MUNICIPALITY OF ANCHORAGE

Office of the Municipal Attorney

Memorandum

DATE: August 29, 2022 – 2nd Reissue

TO: **Barbara Jones, Municipal Clerk**
Jamie Heinz, Municipal Election Administrator

THROUGH: **Mario Bird, Acting Municipal Attorney** MLB

FROM: **Ruth Botstein, Assistant Municipal Attorney**

SUBJECT: Referendum Application 2022-1, Petition to Repeal AO 2022-60(S), As Amended

QUESTION

Is Referendum Application number 2022-1, Petition to Repeal AO 2022-60(S), As Amended, legally sufficient?

BRIEF ANSWER

No, the proposed referendum is insufficient because it lacks both the verbatim text of the passed ordinance and a fair and impartial summary of the ordinance. These are deficiencies which can be cured.

BACKGROUND

On July 12, 2022, the Anchorage Assembly passed AO No. 2022-60(S), As Amended,[1] entitled:

> An Ordinance of the Anchorage Assembly Amending Anchorage Municipal Code Chapters 3.10, *General Provisions*, and 27.20,

[1] Exhibit A.

Supervisory Boards, and Sections 2.70.030 and 29.10.060 To Fulfill the Requirement of Anchorage Municipal Charter Section 7.01(b) That the Assembly By Ordinance Must Establish Specific Procedures for Removal Of An Elected Official for Breach of the Public Trust.

The principal effect of the ordinance was to prescribe removal procedures for a breach of public trust committed by an Anchorage Mayor (AMC 3.10.050) or Supervisory Board member (AMC 27.20.070 and AMC 27.20.085), and to revise existing removal procedures for an Assembly member (AMC 2.70.030) or School Board member (AMC 29.10.060). During its July 12, 2022 regular meeting, the Assembly amended the "(S)" version of the ordinance with five written floor amendments[2] and a voice amendment.

On July 18, 2022, Anchorage Mayor Dave Bronson vetoed AO No. 2022-60(S), As Amended. On August 1, 2022, the Assembly overrode the Mayor's veto at a special meeting.

On August 4, 2022, the referendum sponsors submitted to the Municipal Clerk an application for a referendum petition titled, "Referendum Petition to Repeal AO No. 2022-60(S) as amend" [sic].[3] The application included a primary sponsor, alternate sponsor, and ten names of purported qualified voters. At the time of submission, the sponsors did not include a verbatim copy of the ordinance or any previous versions.

On August 11, 2022, a finalized and signed version of the ordinance became available to the public.[4]

DISCUSSION

A. Applicable Law.

Article XI, section 1 of Alaska's Constitution provides for popular referendum: "The people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum." The Alaska Statutes extend the right of referendum to

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[2] Exhibit B.

[3] Exhibit C.

[4] The Municipality has previously approved a referendum application, Referendum Application 2016-7, that similarly was prepared and submitted before the final version of the ordinance sought to be repealed was available. Exhibit D (Municipal Attorney Memorandum Re: Referendum Application 2016-7 (dated Jan. 9, 2017)) at 2. There, at the request of the sponsors, the Municipal Clerk attached the correct, final version of the ordinance to the petition, which satisfied AMC 2.50.020B.3.a.'s technical requirement that the application "set out verbatim the ordinance . . . . sought to be . . . repealed by the petition."

citizens of home rule municipalities, including Anchorage,[5] and the Municipality of Anchorage has codified referendum rights and procedures in Charter[6] and in Code.[7]

Pre-election review of a proposed referendum petition is limited to determining whether the petition "complies with the constitutional and statutory provisions regulating referend[a], and whether the petition is clearly unconstitutional or unlawful."[8] It is well-established that "[t]he right of initiative and referendum, sometimes referred to as direct legislation, should be liberally construed to permit exercise of that right."[9]

But "the right of referendum is not absolute."[10] Article XI, section 7 of the Alaska Constitution states that a "referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety." Alaska Statute[11] and Anchorage Charter[12] similarly forbid referenda that attempt to repeal an ordinance which appropriates or otherwise deals with public monies.

Per Code, "[w]ithin ten business days after receiving a completed application, the municipal clerk shall verify the sponsors' qualifications."[13] "After consultation with the municipal attorney, the municipal clerk shall determine whether the measure proposed in the application may be submitted to the voters by initiative or referendum; or whether the measure proposed must be denied. In making this determination, the municipal clerk may rely upon the legal counsel of the municipal attorney."[14]

Per AMC 2.50.020B, an application shall contain:

1. The name, residence and mailing address, signature and date of signature of two qualified voters of the municipality who are the primary and alternate contact persons to whom

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[5] AS 29.10.030(a).

[6] Anch. Muni. Charter Art. § 2.01.

[7] AMC 2.50.010.

[8] *Price v. Kenai Peninsula Borough*, 331 P.3d 356, 359 (Alaska 2014) (internal quotations and punctuation omitted).

[9] *Thomas v. Bailey*, 595 P.2d 1, 3 (Alaska 1979).

[10] *Municipality of Anchorage v. Holleman*, 321 P.3d 378, 382 (Alaska 2014).

[11] AS 29.10.030(c).

[12] Anch. Muni. Charter § 3.02(a).

[13] AMC 2.50.030A.2.

[14] AMC 2.50.030A.3.

all correspondence relating to the petition may be sent. The application form shall include space for each contact person to provide optional phone and facsimile numbers, and an email address. The two contact persons shall be considered sponsors;

2. The name, residence and mailing address, signature and date of signature of at least ten qualified voters of the municipality, not including the contact persons, who will sponsor the initiative or referendum. Additional qualified sponsors may be added not less than three days before the date of first circulation of the petition certified by the clerk; and
3. The verbatim text of the measure to be enacted or repealed. A proposed measure shall:
    a. Meet constitutional, charter and other legal requirements or restrictions;
    b. Include only a single subject; and
    c. Be enforceable as a matter of law or be clearly denominated as advisory only.

SUFFICIENCY ANALYSIS

A. FORM.

1. Name, identifying information, and signature of two sponsors; and
2. Names, identifying information, and signatures of ten additional qualified voters.

The municipal clerk reviews the application to determine whether these code requirements—names, identifying information, and signatures of two sponsors and ten additional qualified voters—have been satisfied.

3. Verbatim text of measure to be repealed.

Anchorage Municipal Code 2.50.020B.3 provides that "[t]he application shall contain . . . [t]he verbatim text of the measure to be enacted or repealed."

Referendum Application 2022-01 does not include the verbatim text of AO 2022-60(S), As Amended. This is a technical defect, but it can be corrected. Past practice allows the municipal clerk to "point out the deficiencies and allow the sponsors to resubmit the

petition application, but she may not alter the petition as it is submitted by the sponsor."[15] As past Municipal Attorneys have also recognized, failing to include the full text of an ordinance "is a technical defect that the applicants could correct."[16]

For example, a 2013 referendum petition application was initially rejected by the municipal clerk because—among other technical deficiencies—"the petition fails to set forth verbatim the ordinance sought to be repealed."[17] After their first application was rejected, the petition sponsors submitted a new application that "resolve[d] the technical defects present in the original application."[18]

I recommend the same course of action in this instance: point out the deficiency and allow the sponsors to cure the petition application, but do not alter the petition application as submitted.

B. CONTENT.

Per AMC 2.50.020B.3, a proposed referendum shall "(a) Meet constitutional, charter and other legal requirements or restrictions; (b) Include only a single subject; and (c) Be enforceable as a matter of law or be clearly denominated as advisory only."

1. The referendum application addresses a single subject and is enforceable.

With regard to Code requirements under AMC 2.50.020B.3.b and B.3.c, Referendum Application 2022-1 is limited to a single-subject–AO 2022-60(S), As Amended–and it is enforceable as a matter of law because a successful repeal of the ordinance could be enforced by court order upon certification of a referendum election. **My opinion is that Referendum Application 2022-1 is legally sufficient in this regard.**

2. The referendum application does not attempt to make or repeal an appropriation.

As stated above, Article XI, section 7 of the Alaska Constitution prohibits application of the referendum to dedications of revenue or appropriations, and Anchorage

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[15] Exhibit E (Municipal Attorney Memorandum Re: Referendum Application 2013-1 (dated April 15, 2013)).

[16] Exhibit F (Municipal Attorney Memorandum Re: Referendum Application 2020-01 (dated Sept. 11, 2020) at 7 (citing *Municipality v. Holleman*, 321 P.3d 378, 381 n.6 (Alaska 2014)).

[17] Exhibit F at 1.

[18] Exhibit G (Municipal Attorney Memorandum Re: Referendum Application 2013-2 (dated April 29, 2013)) at 3.

Municipal Charter prohibits use of referenda for establishing budgets or appropriating funds.

Here, Assembly member Constant, the sponsor of AO 2022-60(S), As Amended, stated that "[t]here are no anticipated economic effects from this Code change."[19] Similarly, the sponsors of all five written amendments adopted at the July 12, 2022 Assembly meeting stated that there would be "NO" public or private economic effect from said amendments.[20] There are provisions in AO 2022-60(S), As Amended, however, requiring that "the municipality shall employ an attorney" to represent an accused Supervisory Board member,[21] mayor,[22] assembly member,[23] or school board member,[24]; as well as an arbitrator to conduct the removal hearing of a mayor,[25] assembly member,[26] or school board member[27]; and special counsel to substitute for the municipal attorney in the event of an attempted mayoral removal.[28]

While these provisions to hire attorneys and arbitrators anticipate expenditure of municipal funds as part of any removal process, there is controlling Alaska Supreme Court case law stating that, to qualify as an appropriation, legislation must set aside specific funds and provide for an executable, mandatory, and reasonably definite purpose:

> [W]e have never held that any effect on public resources triggers the prohibition on direct legislation; nearly all legislation involves public assets to some degree. We have held that "an initiative proposes to make an appropriation if it would set aside a certain specified amount of money or property for a specific purpose or object in such a manner that

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[19] Exhibit H at 2.

[20] Exhibit B.

[21] Exhibit A at § 2, page 4, lines 3-11.

[22] *Id.* at § 3, page 6, lines 36-44.

[23] *Id.* at § 4, page 9, lines 22-30.

[24] *Id.* at § 5, page 12, lines 13-21 (prescribing that the school board shall pay).

[25] *Id.* at § 3, page 7, lines 1-38.

[26] *Id.* at § 4, page 9, line 32 – page 10, line 30.

[27] *Id.* at § 5, page 12, line 23 – page 13, line 21.

[28] *Id.* at § 3, page 6, lines 21-38.

> is executable, mandatory, and reasonably definite with no further legislative action."[29]

The possible expenditure of funds in connection with a future removal proceeding does not satisfy this standard. First, the ordinance contains no set-aside of a specified amount of money for a specific purpose. While the ordinance sets forth procedures and standards for public officer removal, it does not initiate or contemplate any removal of a specific public official at this time. Any future funds to be used for counsel and arbitration expenses in connection with a removal attempt therefore are entirely hypothetical. It is not currently known if any removal proceedings would ever be initiated under the ordinance, let alone when money would be spent in connection with removal and how costly those proceedings would be. Thus, the expenses for those future events are not currently quantifiable, definite, or certain. Second, further legislative action is obviously contemplated, because hiring the attorneys and arbitrator for a removal proceeding would require an ordinance or resolution from the Assembly; accordingly, the ordinance sought to be repealed does not set aside funds in a way that is "executable, mandatory, and reasonably definite with no further legislative action."[30] **Therefore, my opinion is that the attorney and arbitrator hiring contemplated in AO 2022-60(S), As Amended, is not an appropriation which would make the ordinance an unconstitutional object for referendum.**

3. The ordinance sought to be repealed is legislative.

Alaska law also restricts referenda to enactments that are legislative—not "administrative or executive in character."[31] This limitation has been codified to extend to municipal initiatives and the Alaska Supreme Court has assumed without deciding that the restriction similarly extends to referenda.[32] If a legislative purpose is required here, I conclude that Referendum Application 2022-1 is legally sufficient because it is legislative in character.

Three guidelines dictate whether a proposed referendum impermissibly attempts to address an administrative matter:

> 1. An ordinance that makes new law is legislative; while an ordinance that executes an existing law is

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[29] *Municipality of Anchorage v. Holleman*, 321 P.3d at 384 (holding that a referendum to repeal a labor ordinance is not a set-aside or appropriation).

[30] *Id.*

[31] *Holleman*, 321 P.3d at 385-86; *Swetzof v. Philemonoff*, 203 P.3d 471, 476 (Alaska 2009).

[32] *Holleman*, 321 P.3d at at 385 & n.36 (citing AS 29.26.110(a)).

> administrative. Permanency and generality are key features of a legislative ordinance.
>
> 2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative.
>
> 3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy.[33]

The proposed referendum is properly classified as legislative under these standards. The ordinance sought to be repealed is general in that it applies to all publically elected mayors, assembly members, school board members, and members of supervisory boards, and it comprehensively addresses removal standards and procedures.[34] The ordinance makes new law because it sets forth a "new policy direction"[35] by creating removal standards for public employees, giving examples and fleshing out the meaning of "breach of the public trust," and providing for public process in connection with removal proceedings. The ordinance is permanent because it applies indefinitely going forward.[36]

Looking to the second guideline, the ordinance is legislative because it "declares new public policies and provides ways and means to accomplish them."[37] The ordinance explicitly extends removal standards to the mayor and supervisory board members, expressing a policy of public accountability and elaborating on what types of actions constitute removable breaches of the public trust. And it sets forth ways and means that the Assembly or Board of Ethics would go about seeking removal, providing for legal counsel, arbitration, and public process. While some of the details of how removal procedings would be handled might be properly characterized as administrative, the legal analysis properly looks to the overall character and effect of the ordianance, in recognotion

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[33] *Holleman*, 321 P.3d at 385-86 (quoting *Swetzof,* 203 P.3d at 476).

[34] *See Holleman*, 321 P.3d at 386.

[35] *Id.*

[36] *Id.*

[37] *Id.*

that proposed initiatives and referenda "should be construed liberally . . . to support the electorate's right to participate in direct law-making."[38]

Finally, understanding the ordinance—and deciding whether to vote in favor of repealing it—does not require a voter to have "specialized training in municipal government or intimate knowledge of the fiscal affairs of the city."[39] Instead, the ordinance "addresses broad concepts that voters can readily understand"[40] such as when a public official takes actions that compromise the public trust, and whether and how such an official should be removed from office.

For these reasons, I conclude that the proposed referendum is permissibly legislative.

4. The referendum application's summary description is legally insufficient.

The Alaska Supreme Court has held that a statewide referendum may be invalidated if the referendum question is confusing or misleading,[41] and has likewise stayed municipal elections on this basis.[42] For this reason, the inclusion of confusing and misleading statements as part of the petition is a separate ground for finding the proposed petition legally insufficient.[43]

Notably, however, the Anchorage Municipal Code does *not* require the inclusion of a summary in a referendum petition application. Anchorage Code *does* require the referendum petition master form to include a fair and impartial summary.[44] Anchorage Code *also* requires that official and sample proposition *ballots* contain an impartial summary:

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[38] *Id.*

[39] *Id.* (quoting Swetzof, 203 P.3d at 479).

[40] *Holleman*, 321 P.3d at 386.

[41] *Boucher v. Bomhoff*, 495 P.2d 77, 78 (Alaska 1972)); *accord Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273, 275 (Alaska 1982) (ruling that a petition summary must be "fair, concise, true and impartial statement of the intent of the proposed measure. The summary may not be an argument for or against the measure, nor can it be likely to create prejudice for or against the measure.").

[42] *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1215-16 (Alaska 1993).

[43] *Id.* at 1218 (holding that referendum petitions which do not accurately and fairly characterize ordinances which they propose to repeal are not legally acceptable).

[44] AMC 2.50.035.

> The title, including the number or letter, and a **summary description**, including the question, of each proposition to be voted on, and any additional information concerning a proposition that is required by law to appear on the ballot. This information shall be prepared in a **fair, true and impartial manner** by the municipal attorney, in consultation with the municipal clerk.[45] (Emphases added).

The absence of an explicit impartial summary requirement in the municipal code has resulted in divergent approaches to the summary at the application stage. The Municipality approved a 2013 referendum application that contained no summary on the theory that "Municipal Code 2.50.020(B) does not require a summary as part of the petition application. This should eliminate any concern whether the summary is misleading or confusing."[46] This practice was accepted by the municipal attorney, and unaddressed in a court challenge which otherwise upheld the petition sponsors' position. But more recent municipal analyses have required an impartial summary at this stage. In 2015, the municipal attorney advised the clerk to revise a referendum summary rather than eliminating it.[47] And in 2017, the municipal attorney suggested that the requirement of a summary is "constitutional in nature,"[48] and recommended that the clerk revise the sponsors' proposed referendum summary.

