ordinary 90-day effective date. This authority rests on a construction of the effective date as not being a material factor influencing the favorable vote. This rule should apply by analogy to the failure of the Senate to vote separately on the rule change provisions in this bill. Consequently, I have concluded that HCS CSSB 535 (Jud) am H has been adopted by the legislature but without the effect of changing the court rules cited in sec. 43 and 44.

Sincerely,

/s/Jay S. Hammond
Jay S. Hammond
Governor

SB 180 VETOED

July 15, 1982

The Honorable Jalmar Kerttula
President of the Senate
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Mr. President:

Under Article II, Sec. 15, of the Alaska Constitution, I have vetoed HCS CSSB 180 (Jud) am H, relating to municipal government.

SB 180 (Cont.)

I regret having to take this action for several reasons. Certainly, the bill contains many meritorious revisions and improvements to the municipal code. These were the product of an arduous undertaking accomplished after three years of unprecedented cooperation among legislators, state and local government officials and staff. Further, there are some concepts contained within questionably designed and inadequately considered amendments which I believe should be addressed responsibly by the next Legislature. While perhaps none of these amendments is individually sufficiently flawed to warrant a veto of the entire measure, a combination of them creates significant problems that have incurred greater collective public opposition than has almost any other legislative action in my entire political experience. It's for these reasons that I have regretfully concluded that it is simply not in the best public interest to permit this bill to become law.

For example, the amendment redefining "population" and permitting the counting of workers at "isolated job sites" appropriately recognizes that the influx of seasonal empl[illegible] can significantly impact local services for which there i[illegible] now no readjustment provided under revenue sharing statut[illegible] However, I am advised by counsel that the manner in which this matter is handled in SB 180 seriously jeopardizes the resolution reached by the state with the U.S. Census Bureau and could incur substantial losses in federal funding to both state and local governments. While I believe some redistribution of state funds is warranted to assist communities most impacted by seasonal and temporary influxes of population, (whether they be "isolated" communities or otherwise), I am concerned with the potential inequity created by this amendment. The vagueness of the term "isolated job site," I am advised, could result in endless litigation no matter what clarifying efforts might be made through regulation. This questionable feature, coupled with prospective revenue losses to the state treasury ascribed to it by the Department of Revenue in their request for veto, are but two of several causes for concern.

I as well favor the basic policy decision of the Legislature that forest values above ground, (just as mineral values beneath it), should be accorded different status for purposes of municipal taxation. However, the provision exempting forest lands from municipal property taxation contains a definition by reference that poses substantial problems of interpretation and impact according to all concerned state agencies. I am advised by the Department of Law, for example, that the definition problem alone would probably induce costly and unnecessary litigation.

Perhaps more importantly, bond counsel advises that the bill would gravely impede local government general obligation bond programs in progress and significantly harm the credit ratings of virtually all Alaska communities. This feature is perhaps the most damaging potentially of all the questionable features contained in SB 180 and, in the view of most financial consultants, would alone warrant veto. I

SB 180 (Cont.)

am certainly in no position to second guess and override them in this conclusion. They assert the resulting adverse effect of this feature is likely to be a decline in market value of outstanding issues and an increase in the costs for new financing. Potential impact on the state's bond bank is, of course, of equal concern.

Additionally, the Department of Natural Resources has expressed major concerns over the manner in which this amendment might apply, despite their agreement with the avowed basic philosophical intent of the amendment's sponsors. They point to the Oregon forest value taxing policies as a far preferable approach to meet that objective. Accordingly, I have directed that legislation be drafted which would more appropriately address this matter.

Another problem rests in the attempt to clarify statutory references regarding tax exemptions of undeveloped Alaska Native Claims Settlement Act lands. Agencies have raised unanswered questions as to whether the language is indeed clarified. Moreover, a retroactivity feature of this provision casts serious "public purpose" doubts upon the legality of the proposed solution.

The amendment prohibiting local governments from passing ordinances relating to firearms has been violently objected to by some law enforcement people. It causes me concern as well because of my reluctance to permit state government to impede the ability of local communities to govern in a manner deemed by themselves most responsive to their unique needs.

Objected to by many others requesting veto is the further intrusion into the conduct of local government business represented by amendment 13. This would expand the initiative and referendum process to include local administrative matters. Those requesting veto assert that actions of the governing body elected by the public should be subject of initiative and referendum; but that ongoing daily administrative matters should be subjected to the usual review and oversight inherent in the concept of a governing body of elected officials held accountable for actions of those whom they employ. For state government to impose its will in such matters upon local governments without far more public debate than was accorded this amendment, appears to me to be yet another undue incursion of "Big Brother" into local matters.

Another section affects a major change in public utility regulatory philosophy, and reverses the direction chosen with deregulation in 1980. In urging veto a multitude of agencies and utilities pled for further public hearings and agency consideration before so drastic a change be contemplated. Again, if this alone were the measure's greatest flaw, I perhaps would not have vetoed it. However, in conjunction with a multitude of other alleged defects and public confidence eroding features, it adds one more reason for my action.

SB 180 (Cont.)

A final problem is one related to language, not concept. This provision allows municipalities to use the group insurance concept for the purpose of pooling their workers compensation liabilities and claims handling. The language appears to mandate board adoption of regulations permitting a municipal employer group to recede under any circumstances. It seems only prudent that qualifications be stipulated so that municipalities requesting approval for group self insurance status are subject to the same regulatory criteria as any other self-insured employer.

The subject legislation has produced more controversy and debate than any other to emerge from the 12th Legislature. Because I find some issues addressed in the amendments, as well as the municipal code revisions, to be desirable, I am taking specific steps to encourage the 13th Legislature to address these issues. Accordingly, I have directed that legislation be drafted which would accomplish the municipal code revisions effective prior to the floor amendments. This would address the problem areas in a manner both acceptable to me and, I believe, to most legislators.

I have also directed that legislation be prepared to address the forest lands and taxation issues in a more acceptable manner to accommodate the appropriate intent of these amendments' sponsors.

I have also directed legislation be prepared to address the workers compensation provisions allowing local governments to use the group self-insurance concept for the purpose of pooling their workers compensation liabilities and claim handling.

Further, I'm directing the Department of Community and Regional Affairs to draft regulations on the provisions of state assistance to local governments in a manner which compensates more equitably those communities impacted by seasonal, temporary and isolated workers. Minimally, I would hope that in the short term we could at least "hold harmless" the North Slope Borough, which otherwise stands to lose about $2 million in revenues from the amount they received last year. All other municipalities would receive, I'm told, increases. Accordingly, I would hope that all other municipalities, which rose in violent protest over the prospects of revenue losses to themselves were SB 180 to become law, would be equally concerned about revenue losses incurred by other municipalities through this measure's veto.

I do not intend to submit legislation re-regulating public utilities at the municipal level unless some valid arguments can be presented for this change.

The legislative package presented to the 13th Legislature will, of course, be that of the future governor. Therefore, I cannot guarantee that all these proposals will come before the House and Senate. However, several key legislators who are likely to return assure me of their dedication towards

SB 180 (Cont)

address of these matters.

Despite the bill's problems, I was at first inclined to go along with policy decisions rendered by the Legislature in their passage of 180. After all, by so doing I could assure these issues would be addressed next session if as serious as opponents were contending. However, a growing crescendo of public opposition, virtually unanimous staff and agency veto recommendations, plus pleas from some legislators who now wish to do penance for having voted for the measure, cause me to conclude that while a veto does a disservice to the legitimate concerns of some communities and interests, permitting the bill to become law could incur even more disservice to all others. Finally, as one of two senators who will assuredly return next session, let me urge you, Mr. President, to place this crucial issue high upon you agenda.

Sincerely,

/s/ Jay S. Hammond
Jay S. Hammond
Governor

Message of July 21 was received July 22 stating the Governor has signed the following bill and transmitted the engrossed and enrolled copies to the Lieutenant Governor's Office for permanent filing:

HB 156

SENATE CS FOR CS FOR HOUSE BILL NO. 156 (Fin) am Senate
Relating to public contracts; and providing for an effective date.

Chapter 144, SLA 1982

INDEX OF VETOED AND REDUCED BILLS RECEIVED AFTER ADJOURNMENT:

BILLS VETOED BY THE GOVERNOR

REDUCED BILLS

This final supplement of the Senate Journal completes the record of legislation for the Second Session of the Twelfth State Legislature.

Peggy Mullig
Secretary of the Senate
July 1982

DETAILED ANALYSIS OF LAND USE REGULATION BY MUNICIPALITIES UNDER CSSB 180 (C & RA) AND CSHB 170 (C & RA)

A. Current law.

Land use regulation by municipal governments is currently governed by A.S. 29.33.070-.245. A.S. 29.33.070 requires all boroughs to provide for planning, platting and zoning on a "area-wide basis." A.S. 29.43.040 grants the same power to home rule and first and second class cities located outside organized boroughs.

A.S. 29.33.080 and .085 require the assembly to adopt a "comprehensive plan" containing policy statements, goals, standards and maps. A.S. 29.33.090 requires the municipal assembly to regulate land use "by districts or contract zoning." It requires land use regulations to be uniform for each class of use in each district. Contract zoning is defined as allowing a "zoning reclassification" to a less restricted use where the owner agrees to place restrictions on the use of the land beyond the zoning requirements generally attaching to the new classification. This section also states the purposes for which zoning ordinances may be adopted. The stated purposes clearly envision zoning in an urban environment.

The current law applies to all local governments, and therefore limits the power of home rule boroughs. The current

law has no provision authorizing the regulation of land use by the adoption of a permit system. Additionally, the current law does not allow cities located in third class boroughs to provide for planning, platting and zoning.

B. Land use regulation under CSSB 180 and CSHB 170.

Under CSSB 180 and CSHB 170, land use regulation by local governments would be governed by A.S. 29.40.010-.200.

A.S. 29.35.180(b) requires a home rule borough to provide for planning, platting and zoning. No limitations are imposed upon that power, nor are any guidelines set forth limiting the exercise of that power.

A.S. 29.35.180(a) requires first and second class boroughs to provide for planning, platting and zoning pursuant to A.S. 29.40. A.S. 29.40.010 also requires first and second class boroughs to provide for planning, platting and zoning.

A.S. 29.35.220 and .300(b) would allow a third class borough to acquire the power to provide for planning, platting and zoning within a service area by the adoption of a referendum to that effect.

A.S. 29.35.250(b) requires a home rule or first class city within a third class borough to provide for planning, platting and zoning under A.S. 29.40, and allows a second class city located within a third class borough to so provide.

A.S. 29.35.260(c) requires home rule and first class cities outside a borough and permits a second class city outside a borough to provide for planning, platting and zoning under A.S. 29.40.

These provisions apparently impose no limitation on the planning, platting and zoning authorities of home rule boroughs. It appears that A.S. 29.40 does not apply to the exercise of those powers by home rule boroughs. A.S. 29.35.180(b); compare A.S. 29.35.180(a).

Article X, Section 11 of the Alaska Constitution provides: "A home rule borough or city may exercise all legislative powers not prohibited by law or by charter."

Given this provision and the apparent lack of any explicit limitations on the zoning authorities of home rule boroughs, home rule boroughs would have greatly expanded zoning authority under the bill. As the Supreme Court has stated:

> A municipal ordinance is not necessarily invalid in Alaska because it is inconsistent or in conflict with a state statute. The question rests on whether the exercise of authority has been prohibited to municipalities. The prohibition must be either by express terms or by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is accorded the weight of law.

