From: ASSEMBLY CHAIR HALL
Subject: Special Legal Counsel on Recount Method
Tim Petumenos, Birch Horton Bittner & Cherot

The April 3, 2012 Election has brought to light election law details beyond ballot short falls. The Assembly is fortunate to have the services of Special Legal Counsel Tim Petumenos to assist with election issues.

Mr. Petumenos was on hand to clarify an ambiguity on the required method of recount. The attached opinion of Special Counsel, completed and delivered on May 8, 2012, ensured the application for a hand recount of selected precincts could commence timely on May 9, 2012.

As with Independent Counsel’s review of election certification, this opinion will be publicly posted to the Clerk’s Municipal website for Elections.

Respectfully submitted:

Ernie Hall
Chair of the Assembly
May 8, 2012

Mr. Ernie Hall
Municipality of Anchorage Assembly Chair
City Hall
632 W. Sixth Avenue
Anchorage, AK 99501

RE: April 3, 2012 Municipal Election Recount

Dear Chairman Hall:

This letter constitutes our advice concerning the degree of discretion that the Municipal Clerk of the MOA has to conduct the recount of the April 3, 2012 election. We have been supplied with a memorandum dated circa April 19, 2003 from Dennis Wheeler as Deputy Municipal Attorney to the Begich and Weurch campaigns that mentions the issue.

Our conclusion is that the Clerk has discretion as to the method of recount. The limits on that discretion are: 1) the Clerk must scrupulously follow the municipal election code as to the execution of the recount, and 2) should exercise her discretion in choosing the method and manner of recount so as to enfranchise voters as well as bolster the credibility and legitimacy of the election.

The wording of the April 19, 2003 memo is ambiguous. It states in relevant part that "as a point of reference" the recount must use the same method of recount as was used in the original count. There is no authority for this proposition and the memorandum could be read as to require nothing more than that the detailed instructions for conducting a count of votes also apply to the recount of votes. If the memorandum was intended to suggest that the Clerk’s discretion is limited to using the identical form of recount as was used in the first count, regardless of the circumstances leading to the recount, we disagree.
There is nothing in the municipal election code that expressly states that the recount must employ the same methodology as was used in the count. Nor can we discern a legislative intent or public policy consideration from which to infer the existence of such a restriction. As we reported in our May 3, 2012 letter to you, the election code should be interpreted to further the accuracy of the vote, enfranchise voters and support the integrity of the electoral process.

The facts leading up to the request for recount of the April 3, 2012 election demonstrate the reason why a restriction on the discretion of the Clerk would be inconsistent with the interests described above. As we understand it, there has been voter concern about whether the computerized method of counting votes from the election is accurate. Ten voters then requested a recount and further requested that the recount be by hand in order to corroborate the accuracy of the computerized count. Under these circumstances, there is no reason in the election code, neither is there anything in the legislative intent behind the election code that would support restricting the Clerk's discretion to meet voter concerns by conducting the recount in such a fashion as to allay voter and public concern. AMC 28.70.010 provides that either manual or computer counts are authorized and does not distinguish between their use in either the initial vote or a recount. The precise method and manner of conducting the recount must comply with AMC 28.70.020 and 28.70.030. Common sense in this instance may dictate that a recount using the same computer assisted methodology as that being challenged does less to further the legislative purpose to validate the election than does a hand recount. No purpose is served to so restrict the Clerk's discretion and there is no express prohibition against the exercise of that discretion.

Our review of prior court challenges to recounts in this state supports this analysis. The inquiry that the courts make on the validity of a recount is whether the specific class of votes subject to recount were properly counted or rejected. To meet this standard, the counting authority is granted discretion to accomplish this purpose:

...the Lieutenant Governor's authority to conduct a recount is not limited to inspection of the ballots. He must review all ballots, counted or uncounted for whatever reason, and make rulings as to whether they were properly included or excluded in the canvass. As a matter of course this involves making rulings on questioned or challenged ballots and must necessarily go beyond the ballots themselves. (Citations omitted.)

_Willis v. Thomas_, 600 P.2d 1079, 1081 (Alaska 1979). In _Willis_, the court was applying AS 15.20.480 that parallels AMC 28.90.040(C) which provides that the recount authority's job is to check the "accuracy" of the original count.
We therefore have concluded that when a colorable, specific challenge to the original count is raised, the Clerk has the discretion to employ whatever recount method is authorized under the municipal election code, and that discretion should be exercised so as to foster the legitimacy and confidence in the electoral process.

Very truly yours,

BIRCH HORTON BITTNER & CHEROT

[Signature]

Timothy J. Petumenos

TJP:klh

cc: Julia Tucker, Assembly Counsel

cc: Dennis A. Wheeler, Municipal Attorney