Even if a summary is not required at the application stage, AMC 2.50.035.B.2 directs the municipal clerk, in consultation with the municipal attorney, to prepare "a fair and impartial summary" for inclusion on the petition master form. This allows potential signatories to understand the meaning of the referendum so they can decide whether to endorse it.[50]

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[45] AMC 28.40.010D.1.b.

[46] Exhibit I (Letter from Referendum sponsor Andy Holleman to Municipal Clerk Barbara Jones, Re: Petition for Referendum of AO No. 2013-37(S-2) (as amended) (dated Apr. 12, 2013)).

[47] Exhibit J (Municipal Attorney Memorandum Re: Referendum Application 2015-5 (dated December 15, 2015))

[48] Exhibit D (Municipal Attorney Memorandum Re: Referendum Application 2016-7 (dated January 9, 2017)) at 4 n.16 (relying on *Faipeas*, 860 P.2d at 1219 n.8 and *Boucher*, 495 P.2d at 78, for the proposition that voters have a constitutional right to be provided a "fair and accurate summary of issues on which they are being asked to express their will").

[50] AMC 2.50.035.B.2 also allows the Clerk, in her discretion, to substitute the verbatim text of the measure rather than a summary. I do not recommend this approach here. The ordinance sought to be repealed is lengthy and amends several sections of the Code; accordingly, it is technical and somewhat difficult to understand the meaning of the changes as a whole without viewing the revised language together with scattered sections of the previous code. This is very likely to be confusing for the voters and potential signatories. For these reasons, a fair and impartial summary should be included on the master petition form.

When a summary is provided, it must meet the fairness and impartiality requirements.[51] In this case, the sponsors of Application 2022-1 included the following summary of the proposed referendum:

> Proposed petition: In accordance with Section 3.02 of the Home Rule Charter for the Municipality of Anchorage and Section 2.50 of the Anchorage Municipal Code, we the undersigned qualified voters of the Municipality of Anchorage submit this Referendum Petition calling for the repeal of Anchorage Ordinance ("AO") No. 2022-60(S)(as amended), enacted on July 12th, 2022, amending Anchorage Municipal Code Chapters 3.10, General Provisions, and 27.20, Supervisory Boards, and Sections 2.70.030 and 29.10.060.
>
> We, the undersigned registered voters of the Municipality of Anchorage, request the following question be placed before the voters of the Municipality of Anchorage as a referendum question:
>
> Shall AO No. 2022-60(S)(as amended), be repealed?
>
> Yes [] No []

I do not believe this summary is sufficient to fairly inform voters what the referendum is about. This summary of Referendum Application 2022-1 eschews discussion of everything other than the "nuts and bolts" description of which portions of Code are affected by the ordinance. In other words, it presumes that the voters of Anchorage will already know the substance and import of AO 2022-60(S), As Amended, or else discover it by reading the ordinance themselves. Forcing voters to do this work is not consistent with the requirement that voters be provided a fair and impartial summary of the proposed referendum to assist them at the ballot box.

The substance of AO 2022-60(S), As Amended, is the fulfillment of Anchorage's charter, which states, in pertinent part, that "[t]he assembly shall establish procedures for removal of elected officials for breach of the public trust, including provision for notice, a complete statement of the charge, a public hearing conducted by an impartial hearing officer, and judicial review."[52] The ordinance has been well-reported in the local press as

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[51] *Faipeas*, 860 P.2d at 1218.

[52] Anch. Muni. Charter § 7.01(b).

a law for the "mayor removal process."[53] Thus, the key substantive concepts of AO 2022-60(S), As Amended, are removal of public officers, breach of the public trust, and procedures for removal. Petitioners' proposed summary does not contain any of these terms; it is hard to see how voters entitled to a fair and impartial summary could obtain an understanding of what voting "yes" on the proposed referendum would accomplish from these bare citations to Code and the date of the ordinance's enactment.

Provided that the technical deficiency mentioned above in section A.3 is cured, then, in line with recent Municipal practice in 2015 and 2017, and *dicta* indicating that the Alaska Supreme Court may find that there is a constitutional right to a fair and impartial summary of ballot propositions, **my recommendation is that the Clerk should issue a master petition form which includes the following fair and impartial summary of the proposed referendum:**

PROPOSITION NO. ___

> Repeal of AO 2022-60(S), As Amended, Regarding Removal Procedures for the Mayor, Assembly Members, School Board Members, and Supervisory Board Members
>
> Voters are asked whether to repeal an ordinance adopted by the Assembly entitled "An Ordinance of the Anchorage Assembly Amending Anchorage Municipal Code Chapters 3.10, *General Provisions*, and 27.20, *Supervisory Boards*, and Sections 2.70.030 and 29.10.060 To Fulfill the Requirement of Anchorage Municipal Charter Section 7.01(b) That The Assembly By Ordinance Must Establish Specific Procedures for Removal of an Elected Official for Breach of the Public Trust."
>
> Among other things, the ordinance:
>
> (1) Provides that "[w]illful and knowing breach of duty or culpable indifference to official duties may constitute a breach of the public trust";
> (2) Gives examples of actions that constitute a breach of the public trust;

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[53] *See, e.g.,* Emily Goodykoontz, *Anchorage Assembly overrides Mayor Bronson's veto of legislation codifying mayor removal process*, ANCHORAGE DAILY NEWS (Aug. 1, 2022), available at https://www.adn.com/alaska-news/anchorage/2022/08/01/anchorage-assembly-overrides-mayor-bronsons-veto-of-legislation-codifying-mayor-removal-process/.

(3) Provides a procedure by which the Anchorage Assembly may remove a Mayor or Supervisory Board member for breach of the public trust;
(4) Amends a procedure by which the Anchorage Assembly may remove an Assembly member for breach of the public trust;
(5) Amends a procedure by which the Anchorage School Board may remove a School Board member for breach of the public trust;
(6) Requires a public hearing for an accused Mayor, Supervisory Board member, Assembly member, or School Board member;
(7) Defines the standard of proof necessary to prove breach of the public trust before an impartial hearing officer;
(8) Provides for an appeal process of public officer removal before the judicial branch.

Shall AO 2022-60(S)(as amended) be repealed?

YES [] NO []

CONCLUSION

Referendum Application 2022-1 does not include the verbatim text of AO 2022-60(S), As Amended, which is a Code requirement. Nor does it include a fair and impartial written summary, which is a requirement for the municipal clerk's master petition for and municipal ballots, and might also be a constitutional requirement under relevant Alaska Supreme Court case law and past municipal attorney advice. These are both deficiencies that can and have been cured in past municipal referendum applications. Given the broad access to referenda required by Alaska law, my recommendation is that the Clerk point out the deficiencies and cure requirements to the sponsors. If the sponsors subsequently cure the defects by submitting the verbatim text of the ordinance, the clerk should issue the master petition form, including the revise summary written above.

Municipal Clerk's Office
Amended and Approved
Date: July 12, 2022
Mayoral Veto Given
Date: July 18, 2022
Mayoral Veto Overridden
Date: August 1, 2022

Submitted by: Assembly Vice Chair Constant
Prepared by: Assembly Counsel's Office
For reading (S): May 24, 2022

ANCHORAGE, ALASKA
AO No. 2022-60(S), As Amended

AN ORDINANCE OF THE ANCHORAGE ASSEMBLY AMENDING ANCHORAGE MUNICIPAL CODE CHAPTERS 3.10, *GENERAL PROVISIONS,* AND 27.20, *SUPERVISORY BOARDS,* AND SECTIONS 2.70.030 AND 29.10.060 TO FULFILL THE REQUIREMENT OF ANCHORAGE MUNICIPAL CHARTER SECTION 7.01(b) THAT THE ASSEMBLY BY ORDINANCE MUST ESTABLISH SPECIFIC PROCEDURES FOR REMOVAL OF AN ELECTED OFFICIAL FOR BREACH OF THE PUBLIC TRUST.

WHEREAS, *Anchorage Municipal Charter section 7.01(b) provides that an elected official may be removed "by two-thirds of the authorized membership of the assembly or school board," when the elected official has breached the public trust; and*

WHEREAS, Anchorage Municipal Charter section 7.01(b) *further* provides, in part, "[t]he assembly by ordinance shall establish procedures for removal of elected officials for breach of the public trust, including provision for notice, a complete statement of the charge, a public hearing conducted by an impartial hearing officer, and judicial review"; and

WHEREAS*, constitutional provisions like Charter section 7.01(b), that allow the legislative branch to initiate removal of an executive officer, are not uncommon: the U.S. Congress can impeach and remove the president (U.S. Constitution, art. I, sections 2-3; art. II, section 4); the Alaska State Legislature can impeach and remove a Governor (Alaska Constitution, art. II, section 20); the state legislature of Nebraska, which like the Assembly is unicameral, can initiate impeachments that involve a fair hearing conducted by persons not in the legislative branch and include procedural safeguards similar to those proposed in AO 2022-60(S) (Nebraska Constitution, art. III, section 17); and in Alaska, the council or assembly of a general-law municipality may remove a mayor when certain conditions are met (AS 29.20.280); and*

WHEREAS, *consistent with Charter section 7.01(b), the Assembly has adopted procedures to govern the removal of assembly and school board members, but has not adopted procedures to govern the removal of elected service-area board members or the mayor, with the consequence that* the requirements of section 7.01(b) have only been partly fulfilled; and

WHEREAS*, "recall" by voters is a separate process from "removal," and is addressed in Charter section 3.03, not section 7.01; and*

WHEREAS*, the Assembly's adoption of Anchorage Municipal Code chapter 2.50, which addresses recall by voters, does not fulfill the Charter section 7.01(b)*

mandate to establish procedures for removal of elected officials "by a majority of all members of the assembly, or the school board in the case of removal of a school board member"; and

WHEREAS, the Assembly has by ordinance established procedures by which an assembly member or school board member may be removed for a breach of the public trust in Anchorage Municipal Code section 2.70.030, *Removal from office,* and AMC section 29.10.060, *Removal of members from office,* which could be updated for efficiency; and

WHEREAS, the Charter requires enactment of similar provisions applicable to other elected officials, including supervisory boards of service areas and the mayor; and

WHEREAS, this Ordinance would apply to these elected officials provisions similar to those currently applicable to assembly and school board members; and

WHEREAS, this ordinance will not have significant economic effects; now, therefore,

THE ANCHORAGE ASSEMBLY ORDAINS:

Section 1. Anchorage Municipal Code section 27.20.070 is hereby amended as follows (*the remainder of the section is not affected and therefore not set out)*:

27.20.070 Vacancies generally; unexcused absences.

A. The office of an elected member of a supervisory board established under this chapter shall become vacant in the same manner as an elected office becomes vacant as provided in section 7.01(a) of the Charter. In addition, a [A] vacancy shall occur on the failure of a member to:

1. Attend three consecutive regular or special meetings without excuse; or

2. Attend a two-thirds majority of the regular and special meetings during any calendar year without excuse.

*** *** ***

(CAC 2.64.060)

Section 2. Anchorage Municipal Code chapter 27.20, *Supervisory Boards,* is hereby amended to add a new section 27.20.085 to read as follows:

27.20.085 Removal from office.

An elected member of a supervisory board established under this chapter

may be removed from office for breach of the public trust following the procedures set forth in this section.

A. **Willful and knowing breach of duty or culpable indifference to official duties may constitute a breach of the public trust.** For the purposes of this section actions constituting a breach of the public trust shall include**, but are not limited to**:

1. Acceptance of cash gifts from one doing business with the *member's service area [~~municipality~~];*
2. Violation of chapter 1.15;
3. Perjury;
4. Falsification of records;
5. Filing false reports;
6. Nepotism;
7. Making personal use of municipal or school district property;
8. Destruction of municipal or school district property;
9. [*~~Official oppression;~~*
~~10.~~] Actual or attempted official misconduct, as defined by state law;
10[~~11~~]. Ordering a municipal employee or contractor employed by the supervisory board to undertake an unlawful act;
11[~~12~~]. Substantial breach of a statutory-, Code- or Charter-imposed duty.

B. Proceedings for removal from office **may only [~~shall~~]** be initiated by delivery of an accusation document to the municipal clerk setting forth the grounds for removal and specifying if delivery is to the assembly or the board of ethics. An accusation document may be submitted to the municipal clerk only by a majority vote of the assembly or decision of the municipal board of ethics and must allege specific actions by the member that breach the public trust.

C. After a successful vote to submit it, the municipal clerk shall cause a copy of the accusation document to be served on the member in the same manner as service of process under Alaska Rules of Civil Procedure, and a copy delivered to the municipal attorney.

D. The municipal attorney shall review the accusation document for legal sufficiency. The municipal attorney shall determine the legal sufficiency of the allegations within ten days of receipt of the accusation document. If the municipal attorney determines that the allegations are legally insufficient, the removal action shall be discontinued. The municipal attorney's determination, if it rejects the accusation document, may be appealed to the superior court within 30 days. No interlocutory appeal is permitted from a determination by the municipal attorney that the accusation document is legally sufficient.

Following a determination by the municipal attorney that the accusation document is legally sufficient, it shall be delivered to the municipal administrative hearings office established by Title 14, and the municipality shall employ an attorney of the member's choice, subject to the limitations of this subsection, to defend the charges. The attorney selected must be engaged in the active practice of law in the state. The fees charged by the attorney must be reasonable in both the rate and the amount of time expended. Reasonableness shall be evaluated in accordance with Alaska Bar Rule 35 and shall be subject to fee arbitration under the Alaska Bar Rules if the municipality disputes the reasonableness of the fees claimed.

E. A hearing conducted by the municipal administrative hearing officer shall be held no later than 30 days following appointment of the hearing officer. The hearing shall be open to the public and, unless otherwise provided in this section, shall be conducted in accordance with the procedures set forth in chapter 3.60**, however the hearing officer shall expedite the matter within the required times set forth in this section and chapter 3.60 and shall grant extensions only for good cause. Good cause must be based upon matters either beyond the control of the party making application or conditions which would create a significant hardship if a continuance is not granted**. Within ten days following the conclusion of the public hearing the hearing officer shall submit written findings and recommendations to the assembly. The recommendations shall include whether the member should be removed.

F. The standard of proof of the allegations in the accusation document to be applied by the hearing officer is *clear and convincing* *[~~proof by a preponderance of the~~]* evidence. The hearing officer shall evaluate the evidence relating to the accusations set forth in the accusation document and evaluate both whether the allegations are supported and whether those actions alleged constitute a breach of the public trust as set forth in subsection A. of this section. Wrongful acts or admissions occurring while the member was acting in a private capacity as opposed to in a capacity as a public officer shall not constitute a breach of the public trust. **[~~Willful and knowing breach of duty or culpable indifference to official duties may constitute a breach of the public trust.~~]**

G. Within ten days of receiving the hearing officer's recommendations, the assembly shall vote on whether to remove the member who is the subject of the accusation document. Removal shall occur only on the concurrence of two-thirds of the fully constituted body.

H. The decision of the assembly acting upon the recommendations of the hearing officer may be appealed to the superior court within 30 days of the assembly's decision. If the assembly's decision is for removal, the office shall be considered vacant beginning at 12:01 a.m. seven days following the decision unless the appellate court issues a stay of the removal pending appeal. In evaluating whether to grant a stay of removal pending appeal, the fact that another individual may be seated as acting member shall not constitute irreparable harm. During a stay, the seat may be temporarily filled pending the outcome of the court case using the procedures in section 27.20.080. If, after exhaustion of appeals, the final ruling reverses the removal, the removed member shall be reseated for the remainder of the term for which the member was elected, and the acting member shall be displaced.

I. The assembly shall submit specific written findings for the record showing good cause in the event that the assembly intends to reject the hearing officer's recommendation.

Section 3. Anchorage Municipal Code chapter 3.10, *General Provisions,* (*Reserved)* is hereby amended to rename the chapter and to add a new section 3.10.050 to read as follows:

Chapter 3.10 - GENERAL PROVISIONS [(RESERVED)]

*** *** ***

3.10.050 Removal from office.

The mayor may be removed from office for breach of the public trust following the procedures set forth in this section:

A. **Willful and knowing breach of duty or culpable indifference to official duties may constitute a breach of the public trust.** For the purposes of this section actions constituting a breach of the public trust shall include**, but are not limited to**:

1. Acceptance of cash gifts from one doing business with the municipality;
2. Violation of chapter 1.15;
3. Perjury;
4. Falsification of records;
5. Filing false reports;
6. Nepotism;
7. Making personal use of municipal or school district property;
8. Destruction of municipal or school district property;
9. *[Official oppression;*

10.] Actual or attempted official misconduct, as defined by state law;

10[~~11~~].Ordering, or knowingly allowing a person appointed by the mayor to order, a municipal employee to undertake an unlawful act;

11[~~12~~].Substantial breach of a statutory-, Code- or Charter-imposed duty;

12[~~13~~].Failure to faithfully execute the directives of a duly enacted ordinance.