Jefferson v. State, 527 P.2d 37, 43 (footnotes omitted, emphasis added).

This position was reiterated by the Supreme Court in Liberati v. Bristol Bay Borough, 584 P.2d 1115 (Alaska 1978).

> Merely because the State has enacted legislation concerning a particular subject does not mean that all municipal power to act on the same subject is lost. We have consistently rejected application of any such concept in our cases dealing with home rule municipalities. We do so now with respect to general law municipalities because our constitution requires that their powers be liberally construed as well. We believe that an appropriate accomodation can be made between the State and general law municipalities by a rule which determines pre-emption to exist, in the absence of an express legislative direction or a direct conflict with a statute, only where an ordinance substantially interferes with the effective functioning of a state statute or regulation or its underlying purpose.

584 P.2d at 1121-1122 (footnotes omitted, emphasis added).

It appears that the Alaska Supreme Court is applying the same test for state pre-emption to both home rule and general law municipalities. In summary, in order for a local ordinance to be determined invalid pursuant to Article X, Section 11 of the Alaska Constitution, there must be a prohibition by state statute, express or implied, or the ordinance must substantially interfere with the effective functioning of the state statute or regulation or its underlying purpose.

Under CSSB 180 and CSHB 170, there would be no explicit prohibition of any zoning ordinance adopted by a home rule municipality.

Federal lands may be unaffected by the zoning ordinances adopted by home rule boroughs in any event. See Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), affirmed per curiam 100 S. Ct. 1593 (1980).

Private land may be totally at the mercy of local zoning ordinances except insofar as inverse codemnation can be claimed and proved. It could be argued that, as applied to land granted to the natives by the Alaska Native Land Claims Settlement Act, zoning ordinances which prohibit development are inconsistent with the purposes of that act and therefore invalid. There is no precedent for such an argument and the success of such a position is questionable.

Any argument opposing the restriction of energy development on state lands by a local zoning ordinance adopted by a home rule borough would have to rely on the claimed inconsistency of the ordinance with the state's right to develop its natural resources. In that regard, determination of whether there is a limit to the home rule borough's authority to adopt ordinances prohibiting or restricting the development of energy sources requires a two-fold inquiry:

1. Are there Alaskan constitutional and statutory provisions which seek to implement a statewide policy with reference to the subject matter of the ordinances?

2. Do the proposed borough ordinances impede implementation of that policy?

While control of natural resources of the State of Alaska is specifically retained by state government pursuant to Article VIII of the Alaska Constitution, it is by no means certain that a court would rule that a local zoning ordinance which impedes or prohibits development of oil and gas in certain specific locations would be struck down as unconstitutional or unauthorized. In any event, the adoption of the current provisions concerning home rule regulationof land use as stated in CSSB 180 and CSHB 170 would insure extensive constitutional litigation to resolve these questions.

The question is further complicated by the fact that A.S. 29.40.040(a)(2) in the two bills would specifically authorize the use of a permitting system to regulate land use. This section places far greater authority in local government than the current law does. It is conceivable that an ordinance could be adopted which would prohibit all uses unless a land use permit is obtained from the local government involved. This would allow local governments to assess energy development projects on a case by case basis thus adding another layer to the regulation of energy development in general.

It should be noted that this permit procedure would be available to any local government that possesses or obtains planning, platting or zoning authority under A.S. 29.35 and A.S. 29.40 as proposed in CSSB 180 and CSHB 170.

Alaska State Legislature

Room 104
State Capitol
Juneau, Alaska 99811

Pouch V
Juneau, Alaska 99811

House of Representatives
Committee on Community & Regional Affairs

HOUSE C & R A COMMITTEE AGENDA

February 18, 1983

1. Call to Order
2. Roll Call
3. Today's Agenda - first hearing on HB 172 Title 29
4. Presentation of Witnesses -

   Doug Griffin - Department of Community & Regional Affairs
   Tam Cook - Division of Legal Services
5. Closing Tam Cook - Legal Div of Legislative Affairs
6. Adjournment

1. need - Sectional analyses of SB 1
2. See "Power section" - re home rule, etc
2. No more 3rd class boroughs, but they are encouraged to adopt a home rule charter. Leads to for home rule city.
4. Recall, referendum changed significantly.
5. allows municipalities choice of not taping pers. Prop.

Note - 6. no specific direction for Muni Clerk to write ballot propositions clearly, so that a yes vote means for, + no vote means against

Add the following:

PAGE: 99 LINE: 15

Submitted

Sec. 29.40.210. ACTIVITIES AUTHORIZED BY STATE OR FEDERAL AGENCIES. (a) Ordinances, regulations, permit decisions, coastal management or other land use plans adopted or promulgated under AS 29.35.180, AS 29.40 or AS 46.40 may not preclude or otherwise impede a hydrocarbon, mineral or geothermal exploration, development or production activity or project conducted pursuant to a lease, license, permit or other authorization issued by a state or federal regulatory agency or department having jurisdiction over the activity or project.

(b) The provisions of this section apply to home rule and general home rule and general law municipalities.

Alaska State Legislature

Speaker of the House of Representatives

Pouch V
State Capitol
Juneau, Alaska 99811
(907) 465-3720

Official Business

February 4, 1983

Mr. Wayne Mabry
Ombudsman
Municipality of Anchorage
Pouch 6-650
Anchorage, Alaska 99502

Dear Wayne:

Thank you for your recent letter regarding the lack of clarification in statutes and case history as it refers to recall petitions. I am aware of the recent problems this has caused in Anchorage and can appreciate the position you have been put in.

A complete revision of Title 29, Municipal Code, is indeed taking place agin this year. Last year, as I am sure you are aware, a similar bill passed but later became mired in controversy and was vetoed. SB 1 is now in the Senate committee process and is the vehicle which is being used to address this question. Eventually, should it pass the Senate, it will be referred to the Community and Regional affairs committee in the House chaired by Representative Barbara Lacher.

I am forwarding your letter and backup to her at this time for investigation and consideration. This matter could be taken up as a separate issue or incorporated as part of the overall Title 29 examination. In any case, it warrants investigation and Representatuve Lacher's committee has propoer jurisdiction over this matter. I will keep in touch with her to monitor the progress on this situation. You may wish to contact her as well at 465-4894.

I hope we can reach an acceptable solution. Please feel free to contact me at any time if I can be of assistance.

Very truly yours,

Joe L. Hayes
Speaker

JLH/jkd

Barbara- Joe has asked that you take this into consideration as you review Title 29- Thanks. Pat

FEB 3 1983

FEB 3 1983

February 1, 1983

Joe L. Hayes, Legislator
Alaska State Senate
Pouch V
Juneau, AK 99811

Dear Joe:

I have recently investigated a complaint about a recall petition for A Municipal Assemblyman. My investigation found that the State Law (AS 29.28.130) on recall petitions is not clear as to the legislative intent regarding a clerk's authority and/or responsibility. The legal opinions regarding similar cases are, in my view, conflicting. In the case I reviewed, the Anchorage Municipal Clerk ruled that the "grounds" stated in the recall petition did not "constitute incompetence or failure to perform prescribed duties" and rejected it. The Municipal CLerk's decision was based on several legal opinions which stated the Clerk had the responsibility and authority to review the grounds based on the word "content" in AS 29.28.160.

My case summary disagrees with those legal opinions and states that a recall petition can only be rejected for one of the reasons stated in AS 29.28.150. I feel that no individual can rule the grounds for recall insufficient except the voters in a duly called recall election. A copy of my case summary is enclosed with four attachments covering the legal opinions. Also enclosed is a copy of the Anchorage Municipal's Clerks January 11th letter to the complainant, Tom Staudenmaier.

I understand that you are involved in revising this portion of the Alaska Statutes and ask that you review my case summary. I would appreciate your comments on this problem and would like to be informed of any proposed changes to this state law. Also, if any hearings are being planned, please let me know as I would like to testify.

If you have any questions, please don't hesitate to call.

Sincerely yours,

Wayne D. Mabry
Ombudsman

WDM:sl

cc: Ruby Smith, Municipal Clerk
Jerry Wertzbaugher, Municipal Attorney
Steve Morrissett, Matanuska-Susitna Borough Attorney
Tom Staudenmaier, complainant

Attachments

3 JAN 83 CLERKS OFFICE

AKC PAC

PETITION FOR RECALL

OF GERRY O'CONNER, ASSEMBLYMAN

SECTION (2) TWO, SEAT C

P.O. BOX 8-9110
ANCHORAGE, AK
694-4982
694-2322

575 Total

509

We the undersigned registered voters of Section (2) two, Seat C, of the Municipality of Anchorage, which includes Fort Richardson, Eagle River and Chugiak, hereby petition for the recall of Assembly Member Gerry O'Conner under the Anchorage Municipal Charter, Article III, Section 3.03, Recall; Title 29, Section 29.28.140 for incompetence and failure to perform prescribed duties.

Said recall is based upon dereliction of duty of this representative of Eagle River and Chugiak. At the December 2nd, 1982 Municipal Assembly Meeting, Gerry O'Connor joined Tony Knowles, Mayor of Anchorage and voted to increase property taxes up to 50%. His other past actions and this ta increase are contrary to the best interest of the citizens of Eagle River and Chugiak.

	Print first and last name	Signature	Date	Full Residence Address (No P. O. Box Numbers)
1.	Jeanne Blahut	[illegible]	12-31-82	SR 2 Box 2314 Eagle River AK 9957
I.A. 2.	Christopher Walters	[illegible]	12/31/82	PO Box 1334 Chugiak
I.A. 3.	Roger R Rasmussen	[illegible]	12/31/82	P.O. Box 447 Eagle River 9957
I.A. 4.	Gary Laird Hall	[illegible]	12/31	133 Marcus St E.R. 995
N.R. 5.	Ronald Wild	Ronald Wild	12/31/82	SR 1 Box [illegible] Chugiak
N.R. 6.	Sharon Wild	Sharon Wild	12/31/82	" "
7.	Clifford Wilson	[illegible]	12/31/82	P.O. Box 1252 Chugiak 99567
8.	Rita E Wilson	[illegible]	12/31/82	Box 1252 Chugiak 99567
9	[illegible]	[illegible]	12-31/82	Box 773 Chugiak AK [illegible]
10.	[illegible]	[illegible]	12-31-82	" " " "
11	Gloria Kiddy	GLORIA KIDDY	1-2-83	Box 70 Citation ER 9957
12.	Lester Kiddy	[illegible]	1-2-83	" " " " "
13.	RA Morris	[illegible]	1/2/83	Lot 6 Blk 4 [illegible]
I. 14.	[illegible]	[illegible]	1/2/83	[illegible]
15.	[illegible]	[illegible]	1/2/83	28 [illegible]
I. 16.	[illegible]	Mary Ann [illegible]	1/2/83	Box 393 Eagle River AK

Date Petition Started: Dec. 29, 1982

ALASKA CONSERVATIVE POLITICAL ACTION COMMITTEE

Municipality of Anchorage

POUCH 6-650
ANCHORAGE, ALASKA 99502-0650
(907) 264-4311

OFFICE OF THE CLERK

January 11, 1983

Mr. Tom Staudenmaier, Chairman
AKC-PAC
P.O. Box 8-9110
Anchorage, AK 99508

Dear Mr. Staudenmaier:

On January 3, 1983, you presented to the Municipal Clerk a petition for recall of Assemblyman Gerry O'Connor. In accordance with AS. Section 29.28.160, the Municipal Clerk shall, within 10 days, review the petition for content and signatures and shall certify on the petition whether it is accepted or rejected.