B. Proceedings for removal from office **may only [~~shall~~]** be initiated by delivery of an accusation document to the municipal clerk setting forth the grounds for removal and specifying if delivery is to the assembly or the board of ethics. An accusation document may be submitted to the municipal clerk only by a majority vote of the assembly or decision of the municipal board of ethics and must allege specific actions by the mayor that breach the public trust.

C. After a successful vote to submit it, the municipal clerk shall cause a copy of the accusation document to be delivered by personal service to the mayor and a copy delivered to the municipal attorney.

D. The municipal attorney, or an impartial third-party attorney retained by the Assembly to serve as special counsel, shall review the accusation document for legal sufficiency. An accusation approved by the assembly shall specify whether the accusation shall be reviewed for legal sufficiency by the municipal attorney or special counsel. The municipal attorney, or the retained special counsel, shall determine the legal sufficiency of the allegations within ten days of receipt of the accusation document. If the municipal attorney, or special counsel, determines that the allegations are legally insufficient, the removal action shall be discontinued. The municipal attorney's or special counsel's determination, if it rejects the accusation document, may be appealed to the superior court within 30 days. No interlocutory appeal is permitted from a determination by the municipal attorney or special counsel that the accusation document is legally sufficient. Following a determination by the municipal attorney or special counsel that the accusation document is legally sufficient, the municipality shall employ an attorney of the mayor's choice, subject to the limitations of this subsection, to defend the charges. The attorney selected must be engaged in the active practice of law in the state. The fees charged by the attorney must be reasonable in both the rate and the amount of time expended. Reasonableness shall be evaluated in accordance with Alaska Bar Rule 35 and shall be subject to fee arbitration under the Alaska Bar Rules if the municipality disputes the reasonableness of the fees claimed.

E. Within two weeks following the service of an accusation document, the municipal clerk shall request that six names be submitted as potential hearing officers by the American Arbitration Association unless otherwise mutually agreed to by the assembly and the mayor. Three of the names submitted should be from the state and three from out-of-state. From these names the assembly and the mayor shall agree upon a hearing officer who shall conduct the hearing concerning the allegations in the accusation document. If no agreement is reached within ten days of distribution of the list of potential hearing officers, the hearing officer shall be selected by each side exercising preemptory challenges to the six potential names in turn until only one remains.

F. A hearing conducted by the appointed hearing officer shall be held no later than 30 days following appointment of the hearing officer. The hearing shall be open to the public and, unless otherwise provided in this section, shall be conducted in accordance with the procedures set forth in chapter 3.60**, however the hearing officer shall expedite the matter within the required times set forth in this section and chapter 3.60 and shall grant extensions only for good cause. Good cause must be based upon matters either beyond the control of the party making application or conditions which would create a significant hardship if a continuance is not granted**. Within ten days following the conclusion of the public hearing the hearing officer shall submit written findings and recommendations to the assembly. The recommendations shall include whether the mayor should be removed.

G. The standard of proof of the allegations in the accusation document to be applied by the hearing officer is *clear and convincing* *[~~proof by a preponderance of the~~]* evidence. The hearing officer shall evaluate the evidence relating to the accusations set forth in the accusation document and evaluate both whether the allegations are supported and whether those actions alleged constitute a breach of the public trust as set forth in subsection A. of this section. Wrongful acts or admissions occurring while the mayor was acting in a private capacity as opposed to in a capacity as a public officer shall not constitute a breach of the public trust. **[~~Willful and knowing breach of duty or culpable indifference to official duties may constitute a breach of the public trust.~~]**

H. Within ten days of receiving the hearing officer's recommendations, the assembly shall vote on whether to remove the mayor. Removal shall occur only on the concurrence of two-thirds of the fully constituted body.

I. The decision of the assembly acting upon the recommendations of the hearing officer may be appealed to the superior court within 30 days of the assembly's decision. If the assembly's decision is for removal, the office shall be considered vacant beginning at 12:01 a.m. seven days following the decision unless the appellate court issues a stay of the removal pending appeal. In evaluating whether to grant a stay of removal pending appeal, the fact that another individual may be seated as acting mayor shall not constitute irreparable harm. During a stay, unless otherwise ordered by the court the seat is considered vacant and shall be filled in accordance with Charter 7.02(c) pending the outcome of the court case. If, after exhaustion of appeals, the final ruling reverses the removal, the removed mayor shall be reseated for the remainder of the term for which the mayor was elected, and the acting mayor shall return to the person's prior position.

J. The assembly shall submit specific written findings for the record showing good cause in the event that the assembly intends to reject the hearing officer's recommendation.

Section 4. Anchorage Municipal Code section 2.70.030, *Removal from office,* is hereby amended as follows (*the remainder of the section is not affected and therefore not set out)*:

2.70.030 - Removal from office.

A member of the municipal assembly may be removed from office for breach of the public trust following the procedures set forth in this section:

A. **Willful and knowing breach of duty or culpable indifference to official duties may constitute a breach of the public trust.** For the purposes of this section actions constituting a breach of the public trust shall include**, but are not limited to**:

*** *** ***

9. *[OFFICIAL OPPRESSION;*

10]. **Actual or attempted official misconduct, as defined by state law;**

*10**[~~11~~].* Unexcused absence from three consecutive meetings;

*11**[~~12~~]***[11]. Failure to attend 75 percent of meetings in a 24-month period; or

*12**[~~13~~]***[12]. Substantial b[B]reach of a statutory**-, Code-** or Charter-imposed duty.

B. Proceedings for removal from office **may only [SHALL]** be initiated by delivery of an accusation document to the municipal clerk setting forth the grounds for removal and specifying if delivery is to the

assembly or the board of ethics. An accusation document may be submitted to the municipal clerk only by a majority [TWO-THIRDS] vote of the assembly or [TWO-THIRDS MAJORITY] decision of the municipal board of ethics and must allege specific actions by the assembly member in question which breach the public trust.

C. After a successful vote to submit it, the municipal clerk shall cause a copy of the accusation document to [MUST] be delivered by personal service to the member of the assembly who is the subject of the accusation document and a copy delivered to the municipal attorney.

D. The municipal attorney shall review the accusation document for legal sufficiency. The municipal attorney shall determine the legal sufficiency of the allegations within ten days of receipt of the accusation document. If the municipal attorney determines that the allegations are legally insufficient, the removal action shall be discontinued. The municipal attorney's determination, if it rejects the accusation document, may be appealed to the superior court within 30 days. No interlocutory appeal is permitted from a determination by the municipal attorney that the accusation document is legally sufficient. Following a determination by the municipal attorney that the accusation document is legally sufficient, the municipality shall employ an attorney of the accused's choice, subject to the limitations of this subsection, to defend the charges. The attorney selected must be engaged in the active practice of law in the state. The fees charged by the attorney must be reasonable in both the rate and the amount of time expended. Reasonableness shall be evaluated in accordance with Alaska Bar Rule 35 and shall be subject to fee arbitration under the Alaska Bar Rules if the municipality disputes the reasonableness of the fees claimed.

E. Within two weeks following the delivery of an accusation document, the municipal clerk shall request that six names be submitted as potential hearing officers by the American Arbitration Association. Three of the names submitted should be from the state and three from out-of-state. From these names the assembly and the accused shall agree upon a hearing officer who shall conduct the hearing concerning the allegations in the accusation document. If [, OR, IF] no agreement is reached within ten days of distribution of the list of potential hearing officers, the hearing officer shall be selected by each side exercising preemptory challenges to the six potential names in turn until only one remains [THE MUNICIPAL CLERK SHALL SELECT A HEARING OFFICER FROM THE LIST WHO SHALL CONDUCT A HEARING CONCERNING THE ACCUSATIONS CONTAINED IN THE DOCUMENT FILED WITH THE MUNICIPAL CLERK AND SHALL PROVIDE A RECOMMENDATION TO THE ASSEMBLY]. If more

than one assembly member is the subject of the accusation document or the alleged breach arises out of the same event, the same hearing officer shall hear those matters and may hold one consolidated hearing.

F. A hearing conducted by the appointed hearing officer shall be held no later than 30 days following appointment of the hearing officer. The hearing shall be open to the public and, unless otherwise provided in this section, shall be conducted in accordance with the procedures set forth in chapter 3.60**, however the hearing officer shall expedite the matter within the required times set forth in this section and chapter 3.60 and shall grant extensions only for good cause. Good cause must be based upon matters either beyond the control of the party making application or conditions which would create a significant hardship if a continuance is not granted**. Within ten days following the conclusion of the public hearing the hearing officer shall submit written findings and recommendations to the assembly. The recommendations shall include whether the officer should be removed.

G. The standard of proof of the allegations in the accusation document to be applied by the hearing officer is *clear and convincing* *[~~proof by a preponderance of the~~]* evidence. The hearing officer shall evaluate the evidence relating to the accusations set forth in the accusation document and evaluate both whether the allegations are supported and whether those actions alleged constitute a breach of the public trust as set forth in subsection A of this section. Wrongful acts or admissions occurring while the officer was acting in a private capacity as opposed to his capacity as a public officer shall not constitute a breach of the public trust. **[WILLFUL AND KNOWING BREACH OF DUTY OR CULPABLE INDIFFERENCE TO OFFICIAL DUTIES MAY CONSTITUTE A BREACH OF THE PUBLIC TRUST.]**

*** *** ***

I. The decision of the assembly acting upon the recommendations of the hearing officer may be appealed to the superior court within 30 days of the assembly's decision. If the assembly's decision is for removal, the office shall be considered vacant beginning at 12:01 a.m. seven days following the decision unless the appellate court issues a stay of the removal pending appeal. In evaluating whether to grant a stay of removal pending appeal the facts that the removed member could miss important votes and that another individual may be seated to replace the removed member shall not constitute irreparable harm. During a stay, unless otherwise ordered by the court the seat is considered vacant and shall be filled in accordance with Charter 7.02(b) and section 2.70.020 pending the outcome of the court case. If, after exhaustion of appeals, the final ruling reverses the removal,

the removed member shall be reseated for the remainder of the term for which elected, and any replacement, whether appointed or elected at a special election, shall be displaced.

J. The assembly shall submit specific written findings for the record showing good cause in the event that the assembly intends to reject the hearing officer's recommendation.

(AO No. 93-54(S-1), 5-5-93)

Section 5. Anchorage Municipal Code section 29.10.060, *Removal of members from office,* is hereby amended as follows (*the remainder of the section is not affected and therefore not set out)*:

29.10.060 - Removal of members from office.

A member of the school board may be removed from office for breach of the public trust following the procedures set forth in this section.

A. **Willful and knowing breach of duty or culpable indifference to official duties may constitute a breach of the public trust.** For the purposes of this section, actions constituting a breach of the public trust shall include**, but are not limited to**:

*** *** ***

9. *[OFFICIAL OPPRESSION;*

10]. **Actual or attempted official misconduct, as defined by state law;**

*10**[~~11~~]*.** Unexcused absence from three consecutive meetings;

*11**[~~12~~]*[11]**. Failure to attend 75 percent of meetings in a 24-month period; or

*12**[~~13~~]*[12]**. Substantial b[B]reach of a statutory-, Code- or Charter-imposed duty.

B. Proceedings for removal from office **may only [SHALL]** be initiated by delivery of an accusation document to the municipal clerk setting forth the grounds for removal and specifying if delivery is to the school board or the board of ethics. An accusation document may be submitted to municipal clerk only by a majority [TWO-THIRDS] vote of the school board or a [TWO-THIRDS MAJORITY] decision of the municipal board of ethics and must allege specific actions by the school board member in question which breach the public trust.

C. After a successful vote to submit it, the municipal clerk shall cause a copy of the accusation document to [MUST] be delivered by personal service to the members of the school board who are the subjects of the accusation document and a copy delivered to the municipal

attorney.

D. The municipal attorney shall review the accusation document for legal sufficiency. The municipal attorney shall determine the legal sufficiency of the allegations within ten days of receipt of the accusation document. If the municipal attorney determines that the allegations are legally insufficient, the removal action shall be discontinued. The municipal attorney's determination, if it rejects the accusation document, may be appealed to the superior court within 30 days. No interlocutory appeal is permitted from a determination by the municipal attorney that the accusation document is legally sufficient. Following a determination by the municipal attorney that the accusation document is legally sufficient, the school board shall employ an attorney of the accused's choice, subject to the limitations of this subsection, to defend the charges. The attorney selected must be engaged in the active practice of law in the state. The fees charged by the attorney must be reasonable in both the rate and the amount of time expended. Reasonableness shall be evaluated in accordance with Alaska Bar Rule 35 and shall be subject to fee arbitration under the Alaska Bar Rules if the school district disputes the reasonableness of the fees claimed.

E. Within two weeks following the service [DELIVERY] of an accusation document, the municipal clerk shall request six names be submitted as potential hearing officers by the American Arbitration Association. Three of the names submitted should be from the state and three from out of state. From these names the school board and the accused shall agree upon a hearing officer who shall conduct the hearing concerning the allegations in the accusation document. If [, OR, IF] no agreement is reached within ten days of distribution of the list of potential hearing officers, the hearing officer shall be selected by each side exercising preemptory challenges to the six potential names in turn until only one remains [THE MUNICIPAL CLERK SHALL SELECT A HEARING OFFICER FROM THE LIST, WHO SHALL CONDUCT A HEARING CONCERNING THE ACCUSATIONS CONTAINED IN THE DOCUMENT FILED WITH THE MUNICIPAL CLERK AND SHALL PROVIDE A RECOMMENDATION TO THE SCHOOL BOARD]. If more than one school board member is the subject of the accusation document or the alleged breach arises out of the same event, the same hearing officer shall hear those matters and may hold one consolidated hearing.

F. A hearing conducted by an appointed hearing officer shall be held no later than 30 days following appointment of the hearing officer. The hearing shall be open to the public and, unless otherwise provided in this section, shall be conducted in accordance with the procedures set

forth in chapter 3.60**, however the hearing officer shall expedite the matter within the required times set forth in this section and chapter 3.60 and shall grant extensions only for good cause. Good cause must be based upon matters either beyond the control of the party making application or conditions which would create a significant hardship if a continuance is not granted**. Within ten days following the conclusion of the public hearing, the hearing officer shall submit written findings and recommendations to the school board. The recommendations shall include whether the official should be removed.

G. The standard of proof of the allegations in the accusation document to be applied by the hearing officer is *clear and convincing* *[~~proof by a preponderance of the~~]* evidence. The hearing officer shall evaluate the evidence relating to the accusations set forth in the accusation document and evaluate both whether the allegations are supported and whether those actions alleged constitute a breach of the public trust. Wrongful acts or admissions occurring while the officer was acting in a private capacity as opposed to his capacity as a public officer shall not constitute a breach of the public trust as set forth in subsection A of this section. **WILLFUL AND KNOWING BREACH OF DUTY OR CULPABLE INDIFFERENCE TO OFFICIAL DUTIES MAY CONSTITUTE A BREACH OF THE PUBLIC TRUST.]**

*** *** ***

I. The decision of the school board acting upon the recommendations of the hearing officer may be appealed to the superior court within 30 days of the school board's decision. If the school board's decision is for removal, the office shall be considered vacant beginning at 12:01 a.m. seven days following the decision unless the appellate court issues a stay of the removal pending appeal. In evaluating whether to grant a stay of removal pending appeal the facts that the removed member could miss important votes or that another individual may be seated to replace the removed member shall not constitute irreparable harm. During a stay, unless otherwise ordered by the court the seat is considered vacant and shall be filled in accordance with Charter 7.02(a) pending the outcome of the court case. If, after exhaustion of appeals, the final ruling reverses the removal, the removed member shall be reseated for the remainder of the term for which elected, and any replacement, whether appointed or elected at a special election, shall be displaced.

J. The school board shall submit specific written findings for the record showing good cause in the event that the school board intends to reject the hearing officer's recommendation.

(AO No. 93-54(S-1), 5-5-93)

Section 6. This ordinance shall be effective immediately upon passage and approval by the Assembly.

PASSED AND APPROVED by the Anchorage Assembly this 12th day of July, 2022.

Christopher Constant

Chair

ATTEST:

Barbara A. Jones

Municipal Clerk

Proposed Amendment #1 to AO 2022-60(S)

AN ORDINANCE OF THE ANCHORAGE ASSEMBLY AMENDING ANCHORAGE MUNICIPAL CODE CHAPTERS 3.10, GENERAL PROVISIONS, AND 27.20, SUPERVISORY BOARDS, AND SECTIONS 2.70.030 AND 29.10.060 TO FULFILL THE REQUIREMENT OF ANCHORAGE MUNICIPAL CHARTER SECTION 7.01(b) THAT THE ASSEMBLY BY ORDINANCE MUST ESTABLISH SPECIFIC PROCEDURES FOR REMOVAL OF AN ELECTED OFFICIAL FOR BREACH OF THE PUBLIC TRUST.

Submitted by: Chair LaFrance and Vice Chair Constant

PROPOSED AMENDMENT

Purpose/Summary of Amendment: This amendment amends the proposed ordinance's whereas statements to address a question raised during public testimony: Don't the recall provisions in Anchorage Municipal Code chapter 2.50 fulfill the the Anchorage Municipal Charter mandate to establish procedures for removal of elected officials?

Anchorage Municipal Code section 2.50.100, which addresses recall *by voters*, does not fulfill the Charter mandate to establish procedures for removal of elected officials "*by a majority of all members of the assembly*, *or the school board* in the case of removal of a school board member."

The Charter addresses "recall" and "removal" in different sections. It reserves recall for "voters," and removal for "the assembly" or "school board":

> **Section 3.03. - Recall.**
> An elected official may be recalled by the voters in the manner provided by law. A petition to place the recall of an elected official before the voters shall be signed by a number of qualified voters as required by law.
>
> And
>
> **Section 7.01. - Determining vacancies.**
> (b) Proceedings for removal of an elected official for breach of the public trust may be initiated by a majority of all members of the assembly, or the school board in the case of removal of a school board member. In addition, proceedings for removal may be initiated by any duly constituted ethics board. The assembly by ordinance shall establish procedures for removal of elected officials for breach of the public trust, including provision for notice, a complete statement of the charge, a public hearing conducted by an impartial hearing officer, and judicial review. Removal must be approved by two-thirds of the authorized membership of the assembly or school board as the case may be.

The Assembly has so far established procedures for only *some* "elected officials" – Assembly and school board members. It has not yet adopted procedures for elected service-area board members or the mayor.

TEXT OF AMENDMENT

(*adding new language*, *[DELETING CURRENT CODE LANGUAGE]* and *[~~Deleting words proposed by the unamended AO **or AO(S)** that are not in current code~~]*)

AO Page 1, beginning at line 9, insert the following new whereas statement and revise the existing whereas statement as follows:

> ***WHEREAS,*** *Anchorage Municipal Charter section 7.01(b) provides that an elected official may be removed "by two-thirds of the authorized membership of the assembly or school board," when the elected official has breached the public trust; and*
>
> ***WHEREAS***, Anchorage Municipal Charter section 7.01(b) *further* provides, in part, "[t]he assembly by ordinance shall establish procedures for removal of elected officials for breach of the public trust, including provision for notice, a complete statement of the charge, a public hearing conducted by an impartial hearing officer, and judicial review";

AO Page 1, beginning at line 15, revise the second whereas statement, and insert the following two new whereas statements, as follows:

> **WHEREAS**, *consistent with Charter section 7.01(b), the Assembly has adopted procedures to govern the removal of assembly and school board members, but has not adopted procedures to govern the removal of elected service-area board members or the mayor, with the consequence that* the requirements of section 7.01(b) have only been partly fulfilled; and
>
> ***WHEREAS****, "recall" by voters is a separate process from "removal," and is addressed in Charter section 3.03, not section 7.01; and*
>
> ***WHEREAS****, the Assembly's adoption of Anchorage Municipal Code chapter 2.50, which addresses recall by voters, does not fulfill the Charter section 7.01(b) mandate to establish procedures for removal of elected officials "by a majority of all members of the assembly, or the school board in the case of removal of a school board member"; and*

Will there be any public or private economic effect to the proposed amendment?
☐ YES ☒ NO (check one) **If yes, please detail below.**

Proposed Amendment #2 to AO 2022-60(S)

AN ORDINANCE OF THE ANCHORAGE ASSEMBLY AMENDING ANCHORAGE MUNICIPAL CODE CHAPTERS 3.10, GENERAL PROVISIONS, AND 27.20, SUPERVISORY BOARDS, AND SECTIONS 2.70.030 AND 29.10.060 TO FULFILL THE REQUIREMENT OF ANCHORAGE MUNICIPAL CHARTER SECTION 7.01(b) THAT THE ASSEMBLY BY ORDINANCE MUST ESTABLISH SPECIFIC PROCEDURES FOR REMOVAL OF AN ELECTED OFFICIAL FOR BREACH OF THE PUBLIC TRUST.

Submitted by: Chair LaFrance and Vice Chair Constant

PROPOSED AMENDMENT

Purpose/Summary of Amendment: This amendment adds a whereas statement to address questions raised during public testimony: Does the Assembly have the authority to remove elected officials, including the mayor, for breach of public trust? Do other legislative bodies have this authority?

As a Unified Home Rule Borough Charter, the Municipality of Anchorage is authorized to enact legislative powers not prohibited by law or Charter. In this instance the Anchorage Municipal Charter in Section 7.01(b) directs the Assembly to "establish procedures for removal of elected officials for breach of the public trust.". This is a separate and distinct process from removal from office by voter recall, which is addressed in Section 3.03 of the Charter.

Many legislative bodies in the U.S., bicameral and unicameral, at all levels of government are authorized by law to initiate proceedings for removal of elected officials, including the chief executive. The U.S. Congress can impeach and remove the president (U.S. Constitution, art. I, sections 2-3; art. II, sec 4). The Alaska State Legislature can impeach and remove a Governor (Alaska Constitution, art. II, section 20). The unicameral state legislature of Nebraska may present an impeachment to judicial officers (Nebraska Constitution, art. III, section 17), which involves a neutral hearing officer and judicial remedies similar to those proposed in AO 2022-60(S).

Per Alaska Statute 29.20.280, the council or assembly of a general law municipality in Alaska can remove a mayor, by two-thirds vote, convicted of a felony, convicted of a misdemeanor election offense, convicted of an election campaign violation, or where the body concludes that the mayor is "physically or mentally unable to perform the duties of office."

TEXT OF AMENDMENT

(*adding new language*, *[DELETING CURRENT CODE LANGUAGE]* and *[~~Deleting words proposed by the unamended AO **or AO(S)** that are not in current code~~]*)

AO Page 1, after the second whereas statement (ending "the requirements of section 7.01 (b) have only been partially fulfilled")**,** insert the following new whereas statement:

> ***WHEREAS***, *constitutional provisions like Charter section 7.01(b), that allow the legislative branch to initiate removal of an executive officer, are not uncommon: the U.S. Congress can impeach and remove the president (U.S. Constitution, art. I, sections 2-3; art. II, section 4); the Alaska State Legislature can impeach and remove a Governor (Alaska Constitution, art. II, section 20); the state legislature of Nebraska, which like the Assembly is unicameral, can initiate impeachments that involve a fair hearing conducted by persons not in the legislative branch and include procedural safeguards similar to those proposed in AO 2022-60(S) (Nebraska Constitution, art. III, section 17); and in Alaska, the council or assembly of a general-law municipality may remove a mayor when certain conditions are met (AS 29.20.280); and*

Will there be any public or private economic effect to the proposed amendment?
☐ YES ☒ NO (check one) **If yes, please detail below.**

Proposed Amendment #3 to AO 2022-60(S)

AN ORDINANCE OF THE ANCHORAGE ASSEMBLY AMENDING ANCHORAGE MUNICIPAL CODE CHAPTERS 3.10, *GENERAL PROVISIONS,* AND 27.20, *SUPERVISORY BOARDS,* AND SECTIONS 2.70.030 AND 29.10.060 TO FULFILL THE REQUIREMENT OF ANCHORAGE MUNICIPAL CHARTER SECTION 7.01(b)…

Submitted by: Assembly Chair Suzanne LaFrance and Vice Chair Christopher Constant

PROPOSED AMENDMENT

Purpose/Summary of Amendment: The purpose of this amendment is to clarify the limitation on elected supervisory board members with regard to acceptance of cash gifts to align with the limitation contained in existing ethics code.

TEXT OF AMENDMENT

AO 2022-60S, Section 2, p. 2, beginning at line 11, amending as follows:

1. Acceptance of cash gifts from one doing business with the *member's service area* [***municipality***];

Will there be any public or private economic effect to the proposed amendment?
☐ YES ☒ NO (check one) **If yes, please detail below.**

Proposed Amendment #4 to AO 2022-60(S)

AN ORDINANCE OF THE ANCHORAGE ASSEMBLY AMENDING ANCHORAGE MUNICIPAL CODE CHAPTERS 3.10, *GENERAL PROVISIONS,* AND 27.20, *SUPERVISORY BOARDS,* AND SECTIONS 2.70.030 AND 29.10.060 TO FULFILL THE REQUIREMENT OF ANCHORAGE MUNICIPAL CHARTER SECTION 7.01(b)…

Submitted by: Assembly Member Zaletel

PROPOSED AMENDMENT

Purpose/Summary of Amendment: The purpose of this amendment is to raise the threshold to be applied by the hearing officer to "clear and convincing" vs. "proof by a preponderance of the evidence" for all elected officials.

TEXT OF AMENDMENT

AO 2022-60(S), Section 2, p. 3, subsection F beginning at line 45, amending as follows:

F. The standard of proof of the allegations in the accusation document to be applied by the hearing officer is [~~*proof by a preponderance of the*~~] *clear and convincing* evidence. The hearing officer shall evaluate the evidence relating to the accusations set forth in the accusation document and evaluate both whether the allegations are supported and whether those actions alleged constitute a breach of the public trust as set forth in subsection A. of this section. Wrongful acts or admissions occurring while the member was acting in a private capacity as opposed to in a capacity as a public officer shall not constitute a breach of the public trust. **[~~Willful and knowing breach of duty or culpable indifference to official duties may constitute a breach of the public trust.~~]**

AND Section 3, p. 6, subsection G beginning at line 39:

G. The standard of proof of the allegations in the accusation document to be applied by the hearing officer is [~~*proof by a preponderance of the*~~] *clear and convincing* evidence. The hearing officer shall evaluate the evidence relating to the accusations set forth in the accusation document and evaluate both whether the allegations are supported and whether those actions alleged constitute a breach of the public trust as set forth in subsection A. of this section. Wrongful acts or admissions occurring while the mayor was acting in a private capacity as opposed to in a capacity as a public officer shall not constitute a breach of the public trust. **[~~Willful and knowing breach of duty or culpable indifference to official duties may constitute a breach of the public trust.~~]**

AND Section 4, p. 9, subsection G beginning at line 26:

G. The standard of proof of the allegations in the accusation document to be applied by the hearing officer is [~~*proof by a preponderance of the*~~] *clear and convincing* evidence. The hearing officer shall evaluate the evidence relating to the accusations set forth in the accusation document and evaluate both whether the allegations are supported and whether those actions alleged constitute a breach of the public trust as set forth in subsection A of this section. Wrongful acts or admissions occurring while the officer was acting in a private capacity as opposed to his capacity as a public officer shall not constitute a breach of the public trust. **[WILLFUL AND KNOWING BREACH OF DUTY OR CULPABLE INDIFFERENCE TO OFFICIAL DUTIES MAY CONSTITUTE A BREACH OF THE PUBLIC TRUST.]**

And Section 5, p. 12, subsection G beginning at line 13:

G. The standard of proof of the allegations in the accusation document to be applied by the hearing officer is [~~*proof by a preponderance of the*~~] *clear and convincing* evidence. The hearing officer shall evaluate the evidence relating to the accusations set forth in the accusation document and evaluate both whether the allegations are supported and whether those actions alleged constitute a breach of the public trust. Wrongful acts or admissions occurring while the officer was acting in a private capacity as opposed to his capacity as a public officer shall not constitute a breach of the public trust as set forth in subsection A of this section. [**WILLFUL AND KNOWING BREACH OF DUTY OR CULPABLE INDIFFERENCE TO OFFICIAL DUTIES MAY CONSTITUTE A BREACH OF THE PUBLIC TRUST.]**

Will there be any public or private economic effect to the proposed amendment?
☐ YES ☒ NO (check one) **If yes, please detail below.**

Proposed Amendment #5 to AO 2022-60(S)

AN ORDINANCE OF THE ANCHORAGE ASSEMBLY AMENDING ANCHORAGE MUNICIPAL CODE CHAPTERS 3.10, *GENERAL PROVISIONS,* AND 27.20, *SUPERVISORY BOARDS,* AND SECTIONS 2.70.030 AND 29.10.060 TO FULFILL THE REQUIREMENT OF ANCHORAGE MUNICIPAL CHARTER SECTION 7.01(b)…

Submitted by: Assembly Member Zaletel

PROPOSED AMENDMENT

Purpose/Summary of Amendment: The purpose of this amendment is to require that written findings showing good cause be submitted to the record should the assembly or school board vote to set aside the recommendation of the hearing officer.

TEXT OF AMENDMENT

AO 2022-60S, Section 2, adding a new subsection I as follows:

27.20.085 Removal from office.

An elected member of a supervisory board established under this chapter may be removed from office for breach of the public trust following the procedures set forth in this section.

*** *** ***

I. The assembly shall submit specific written findings for the record showing good cause in the event that the assembly intends to reject the hearing officer's recommendation.

*** *** ***

And Section 3, adding a new subsection J as follows:

3.10.050 Removal from office.

The mayor may be removed from office for breach of the public trust following the procedures set forth in this section:

*** *** ***

J. The assembly shall submit specific written findings for the record showing good cause in the event that the assembly intends to reject the hearing officer's recommendation.

*** *** ***

And Section 4, adding a new subsection J as follows:

2.70.030 - Removal from office.

A member of the municipal assembly may be removed from office for breach of the public trust following the procedures set forth in this section:

*** *** ***

J. The assembly shall submit specific written findings for the record showing good cause in the event that the assembly intends to reject the hearing officer's recommendation.

*** *** ***

And Section 5, adding a new subsection J as follows:

29.10.060 - Removal of members from office.

A member of the school board may be removed from office for breach of the public trust following the procedures set forth in this section.

*** *** ***

J. The school board shall submit specific written findings for the record showing good cause in the event that the school board intends to reject the hearing officer's recommendation.

*** *** ***

Will there be any public or private economic effect to the proposed amendment?
☐ YES ☒ NO (check one) **If yes, please detail below.**

Municipality of Anchorage

#: 2022 - 1

Office of the Municipal Clerk
632 West Sixth Avenue, Suite 250, Anchorage, Alaska 99501
Mailing Address: P.O. Box 196650 Anchorage, AK 99519-6650

Phone: 343-4311 Fax: 343-4313 Municipal Clerk: Barbara A. Jones

RECEIVED OFFICE OF THE MUNICIPAL CLERK AUG 04 2022

Initiative and Referenda Application

Anchorage Charter: Section 3.20 ~ Anchorage Municipal Code: Chapter 2.50

2.50.020 – Application for a petition.

A. *Application.* An initiative or referendum may only be proposed by first filing an application for a petition on a form, which shall be prescribed and provided by the municipal clerk.

B. *Form and content.* The application shall contain:

1. The name, residence and mailing address, signature and date of signature of two qualified voters of the municipality who are the primary and alternate contact persons to whom all correspondence relating to the petition may be sent. The application form shall include space for each contact person to provide optional phone and facsimile numbers, and an email address. The two contact persons shall be considered sponsors;

*** *** ***

(AO No. 2002-162, § 1, 12-17-02; AO No. 2017-41 , § 2, 3-21-17)

Primary Petition Sponsor and Contact Person

Printed Name: GEORGE WUERCH

Phone Number: 907/563-2737 Email Address: wuerch@alaska.net

Residence Address: 1332 CRESCENT DR, ANCHORAGE, AK 99508

Mailing Address: - same

Identifier: [redacted]

*(Voter #, Socia[redacted]

Signature: [redacted] Date: 8/2/22

Alternate Petition Sponsor and Contact Person

Printed Name: Peggy Jean Roten

Phone Number: 907-338-1590 Email Address: PJRoten@Yahoo.com

Residence Address: 7041 Montagne Cir. Anchorage, AK. 99507

Mailing Address: SAME

Identifier: [redacted]

*(Voter #, Last four of Social Security # or Date of Birth)

Signature: [redacted] Date: 8/2/22

Unsworn falsification in the second degree. "A person commits the crime of unsworn falsification in the second degree if, with the intent to mislead a public servant in the performance of a duty, the person submits a false written or recorded statement that the person does not believe to be true... on a form bearing notice, authorized by law, that false statements made in it are punishable. Unsworn falsification in the second degree is a class A misdemeanor. AS 11.56.210(2) and (2)(b).

Municipality of Anchorage

Office of the Municipal Clerk
632 West Sixth Avenue, Suite 250, Anchorage, Alaska 99501
Mailing Address: P.O. Box 196650 Anchorage, AK 99519-6650

Phone: 343-4311 Fax: 343-4313 Municipal Clerk: Barbara A. Jones

#: 2022 1

Initiative and Referenda Application

Anchorage Charter: Section 3.20 ~ Anchorage Municipal Code: Chapter 2.50

2.50.020 – Application for a petition.