A review of the signatures was made and of the 509 signatures, 354 were registered voters. In reviewing the grounds, the petition was found to be insufficient because the act i.e., voting on the municipal budget, does not constitute incompetence or failure to perform prescribed duties.

It is the decision of the Municipal Clerk the petition is insufficient and it is therefore rejected and will be filed for public record.

A copy of the legal opinion from the Municipal Attorney is enclosed for your information.

If you have any questions, please contact this office.

Sincerely,

Ruby E. Smith
Municipal Clerk

Municipality of Anchorage

MEMORANDUM

DATE: January 20, 1983

TO: Ruby Smith, Municipal Clerk

FROM: Office of the Ombudsman

SUBJECT: CASE SUMMARY, NO. 82-3

The following case summary is provided for your information and review. If you have any questions, clarifying information, or comments regarding our determination or any other aspect of the case, please bring them to our attention so that we can incorporate them into this summary.

CASE SUMMARY

Investigator Wayne D. Mabry In Date: 1-11-83 Close Date: 1-17-83

Category: MUNICIPAL CLERK'S OFFICE

Complaint Summary: The complainant presented a petition for the recall of Assemblyman Gerry O'Conner to the Municipal Clerk's office on January 3, 1983. On January 11, 1983, the Municipal Clerk rejected the petition as being insufficient on the grounds that "voting on the Municipal budget does not constitute incompetence or failure to perform prescribed duties". The complaint is that the Clerk's office does not have the authority under state law (AS 29.28.160) to rule on the alleged grounds.

Case Description: The complainant approached this office on January 3, 1983, after delivering the petition to the Clerk's office, and wished to file a complaint that the petition was going to be rejected based on an opinion by the Municipal Attorney. The complainant felt the Clerk had no right to solicit the Municipal Attorney's opinion. On that date, I informed the complainant the Clerk did have the right to solicit the Municipal Attorney's opinion and since no action had been taken by either the Clerk or the Municipal Attorney, this office could not investigate.

Based on the complainant's contact I did discuss the matter with the Municipal Clerk and Attorney explaining that an official complaint was probably going to be filed with this office if the petition was rejected. At that time, neither the Clerk nor the Attorney had made their determination; a reply by the Clerk to the petition was required by January 11, 1983.

In anticipation of a complaint being filed with this office and a decision to look into the matter on this office's "own motion", I then contacted the Matanuska-Susitna Borough attorney's office and the State Attorney General's office in Anchorage. I spoke with Steven H. Morrissett, Matanuska-Susitna Borough Attorney, about recall petitions because his office has gone through several in the last few years. Mr. Morrissett had given his opinion on the last recall petition filed in the Borough in a memorandum dated August 13, 1981, (attachment #1) which determined that the recall petition was insufficient. I provided a copy of this memorandum to the Municipal Clerk.

On January 11, 1983, the complainant came to this office to lodge a formal complaint based on the Clerk's rejection of the recall petition he had filed. His specific

complaint was that the Municipal Clerk did not have the authority to review the grounds and determine if they constituted "incompetency or failure to perform prescribed duties". I explained to the complainant that this office would accept the complaint and open a case file; however, any recommendation from this office could not change the outcome. Furthermore, the only possible way to change the outcome of the Clerk's decision is through the court system. This was based on my assumption that once the Clerk made a decision, within the 10 day time limit allowed by state law, there is no mechanism to allow the Clerk to change that decision.

I contacted Mr. David LeBlond at the State Attorney General's office. He helped me locate two memorandums regarding recall that had been prepared by the Attorney General's office in 1977. I went to the Attorney General's office, reviewed their files and made copies of the two memorandums regarding a recall petition of a School Board member located in the upper Railbelt School District. In this case there was no municipal clerk involved to handle the recall petition, so the Commissioner of the State Department of Education was handling it. [Later in this Case Summary, I will be quoting from the memorandums by the Assistant Attorneys General, Roger W. Pegues, dated April 12, 1977 and Ronald W. Lorensen, dated June 6, 1977 (attachment #2, #3).]

I then met with the Municipal Clerk, Ruby Smith, to discuss her decision and she informed me that she had contacted numerous Municipal Clerks around the State and had requested an opinion from the Muncipal Attorney, Jerry Wertzbaugher. Ms. Smith tended to agree with my analysis that the term "content" in Section 29.28.160 of the State Statutes, Examinations of Sufficiency, did not relate to determining if the grounds stated in the recall petition were sufficient. She made her decision based on legal opinions she had reviewed and discussions with other clerks around the State, giving the overwhelming opinion that state law did require her to rule on weather the grounds constituted "incompetence or failure to perform prescribed duties". Ms. Smith had contacted Mr. Rubini of the State Attorney General's office in Juneau and the discussion included the opinion by the lawyer that the petition was vali and should go on the ballot. When Ms. Smith requested this opinion in writing the response was that the State Attorney General's office would not give an opinion as the Municipality of Anchorage had an attorney for that purpose.

Basis for Determination: After my first contact with the complaint I reviewed a copy of the applicable state law regarding recall petitions. My first impression of the state law was that there was no legislative intent to have municipal clerks across the state of Alaska determine if the grounds stated in a recall petition were, in fact, "misconduct in office, incompetence, or failure to perform prescribed duties". I then discussed this concept with the Muncipal Clerk and the Municipal Attorney, but neither had yet formed a specific opinion although the Municipal Clerk did tend to agree with my concerns. I then met with the Matanuska-Susitna Borough attorney and also reviewed the files of the State Attorney General's office here in Anchorage. There were several other memorandums in the State Attorney General's files regarding recall petitions, but the two attached were the only ones that related to the specific question of "content".

In reading the January 11, 1983, opinion by Jerry Wertzbaugher, Municipal Attorney, (attachment #4) to the Municipal Clerk, I find that his basic premise revolves around the word "content" located in Section 29.28.160 and that this word "content" means the Municipal Clerk can determine if the grounds stated in the recall petition are in fact grounds for recall as stated in Section 29.28.140. Mr. Wertzbaugher's memorandum goes to great lengths to prove that the term "content" could only refer to the statement of grounds.

My position regarding the term "content" as used in the state law is that it does not nor could not refer to the grounds. In the State Statues regarding recall petitions, Section 29.28.140 states the grounds for recall. Then Section 29.28.150 entitled "Petition" states:

> (a) A petition seeking recall of one or more municipal officials is filed with the Municipal Clerk. The petition shall contain
>
> (1) the signatures and residence addresses of a number of voters as prescribed in §70(b) of this chapter for initiative and referendum;
>
> (2) the date each voter signed the petition; and
>
> (3) a statement of the grounds of the recall stated with particularity as to specific instances; B. A petition for recall must be filed with the Clerk within 60 days after the date of the earliest signature on the petition. (§2 ch 118 SLA 1972)

Then comes Section 29.28.160, Examination for Sufficiency. It states "The Municipal Clerk shall review the petition for content and signatures and shall certify the petition within 10 days of the filing date whether it is accepted or rejected ... ." In my non-legalistic mind it appears that the term "content" in Section 29.28.160 refers to the words "shall contain" in Section 29.28.150 and the only thing the Clerk can look at relating to the grounds is stated in number 3 above: that the grounds will be particular and specific. There is nothing in the law that says the Clerk can determine if the grounds, if assumed to be true, must fit the test of being "misconduct in office, incompetence or failure to perform prescribed duties". As stated in Mr. Morrissett's August 13, 1981 memorandum, I feel the charges must be definite enough to allow the public to determine the truth or falsity of those charges. Mr. Morrissett's memorandum rejecting the recall petition submitted was rejected on the basis that all five charges were too vague and would not give the voter a chance to determine if the Assemblyman should be recalled or not. I think Mr. Morrissett's memorandum tends to support my opinion because the reason for rejecting that recall petition was based on vagueness.

Also, two other recall petitions in 1980 were accepted by the Matanuska-Susitna Borought Clerk based on grounds related to how a particular Assemblyman voted on issues similar to the one in this case (copies of the two 1980 petitions are attached to Mr. Morrissett's memorandum).

It is difficult for me to imagine that the legislative intent was to have any clerk make this decision on the grounds for recall as it could relate to one or more of their bosses. If the clerk is appointed by a manager, the clerk's action could be construed as a political move by the administrative branch against the legislative branch. This would be a terrible position for a clerk to be put in; to have to say one of the members of the legislative body is guilty of "incompetence, misconduct in office or failure to perform prescribed duties" and could put a clerk's job in jeopardy.

The April 12, 1977 memorandum from the Assistant Attorney General regarding the recall of a School Board member states " The recall petition must contain a statement of grounds 'with particularity as to specific instances.'" The petition in question stated that its aim was to correct the incompetency of the School Board and cited two particular instances: "(1) the Board's approving a new position of Assistant Superintendent and (2) the Board's approving funds for a computer." The memorandum further goes on to state:

> It is not the role of the officer charged with ascertaining the petition's sufficiency to judge the merit or truth of the grounds asserted (68 Am. Jur.2d Public Officers and Employees § 245) It suffices that the reasons have been stated and with sufficient particularity to inform the office holder and the electorate. The latter will determine the merit of the charges.

I feel these "grounds" are similar in nature to the ones filed by the complainant and these were acceptable enough to call for a recall election. Also, it is clear that the electorate should determine the merits of the charges, not the clerk.

The second memorandum from the Attorney General's office dated June 6, 1977, goes into even further detail regarding the allegations and what exactly can or cannot be determined by the Commissioner in this case. The first part of the memorandum speaks to the fact that the allegation's truth or untruth is irrelevant to the question of whether or not the recall petition is legally sufficient. The memo goes on to say:

> The decisions of those courts are virtually unanimous in their holding that the question as to whether or not the charges contained in the

petition are true or false is irrelevant. ... the only question to be decided is whether or not the charges which have been made are sufficiently specific to allege incompetence or misfeasance if they were in fact true. ... 'recall is political in nature and it is for the people and not the courts to decide the merits of the reasons stated in the petition'.

Further, the memo goes on to say:

In those states where the power of recall is constitutionally established, the courts have viewed recall as a 'fundamental right' and have consistently said that statutes dealing with recall should be liberally interpreted and that any restrictions which are placed on the power of recall must be strictly construed. ... Consequently, neither you nor the Board may determine the propriety of the policy in this area or the sufficiency of the petitions based on potential factual inaccuracies. A good general description of the judicial approach to recall can be found in State ex rel. Citizens Against Mandatory Bussing v. Brooks, 492 P.2d 536 (Wash., 1972):

First, in determining the validity of recall charges, courts are limited to examination of the charges stated and cannot inquire into factual matters extraneous to the allegations. Second, courts must assume the truth of the charges in determining whether legally sufficient grounds for recall

> have been stated. Third, just as there can be no inquiry into the truth or falsity of the charges, there can be no inquiry into the motives of those filing the charges. Fourth, recall charges are sufficiently specific if they are definite enough to allow the charged official to meet them before the tribunal of the people.