*** *** ***

B. Form and content. The application shall contain:

*** *** ***

A. The name, residence and mailing address, signature and date of signature of at least ten qualified voters of the municipality, not including the contact persons, who will sponsor the initiative or referendum. Additional qualified sponsors may be added not less than three days before the date of first circulation of the petition certified by the clerk; and

*** *** ***

(AO No. 2002-162, § 1, 12-17-02; AO No. 2017-41, § 2, 3-21-17)

Ten Qualified Voters

Printed Name (must be legible):	Residence Address:	Mailing Address:	*Identifier (Voter #, Last 4 of SSN, or DOB):	Signature (must be legible):	Date:
William Starr	22707 Columbia Glacier AK 99577	Same	[redacted]	[redacted]	8/1/2022
Deborah Osstander	[redacted]	PO BX 670772 Chugiak 99567			8/1/22
Crystal Kennedy	20040 New England Dr Eagle River, AK 99577	20040 New England Dr. Eagle River, AK 99577			8/1/22
Daniel W Kendall	[redacted]	PO Box 770616 Eagle River AK 99577			8/1/22
Ernest Hall	4770 W. 84th Ave Anchorage, AK 99502	same			8/1/22
Erica Johnson	3891 Cardwell Dr. Anchorage AK 99502	same			8/1/2022
DAN SULLIVAN	3201 W. 32ND ANCHORAGE AK 99517	SAME			8/1/2022
BRUCE SCHULTE	[redacted]	PO Box 93719 AHCH, AK 9950			8/1/22
TRINA Johnson	[redacted]	PO BOX 92475 ANC, AK 99509			8/2/22
CRAIG CAMPBELL	18324 North Bariview Ter Eagle River, AK 99577	Same			8/3/22

Unsworn falsification in the second degree. "(a) A person commits the crime of unsworn falsification in the second degree if, with the intent to mislead a public servant in the performance of a duty, the person submits a false written or recorded statement that the person does not believe to be true...(2) on a form bearing notice, authorized by law, that false statements made in it are punishable. (b) Unsworn falsification in the second degree is a class A misdemeanor." AS 11.56.210

Municipality of Anchorage

Office of the Municipal Clerk
632 West Sixth Avenue, Suite 250, Anchorage, Alaska 99501
Mailing Address: P.O. Box 196650 Anchorage, AK 99519-6650

Phone: 343-4311 Fax: 343-4313 Municipal Clerk: Barbara A. Jones

Initiative and Referenda Application

Anchorage Charter: Section 3.20 ~ Anchorage Municipal Code: Chapter 2.50

2.50.20 – Application for a petition.

*** *** ***

B. *Form and content.* The application shall contain:

*** *** ***

3. The verbatim text of the measure to be enacted or repealed. A proposed measure shall:
   a. Meet constitutional, charter and other legal requirements or restrictions;
   b. Include only a single subject; and
   c. Be enforceable as a matter of law or be clearly denominated as advisory only.

(AO No. 2002-162, § 1, 12-17-02; AO No. 2017-41, § 2, 3-21-17)

Proposed Petition

Please select Petition Type: ☐ **Measure to be initiated** ☒ **Measure to be repealed**

Proposed Petition Title: Referendum Petition To Repeal AO No. 2022-60(S) as amended

Proposed Petition: *(Use additional sheet or separate page if necessary)* See attached

PETITION TITLE: REFERENDUM PETITION TO REPEAL AO No. 2022-60(S)(as amended)

Proposed petition: In accordance with Section 3.02 of the Home Rule Charter for the Municipality of Anchorage and Section 2.50 of the Anchorage Municipal Code, we the undersigned qualified voters of the Municipality of Anchorage submit this Referendum Petition calling for the repeal of Anchorage Ordinance ("AO") No. 2022-60(S)(as amended), enacted on July 12th, 2022, amending Anchorage Municipal Code Chapters 3.10, General Provisions, and 27.20, Supervisory Boards, and Sections 2.70.030 and 29.10.060.

We, the undersigned registered voters of the Municipality of Anchorage, request the following question be placed before the voters of the Municipality of Anchorage as a referendum question:

Shall AO No. 2022-60(S)(as amended), be repealed?

Yes [ ] No [ ]

MUNICIPALITY OF ANCHORAGE
Office of the Municipal Attorney
MEMORANDUM

DATE:	JANUARY 9, 2017
TO:	AMANDA K. MOSER, DEPUTY MUNICIPAL CLERK, AND BARBARA A. JONES, MUNICIPAL CLERK
THROUGH:	WILLIAM D. FALSEY, MUNICIPAL ATTORNEY WDF
THROUGH:	DEITRA L. ENNIS, DEPUTY MUNICIPAL ATTORNEY DLE
FROM:	DEAN T. GATES, ASSISTANT MUNICIPAL ATTORNEY DTG
SUBJECT:	REFERENDUM APPLICATION 2016-7: PETITION TO REPEAL AO 2016-124(S) AS AMENDED, TAXICAB SERVICES IMPROVEMENT ORDINANCE DEPT. OF LAW MATTER NO. N16-2427

QUESTION:

Is Referendum Application number 2016-7, entitled "Petition for Referendum to Repeal AO No. 2016-124(Evans S)," legally sufficient?

BRIEF ANSWER:

Subject to the following discussion, our brief answer is yes, provided that when preparing the master form of petition for circulation, the Municipal Clerk makes minor modifications as described in this memorandum. The modifications incorporate the sponsors' request to attach the finalized and signed version of AO 2016-124(S), as amended, that was passed by the Anchorage Assembly, and recommend revisions to the proposed petition to present a clear, fair and informative title, summary and question, as required by applicable Alaska Supreme Court precedent.

BACKGROUND:

On December 23, 2016, sponsors submitted to the Municipal Clerk an application for a referendum petition titled, "Petition for Referendum to Repeal AO No. 2016-124(Evans S)"[1] (hereafter "Referendum Application"). By letter dated December 27, 2016, attorney James T. Brennan requested on behalf of the sponsors that when the Municipal Clerk issues the master

[1] Exhibit A.

form of petition, she also provide the finalized and signed version of the subject ordinance, which was unavailable at the time sponsors submitted the Referendum Application.[2]

On December 20, 2016 the Anchorage Assembly, after several hours of public testimony that spanned two separate regular meetings and consideration of several amendments, adopted AO 2016-124(S), as amended, titled "An Ordinance of the Anchorage Assembly Amending Anchorage Municipal Code Title 11 to Improve Taxicab Services by Fostering More Competition and Related Matters Involving the Supply and Demand Framework for Transportation Services."[3] (hereafter "Taxicab Ordinance") Among other things, a principal effect of this ordinance is that it "provides for phased increases in the number of taxicab permits allowed to operate within the Municipality, and ... allow[s] annual review of the impacts on service quality and transportation needs."[4] Assemblymember Bill Evans, the sponsor of the measure, explained in a memorandum that it "phases-in a market based approach to the allocation of taxicab permits" over a five-year period, after which "permits will be available to any applicant who meets the qualification standards and safety requirements."[5] Several other features of the Taxicab Ordinance, as amended, are not clearly indicated by its title.[6]

The proposed petition, with edits requested to refer to the finalized ordinance, would circulate to voters the following question:

> Shall AO No. 2016-124(S), as amended, an ordinance of the Anchorage Assembly amending Anchorage Municipal Code Title 11 to improve taxicab services by fostering more competition and related matters involving the supply and demand framework for transportation services, be repealed? A copy of this ordinance is attached hereto.

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2 Exhibit B.

3 Exhibit C.

4 *See* Exh. C, AO 2016-124(S), as amended, at p. 1.

5 Exhibit D, AM 669-2016.

6 Other features included in the Taxicab Ordinance are: (1) replaces the prerequisite chauffer experience for permit applicants with only a state driver's license requirement, (2) provides for a certificate of ownership for current transferable permit owners to exempt them from minimum time operation requirements for owner/operators, (3) replaces the biannual "public convenience and necessity" process with an annual "market-conciliation hearing," (4) deletes all code references to the obsolete and unused "limited permit," (5) establishes minimum hours of operation for wheelchair accessible permitted taxicabs, (6) removes the prohibition on medical transport vehicles for hire accepting Medicaid vouchers for transporting passengers, (7) allows licensed taxicab dispatch service companies to use a digital dispatch system in place of traditional radio or GPS-based systems, (8) adds heavier fines for the offenses of operating a regulated vehicle without a permit, and (9) creates a new "accessible taxicab fleet permit" available to qualified nonprofit organizations that serve persons with disabilities.

DISCUSSION:

Applicable Law

Pursuant to Anchorage Municipal Code 2.50.030A., "...[w]ithin ten business days after receiving a completed application, the municipal clerk shall verify the sponsors' qualifications and, after consultation with the municipal attorney, determine and certify the legal sufficiency, or lack thereof, of the application and the proposed initiative or referendum."

Pursuant to AMC 2.50.020B., an application must set forth "the petition proposed to be circulated," which must:

a. set out verbatim the ordinance or resolution sought to be enacted or repealed by the petition;
b. have the required names, residence and mailing addresses, signatures, and dates of signatures of the initial contact persons and sponsors;
c. meet constitutional, charter and other legal requirements or restrictions;
d. include only a single subject; and
e. be enforceable as a matter of law or be clearly denominated as advisory only.

The Alaska Supreme Court has held that its pre-election review of a proposed referendum petition is limited to determining whether the petition "compl[ies] with the constitutional and statutory provisions regulating . . . referendums," and whether the petition is "clearly unconstitutional or unlawful."[7] The Court has held that "[t]he right of initiative and referendum, sometimes referred to as direct legislation, should be liberally construed to permit exercise of that right."[8]

The Anchorage Municipal Charter provides that "[t]he powers of initiative and referendum do not apply to ordinances establishing budgets, fixing mill levies, authorizing the issuance of bonds, or appropriating funds."[9]

A provision of the Alaska Constitution, with which home rule municipalities must comply as a consequence of state law,[10] further provides that "[t]he referendum shall not be applied to

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7 *Price v. Kenai Peninsula Borough*, 331 P.3d 356, 359 (Alaska 2014).

8 *Thomas v. Bailey*, 595 P.2d 1, 3 (Alaska 1979).

9 ANCHORAGE MUNICIPAL CHARTER § 3.02(a).

10 *See* AS 29.10.030 *Initiative and Referendum*, which provides:

(a) A home rule charter shall provide procedures for initiative and referendum.

. . .

(c) A charter may not permit the initiative and referendum to be used for a purpose prohibited by art. XI, § 7 of the state constitution.

dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety."[11]

Further, the Alaska Supreme Court has held that the powers of the referendum are restricted only to "enactments that are legislative rather than administrative or executive in character."[12]

Last, the Alaska Supreme Court has held that "[t]he signature-gathering requirement of the referendum process serves an important screening purpose,"[13] and that a referendum petition "should be a source of accurate information for all citizens concerning what is being proposed."[14] It has held that "a petition summary should be 'complete enough to convey an intelligible idea of the scope and import of the proposed law, and that it ought to be free from any misleading tendency, whether of amplification, of omission, or of fallacy, and that it must contain no partisan coloring.' "[15] The Court has suggested that requirement is constitutional in nature,[16] and it accords with related provisions of municipal law. Anchorage Municipal Code section 28.40.010D.1.b. requires that, when placed on a municipal ballot, "a summary description, including the question, of each proposition" presented to voters must be prepared in "a fair, true and impartial manner by the municipal attorney in consultation with the municipal clerk."

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11 ALASKA CONST. art. XI, § 7.

12 *Municipality of Anchorage v. Holleman*, 321 P.3d 378, 385 (Alaska 2014).

13 *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1219 (Alaska 1993).

14 *Id.* at 1220.

15 *Id.* at 1218 (quoting *Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273 (Alaska 1982) (citing *Hope v. Hall*, 229 Ark. 407, 316 S.W.2d 199, 201 (1958))). *See also id.* at 1219 (quoting *Sawyer Stores, Inc. v. Mitchell*, 103 Mont. 148, 62 P.2d 342, 348 (1936) (quoting *In re Opinion of the Justices*, 271 Mass. 582, 171 N.E. 294, 297 (1930)).

16 *Id.* at n.8:

> The fair and accurate description requirement arguably has constitutional stature. Article I, section 2 of the Alaska Constitution states:
>
> > All political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole.
>
> Referring to this provision in *Boucher v. Bomhoff*, 495 P.2d 77, 78 (Alaska 1972), we stated: "it is basic to our democratic society that the people be afforded the opportunity of expressing their will on the multitudinous issues which confront them." A logical corollary to this interpretation of Article I, section 2 is that the people have a right to a fair and accurate summary of issues on which they are being asked to express their will. This right would extend to petitions in all elections subject to the state constitution, including those conducted by home rule municipalities.

(emphasis added).

Compliance with Applicable Law

We conclude that the Referendum Application is legally sufficient with the after-filed edits requested by the sponsors' counsel to refer the ordinance actually adopted by the Assembly. We recommend the proposition title, summary, and question be modified for the master form of petition to more clearly, fairly and accurately present the question to petition signers and voters.

1. The technical requirements.

In compliance with AMC 2.50.020B.3.b. and AMC 2.50.020B.3.d., the proposed petition includes the required names, residence and mailing addresses, and signatures of the initial contact persons and sponsors,[17] and it covers a single subject. The Referendum Application had attached the wrong version of the ordinance, but when the request from sponsors' attorney is followed to replace it with the finalized, signed version of AO 2016-124(S) as amended, the Application's proposed petition is in compliance with the requirement to "set out verbatim the ordinance ... sought to be ... repealed by the petition."[18] The Taxicab Ordinance must be available with the petition form when gathering signatures.

2. The Referendum Application does not address a prohibited subject.

There are several subjects and types of legislation that is not subject to the referendum power by law. Because the ordinance that the sponsors seek to repeal applies throughout the Municipality, and embraces a subject of "common interest" to the people of the Municipality,[19] the Application does not propose to repeal local or special legislation.

There is no Alaska precedent defining when a law sought to be repealed by referendum is one necessary for the immediate preservation of the public peace, health or safety, but other jurisdictions characterize such laws as emergency police legislation or those enacted for urgent health or safety needs, such as ordinances defining criminal offenses.[20] AO 2016-124(S), as amended, is not such a law.

a. *Restructuring the taxicab permit system is not an appropriation.*

In 2002, the Municipal Attorney issued an opinion declaring impermissible an initiative petition to amend the Charter with provisions requiring an open entry system for taxicab permits because it would devalue transferable permits (those issued prior to February 1994) and consequently

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17 The veracity of the submitted information is subject to verification by the Municipal Clerk.

18 AMC 2.50.020B.3.a.

19 *Cf. Price*, 331 P.3d at 359-360.

20 5 MCQUILLIN MUN. CORP. § 16:55 *Measures submissible – police and emergency measures* (3d ed.) (collecting cases on use of the initiative or referendum related to "laws or ordinances of municipalities . . . such as may be necessary for the immediate preservation of the public health, peace, or safety").

require an appropriation. On appeal, the Alaska Supreme Court ordered the initiative be presented to the voters, stating taxicab permits were not public assets and therefore opening them to entry for any eligible applicant was not an appropriation.[21] The court declared that any constitutional takings discussion is premature at the petitioning stage of direct legislation.[22] While the roles are reversed here with the Assembly opening entry to ownership of taxicab permits and the petitioners requesting a public vote repealing that measure, we believe the same conclusion the court reached earlier applies: AO 2016-124(S), as amended, did not make an appropriation and the Referendum Application does not seek to repeal any appropriation.

In compliance with the requirements of the Anchorage Municipal Charter, the Referendum Application does not propose to apply to an ordinance that establishes a budget, fixes a mill levy, authorizes the issuance of bonds, or appropriates funds. In compliance with the requirements of the Alaska Constitution, the Referendum Application does not seek to repeal a dedication of revenues or an appropriation.

b. *The Taxicab Ordinance as a whole is legislative in character.*

The Taxicab Ordinance contains numerous amendments that go into detail regarding, among other things, procedures for issuing permits, permit applicant eligibility criteria, annual review of the market, dispatch service systems, fines, and accessible taxicab permits.[23] Some may argue that as a result the ordinance has administrative characteristics that remove it from the scope of the referendum power. We believe this is factually comparable to an earlier ordinance, AO 2013-37(S-2)(as amended) ("AO 37"), that was ruled by this office as not subject to a referendum effort because it was generally administrative in nature, even though certain provisions set out new general policy. The rejection of that referendum application was appealed to superior court which decided it may be submitted to the voters. On further appeal, the Alaska Supreme Court held barring an initiative that contains both legislative and administrative matters would "run counter to Alaska's rule of construction that proposed initiatives should be construed liberally ... to support the electorate's right to participate in direct law-making."[24] Overall, the Taxicab Ordinance may be construed to include both administrative and legislative matters, but in the balance we believe it creates more new policy than furthering existing law. Given the guidance of the Alaska Supreme Court in the AO 37 case, we believe it clear that this Referendum Application should not be denied on grounds that the Taxicab Ordinance is administrative in nature.

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21 *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418 (Alaska 2006) (Carpeneti, J, *dissenting*).

22 *Id.*

23 *Supra*, note 6, and *see* Exhibit C.

24 *Municipality of Anchorage v. Holleman*, 321 P.3d at 387, *quoting Swetzof v. Philemonoff*, 203 P.3d 471, 477 (Alaska 2009). *Swetzof* set forth three guidelines to consider when analyzing whether an ordinance is legislative or administrative.