These statements lead me to believe that rejecting the petition because the grounds are political is invalid as everything a politician does is political. Also, rejecting the petition because it does not fit the definitions of "incompetence or failure to perform prescribed duties" is a right that can only be exercised by the voters.

My concern is if the legal opinion stated by Jerry Wertzbaugher and Steven Morrissett is correct. Then, what I hear this saying to those voters who wish to submit a recall petition, is to make allegations that, although possibly blatant lies, could be determined non-political statements and therefore allow a recall election. I do not think this concept is the intent of the state law. I totally agree with the statement that the recall petition is a "fundamental right" and that these petitions should be liberally interpreted and that restrictions placed on the power of recall must be strictly construed. Otherwise, the voters, as in this case, are not being allowed their fundamental right to a recall election.

Based on all of the above information, my opinion is that the state law does not allow the Municipal Clerk to review the content of a recall petition as it relates to the grounds for recall as stated in the state law, I have determined this case to be JUSTIFIED.

Note: I did not seek another legal opinion for two reasons. The first is my assumption that this matter will have to be settled in the courts which will generate additional legal opinions. Secondly, I felt I had enough information on which to base my determination.

Case Action:

This investigation leads me to the opinion that the state law needs to be revised in such a way that this question of content can be cleared up and made very specific as to what the legislature's intent is in regards to review by any municipal clerk within the State. Based on that I will be forwarding my memorandum on to members of the State Legislature who are interested in amending the Alaskan Statues regarding recall petitions. It is my understanding that some changes were recently passed by the State Legislature but vetoed by the Governor.

In my discussions with the complainant I stated that I felt the recall effort was premature if based on a Municipal tax increase. My reasoning is that approving the budget does not automatically raise taxes. Taxes are set in April or May by the Assembly only when it approves a specific mill rate for each Municipality service area. At this time the Assembly still retains the option to not raise the mill rate which, in effect, would lower the budget.

Wayne D. Mabry

WAYNE D. MABRY, OMBUDSMAN

WDM:sl

Attachments (4)

cc: Complainant
Assembly Representatives
Jerry Wertzbaugher, Municipal Attorney
Steve Morrissett, Matanuska-Susitna Borought Attorney

Matanuska-Susitna Borough

BOX B, PALMER, ALASKA 99645 • PHONE 745-3246

BOROUGH ATTORNEY'S OFFICE

August 13, 1981

MEMORANDUM

To: Evelyn Thompson, Borough Clerk

From: Steven H. Morrissett, Borough Attorney

Subject: Recall of an Elected Official--Procedures

The recall of an elected official is governed by AS 29.28.130--.250. Any elected official of the Borough may be recalled by the voters after he or she has served six months in office, subject to the provisions of those sections. The subject of this memorandum is discussed in relation to a petition received on August 6, 1981, to recall Assemblyperson Dorothy Jones.

Recall Charges

It is for the voters to decide whether the charges in the recall petition are true and, if true, whether they are enough reason for recalling the elected official. However, it is the duty of the Borough Clerk to determine whether the charges alleged, if taken as true, constitute "misconduct in office, incompetence or failure to perform prescribed duties" within the meaning of the law. Bocek v. Bagley, 505 P. 2d 814 (Wash 1973). AS 29.28.140.

The requirement that reasons be provided means that a recall petition is not sufficient if it is submitted solely for political reasons. However, the Clerk must look only to the language of the charge in determining whether adequate reasons are alleged in the petition.

Charges must be made which "state the grounds with particularity as to specific instances." AS 29.28.150(a)(3). An allegation of "misconduct", for instance, must be supplemented by specific facts which demonstrate "misconduct". The charges must be definite enough to allow the public to determine the truth or falsity of the charges. If even one charge, or if all together meet these requirements then the petition is sufficient.

"Misconduct in office" includes any wrongful conduct which affects or interferes with performance of official duty and includes misfeasance or malfeasance: the performance of a duty in an improper manner or the doing of an unlawful or unethical act. Knowledge by the official that the act was "misconduct" may not be relevant except to the extent that knowledge is required to show misconduct.

"Incompentence" ordinaril means intellectual, physical or moral inability to carry out a required task. It may include serious ignorance of basic information or a lack of mental or emotional ability necessary to carry on the duties of the official. It would not include making decisions which were politically unpopular.

"Failure to perform prescribed duties" means a failure to carry out those responsibilities of the office set out in state or local laws. Prescribed duties are numerous, from the obligation to attend Assembly meetings unless excused, to ordering elections on the acquisition of Borough powers if requested by the voters. MSB 2.12.070(F), 2.04.050. A "prescribed" duty may be created by implication; e.g., when the Assembly as a whole is required to perform a function, it is the implicit duty of each official who is a member to aid in the performance of that function. However, it is not a "prescribed duty" of each Assemblyperson to take every conceivable action which might make that official a more informed or more popular representative. Thus, it is not a "prescribed duty" to attend meetings which are not official or are sponsored by other non-Borough organizations. It is not a "prescribed duty" of an Assemblyperson to inform all constitutents of the economic impact of an Assembly decision.

On the Jones recall petition, five charges were made, as set forth in the footnote below.1/ The petition characterizes these charges as "incompetency and/or failure to perform prescribed duties." However, the sufficiency of the petition is not determined by this characterization, but by whether any charge, or all of the charges together, constitutes misconduct in office, incompetency or failure to perform prescribed duties.

The first charge is that Assemblyperson Jones has generally failed to consult with constitutents or keep them informed. Taking this as true, it fails to allege specific instances which would constitute

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1/ (1) Has generally failed to consult with constituents and has failed to keep citizens informed concerning the various activities of the Borough Assembly and Borough Government; (2) Has failed to inform constituents concerning the true size and scope of Borough Government and the sources of revenues for the operation of Borough Government. This was especially true during early 1981 at Borough budget meetings; (3) Has failed to inform and/or consult with constituents concerning future property tax liabilities if and when present sources of state and federal revenues should cease to be available for the operation of the Borough Government. Specifically, she failed to discuss these matters at Borough budget meetings in 1981; (4) Has failed to recognize the desires of many constituents to lead quiet, peaceful, and uncomplicated lifestyles with a minimum of government regulation, intrusion, and interference. Has sponsored and/or voted for ordinances which interfere with privacy rights and individual freedoms of citizens; and (5) Has favored and/or voted for more expensive and burdensome Borough Government despite the objections of many of her constituents. Specifically, in May 1981, she ignored a petition signed by approximately 50 of her constituents, the purpose of w was to inform the Borough Assembly that many Borough citizens were against the addition of permanent employees to the general Borough Government staff.

statutory grounds for recall. It does not allege refusal to talk with constitutents in specific cases , nor does it state the nature of the failure to inform. It is not a prescribed duty of an Assemblyperson to inform all constitutents of all matters. The charge is not specifically clear to establish a valid reason for recall, nor would it generally be a sufficient charge if referenced to a specific instance.

The second charge is that Jones has failed to inform constitutents concerning the true size and scope of the government and its sources of revenue, particularly during the 1981 Budget hearings. This charge sets a specific time, but is as vague as the first charge in showing an act constituting misconduct, incompetence or failure of duty. The "true size and scope of government" is no more specific a subject than "various activities". There is no catagorical duty of Assemblypersons to inform all constitutents of all matters in a representative form of government.

The third charge is that Jones has failed to inform constitutents of future tax liability "if and when present sources of state and federal revenues should cease to be available..." This is so vague as to be impossible to respond to or for voters to determine whether the charge is true. It also fails for the reasons stated previously.

The fourth charge is that Jones has "failed to recognize the desires of many constitutents..." This is strictly a "political" reason for wanting a different representative. It is inevitable that some voters will be disappointed by every action taken by an Assemblyman. The elective process is the remedy. Recall requires specific, limited grounds for removal of an official before the end of his or her regular term.

The fifth charge is that Assemblyperson Jones has voted for "expensive Borough government", despite objections and a petition signed by 50 constitutents. If true, this is a charge that the elected official has acted contrary to the wishes of certain voters, not that the official is guilty of misconduct or failure of duty.

No charge states an allegation of incompetence, i.e. that Assemblyperson Jones is incapable of performing her duties. No charge alleges misconduct in office, i.e. an illegal or unethical act. Allegations directed towards claims of failure to perform prescribed duties establish no duties that were not performed. No allegation is made by the petition which is a basis for recall and which could be considered by informed voters as to its truth. The charges set forth in the recall petition are therefore insufficient. 2/

2/ This opinion is consistent with two previous written opinions of attorneys Allen Tesche and Harland Davis, provided at the request of the Clerk in 1980. Each of those opinions, issued in relation to petitions for the recall of Assemblypersons Schmall and Hitchcock, concluded that certain reasons on the petition were not legally sufficient. The charges that Schmall and Hitchcock failed to discuss "certain matters and general charges were noted not to be sufficient. However, charges of a specific instance of slander, excessive absences from meetings and illegal actions related to dismissal of the manager in violation of the law were detailed and sufficient to present to the voters.

Form of Petition Signatures

A recall petition must have a statement of the grounds of the recall stated with particularity. It must have the signature, residence address and signing date for each signer.

There is no requirement that the petition be on one page. Where the petition extends to several pages, each page should be attached to the others which form a complete petition and should be identified clearly as to the purpose of the petition to assure no signer is misinformed as to what he is signing. However, it is permissible to circulate more than one petition, each of which can be filed in a joint petition, if the form of each petition is identical.

It is preferable if each page of a petition has a full statement of the petition or a summary clearly setting forth the purpose. There is no apparent requirement that proof be provided that all sheets in a petition were circulated as a unit; some states require an affidavit to that effect.

The signatures on the petition must meet certain statutory requirements. If the area concerned by the petition in the Borough has fewer than 7,500 persons, the petition must contain the signatures of persons who are registered to vote in and living in the concerned area equal to 25% of the total number of votes cast at the last general election within that area. If the concerned area has 7,500 persons or more, the petition must be signed by voters equal in number to at least 15% of the total votes cast in the last general election in that area. In this case, the concerned area is District 5 only.

The signature must be in ink or indelible pencil. To be valid a signature must be followed by the date of signature and the person's current residence address. Each and every signature on the petition must have been signed within 60 days of the filing of the petition with the clerk.

Only those persons who are currently registered voters within the concerned area may be counted toward the petition. The petition itself is not an affidavit of residency; the required voter registration establishes the validity of a person's signature, residence and right to sign the petition. Because of the lack of specific residence addresses within the Borough, certain leeway must be granted to describing the location of residence. However, a signature may not be counted if it cannot be ascertained from the address that the person lives within the area concerned.

Processing a Petition

The municipal clerk is required to review the petition for content and signatures and accept the petition within ten days of the filing date. Until such time as the petition is accepted, any signer of the petition may withdraw his signature upon written application to the clerk.

If the petition is sufficient, the clerk should immediately submit it to the Borough Assembly to be placed on the ballot within 75 days of submission of the petition to the clerk. If the clerk finds that there are insufficient signatures, or that the petition is otherwise inadequate, the clerk must let the petitioners know within the ten day period for review of the petition. The petitioners are entitled to an additional ten days from the date of rejection to provide additional signatures.

If the petition is insufficient for any reason other thatn insufficient signatures, it must be rejected in its entirety. If insufficient signatures are provided within a supplemental ten day period, the petition shall also be rejected. A new recall petition cannot be filed for six months after rejection of the first petition.

The recall petition must be placed on the ballot within 75 days of submission of the petition. The question on the ballot must include:

(1) The grounds for recall as stated in the recall petition.

(2) The elected officer's response to the petition, in 200 words or less.

(3) The proposition questions: "Shall (the elected official) be recalled from the office of (office)? Yes___ No___

A majority vote on the question is required to recall an officer. Failure to recall an elected official prevents the filing of a new recall petition within six months after the election. A successful recall requires that an election be conducted for its successor at least ten but not more than 45 days after the date of the recall election, except that the election for the successor may be held at a regular election if occurring within 75 days of the recall election.

Steven H. Morrissett
Borough Attorney

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(13)

RECALL PETITION

THE PETITION FOR RECALL OF ASSEMBLYPERSON DOROTHY JONES (Rejected) Page 1 of 13

THE UNDERSIGNED VOTERS of the Matanuska-Susitna Borough Assembly District 5, currently composed of Precincts 3, 8, 15, 17, 21, and 50, seek the recall of DOROTHY JONES due to incompetency and/or failure to perform prescribed duties. Each of the undersigned states that he/she petitions for the recall of DOROTHY JONES for each of the instances of incompetency and/or failure to perform prescribed duties cited below with or without the other, and whether such instances constitutes incompetence, failure to perform assigned duties, or both: (1) Has generally failed to consult with constituents and has failed to keep citizens informed concerning the various activities of the Borough Assembly and Borough Government; (2) Has failed to inform constituents concerning the true size and scope of Borough Government and the sources of revenues for the operation of Borough Government. This was especially true during early 1981 at Borough budget meetings; (3) Has failed to inform and/or consult with constituents concerning future property tax liabilities if and when present sources of state and federal revenues should cease to be available for the operation of the Borough Government. Specifically, she failed to discuss these matters at Borough budget meetings in 1981; (4) Has failed to recognize the desires of many constituents to lead quiet, peaceful, and uncomplicated lifestyles with a minimum of government regulation, intrusion, and interference. Has sponsored and/or voted for ordinances which interfere with privacy rights and individual freedoms of citizens; and (5) Has favored and/or voted for more expensive and burdensome Borough Government despite the objections of many of her constituents. Specifically, in May 1981, she ignored a petition signed by approximately 50 of her constituents, the purpose of which was to inform the Borough Assembly that many Borough citizens were against the addition of permanent employees to the general Borough Government staff.

RECEIVED
JUL 10 1981
OFFICE OF THE OMBUDSMAN

THE VOTERS OF ASSEMBLY DISTRICT 5 RESPECTFULLY REQUEST THAT A RECALL ELECTION BE HELD AS SOON AS POSSIBLE.

PRINTED NAME	SIGNATURE	MAILING ADDRESS	RESIDENCE ADDRESS	DATE
A E Frantz	A E Frantz	Box 17-351 Big Lake	Same	7-15-81
JUDY RIFE	Judy Rife	P.O. BOX 2687 Palmer	KNIK RD ½ mile APT #1 L	7-15-81
JAMES OLSON	James Olson	P.O. Box 17-249 Big Lake	Same Big Lake	7-15-81
Raymond A Hall	Raymond A Hall	PO Box 17306 Big Lake	Lot 25 Burkeshore	7-15-81
Bethel C. Hall	Bethel C Hall	PO Box 17306 Big Lake	Lot 25 Burkeshore	7-15-81
Mike Winchester	Mike Winchester	PO. BOX 17229 Big Lake	Lot 22 Butler Sub	7-15-81
Lola J Jensen Winchester	Lola Jean Winchester	P.O Box 17229 Big Lake	Lot 22 Butler Sub	7-15-81
Herbert L Rinn	Herbert L Rinn	St. Rt ABOX 470 Willow	Mile 91½ PHW	8-1-81
Margaret S Rinn	Margaret S. Rinn	SRQ-Box 490, Willow, AK.	Mile 91½ Parks Highway	8-1-81
Paul E. Hipps	Paul E Hipps	Box 133 Wasilla AK	Mile 1 Valley Spur Rd	8/1/81
Stephanie Cogdill	Stephanie Cogdill	P.O. Box 17048 Big Lake	mile 24 Big Lake Rd.	8/2/81
Mary J Oberg	Mary J. Oberg	Box 17-334 Big Lake	Knollwood Heights Big Lake	8/2/81

RECALL PETITION

THE PETITION FOR RECALL OF ASSEMBLYPERSON KATHRYN R. SCHMALL

The undersigned voters of the Matanuska-Susitna Borough Assembly District 4, currently composed of precincts 18, 19 and 35, seek the recall of Kathryn R. Schmall due to incompetence and/or misconduct. Each of the undersigned states that he/she petitions for the recall of Kathryn R. Schmall for each of the instances of incompetence and/or misconduct cited below with or without the others, and whether such instance constitutes misconduct, incompetence, or both.

A. Voting at the Assembly meeting on June 3, 1980 to dismiss the Borough Manager, constituting incompetence because (1) the vote was based upon unsubstantiated charges presented at an executive session, which charges affected the character and reputation of the Manager, without allowing the Manager an opportunity to respond to the charges or confront the witnesses against him; (2) failing to publish the topic of the Manager's dismissal on the Assembly's agenda, not allowing for appropriate input from all interested segments of the community; and (3) voting to dismiss the Manager capriciously, without making any provision for a smooth administrative transition at a critical period in the development of several major economic development projects in the Point McKenzie area, generating the likelihood of great economic loss to the Borough and its residents.

B. Voting to hold executive sessions beyond the authority granted by statutes, in derogation of the people's right to attend and observe the Assembly's deliberations.

C. Refusing to discuss Borough Assembly actions with constituents, who have a right to know.

D. Making slanderous remarks against the Borough Manager at the Wasilla Chamber of Commerce meeting of May 20, 1980.

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The voters of Assembly District 4 respectfully request that a recall election be held as soon as possible.

PRINTED NAME	SIGNATURE	MAILING ADDRESS	RESIDENCE ADDRESS	DATE
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Charlotte Cremer	Charlotte Cremer	P O Box 657 Wasilla 99687	687 Southway Ave	6/30/80
Theodore Cremer	Theodore E Cremer	PO Bx 657 WASILLA 99687	687 Southway Ave	6/30/80
John Poole	John Poole	Box 525 Wasilla	Cedarflying + Gilbert Rd	7/4/80
[illegible]	[illegible]	Box 155 Wasilla ak	Silverbow County, Mt	7/4/80
Colleen G. Cottle	Colleen G Cottle	PO Box 341 Wasilla	Lakeview Ave	7-5-80
[illegible]	[illegible]	[illegible]	Susitna East	7-5-80

RECALL PETITION

Certified for submission to the lieutenant. 123 signatures. Evelyn Thompson Borough Clerk 5-1-80

THE PETITION FOR RECALL OF ASSEMBLYPERSON JAMES (JIM) M. HITCHCOCK

The undersigned voters of the Matanuska-Susitna Borough Assembly District 3, currently composed of precincts 10 and 30, seek the recall of James (Jim) M. Hitchcock due to incompetence and/or misconduct. Each of the undersigned states that he/she petitions for the recall of James (Jim) M. Hitchcock for each of the instances of incompetence and/or misconduct cited below with or without the others, and whether such instance constitutes misconduct, incompetence, or both.

A. Voting at the Assembly meeting on June 3, 1980 to dismiss the Borough Manager, constituting incompetence because (1) the vote was based upon unsubstantiated charges presented at an executive session, which charges affected the character and reputation of the Manager, without allowing the Manager an opportunity to respond to the charges or confront the witnesses against him; (2) failing to publish the topic of the Manager's dismissal on the Assembly's agenda, not allowing for appropriate input from all interested segments of the community; and (3) voting to dismiss the Manager capriciously, without making any provision for a smooth administrative transition at a critical period in the development of several major economic development projects in the Point McKenzie area, generating the likelihood of great economic loss to the Borough and its residents.

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B. Being absent from an excessive number of regular and special Assembly meetings, and frequent tardiness at meetings he attended. These absences have substantially hindered the conduct of Borough business by necessitating postponements and reconsiderations of important Borough legislation to the detriment of the Borough and its residents.

The voters of Assembly District 3 respectfully request that a recall election be held as soon as possible.

PRINTED NAME	SIGNATURE	MAILING ADDRESS	RESIDENCE ADDRESS	DATE
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Elroy Francis Garcia Jr.	Elroy Garcia	Star Route Box 3095	mile 3 Wasilla Alaska	7/20/80
Clara E Garcia	Clara E. Garcia	Star Route Box 3095	mile 3 Wasilla Alaska	7/20/80
Michael K. Betts	Michael K Betts	P.O. Box 1012	mile 4 Woodla Fishlake	7-20-80
John A Antoni	John Antoni	STAR ROUTE BOX 3070 WASILLA	MILE 2 SCHRECK ROAD	7/20/80
Edna M Slather	Edna M. Slather	Box 443 WASILLA	Mile 2½ Schreck Rd	7/20/80
[illegible]	[illegible]	P.O. BOX 3040	Wasilla, AK	[illegible]
[illegible]	[illegible]	P.O. Box 1-3040	Wasilla Alaska	[illegible]
[illegible]	Patsy KNEFF	SILA. BX-6083	Palmer Alaska	7-20-80

ATTACHMENT #2

Hon. Marshall L. Lind
Commissioner
Dept. of Education

April 12, 1977

Avrum M. Gross
Attorney General

Petition for recall, Upper Railbelt school board

FROM: Rodger W. Pegues
Assistant Attorney General

As you requested, we have reviewed the recall petition from REAA #14, the Upper Railbelt School District. In our opinion, the petition meets the statutory requirements, and we advise that it be accepted as sufficient in form and substance. */

By law, the grounds for recall are misconduct in office, incompetence, or failure to perform prescribed duties. AS 29.28.140. The recall petition must contain a statement of the grounds, "with particularity as to specific instances." AS 29.28.150(a)(3). **/ While certain of the recall petition's allegations are vague and do not meet the statutory requirements for particularity, the petition recites that the "aim is to correct the incompetency of the School Board," and the petition states two particular instances of alleged misconduct or incompetency: (1) the board's approving a new position of assistant superintendent, and (2) the board's approving funds for a computer. Accordingly, while far from a perfect instrument, the petition does facially meet the statutory requirements.

It is not the role of the officer charged with ascertaining the petition's sufficiency to judge the merit or truth of the grounds asserted. 60 Am. Jur.2d Public Officers and Employees § 245. "It suffices that the reasons have been stated and with sufficient particularity to inform the office holder and the electorate. The latter will determine the merit of the charges.

*/ This assumes that a check of the signatures results in a determination that the petition has been signed by the required number of qualified voters.

**/ AS 14.08.081 makes REAA school board members subject to recall under AS 29.28.130--250, except that the commissioner of education performs the municipal clerk's functions and the state Board of Education performs the functions of the assembly. All elected public officials in Alaska, except judicial officers, are subject to recall. Alaska Const., art. XI, § 8.