3. The Referendum Application proposes a petition that does not adequately describe the effects of the ordinance the sponsors seek to repeal.

Legally acceptable petition language must accurately and fairly characterize the ordinance that the petition proposes to repeal.[25] The summary of the ordinance in a referendum petition should be complete enough to convey an intelligible idea of the scope and import of the law it seeks to repeal, and free of any misleading tendency by, for example, amplification or omission.[26] A description which is misleading or not complete enough to convey basic information as to the scope of what the ordinance does cannot be regarded as legally sufficient.[27] The matter presented in a petition should be "presented clearly and honestly to the people" of Anchorage.[28]

The proposed petition itself would present voters with a question that does not describe AO 2016-124(S), as amended, but merely restates the title of the ordinance. The problem with using only the title of the Taxicab Ordinance is it provides citizens with very little sense of what the law actually did through Title 11 amendments to improve taxicab service, foster more competition and alter the supply and demand framework for taxicab service in the Municipality. Because the proposed petition would not give potential petition signers and voters adequate information about the "scope and import" of the ordinance they were being asked to repeal, the cure is to ensure the Taxicab Ordinance accompanies the petition form, and that the proposition summary provides more specifics about the legislation.

The Anchorage Municipal Code provides that proposition language, as it will appear to voters on a ballot, must be "fair, true and impartial," and it entrusts the preparation of the language to the Municipal Attorney, in consultation with the Municipal Clerk.[29] Heeding the advice of the Alaska Supreme Court, we suggest that the language of the proposed petition be revised to read as follows:

PROPOSITION No. ___
Repeal of AO 2016-124(S)(as amended), Regarding Taxicab Permits and Services

This proposition is to repeal an ordinance adopted by the Assembly entitled "An Ordinance of the Anchorage Assembly Amending Anchorage Municipal Code Title 11 to Improve Taxicab Services by Fostering More Competition and Related Matters Involving the Supply and Demand Framework for Transportation Services."

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25 *Faipeas*, 860 P.2d at 1218.

26 *Id.* (quoting *Burgess v. Alaska Lieutenant Governor*, 654 P.2d 273 (Alaska 1982) (approving the Arkansas Supreme Court's position on petition summary in *Hope v. Hall*, 316 S.W.2d 199, 201 (Ark. 1958))).

27 *Id. See also Citizens for Implementing Med. Marijuana v. Municipality of Anchorage*, 129 P.3d 898, 903 (Alaska 2006).

28 *Citizens for Implementing Med. Marijuana*, 129 P.3d at 903.

29 AMC 28.20.010D.1.b

Among other things, the ordinance:

(1) changed the current system of issuing new permits based on a "public convenience and necessity" study to an "open entry" system, allowing any qualified applicant to receive a permit after a 5-year phase-in period;
(2) requires the Municipality to issue 116 new taxicab permits by competitive sealed bid over the next 5 years;
(3) after the 5-year phase-in period, requires an annual hearing to determine if further open entry is harmful to the quality of taxicab services or public safety;
(4) removes the requirement that permit applicants must have 500 hours of chauffeuring experience in a year;
(5) establishes minimum hours of operation (8a.m.-5p.m., M-F) for wheelchair-accessible permitted taxicabs;
(6) removes the prohibition on medical transport vehicles-for-hire accepting Medicaid vouchers for transporting passengers;
(7) allows licensed taxicab dispatch service companies to use a digital dispatch system in place of traditional radio or GPS-based systems;
(8) increases fines for operating a taxicab, limousine, or vehicle-for-hire vehicle without a permit; and
(9) creates a new "accessible taxicab fleet permit" available to qualified nonprofit organizations that serve persons with disabilities.

Shall AO 2016-124(S)(as amended) be repealed?

YES ☐ NO ☐

CONCLUSION:

Referendum Application 2016-7, with after-filed edits requested by the sponsors, is legally sufficient. We recommend the Clerk's Office issue a master petition form to the sponsors that includes revisions to the proposition title, summary and question as discussed above.

MUNICIPALITY OF ANCHORAGE

Office of the Municipal Attorney

Memorandum

DATE: April 15, 2013

TO: Barbara A. Jones, Municipal Clerk

THRU: Dennis A. Wheeler, Municipal Attorney

THRU: Deitra L. Ennis, Deputy Municipal Attorney

FROM: Dean T. Gates, Assistant Municipal Attorney
Theresa Hillhouse, Assistant Municipal Attorney

SUBJECT: Referenda Application 2013-1, for Petition to Repeal AO-37 Labor Ordinance
Dept. of Law Matter No. 13-1233

QUESTION:

Is the referendum petition application 2013-1, "Referendum Petition to Repeal AO 37" received April 3, 2013, legally sufficient to be placed on the ballot at a municipal election?

BRIEF ANSWER:

Subject to the following Background and Discussion below, our Brief Answer is No. The proposed petition does not properly cite the ordinance, the petition narrative may be confusing, and the petition fails to set forth verbatim the ordinance sought to be repealed. In addition, the petition addresses subjects prohibited by Alaska law.

BACKGROUND:

On April 3, 2013, sponsors submitted an application to the Municipal Clerk for a referendum petition titled "Referendum Petition to Repeal AO 37". (hereinafter "Application") See Exhibit A.

Pursuant to Anchorage Municipal Code subsection 2.50.030A., "...[w]ithin ten business days after receiving a completed application, the municipal clerk shall verify the sponsors' qualifications and, after consultation with the municipal attorney, determine and certify the legal sufficiency, or lack thereof, of the application and the proposed initiative or referendum."

DISCUSSION:

I. Review standards.

The Municipal Clerk's pre-election review of an initiative or referendum petition application should be consistent with Alaska courts' standard of review, which "is limited to determining whether the initiative complies with the particular constitutional and statutory provisions regulating initiatives" and whether enforcement of the proposed ordinance is precluded by controlling authority as a matter of law.[1] Pursuant to AMC subsection 2.50.020B.3:

> The proposed petition shall:
>
> a. set out verbatim the ordinance or resolution sought to be enacted or repealed by the petition;
>
> b. have the required names, residence and mailing addresses, signatures, and dates of signatures of the initial contact persons and sponsors;
>
> c. meet constitutional, charter and other legal requirements or restrictions;
>
> d. include only a single subject; and
>
> e. be enforceable as a matter of law or be clearly denominated as advisory only.

[1] *Kodiak Island Borough v. Mahoney,* 71 P.3d 896, 898 (Alaska 2003); *Alaskans for Efficient Government, Inc. v. State,* 153 P.3d 296, 298 (Alaska 2007); *Brooks v. Wright,* 971 P.2d 1025, 1027 (Alaska 1999). There is a dearth of case law discussing referenda applications submitted by citizens (*see* AS 15.45.250-.465), however courts treat pre-election reviews of initiatives and referenda similarly, thus the holdings regarding review of initiative applications are relied upon here.

The Application for repealing the labor ordinance includes the required names, residence and mailing addresses, signatures, and dates of signatures of the initial contact persons and sponsors,[2] and includes only a single subject.

There is a balancing of interests between the right to bring initiatives and referendums, and the Constitutional restrictions on such rights. The Alaska Supreme Court has explained that the restrictions of Art. XI, § 7 of the Alaska Constitution must also be liberally construed, as well as require strict compliance[3] with such restrictions:

> . . . it does not necessarily follow that a liberal construction of the people's initiative power requires a narrow construction of the limits that define the power. On the contrary, the mandate for liberal construction of the initiative right in article XII, section 11 concludes with a qualifying, cautionary clause: "subject to the limitations of Article XI." This reiterative warning underscores the importance of the restrictions. Additionally, we must never lose sight of another important right of the people implicated in all cases of constitutional construction, namely the right to have the constitution upheld as the people ratified it. *See Thomas*, 595 P.2d at 3-4. We must interpret all constitutional provisions -- grants of power and restrictions on power alike -- as broadly as the people intended them to be interpreted. [4]

II. The Petition Application is legally insufficient because it does not meet technical Code requirements for referendum petitions.

A. Incorrect citations and the ordinance sought to be repealed not attached.

The Application does not comply with Code provisions regulating the referenda application and petition process. AMC subsection 2.50.020B.3.a. requires the proposed petition to "set out verbatim the ordinance … sought to be … repealed by the petition." This Application includes a narrative under the heading "Proposed Petition" which refers to: "Anchorage Ordinance 37 ('AO 37') enacted on March 26, 2013, amending Section 3.70, Employee Relations, of the Anchorage Municipal Code."[5] The Application does not set out verbatim the ordinance sought to be repealed and no part of the ordinance is quoted or attached. In addition, a reader of the petition may search for "AO 37" only to either not find the ordinance at all or discover the reference to be incorrect. AO No. 2013-37(S-2)(as amended) is the actual ordinance enacted by the Anchorage Assembly. It

[2] Subject to the Clerk's Office verification.
[3] *Citizens Coalition for Tort Reform v. McAlpine,* 810 P.2d 162, 168 (Alaska 1991).
[4] *Citizens Coalition for Tort Reform,* 810 P.2d at 169 (citing *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979) (additional citations omitted)).
[5] Exhibit A at p. 3.

is a subsequent version of the originally introduced proposed ordinance AO No. 2013-37, distinguished by numerous changes and amendments. Even though the date of enactment is correct, and a qualified voter considering signing the petition may, with some inquiry, figure out the correct ordinance is AO 2013-37(S-2)(as amended) and obtain a copy of it, those facts do not cure the Application's failure to set out verbatim the ordinance sought to be repealed. Allowing a petition to be circulated under these circumstances is inconsistent with the petition circulation and signature-gathering function recognized by the Alaska Supreme Court as an important screening purpose because it is not complete enough standing alone to convey an intelligible idea of the scope and import of the proposed repeal.[6]

It may be argued the Municipal Clerk can simply attach the correct ordinance. On the one hand, the Alaska Supreme Court has held that "all doubts as to all technical deficiencies or failure to comply with the exact letter of procedure" should be resolved in favor of a liberal construction of the constitutional and statutory provisions to which they relate.[7] On the other hand, errors cannot be corrected by the Municipal Clerk even if the intent is clear, because the master form of the petition[8] certified by the Municipal Clerk to provide to the sponsors must contain the complete language "as submitted by the sponsors."[9]

The Code regulating applications for referenda petitions is explicit in requiring the proposed petition to "set out verbatim the ordinance ... sought to be repealed."[10] The Municipal Clerk may point out the deficiencies and allow the sponsors to resubmit the petition application, but she may not alter the petition as it is submitted by the sponsor.[11] In enacting this requirement, the Assembly sought to ensure that the Municipal Clerk would have no subjective involvement in the petition process.[12] Thus, on its face the Application here is not a "source of accurate information for all citizens concerning what

[6] *Faipeas* v. *Municipality of Anchorage* 860 P.2d 1214, 1220 (Alaska 1993) (additional citations omitted).
[7] *Yute Air Alaska, Inc. v. McAlpine,* 698 P.2d 1173, 1181 (Alaska 1985) (quoting *Municipality of Anchorage v. Frohne,* 568 P.2d 3, 8 (Alaska 1977)) (in turn citing to *Boucher v. Engstrom,* 528 P.2d 456, 462 (Alaska 1974).
[8] AMC 2.50.030B.
[9] AS 29.26.120(a)(2); and see *Kodiak Island Borough v. Mahoney,* 71 P.3d 896, 901 and n. 23 (Alaska 2003).
[10] AMC 2.50.020B.3.a.
[11] *Id.*
[12] AO 2002-162 amended the Code to require the ordinance be set out verbatim, while prior code allowed petitioners to "describe the ordinance." *See* AS 15.45.090(a) and the annotations thereof for state cases where the Lt. Governor's statements for the petitions have been litigated.

is being proposed" because of the deficiencies and the Municipal Clerk is unable to remedy these.[13]

B. Confusing and misleading supporting statements.

The description submitted by the sponsors with this Application has some broad statements that attempt to summarize "AO 37" (the incorrect ordinance cite). A description which is untruthful, misleading, or which is not complete enough to convey basic information as to what the ordinance does, cannot be regarded as a legally adequate or sufficient description within the meaning of the ordinance.[14] The sponsor's summary falls short of conveying basic information as to the particulars of the numerous and lengthy amendments enacted by AO 2013-37(S-2)(as amended). Consequently, there exists significant potential to mislead the reader, particularly in the absence of having a verbatim copy of the ordinance circulated with the petition.

The proposed petition states in part as follows regarding the reason for repeal of the recently passed ordinance that amends AMC 3.70:

> AO 37 makes numerous changes to the Anchorage Municipal Code that affect municipal employees. Among the changes, AO 37 limits collective bargaining for municipal employees; introduces a managed competition program for potential outsourcing of certain city services; removes certain public employees from collective bargaining; gives the Municipality additional control over staffing, scheduling, equipment, benefits, overtime, and leave; eliminates binding arbitration for contractual impasse resolution; prohibits strikes; and limits annual pay and benefit increases.

This portion of the proposed petition is misleading, legally incorrect and mischaracterizes the amendments to AMC 3.70. For example, the statement says the ordinance "limits collective bargaining for municipal employees." The implications are that, due to the ordinance, employees who had collective bargaining are now no longer entitled to it, or that new groups of employees are not entitled to collective bargaining at all, or the right for either group has been substantially reduced. This is not the case. Certain employee classifications have never had collective bargaining, including executives, supervisors, and confidential employees.[15] Some are designated by location (e.g., staff of the municipal attorney); others are designated by function (supervisory and confidential employees). The ordinance made very few changes to the designations, largely aimed at

[13] *Faipeas* at 1220.
[14] *Id.* at 1219.
[15] AMC 3.70.060C.

eliminating the distinction based on location and instead focusing on employee functions.[16] While a handful of employees may be reclassified into exempt positions, the ordinance does not implement or dictate this outcome. The classification process includes collaboration between the Municipality and the involved union. Should the parties not agree, the final decision is made by the Employee Relations Board.[17]

The statement also alleges the ordinance "eliminates binding arbitration for contractual impasse resolution." This implies that all union employees had the right to binding arbitration when, in fact, only the police and fire bargaining units had binding arbitration prior to passage of the ordinance. This statement also conflicts with the recent Alaska Supreme Court decision in *Plumbers & Pipefitters, Local 367 v. Municipality of Anchorage,* 2013 WL 1281791 (Alaska), rejecting the union's argument that the arbitrator's decision should be binding on the parties because the union was enjoined from striking.[18] Binding arbitration is not required in such situations under the version of AMC 3.70 as it existed before the amendments. Additionally, the statement infers that striking was permitted for all bargaining units prior to enactment of the ordinance, based on the recent amendment to AMC 3.70. However, the prohibition against striking was already part of AMC 3.70 prior to the amendments for certain employee groups (police, fire).

The inclusion of confusing and misleading statements as part of the petition is a separate ground for finding the proposed petition legally insufficient. *Citizens for Implementing Medical Marijuana v. Municipality of Anchorage and Greg Moyer, Clerk,* 129 P.3d 898, 901(Alaska 2006)(citing *Faipeas,* 860 P.2d at 1219 (confusing and misleading petitions frustrate the ability of voters to express their will, and "should be presented clearly and honestly to the people of Alaska."))

[16] Compare AMC 3.70.060C prior to the ordinance with the text of AMC 3.70.060C as amended in the ordinance.

[17] See both current AMC 3.70.050D.6 and the same as amended in AO 2013-37(S-2)(as amended).

[18] There is a higher burden to meet to deny a proposed initiative or referendum petition as misleading. The Alaska Supreme Court explained, "[w]hen reviewing initiatives, [the court] will 'construe voter initiatives broadly so as to preserve them whenever possible.'" *Pebble Ltd. Partnership ex rel. Pebble Mines Corp. v. Parnell,* 215 P.3d 1064, 1073 (Alaska 2009)(citing *Anchorage Citizens for Taxi Reform,* 151 P.3d 418, 422 (Alaska 2006)). It also held in the same decision: "We apply a deferential standard of review for challenges to the adequacy of a petition summary..." and "[t]hose attacking the summary bear the burden 'to demonstrate that it is biased or misleading.'" *Id.* (citing *Alaskans for Efficient Gov't, Inc. v. State,* 52 P.3d 732, 735 (Alaska 2002)).

If the technical deficiencies are corrected, the substantive intent of this referenda petition is clear, but it is not a permissible use of the referendum power, as discussed below.

III. The proposed referendum petition contains prohibited subjects involving administrative rather than legislative matters.

In *Wolf v. Alaska State Housing Authority*, 514 P.2d 233, 235 n.13 (Alaska 1973), the Alaska Supreme Court recognized the common law principle that "the power of both initiative and referendum is restricted to legislative ordinances, and does not extend to administrative measures."[19] The Court cited a leading municipal law treatise to explain this limitation on initiatives and referendums, McQuillin: The Law of Municipal Corporations:

> . . .The courts have noted that the constitutional provisions conferring the initiative and referendum are placed within the article defining and delegating the state's legislative powers, and have taken cognizance of the ways in which the conduct of government would be seriously hampered were the initiative and referendum to be used to compel or bar "administrative" acts of elected officials.
>
> Actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subject of a temporary and special character are regarded as administrative. In this connection an ordinance which shows an intent to form a permanent rule of government until repealed is one of permanent operation. Obviously, details which are essentially of a fluctuating sort, due to economical or other conditions, cannot be set up in and by an ordinance to be subjected to the vote of the people.[20]

In addition, the Alaska Supreme Court adopted these guidelines from a Kansas Supreme Court case for determining when an initiative or referendum is administrative or legislative in character:

[19] *See Swetzof v. Philemonoff,* 203 P.3d 471, 476 (Alaska 2009). This was codified for general law municipalities in AS 29.26.110.

[20] McQuillin: The Law of Municipal Corporations § 16.55 (3rd Ed. 1969) (emphasis added).A good example of this found in AO 2013-37(S-2)(as amended) is the limitation on certain wage increases to CPI plus a numerical factor.

1. An ordinance that makes new law is legislative, while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance.[21]

2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative.

3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy.[22]

Not all laws are purely legislative in character, particularly municipal laws. In *Swetzof,* 203 P.3d at 479, the Alaska Supreme Court analyzed this distinction, recognizing the overlap between municipal laws that can be both legislative as well as administrative in nature. But, applying the tests utilized by the Alaska Supreme Court, we find the referendum to be administrative in nature.

AMC 3.70 was created years ago, having originated from Anchorage's personnel rules that were amended as a result of Municipality of Anchorage opting out of the State's Public Employment Relations Act ("PERA") in October of 1976.[23] As recently confirmed by the Alaska Supreme Court in *Plumbers & Pipefitters, Local 367 v. MOA,* 2013 WL 1281791, at page 2, Anchorage has the power to enact its own labor ordinances addressing collective bargaining, which it did at AMC 3.70 *et seq*. AMC 3.70 provides a comprehensive structure upon which rests years of labor negotiations, contracts, and related legal decisions. The referendum is aimed at only repealing portions of AMC 3.70

[21] *See also* McQuillin: The Law of Municipal Corporations § 16:54 at 409-410 for this proposition.

[22] *Swetzof,* 203 P.3d at 481 (adopting 3 of the 4 guidelines from *City of Wichita v. Kansas Taxpayers Network, Inc.,* 874 P.2d 667 (Kan. 1994)). The *City of Wichita* case found a referendum repealing an ordinance establishing a storm water utility system administrative in character, not making new law by executing existing laws found in the enabling laws of the Charter which gave it the powers to develop and maintain a sewer system. It also held operation, management and financing of the city-wide storm water management system required specialized knowledge and the experience of city management.

[23] *Anchorage Municipal Employees Association v. Municipality of Anchorage,* 618 P.2d 575, 575-77 (Alaska 1980).

based on the recent amendments in AO 2013-37(S-2)(as amended), and involves very detailed aspects of labor relations and union personnel rules, such as:

- Defining overtime pay - **AMC 3.70.170**
- Scheduling of Employees – **AMC 3.70.040A.7**
- Limiting wage increase to CPI plus a factor – **AMC 3.70.020D**
- Reclassification (from union to confidential employee when confidential information access exists or primary duties involve certain payroll functions; Treasury Department employees) - **AMC 3.70.010; AMC 3.70.060C**
- Defining, redefining and deleting labor terms (i.e., direct labor costs; supervisory employee; police, port operations, sewer treatment, and water treatment employees) - **AMC 3.70.010; AMC 3.70.020**
- Format for reporting CBA negotiations - **AMC 3.70.090B**
- Content of Economic Effects summary - **AMC 3.70.090D.3.b**
- Standardization of benefit programs (i.e. health or dental plans; life; disability; dependent life insurance; optional retirement savings plans) - **AMC 3.70.020E**
- Pay for Union services defined - **AMC 3.70.020F**
- Defining overtime based on federal laws (FLSA) - **AMC 3.70.170**
- Uniform holidays - **AMC 3.70.020G**
- Elimination of certain pay enhancements under new CBAs - **AMC 3.70.020H**
- Time limits changed for mediation and Fact-Finding regarding CBA negotiations - **AMC 3.70.100**
- Union and Employer ERB subpoena procedures redefined - **AMC 3.70.050E**
- Voting procedures for union recognition - **AMC 3.70.080**

This list encompasses operations, finance, and management details concerning pay, benefits, scheduling, holidays, personnel rules, classifications, appeal procedures, etc. Such subjects involve expertise and specialized training necessary to make a rational choice. It may be said that policy is involved, but the sections subject to referendum address only a segment of the Municipality's overall policy regarding its relationship with its employees.[24] The referendum does not address or directly affect the Municipality's relationship with the general public in any way; it only seeks to alter the bargaining relationship between the Municipality and its represented employees. Therefore, the referendum improperly addresses administrative matters.

[24] Second guideline set out in *Swetzof*, 203 P.3d at 481, at page 8 of this memo.

This analysis is consistent with decisions in other states involving initiatives or referenda on personnel type matters that hold such initiatives/referenda to be administrative rather than legislative in nature, and thus not subject to referendum or initiative. The *Swetzof* court cited cases including:

- *City of Lawrence v. McArdle,* 522 P.2d 420 (Kan.1994) (retroactively equalizing firefighters' pay with police by initiative was held to be administrative in nature);

- *City of Newport v. Gugel,* 342 S.W.2d 517, 519, 520 (Ky. 1960) (initiative declared to be administrative in nature because it involved: fixed minimum salaries for police and fire employees; prescribed minimum staff for certain positions; regulated work hours, vacations, days off without pay; filling of certain positions by police department personnel (i.e. alcohol beverage administrator).

In *City of Newport v. Gugel*, the court stated:

> The rule that has been followed in this jurisdiction, for determining whether a particular matter is legislative or administrative, is that if the power to be exercised prescribes a new policy or plan it is legislative, whereas if it merely pursues a plan already adopted by the legislative body or some power superior thereto it is administrative. Another form of the rule is that an ordinance originating or enacting a permanent law or laying down a rule of conduct or course of policy for the guidance of citizens or their officers or agents is legislative, while an ordinance which simply puts into execution previously declared policies or previously enacted laws is administrative....
>
> Personnel administration is primarily an administrative matter, at least as far as concerns the details of management. To permit the electorate to initiate piece-meal measures affecting the fiscal affairs of the city without regard for the overall fiscal program, or measures not embodying a basic plan or policy for the entire area of government activity upon which the measure touches, could result in destruction of the efficient administration of the affairs of the city, and we do not believe the initiative statute so intends.[25]

We note the following cases also support our conclusion:

- *In Re Initiative Petition No. 27 of the City of Oklahoma City,* 82 P.3d 90, 92 (Okla. 2003) (initiative that provided for the creation of a labor relations board, the

[25] *City of Newport v. Gugel,* 342 S.W.2d 517, 519-20 (Ky. 1960)(Internal citations omitted).

selection of arbitrators, and establishment of collective bargaining procedures and personnel matters, such as wages, benefits, working conditions, and hiring and firing decisions, held to be administrative since it required a comprehensive knowledge of the municipality's fiscal affairs. "Because wages, benefits, working conditions, and hiring and firing decisions require a comprehensive knowledge of a municipality's fiscal affairs, decisions regarding personnel matters are usually administrative.")

- *Shriver v. Bench,* 313 P.2d 475, 478 (Utah 1957)("It appears to us that notwithstanding the effort to make these salary schedules as permanent as possible by tying them into the U. S. Department of Labor's Consumer Price Index, considerable doubt exists as to whether such salary fixing can stand up to this 'permanancy' test. Experience teaches that there are many factors, a number of which are referred to in the next paragraph, which are constantly subject to change, necessitating the re-examination of the question of salaries at frequent intervals. . . . . The fixing of salary schedules in a modern city with its numerous departments and various classes of employees is a duty which can best be performed by persons having specialized training and experience in municipal government generally and particular knowledge of the affairs, fiscal and otherwise, of the city. They must be conversant with many facts such as: prevailing wage scales for similar services both in public service and private industry; the supply and demand for labor of the classes involved; the demands of the various departments upon the public treasury and the balance to be maintained among them; the current inflationary or deflationary trend of money; the extent of the public debt; the money resources available; the tax potential and its limitations; and the overall budget within which the city is required by law to operate.") (Internal citations omitted)

For the reasons noted and in light of the supporting authority, we conclude the referendum violates the subject matter restrictions.

We have additional concerns regarding the constitutionality of the referendum, including to the extent to which the referendum may violate restrictions on appropriations[26] and enactments necessary to the immediate preservation of public health, safety, and welfare[27], but these concerns, while valid, arguably may not rise to the standard for pre-petition clearance and we do not address them here.

[26] Anchorage Municipal Charter §3.02(a)

[27] Initiatives and referenda cannot impermissibly addresses subject matter areas restricted by the Alaska Constitution at Art. XI, §7, including "law necessary for the immediate preservation of the public peace, health, and safety...."

CONCLUSION:

The Municipal Attorney's Office has determined the Application is defective as a matter of law, under the legal requirements for submission of a referendum application. We recommend the Application be rejected pursuant to AMC subsection 2.50.020B.3.a., c.

Municipality of Anchorage
Office of the Municipal Attorney
Memorandum

DATE: September 11, 2020

TO: **ERIKA MCCONNELL, DEPUTY CLERK – ELECTIONS**
BARBARA A. JONES, MUNICIPAL CLERK

THROUGH: **KATHRYN R. VOGEL, MUNICIPAL ATTORNEY** KRV

FROM: **RUTH BOTSTEIN, ASSISTANT MUNICIPAL ATTORNEY**

SUBJECT: **REFERENDUM APPLICATION 2020-01**
Law Matter No. 20-1932

QUESTION PRESENTED

Does Referendum Application 2020-01, Petition for Repeal Referendum on Ordinance No. AO 2020-66(S), satisfy the legal requirements for issuing a referendum petition?

BRIEF ANSWER

No, the submitted referendum application is not legally sufficient to issue a referendum petition. The application is technically deficient because it does not "contain . . . [t]he verbatim text of the measure to be enacted or repealed" as required by Anchorage Municipal Code (AMC) 2.50.020B.3. This technical error could be corrected, but the application still could not be certified because the proposed referendum would effect an impermissible appropriation by giving Anchorage voters veto power over capital expenditures, infringing upon the Anchorage Assembly's exclusive power to allocate municipal funds among competing uses.

THE REFERENDUM APPLICATION

On August 12, 2020, the Clerk's Office received an application for a referendum petition identified as 2020-1 and attached as Exhibit A ("Referendum Application"). The proposed referendum would allow voters to repeal Anchorage

Ordinance No. 2020-66(S). The Proposed Petition, in its entirety, is as follows (verbatim):

> Shall Anchorage Ordinance No. 2020-66(S) be repealed?
>
> Ordinance No. AO 2020-66(S) authorizes the acquisition by purchase, or lease with option to purchase, of real property legally described as: Lot 7 A Block C Heather Meadows Subdivision (Plat 77-149) (PID 009-161-51), Lots 1 - 6 Block C Rosebud Subdivision (Plat P-224A), (PID 009-161-32, 009-161-33, 009-161-34, 009-161-35, 009-161-36, 009-161-37), Block 4A Central City Subdivision (Plat 76-245) (PID 003-241-29), the improvements on Lot 1 Block 33C USS 408 (Plat 84-374) (PID 003-073-33), and Tract C Green Valley Resubdivision No. 1 (Plat 73- 210) (PID O 10-193-22) (Properties) with aggregate acquisition and renovation costs not to exceed Twenty-Two Million Five Hundred Thousand Dollars ($22,500,000).
>
> The purpose of this petition is to have a ballot referendum on AO 2020-66(S). If a majority of voters vote in favor of repeal, the acquisition of the described properties will not be authorized by ordinance.

The application included a primary sponsor, alternate sponsor, and eleven names of purported qualified voters.

APPLICABLE LAW

Article XI, section 1 of Alaska's Constitution provides for direct democracy through referendum, stating that "[t]he people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum." Alaska Statute 29.10.030(a) extends this right to citizens of home rule municipalities, including Anchorage: "A home rule charter shall provide procedures for initiative and referendum." The Anchorage Municipal Charter thus "guarantees . . . [t]he right of initiative; the right of referendum; and the right to recall public officers, as herein provided."[1] Referendum is "the process of repealing an ordinance or resolution by vote of the people without assembly action."[2]

[1] Anch. Muni. Charter Art. II(1).

[2] AMC 2.50.010.

The Municipal Clerk is tasked with reviewing referendum applications to determine "whether the measure proposed in the application may be submitted to voters by initiative or referendum; or whether the measure proposed must be denied."[3] The Clerk's Office has asked the Municipal Attorney's Office to provide an opinion on the legal sufficiency of Application 2020-01 in accordance with AMC 2.50.030A.3, which provides that the Clerk "may rely upon the legal counsel of the municipal attorney" in determining whether the application should be approved or denied." The Clerk has 30 days from receipt of a completed referendum application to certify or deny the application and notify the sponsors accordingly.[4]

"The right of referendum is not absolute."[5] Alaska law places both procedural and substantive limitations on the right to referendum. Procedurally, Anchorage Municipal Code 2.50.020B.1-3 require each application to include "[t]he name, residence and mailing address, signature and date of signature of two qualified voters of the municipality who . . . shall be considered sponsors"; "[t]he name, residence and mailing address, signature and date of signature of at least ten qualified voters of the municipality" who want to see the referendum appear on the ballot, in addition to the sponsors; and "[t]he verbatim text of the measure to be enacted or repealed."

Both the Alaska Constitution and Anchorage Charter also contain subject matter limitations on the exercise of the referendum power. Article XI, section 7 of the Alaska Constitution provides that "[t]he referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety," and AS 29.10.030(c) extends these limitations to municipalities, mandating that local government charters "may not permit the initiative and referendum to be used for a purpose prohibited by art. XI, § 7 of the state constitution." Anchorage's Charter also explicitly prohibits use of the referendum as applied to "ordinances establishing budgets, fixing mill levies, authorizing the issuance of bonds, or appropriating funds."[6] Anchorage ordinance further provides that a referendum must "meet all constitutional, charter and other legal requirements or

[3] AMC 2.50.030.

[4] AMC 2.50.030B.

[5] *Municipality of Anchorage v. Holleman*, 321 P.3d 378, 382 (Alaska 2014).

[6] Anch. Muni. Charter Art. III, § 3.02(a).

restrictions," concern only a single subject, and be legally enforceable or clearly identified as an advisory-only measure.[7]

Alaska's courts generally "construe voter initiatives broadly so as to preserve them whenever possible."[8] But initiatives and referenda "touching upon the allocation of public revenues and assets require careful consideration because the constitutional right of direct legislation is limited by the Alaska Constitution."[9] Because of the substantive constitutional and charter restrictions, a proposed initiative or referendum is "illegal if it makes or repeals an appropriation."[10]

The Alaska Constitution does not define "appropriation," but through its case law, the Alaska Supreme Court has given meaning to the term and explained what types of initiatives and referenda constitute impermissible appropriations.[11] The "foundation of [the court's] appropriation analysis" are the "two core objectives of the constitutional prohibition on the use of initiatives to make appropriations."[12]

The first core objective of the appropriation-by-direct-democracy ban was to "prevent an electoral majority from bestowing state assets on itself," a type of law generally referred to as a give-away program.[13] A referendum or initiative creates a prohibited give-away program if it "transfers state assets into private hands."[14]

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[7] AMC 2.50.020B.3.

[8] *City of Fairbanks v. Fairbanks Convention & Visitors Bureau*, 818 P.2d 1153, 1155 (Alaska 1991).

[9] *Id.*; *see also, e.g., Lieutenant Governor v. Alaska Fisheries Conservation Alliance, Inc.*, 363 P.3d 105, 109 (Alaska 2015).

[10] *City of Fairbanks*, 818 P.2d at 1155.

[11] *See Mallott v. Stand for Salmon*, 431 P.3d 159, 164 (Alaska 2018) ("The Alaska Constitution does not provide any definition of the term 'appropriation,' so it has been the duty of this court to distinguish between initiatives that permissibly regulate and those that impermissibly appropriate.").

[12] *Id.* at 165 (quoting *Pullen v. Ulmer*, 923 P.2d 54, 63 (Alaska 1996)).

[13] *Mallott*, 431 P.3d at 164 (quoting *Pullen*, 623 P.2d at 63).

[14] *Mallott*, 431 P.3d at 166 (citing cases).