In preparing the recall ballot, you are required to include on it "the grounds as stated in the recall petition." AS 29.28.210(1). In our view, this should be interpreted to mean the grounds as stated with particularity so as to comply with AS 29.28.150(a)(3), which requires particularity. Therefore, the statement of grounds on the ballot should exclude the non-specific grounds and include those stated "as to specific instances."

The first statement of grounds in the petition (consistently ignored the will, etc.) may or may not meet these criteria. It is probably sufficiently particular to advise the officers and the electorate in the district. It does not give "specific instances." You should exercise your own judgment as to whether it should be included on the ballot based on your knowledge of the situation, i.e., if you believe that, under the circumstances, the statement adequately recites the alleged misconduct, you should include it on the ballot.

The second statement (created dissension, etc.) is facially inadequate. It states a broad conclusion without the slightest reference to a particular act or instance. It should not be placed on the ballot.

The third statement (new position) and the fourth statement (allocated funds for a computer) are particularized and give specific instances. They should be placed on the ballot.

The statements of grounds placed on the ballot are to be "as stated in the recall petition." AS 29.28.210(1). Following these allegations, the official's rebuttal or defense of not more than 200 words is placed. AS 29.28.010(2).

This is a proceeding without precedent in Alaska, and if you require additional assistance, please do not hesitate to request it.

RMP:chp

ATTACHMENT #3

June 6, 1977

Marshall L. Lind
Commissioner
Department of Education

RECEIVED
JAN 12 1983
OFFICE OF THE OMBUDSMAN

Avrum M. Gross
Attorney General

By:
Ronald W. Lorensen
Assistant Attorney General

Recall petition of the Upper Railbelt School Board
A.G. File No. J-66-512-77

This will confirm my oral advice to you of May 19, 1977 in response to certain questions which you raised as to whether or not the charges contained in the recall petition filed in the above-referenced matter were legally sufficient to require that a recall election be undertaken. I advised you that those charges were in fact sufficient, despite some substantial questions which you had raised as to the apparent untruth of certain of the factual allegations.

While a review of the relevant school board minutes for the Upper Railbelt School District does seem to indicate that certain of the factual allegations contained in the petitions are indeed not correct, this factor, under applicable judicial decisions dealing with the question of recall elections, is irrelevant to the question of whether or not the recall petition is legally sufficient to bring on the holding of the recall election. This point has been addressed in numerous judicial decisions throughout the United States, although it has not yet been addressed in Alaska. The decisions of those courts are virtually unanimous in their holding that the question as to whether or not the charges contained in the petition are true or false is irrelevant. According to those decisions, the only question to be decided is whether or not the charges which have been made are sufficiently specific to allege incompetence or misfeasance if they were in fact true. As recently stated by the Wisconsin Supreme Court in In re Recall of Certain Officials, 217 N.W.2d 277 (1974), "recall is political in nature and it is for the people and not the courts to decide the merits of the reasons stated in the petition."

The power of the people to recall their elected officials is established by our state constitution in Article XI, Section 8 which provides as follows:

> 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.

In those states where the power of recall is constitutionally established, the courts have viewed recall as a "fundamental right" and have consistently said that statutes dealing with recall should be liberally interpreted and that any restrictions which are placed on the power of recall must be strictly construed. See, for example, Bunnen v. City of Boulder, 525 P.2d 416 (Col., 1974).

Although you and the state Board of Education may disagree with respect to the established policy behind the widespread judicial support for recall powers, and though you have substantial concerns over the truth of the factual allegations made in the petitions, neither of these areas are concerns with which either you or the Board in your respective roles in the recall procedure have any vested authority. Consequently, neither you nor the Board may determine the propriety of the policy in this area or the sufficiency of the petitions based on potential factual inaccuracies. A good general description of the judicial approach to recall can be found in State ex rel. Citizens Against Mandatory Busing v. Brooks, 492 P.2d 536 (Wash., 1972):

> This court has on numerous occasions interpreted and applied these constitutional and statutory provisions. Some basic rules may be gleaned from these prior cases. First, in determining the validity of recall charges, courts are limited to examination of the charges stated and cannot inquire into factual matters extraneous to the allegations. Second, courts must assume the truth of the charges in determining whether legally sufficient grounds for recall have been stated. Third, just as there can be no inquiry into the truth of falsity of the charges, there can be no inquiry into the motives of those filing the charges. Fourth, recall charges are sufficiently specific if they are definite enough to allow the charged official to meet them before the tribunal of the people. Finally, any one sufficient charge requires the holding of a recall election. (Citations omitted.)

Consequently, as you can see from the above, I am able to reach only one conclusion in this matter and that is that you and the State Board must proceed to hold the recall election called for under AS 14.08.081.

RWL:jf

Municipality of Anchorage

MEMORANDUM

ATTACHMENT #4

DATE: January 11, 1983

TO: Municipal Clerk

FROM: Municipal Attorney

SUBJECT: Petition for Recall of Gerry O'Connor, Assemblyman, Section 2, Seat C

ISSUE PRESENTED

Are the grounds set forth in the above referenced recall petition sufficient as a matter of law under the provisions of AS 29.28.150 to permit a submission by the Clerk to the Municipal Assembly for the purpose of calling an election pursuant to AS 29.28.200?

CONCLUSION

The above referenced petition is legally insufficient and no recall election may therefore be called. Under AS 29.28.160 - .170, the Municipal Clerk is required within 10 days of submission to examine the sufficiency of the recall petition, both as to the adequacy of signatures and for content with respect to compliance with AS 29.28.130 - .150. On the basis of the authorities and the reasoning referenced below, it is my opinion that an individual assembly member's vote on an ordinance approving the municipal budget cannot, as a matter of law, constitute misconduct in office, incompetence, or failure to perform prescribed duties under the meaning of AS 29.28.140, if that vote was in compliance with state and municipal law governing ethics and conflicts of interest and if the measure passed was in all respects a lawful action.

DISCUSSION

The necessity and sufficiency of specific grounds to support a recall petition is a matter governed by applicable constitutional or statutory provisions. For this reason, the weight given to various legal precedents from other jurisdictions depends on an examination of the specific legal framework involved. Generally, there would be no examination of the legal sufficiency of grounds where the governing statute permits removal from office for any reason or where grounds must be stated in a general manner. This is the case in many states, including, for example, Colorado, Michigan, Oklahoma and Wisconsin. In those states, it is held that recall can be based merely on a disagreement with the policies of the officeholder. A different rule applies, however, where, as in Alaska, the governing statute dictates that only certain grounds are suf-

ficient and that those grounds must be stated "with particularity" and be based on "specific instances". The rule is well stated by Antieau in his treatise on the Law of Municipal Corporations:

> Generally, courts refuse to allow recall proceedings to go forward where the grounds or charges stated in the petition do not satisfy local constitutions or legislation. Where local constitutions, statutes or charters limit the recall to malfeasance, misfeasance. nonfeasance in office or comparable grounds, it has been held that the petitions are inadequate when they indicate only disagreement on matters of policy or political criticism. Antieau, Local Government Law, § 22.20.

The statute in question clearly applies to home rule municipalities. AS 29.28.130. It is equally clear that the remedy of recall is only available for certain specified reasons comparable to malfeasance, misfeasance, or nonfeasance in office:

> AS 29.28.140 Grounds. Grounds for recall are misconduct in office, incompetence, or failure to perform prescribed duties.

This degree of particularity coupled with the stated limitation on grounds constitutes by itself a strong implication that it is insufficient to rely merely on a disagreement with the officeholder's policies. The cited statutes would be superfluous if, as under the governing laws of some states, recall could be applied at any time to test the political strength of the legislator. This principle was well articulated by the Supreme Court of West Virginia in the case of State ex rel Perkins v. City Council of City of Parkersburg, 121 S.E. 489:

> To adopt the view of petitioner [that it is sufficient to allege mere political disagreement] would make it unnecessary for the petition to contain any real grounds. The official could be recalled as well on account of his religious beliefs or political affiliations, as for corruption or malfeasance in office; and if those who desire his removal were unsuccessful in one election the process might be continued inde-

> finitely at the expense of the taxpayers. And suppose the faction seeking power through recall of those in office should be successful and the first, second, or third attempt, then the ousted faction could then in turn employ the same in repeated trials to regain its lost prestige, and the interminable wrangell and turmoil would go on. This would result in the fostering and maintaining of political feuds to the detriment of society and the great expense of the taxpayers. 121 S.E. at 493.

Additional support for this conclusion is found in AS 29.28.160 entitled, EXAMINATION FOR SUFFICIENCY. That section requires that the Municipal Clerk review a recall petition for content as well as for signatures. Since a petition is required to contain only dated signatures with addresses and a statement of grounds, the term "content" could refer only to the statement of grounds. Any other conclusion would make the use of the term "content" superfluous. On this point, note that AS 29.28.170(a) provides for a supplemental petition if, and only if, it is rejected on the basis of insufficient signatures. The statute also provides that "if the petition is insufficient for any other reason, it shall be rejected and filed as a public record." (emphasis added). Obvious from the emphasized language, the legislature contemplated that the Clerk's duties include an examination of the petition for compliance with other requirements. This interpretation of the Clerk's authority is consistent with the Alaska Supreme Court's decision in Warren v. Boucher, 543 P.2d 731. In that case, the Court approved the Lt. Governor's determination that an initiative petition was "substantially the same" as a measure passed by the legislature and therefore barred from the ballot. The Court's approval of the Lt. Governor's authority in that case involved a statute which, like the one under analysis here, permitted the highest election officer of the jurisdiction to make certain threshold decisions on the validity of a petition. This is not an unusual position. In the case of Steadman v. Halland, 641 P.2d 448, the Supreme Court of Montana addressed the same issue; "We agree that the statement of grounds for recall to be included in the petition is 'part of the form of the petition' and find that the filing officer not only is 'empowered to' but is required to reject the petition when it does not comply with statutory requirements." (emphasis added) 641 P.2d at p. 453.

The inquiry need not be confined to the governing statute alone as there exists precedent from other states with similar statutory language.

In Jacobsen v. Nagle, 96 N.W.2d 569, the Supreme Court of Minnesota was called upon to apply constitutional and charter provisions similar to those applicable here. That court found that where recall is founded on specific grounds relating to misconduct in office, the allegations must state more than criticism of the officeholder's policies or positions.

The courts of Florida have also ruled that there must be a statement of facts charging specific misdeeds related to performance of office. In the case of Piuer v. Stallman, 198 So.2d 859, for example, the court specifically stated that the valid exercise of a legislative judgement was not grounds for recall. In another case, the court stated that "errors in judgement cannot be sufficient grounds for recall, nor can legitimate and authorized actions, no matter how unpopular they are." Taines v. Galvin, 279 So.2d 9. In Richard v. Tomlinson, 49 So.2d 798, the court held a charge did not sufficiently comply with the statutory language when it merely alleged activities that were "inimical to the best interest of the citizens".

The basis for recall in Washington, like here, is related to malfeasance, misfeasance and nonfeasance in office. The Washington Supreme Court has observed: "Misfeasance or malfeasance...have been held to be comprehensive terms that include any wrongful conduct that affects, interprets, or interferes with the performance of official duties....Additionally, we have held that 'misfeasance' means 'the improper doing of an act an officer might lawfully do; or, in other words, it is the performance of a duty in an improper manner.' Malfeasance means the commission of an unlawful act, or the doing of an act which the person ought not to do at all." Bocek v. Bayley, 505 P.2d 814; State ex rel LaMon v. Westport, 438 P.2d 200.

In addressing the petition in question relating to Assemblyman Gerry O'Connor, it is apparent that the petitioners have alleged two of the three grounds specified in AS 29.28.140, namely incompetence and a failure to perform prescribed duties. With respect to compliance with AS 29.28.150(a)(3) (which requires that the listed grounds be based on a specific instance of conduct) the petition lists only Mr. O'Connor's vote on the 1983 municipal budget. A vague reference is also made to "his other past actions" and "dereliction of duty of his representation of Eagle River and Chugiak", but these later two items are not insufficiently specific to comply with the statute and should therefore be ignored in any analysis of the sufficiency of petition.

In states where the law permits recall to be based on political grounds alone, the above referenced statement (or any statement for that matter) would be sufficient. It is, however, insufficient to support the grounds of incompetence or failure to perform prescribed duties.

Relative to removal from public office, the terms "incompetence" and "dereliction of duty" have well established meanings. 63 Am.Jur.2d, Public Officers, §§ 191-192. The petition describes one act allegedly constituting incompetence. The allegation does not meet judicially defined standards for "incompetence" as that term has been defined by the courts. "Incompetence" means "some demonstrated lack of capacity or ability to perform the professional functions of office", Vivian v. Examining Board of Architects, 213 N.W.2d 359 (Wisc. 1974), including physical handicap inability to perform official functions; Tafoya v. New Mexico State Police Board, 472 P.2d 973 (N.M. 1970), or other legal disqualification, incapacity, or fitness to discharge the required duty. It means want of physical, intellectual, or moral ability, insufficiency, inadequacy, want of legal qualifications. Appeal of School District of Bethleham, 30 A.2d 726 (Pa. Super. 1943); Hughes v. Hughes, 271 P.2d 172 (C.A. 4th 1954). The allegation in the petition falls short of claiming lack of capacity, ability, or physical, educational or mental ability to perform official functions; rather the allegation merely recites an action of the Assembly to which petitioners object. Failure to perform prescribed duties means a failure to carry out those responsibilities of the office set out in state or local law. Prescribed duties are numerous, from the obligation to attend assembly meetings unless excused to voting on matters for which one is not excused on the basis of a conflict of interest. A prescribed duty may be created by implication, as for example, when the assembly as a whole is required to perform a function. It is the implicit duty of each official who is a member to aid in the performance of that function. It is not, however, a prescribed duty of each assembly person to take every conceivable action which might make that official more informed or a more popular representative. Thus, it is not a prescribed duty to attend meetings which are not official or are sponsored by other nonmunicipal organizations. It is not a prescribed duty of an assembly person to inform all constituents of the basis of his or her political decisions, nor is it a prescribed duty to follow the popular will of ones constituency on any particular issue.

While the Alaska Supreme Court has not ruled on the precise question addressed here, at least one Superior Court Judge has

stated that under AS 29.28.130-.170, the legal sufficiency of stated grounds should be examined and that allegations of "misconduct" cannot be based on "discretionary" items, but rather must be founded on an unlawful or unethical act. White v. Baker, 3KO-80-263. The opinion stated here is also consistent with seve ıl that have been given to the Matanuska-Susitna Borough Assembly by various attorneys retained or employed by that body.

DEPARTMENT OF LAW

Jerry Wertzbaugher
Municipal Attorney

JW:gml
cc: Members of Anchorage Assembly

LAWS OF ALASKA

1983

Source

CSSB 85(Fin)

Chapter No.

95

AN ACT

Amending or repealing provisions related to state aid for health facilities, certificate of need, Medicaid and general relief medical assistance; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1, LINE 11

UNDERLINED MATERIAL INDICATES TEXT THAT IS BEING ADDED TO THE LAW AND BRACKETED MATERIAL IN CAPITAL LETTERS INDICATES DELETIONS FROM THE LAW; COMPLETELY NEW TEXT OR MATERIAL REPEALED AND RE-ENACTED IS IDENTIFIED IN THE INTRODUCTORY LINE OF EACH BILL SECTION.

Approved by the Governor: July 25, 1983
Actual Effective Date: July 26, 1983

Chapter 95

AN ACT

Amending or repealing provisions related to state aid for health facilities, certificate of need, Medicaid and general relief medical assistance; and providing for an effective date.

---

* Section 1. AS 18.07.031 is amended to read:

Sec. 18.07.031. CERTIFICATE OF NEED REQUIRED. No person may make an expenditure of $1,000,000 or more for any of [UNDERTAKE] the following unless authorized under the terms of a certificate of need issued by the office:

(1) construction of a health care facility;

(2) alteration of the bed capacity of a health care facility; or

(3) addition or elimination of a category of health services provided by a health care facility.

* Sec. 2. FINDINGS AND DECLARATION OF POLICY. The legislature acknowledges the need to pay health facilities for services provided to beneficiaries of state programs at a level that will meet the proportionate share of the total financial requirements of the facilities that are attributable to those programs given prudent and cost-effective management and operation of such facilities. The legislature finds that, because Medicaid is a joint state and federal program and because federal Medicaid funds have been and are likely to continue to be reduced dramatically, a retrospective payment system no longer serves as an appropriate method of compensation,

not does it respond with appropriate flexibility to continued federal cutbacks. A prospective payment system is necessary to prudently address payments to health facilities under the Medicaid and general relief medical assistance programs.

* Sec. 3. AS 47.07.070 is repealed and reenacted to read:

Sec. 47.07.070. PAYMENT TO HEALTH FACILITIES. (a) The commission shall determine prospectively the rate of payment to a health facility under this chapter and AS 47.25.120 - 47.25.300 based on a fair rate for reasonable costs incurred by the facility. The commission shall by regulation list the factors it considers in making its rate determinations under this section.

(b) In determining a rate of payment to a health facility under this section, the commission shall consider the proportionate share of the facility's financial requirements for patient care for

(1) costs of current operations, including salaries and wages, purchased services, supplies, insurance, leases, depreciation, taxes, interest expense, maintenance and other health facility operating expenses; and

(2) education, research, and appropriate capital development.

(c) In determining a rate of payment to a health facility under this section, the commission may consider whether the rate of utilization of the facility has been reduced because of improvident or careless development of the facility.

* Sec. 4. AS 47.07 is amended by adding new sections to read:

Sec. 47.07.071. REPORTS BY HEALTH FACILITIES. Not later than 120 days after the end of each fiscal year of a health facility, the facility shall submit to the commission a report on the facility's financial performance during the fiscal year.

* Sec. 9. The sponsor of a hospital or health facility construction project who is receiving or entitled to receive state aid under AS 29.90 on the day preceding the effective date of this Act shall continue to receive state aid until the sponsor has received an amount which, combined with state matching money for construction of the hospital or health facility, equals 25 percent of the total project cost. Money received for construction may not be used for any other purpose.

* Sec. 10. AS 29.90 and AS 47.07.080(1) are repealed.

* Sec. 11. This Act takes effect immediately in accordance with AS 01.10.070(c).

the commission shall elect a chair from among its members.

Sec. 47.07.170. MEETINGS AND QUORUM. The commission shall meet as often as necessary to conduct its business. Three members of the commission constitute a quorum.

Sec. 47.07.180. DUTIES. The commission shall review proposed payment rates and budgets of health facilities and establish payment rates for health facilities under this chapter and AS 47.25.120 - 47.25.300.

Sec. 47.07.190. EMPLOYMENT OF PERSONNEL. The commission may employ and determine the salary of an executive director. With the approval of the commission, the executive director may select and employ additional staff. The commission shall be assisted by the officers or personnel of the department as the commissioner of health and social services shall direct. The executive director of the commission is in the exempt service under AS 39.25.

* Sec. 7. AS 47.25 is amended by adding a new section to read:

Sec. 47.25.195. PAYMENT TO HEALTH FACILITIES FOR TREATMENT OF NEEDY PERSONS. (a) The department may make payments to a health facility for the treatment of a needy person.

(b) A health facility receiving a payment under this chapter is subject to the requirements of AS 47.07.070 - 47.07.075.

(c) For purposes of this section, "health facility" includes a hospital, skilled nursing facility, intermediate care facility, intermediate care facility for the mentally retarded, rehabilitation facility, inpatient psychiatric facility, home health agency, rural health clinic, and outpatient surgical clinic.

* Sec. 8. INTERIM PROSPECTIVE PAYMENT SYSTEM. The department shall establish an interim system of prospective payments for health facilities under this Act for the period July 1, 1983, to June 30, 1984.

Sec. 47.07.072. REPORT BY THE COMMISSION. Not later than September 30 of each year, the commission shall submit to the governor a report on the prospective payments made under this chapter during the current fiscal year and an estimate of the prospective payments that will be made during the remainder of the current fiscal year and the next fiscal year. The report shall state the assumptions that are used as a basis for the estimates.

Sec. 47.07.073. UNIFORM ACCOUNTING, BUDGETING, AND FINANCIAL REPORTING. (a) The commission by regulation shall require a uniform system of accounting, budgeting, and financial reporting for health facilities receiving prospective payments under this chapter. The regulations shall provide for reporting revenues, expenses, assets, liabilities, and units of service. The commission shall specify the date the system becomes effective for each health facility.

(b) In adopting regulations under this section, the commission shall consider

(1) accounting, budgeting, and financial reporting procedures used by health facilities;

(2) variations among health facilities in the types of health care services provided by health facilities;

(3) the size and organizational structure of health facilities;

(4) the methods used by health facilities to obtain payments; and

(5) other factors the commission considers relevant.

(c) The commission may waive or modify a requirement for accounting, budgeting, or financial reporting for a health facility if waiver or modification is

(1) necessary to avoid excessive costs to the facility; and

(2) consistent with the policies of this chapter.

(d) Notwithstanding other provisions of this section, the commission may, by regulation, modify the system of accounting, budgeting, and financial reporting required under this section for a health facility having less than 25 acute care beds in order to reduce the operating costs of that facility.

Sec. 47.07.074. AUDITS AND INSPECTIONS. As a condition of obtaining payment under AS 47.07.070, a health facility shall allow

(1) the department and the commission reasonable access to the financial records of medical assistance beneficiaries; and

(2) inspection of financial records by state and federal agencies to the extent required by federal law.

Sec. 47.07.075. APPLICATION OF ADMINISTRATIVE PROCEDURE ACT. Actions of the commission under AS 47.07 and AS 47.25.120 - 47.25.300 are subject to the provisions of the Administrative Procedure Act (AS 44.62).

* Sec. 5. AS 47.07.080 is amended by adding new paragraphs to read:

(6) "commission" means the Medicaid Rate Commission;

(7) "health facility" includes a hospital, skilled nursing facility, intermediate care facility, intermediate care facility for the mentally retarded, rehabilitation facility, inpatient psychiatric facility, home health agency, rural health clinic, and outpatient surgical clinic.

* Sec. 6. AS 47.07 is amended by adding new sections to read:

ARTICLE 2. MEDICAID RATE COMMISSION.

Sec. 47.07.110. MEDICAID RATE COMMISSION ESTABLISHED. The Medicaid Rate Commission is established in the Department of Health and Social Services.

Sec. 47.07.120. COMPOSITION OF COMMISSION. The commission

consists of five members as follows:

(1) the chief executive officer of a health facility that is licensed by the state but not owned or operated by the state or federal government and that is subject to the budget review process under this chapter;

(2) the commissioner of administration, the commissioner of health and social services, or the appointed designee of either commissioner;

(3) a physician licensed to practice medicine in the state who is actively engaged in the practice of medicine and who is not employed by the state;

(4) a certified public accountant with relevant experience;

(5) a person representing consumers of health services who does not have a direct or indirect interest in an entity that provides health care services.

Sec. 47.07.130. APPOINTMENT OF MEMBERS. Members of the commission are appointed by the governor and serve at the pleasure of the governor.

Sec. 47.07.140. TERM OF MEMBERSHIP. The term of a member of the commission appointed under AS 47.07.120(1), (3), (4), or (5) is three years. A member may not be appointed to a successive term. The terms of the members shall be staggered. A member appointed to fill a vacancy serves for the unexpired term of the member. A term shall be measured from January 1 of the year in which the term of the vacant position begins, regardless of when the vacancy is filled.

Sec. 47.07.150. COMPENSATION. A member of the commission serves without compensation but is entitled to per diem and travel expenses authorized by law for boards and commissions under AS 39.20.180.

Sec. 47.07.160. OFFICERS. At the first meeting of each year,

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

February 10, 1981

MEMORANDUM

TO: Senator Richard Eliason
Senator Frank Ferguson

FROM: Jack Kreinheder
Issues Analyst

RE: Comparison of Municipal Revenue Sharing Entitlements
Research Request No. 81-34

The enclosed computer printout provides the comparison you requested of revenue sharing entitlements for FY 1980 and FY 1981 at funding levels of $33.5 and $51.9 million. The following information is listed:

1. Fiscal year 1980 entitlements (funding level $27,000,000).
2. Fiscal year 1981 entitlements (funding level $33,500,000).
3. Amount of entitlement increase between (1) and (2).
4. Percentage increase between (1) and (2).
5. Fiscal year 1981 entitlements (funding level $51.9 million).
6. Amount of entitlement increase between (1) and (5).
7. Percentage increase between (1) and (5).

As the comparison shows, the percentage increases in entitlements vary widely among the different municipalities. At the $51.9 million funding level, the increases in entitlements range from about 25 percent for some cities such as Barrow and Valdez up to several hundred percent for a number of other cities and boroughs.

As I mentioned at the Senate Finance Committee hearing on SB 125, the primary factor which accounts for the wide range in entitlement increases is the local tax effort or mill rate equivalent. Road, hospital and health facility entitlements affect entitlement increases to a lesser degree. The present revenue sharing program is designed to provide more funding to municipalities with higher local tax effort or tax burden. All other things being equal, such as population and road and hospital entitlements, a community with a higher local tax effort than

another will receive a larger revenue sharing entitlement. Although on the surface it appears that this relationship would induce municipalities to raise taxes in order to increase their entitlement, the ratio between tax effort and entitlements is such that local taxes would have to be increased by about ten dollars to gain one additional dollar of revenue sharing funding.

Entitlements per capita are not equal and differ substantially under the present revenue sharing program, again primarily because of differences in local tax effort. Per capita entitlements range from $21 dollars per resident for Barrow up to several hundred dollars per capita for some small villages receiving the $25,000 minimum entitlements (at the $51.9 million funding level). At this funding level, Sitka receives about $72 per capita, while Anchorage receives $100 per resident. When making these comparisons, it is important to consider the entitlements for cities within boroughs such as Fairbanks, Haines, and others that are not unified municipalities. In many cases, the entitlements for cities within boroughs are as large or larger as the borough entitlements.

I hope this information is useful. If we may be of further assistance, please let us know.

JK/dp

Enclosure

PAGE: 99 LINE: 1517 NO. 10

Sec. 29.40.210. ACTIVITIES AUTHORIZED BY STATE OR FEDERAL AGENCIES. (a) Ordinances, regulations, permit decisions, coastal management or other land use plans adopted or promulgated under AS 29.35.180, AS 29.40 or AS 46.40 may not preclude or otherwise impede a hydrocarbon, mineral or geothermal exploration, development or production activity or project conducted pursuant to a lease, license, permit or other authorization issued by a state or federal regulatory agency or department having jurisdiction over the activity or project.

precludes?

(b) The provisions of this section apply to home rule and general home rule and general law municipalities.

Failed

Alaska State Legislature

House of Representatives

Committee on

Community & Regional Affairs

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

January 23, 1984

2nd Session
13th Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Fellow Legislators:

During the First Session of the Thirteenth Alaska State Legislature, the House Community and Regional Affairs Committee held extensive hearings on HB172, the Municipal Code revision. Eight amendments have received Committee approval. Some other amendments have been proposed to the Committee for consideration early in the Second Session.

HB172 has many complex issues within its scope. The House Community and Regional Affairs Interim Committee has prepared a report covering this legislation and its history. The main purpose of this report is to give a concise overview of the bill and its issues.

The previous veto by Gov. Hammond of similar legislation was brought about by the addition of many well intentioned, but problematical amendments from the Floor. The current bill, HB172, does not contain any of those amendments. Many people believe that HB172 makes major alterations to Title 29. In fact, the major revisions to Title 29 have been passed thru separate legislation in the 1st Session of the 13th Legislature. At this time, HB172 is an editing and clarifying bill to aid the municipalities of the State in accurately interpreting Title 29.

It is the Committee's desire to give each legislator adequate time to suggest any changes during the Committee process. This report features the progression of the bill and the proposals to be considered by the Committee. Any other ideas, comments and suggestions should be directed to the Community and Regional Affairs Committee as soon as conveniently possible. It is the feeling of the Interim House Community and Regional Affairs Committee Chairman that any other major amendments should be dealt with in separate legislation.

The House Community and Regional Affairs staff has devoted much time to the preparation of this report. I hope it is beneficial to you.

Sincerely,

Milo H. Fritz

Representative Milo H. Fritz, M.D.
Interim Chairman
House Community and Regional Affairs Committee

#1 book 3/23/83

A M E N D M E N T

Offered in the HOUSE BY THE COMMUNITY AND REGIONAL

TO: HB 172 AFFAIRS COMMITTEE

Page 35, line 4:

After "request" insert "by a member of the governing body"

Page 35, line 5

Delete "and"

Page 35, line 6:

After "request" insert "by a member of the governing body"

Page 35, line 8:

Delete "." and insert ";"

Page 35, after line 8:

Insert:

"(4) a municipal employee or official, other than a member of the governing body, may not participate in any official action in which the employee or official has a substantial financial interest.

(b) If a municipality fails to adopt a conflict of interest ordinance within 180 days after July 1, 1983, the conflict of interest provision of this section is automatically applicable to and binding upon that municipality."

Page 35, line 9:

Delete "(b)" and insert "(c)"

Page 163, line 24:
Delete "allocable" insert "allocatable".

SENATE AMENDMENT

By SENATE COMMUNITY & REGIONAL AFFAIRS COMMIT

To: _____ SENATE BILL No. 1

To: _____ HOUSE BILL No. _____

PAGE: 8 LINE: 26

1. Pg. 8, line 26, after "council" insert:
   "of a first class city."
2. Pg. 29, line 8, after "commission" insert:
   "of seven elected members"
3. Pg. 29, line 14, after "be" insert:
   "prepared by the petitioners and"
4. Pg. 29, line 14, delete:
   "incorporation"
5. Pg. 29, line 15, following petition, insert:
   "to incorporate a home rule municipality"
6. Pg. 63, line 7:
   delete "bill" and replace with "ordinance or resolution"
   delete "act" , and replace with "ordinance or resolution"
7. Pg. 63, line 26:
   delete "bill" and replace with "ordinance or resolution"
   delete "act" , and replace with "ordinance or resolution"
8. Pg. 64, line 15:
   delete "bill" and replace with "ordinance or resolution"

9. Pg. 82, line 18:

after "emergency", add "services", and

after "center" add "under AS 29.35.130"

10. Page 85, lines 4 and 5 -- subsection (c) is amended as follows:

(c) A third class borough acquires an additional power to exercise in a service area in accordance with AS 29.35.490(b) and (c) [AREAS BY HOLDING AN ELECTION ON THE QUESTION IN WHICH EACH PERSON WHO IS A VOTER OF THE BOROUGH MAY VOTE].

11. Pg. 106, line 9, after "calculate" insert:

"at the rate of one percent per mill"

12. Pg. 106, line 10 and 11, delete:

"at the rate of one percent per mill"

13. Page 182, line 1 -- following "general law", delete:

"first or second class"

MEMORANDUM

TO: REPRESENTATIVE FRITZ and
REPRESENTATIVE MILLER, (NP)

FROM: EVE FOX
C&RA COMMITTEE STAFF

DATE: NOVEMBER 8th, 1983

RE: INTERIM DRAFT REPORT and AK MUNICIPAL LEAGUE CONVENTION

Enclosed is a complete copy, including support documents, of the House Committee on Community and Regional Affairs interim draft report. Final comments of the draft report are forthcoming from Legal Services, the Alaska Municipal League, the Department of Community and Regional Affairs, Legislators, and legislative staff. These final comments are essential in order for the above instrumentalities to draw a consensus and prepare for the issues that will be discussed by committee members during the up-coming legislative session.

In preparation for the up-coming legislative session, the Alaska Municipal League held it's 33rd annual convention here in Juneau during the week of November 2nd, with prime emphasis placed on the 1984 draft policy statement composed by the League's Legislative Committee and Directors (copy of policy statement and convention agenda enclosed).

During Monday, Tuesday, and Wednesday of the convention, I attended the finance officers meetings. These meetings covered a wide array of policy issues from the permanent fund, to bond capabilities of municipalities, to school foundation formula, to municipal assistance and/or revenue sharing, etc.. On Thursday morning I attended the Local Government Powers Policy meeting which covered several policy areas such as communities upgrading, programs that assist communities, and the question of communities opting out of being organized, etc.. During the afternoon I attended the Economic Development Policy meeting. This meeting covered numerous regional and statewide economic activities and policies therein. On Friday I attended the Capital Projects - State and Local Programs meeting where members of the Governor's capital projects mini cabinet spoke on the rules for requesting capital project funding through the Governor for FY'85, guidelines for prioritizing projects, and the prognosis for funding levels.

Numerous changes, additions, and deletions were placed on the policy draft during the meetings by designated committee members of the League and were voted upon by all attending delegates during the business meeting on November 5th (the final 1984 policy statement will be sent to you, from the League, upon it's completion sometime by November 18th).

Comments and questions for the House Committee on Community and Regional Affairs interim draft report are being received by Representative Fritz's office, House Committee on Community and Regional Affairs, 500

"L" Street, Suite 301, Anchorage, Alaska 99501, 277-9569. Your suggested changes will be reviewed and possibly incorporated into the draft report, the result being the final committee interim report. The final report will be sent to the printers and final copies sent to House C&RA committee members and the below listed persons prior to the 1984 legislative session.

cc: Ginny Chitwood, Alaska Municipal League

Tamara Cook, Legal Services

Mr. Brewer, House Judiciary Committee

Doug Griffin, Department of C&RA

Carl Nelson, House Majority Office