"Second, the prohibition was designed to preserve to the legislature the power to make decisions concerning the allocation of state assets."[15] An initiative or referendum therefore "effects an appropriation if it infringes on the legislature's ability to allocate resources among competing uses—that is, if it fails to ensure that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs."[16] Applying these principles, the Court has disallowed attempts to use direct democracy to create a preference for certain fishing methods,[17] or to ban others[18]—concluding in both cases that these attempts were prohibited appropriations because they narrowed the freedom of the legislature and the Board of Fisheries to exercise discretion over allocation decisions regarding salmon, a public asset. Ultimately, "the line between an unobjectionable initiative that deals with a public asset and one that is an impermissible appropriation is crossed 'where an initiative controls the use of public assets such that the voters essentially usurp the legislature's resource allocation role.'"[19]

In *Alliance of Concerned Taxpayers v. Kenai Peninsula Borough*,[20] the Alaska Supreme Court applied these principles to invalidate a city initiative application that would have required prior voter approval for all municipal capital projects with a total cost exceeding one million dollars.[21] The court first confirmed that the initiative concerned public assets, as "no item is more clearly a public asset than public revenue."[22] Focusing on the second core objective of the ban on appropriation through direct democracy, the court found that the initiative effected an appropriation because it narrowed the Borough's ability to make its own decisions about how to allocate municipal assets by giving the voters veto power over government spending: "[T]he voters' ability to veto a capital project . . . infringes on the assembly's ability to allocate resources among competing uses because there is nothing that the assembly can do to appropriate money for that

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[15] *Mallott*, 431 P.3d at 164 (quoting *Pullen*, 623 P.2d at 63) (emphasis removed).

[16] *Mallott*, 431 P.3d at 166 (quoting *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 88 (Alaska 1988)) (internal quotes omitted) (emphasis in original).

[17] *Pullen*, 623 P.2d at 63.

[18] *Lieutenant Governor v. Alaska Fisheries Conservation Alliance, Inc.*, 363 P.3d 105, 114-15 (Alaska 2015).

[19] *Hughes v. Treadwell*, 341 P.3d 1121, 1128 (Alaska 2015) (quoting *Staudenmaier v. Municipality of Anchorage*, 139 P.3d 1259, 1263 (Alaska 2006)).

[20] 273 P.3d 1128 (Alaska 2012).

[21] *Id.* at 1130.

[22] *Id.* at 1137.

project."[23] The court concluded that "when voters refuse to approve a capital project they allocate municipal funds away from the particular project, which interferes with the Borough's exclusive power to allocate funds among competing uses. Proposition 4 thus violates the underlying purposes of the constitutional restrictions on municipal citizens' initiative power."[24]

SUFFICIENCY ANALYSIS

A. Form.

(1) Name, identifying information, and signature of two sponsors.
(2) Names, identifying information, and signatures of ten additional qualified voters.

The Clerk's Office reviews the application to determine whether these statutory requirements—names, identifying information, and signatures of two sponsors and ten additional qualified voters—have been satisfied.

(3) Verbatim text of measure to be repealed.

Anchorage Municipal Code 2.50.020.B.3 requires that a referendum application "shall contain . . . [t]he verbatim text of the measure to be enacted or repealed." Merriam-Webster defines "verbatim" to mean "in the exact words: word for word."[25]

Referendum application 2020-01 does not comply with this requirement. The application explains that it seeks to repeal AO-66(S) through the referendum process: "The purpose of this petition is to have a ballot referendum on AO 2020-66(S). If a majority of voters vote in favor of repeal, the acquisition of the described properties will not be authorized by ordinance." But the application does not include the full text of AO-66, nor does it include any attachments that provide the full, verbatim text of the law. Instead, the application contains a summary description of the ordinance:

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[23] *Id.* at 1138.

[24] *Id.*

[25] Merriam-Webster.com Dictionary, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/verbatim (2020 ed.) (last visited Sept. 8, 2020).

> Ordinance No. AO 2020-66(S) authorizes the acquisition by purchase, or lease with option to purchase, of real property legally described as: Lot 7 A Block C Heather Meadows Subdivision (Plat 77-149) (PID 009-161-51), Lots 1 - 6 Block C Rosebud Subdivision (Plat P-224A), (PID 009-161-32, 009-161-33, 009-161-34, 009-161-35, 009-161-36, 009-161-37), Block 4A Central City Subdivision (Plat 76-245) (PID 003-241-29), the improvements on Lot 1 Block 33C USS 408 (Plat 84-374) (PID 003-073-33), and Tract C Green Valley Resubdivision No. 1 (Plat 73- 210) (PID O 10-193-22) (Properties) with aggregate acquisition and renovation costs not to exceed Twenty-Two Million Five Hundred Thousand Dollars ($22,500,000).

But this is not the full text of AO 2020-66(S), and it is a summary, not a verbatim, word-for-word recitation of the law. The entire verbatim text of AO 2020-66(S) is attached as Exhibit B. Comparison of the full text of AO-66(S)—which is three and a half pages long and contains fifteen introductory "Whereas" clauses and three ordinance sections, one containing four subsections—to the application's language makes clear that the verbatim text of the law is significantly longer, more detailed, and more complex than the one-paragraph summary that the sponsors provided with the referendum application. The application therefore does not satisfy the requirements of AMC 2.50.020B.3. because it does not contain the verbatim text of the law it seeks to repeal via referendum.

This is a technical defect that the applicants could correct.[26] However, because we conclude that the proposed referendum also is an impermissible appropriation, correction of the technical defect would not be sufficient to allow the application to be certified.

B. Content.

AO 2020-66(S) authorizes the Municipality to spend up to $22,500,000 in public funds to purchase four buildings located within the Municipality. The intended use of the properties is for homelessness, substance abuse, and other social services, including housing, substance abuse treatment, shelter, and engagement centers.[27] This ordinance was duly enacted by the Anchorage

[26] *See Municipality of Anchorage v. Holleman*, 321 P.3d 378, 381 n.6 (Alaska 2014).

[27] Exhibit B at 1-2.

Assembly on August 11, 2020.[28] Proposed referendum 2020-01 would subject these capital expenditures to a popular vote. "If a majority of voters vote in favor of repeal, the acquisition of the described properties will not be authorized by ordinance."[29]

Applying the Alaska Supreme Court's appropriations analysis, we conclude that placing this referendum on the ballot would affect an unconstitutional appropriation. The court's focus is on preserving the legislative body's exclusive ability to choose how to spend limited public funds and to allocate those moneys among competing uses. The Anchorage Assembly has made appropriative choices, deciding to use public funds to purchase real property to use for homelessness, substance abuse, and other social services. Allowing voters to undo those choices would weaken or even eviscerate that power and would not be consistent with the constitutional command to "ensure that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs."[30]

Alliance of Concerned Taxpayers v. Kenai Peninsula Borough[31] is the most on-point Alaska Supreme Court decision, and it compels a like outcome here. There, the Supreme Court concluded that an initiative giving voters veto power over capital expenditures by the municipal government was an impermissible appropriation because it narrowed the Borough's ability to make its own decisions about how to allocate municipal assets. The court held that giving voters the "ability to veto a capital project" through direct democracy "infringes on the assembly's ability to allocate resources among competing uses because there is nothing that the assembly can do to appropriate money for that project" if the voters veto the spending.[32] The court concluded that "when voters refuse to approve a capital project they allocate municipal funds away from the particular project, which interferes with the Borough's exclusive power to allocate funds among competing uses."[33]

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[28] Exhibit B at 1.

[29] Exhibit A at 4.

[30] *Mallott*, 431 P.3d at 166 (quoting *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 88 (Alaska 1988)) (internal quotes omitted) (emphasis in original).

[31] 273 P.3d 1128 (Alaska 2012).

[32] *Id.* at 1138.

[33] *Id.*

Precisely the same is true here. The Anchorage Assembly allocated up to $22,500,000 in public funds to make specified capital expenditures. This is consistent with that body's exclusive authority to make decisions about how best to spend municipal funds. After all, "when voters refuse to approve a capital project they allocate municipal funds away from the particular project"—and that "interferes with the Borough's exclusive power to allocate funds among competing uses."[34] Referendum Application 2020-01 aims to do exactly what the court disallowed in *Alliance of Concerned Taxpayers*: invite the voters to veto capital expenditures, forcing the allocation of public revenue away from the Assembly's choice of how to spend it, and directing those moneys elsewhere. Just as in *Alliance of Concerned Taxpayers*, this would leave the Assembly powerless to allocate public funds for its preferred uses and projects. This is the outcome that the framers of Alaska's constitution wanted to prohibit when they banned appropriation by referendum and initiative. The application would affect an impermissible appropriation, and therefore it should not be certified.

CONCLUSION

For the above-discussed reasons, the Clerk's Office should decline to certify the petitioner's referendum application, 2020-01.

[34] *Id.*

MUNICIPALITY OF ANCHORAGE

Office of the Municipal Attorney

Memorandum

DATE: April 29, 2013

TO: Amanda Moser, Acting Municipal Clerk

FROM: Dennis A. Wheeler, Municipal Attorney

SUBJECT: Referenda Application 2013-2, Referendum Petition to Repeal AO 2013-37(S-2)(as amended)
Dept. of Law Matter No. 13-1233A

QUESTION:

Is the referendum petition application 2013-2, "Referendum Petition to Repeal AO 2013-37(S-2)(as amended)" received April 19, 2013, legally sufficient to be placed on the ballot at a municipal election?

BRIEF ANSWER:

Subject to the following Background and Discussion below, our Brief Answer is No. While the petition has satisfied the technical deficiencies present in petition application 2013-1, the petition addresses subjects prohibited by Alaska law.

BACKGROUND:

On April 3, 2013, sponsors submitted an application to the Municipal Clerk for a referendum petition titled "Referendum Petition to Repeal AO 37". In consideration of our advice, the Municipal Clerk's Office rejected that petition. The same sponsors submitted a new application, 2013-2, on April 19 (attached) which also proposes to repeal the ordinance.

On April 24, the sponsors, through their counsel, provided a separate letter outlining their position that the petition to repeal the ordinance is legally suitable to go to the voters.

Pursuant to Anchorage Municipal Code subsection 2.50.030A., "...[w]ithin ten business days after receiving a completed application, the municipal clerk shall verify the sponsors' qualifications and, after consultation with the municipal attorney, determine and certify the legal sufficiency, or lack thereof, of the application and the proposed initiative or referendum."

DISCUSSION:

I. Review standards.

The Municipal Clerk's pre-election review of an initiative or referendum petition application should be consistent with Alaska courts' standard of review, which "is limited to determining whether the initiative complies with the particular constitutional and statutory provisions regulating initiatives" and whether enforcement of the proposed ordinance is precluded by controlling authority as a matter of law.[1] Pursuant to AMC subsection 2.50.020B.3:

> The proposed petition shall:
>
> a. set out verbatim the ordinance or resolution sought to be enacted or repealed by the petition;
>
> b. have the required names, residence and mailing addresses, signatures, and dates of signatures of the initial contact persons and sponsors;
>
> c. meet constitutional, charter and other legal requirements or restrictions;
>
> d. include only a single subject; and
>
> e. be enforceable as a matter of law or be clearly denominated as advisory only.

[1] *Kodiak Island Borough v. Mahoney,* 71 P.3d 896, 898 (Alaska 2003); *Alaskans for Efficient Government, Inc. v. State,* 153 P.3d 296, 298 (Alaska 2007); *Brooks v. Wright,* 971 P.2d 1025, 1027 (Alaska 1999). There is a dearth of case law discussing referenda applications submitted by citizens (*see* AS 15.45.250-.465), however courts treat pre-election reviews of initiatives and referenda similarly, thus the holdings regarding review of initiative applications are relied upon here.

The Application for repealing the labor ordinance includes the required names, residence and mailing addresses, signatures, and dates of signatures of the initial contact persons and sponsors,[2] and includes only a single subject.

There is a balancing of interests between the right to bring initiatives and referendums, and the Constitutional restrictions on such rights. The Alaska Supreme Court has explained that the restrictions of Art. XI, § 7 of the Alaska Constitution must also be liberally construed, as well as require strict compliance[3] with such restrictions:

> . . . it does not necessarily follow that a liberal construction of the people's initiative power requires a narrow construction of the limits that define the power. On the contrary, the mandate for liberal construction of the initiative right in article XII, section 11 concludes with a qualifying, cautionary clause: "subject to the limitations of Article XI." This reiterative warning underscores the importance of the restrictions. Additionally, we must never lose sight of another important right of the people implicated in all cases of constitutional construction, namely the right to have the constitution upheld as the people ratified it. *See Thomas*, 595 P.2d at 3-4. We must interpret all constitutional provisions -- grants of power and restrictions on power alike -- as broadly as the people intended them to be interpreted. [4]

II. The Petition Application satisfies the technical Code requirements for referendum petitions.

The new application properly cites the ordinance, includes the ordinance as an attachment, and does not contain misleading statements about the ordinance. Thus, the application resolves the technical defects present in the original application.

III. The proposed referendum petition contains prohibited subjects involving administrative rather than legislative matters.

For the reasons noted in our prior opinion, we conclude the referendum violates the subject matter restrictions.

We acknowledge and appreciate the effort the sponsors made to outline their legal position on this issue, but do not find the reasons provided to be compelling justification to advise the Municipal Clerk the petition is legally sufficient.

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[2] Subject to the Clerk's Office verification.

[3] *Citizens Coalition for Tort Reform v. McAlpine,* 810 P.2d 162, 168 (Alaska 1991).

[4] *Citizens Coalition for Tort Reform,* 810 P.2d at 169 (citing *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979) (additional citations omitted)).

We had suggested the sponsors write a more specific petition application, one targeting purely legislative matters. Unfortunately, we have not received a more precise application.

The sponsors concede that administrative matters are prohibited subjects for a referendum, but characterize the ordinance as involving legislative rather than administrative matters. The first basis for their position is because the matter being repealed is legislation (an ordinance), it therefore must be legislative. This analysis is obviously too simplistic. Under this interpretation of the test for legislative v. administrative matters, any ordinance, even if purely administrative in nature, is fair game for a referendum. Such a position is clearly not how the test is applied.

The generalized distinction the sponsors make between legislative and administrative matters does not comply with the specific guidelines for initiatives and referendum set out in *Swetzof v. Philemonoff,* 203 P.3d 471, 478-81 (Alaska 2009). Our legal memorandum explains and applies these guidelines to the various types of amendments made to the comprehensive labor laws in AMC 3.70 *et seq.*

This brings us to the sponsors' second basis for claiming the amendments are not administrative but legislative in nature. The sponsors characterize amendments in the ordinance as "broad and sweeping, not minor and technical." They also claim the ordinance declares 6 new policies, and addresses issues such as "scope of collective bargaining, which employees have the right to strike, and how employee compensation and benefits must be limited." These characterizations do not provide specifics. In our legal memorandum at page 9, examples of the varied types of amendments are listed that demonstrate the detailed aspects of collective bargaining that are administrative in nature, and simply part of a long existing statutory scheme created when Anchorage was exempted from PERA, addressing personnel and labor type matters. Even some of the limited changes made by the ordinance to the strike provisions simply incorporate and clarify existing law regarding AMC 3.70 provisions, as confirmed by the Alaska Supreme Court in *Plumbers & Pipefitters, Local 367 v. Municipality of Anchorage,* 2013 WL 1281791 (Alaska), rejecting the union's argument that the arbitrator's decision regarding impasse under AMC 3.70 should be binding on the parties because the union was enjoined from striking.

As far as their claim that new policies were created, and thus the ordinance is therefore on the whole legislative in nature, the sponsors only cite the standard section listed in the beginning of AMC chapters, entitled "policy", "declaration of policy", or "purpose", which was amended in part by the new ordinance. Further, as to the substance and specific changes made by the ordinance to this policy section, these amendments

generally clarify ongoing standing policy or equity objectives, or have very limited substance:

- Adding "while maintaining financial sound principles" to Section A;
- Adding the provision at Section C that states that Collective Bargaining Agreements ("CBA") cannot contain provisions against managed competition;
- Limit direct labor costs increases at Section D;
- Uniform employee benefits and eligibility criteria at Section E;
- Unions shall reimburse Municipality for the time spent primarily on union work; by municipal employees at Section F;
- Uniform holidays at Section G; and
- Qualification based pay enhancement at Section H.

The emphasis on this being "new policy" appears to relate to the first prong of the *Swetzof* initiative/referendum guidelines at 203 P.3d at 481, in analyzing administrative v. legislative matters:

> 1. An ordinance that makes new law is legislative, while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance.

Simply because the policy section of a particular municipal code chapter is amended does not mean it is "new policy", particularly when it is clarifying an existing position. Additionally, as the Alaska Supreme Court recognized in *Swetzof,* 203 P.3d at 479, not all laws are purely legislative in character, particularly municipal laws, and that there can be an overlap that can be both legislative as well as administrative in nature. Further, the sponsors continue to request repeal of the entire ordinance. In accordance with AMC 2.50.020B.3, the Municipality is only able to consider the verbatim request by the sponsors.

The sponsors raised two more arguments relating to the remaining *Swetzof* guidelines:

> 2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative.
>
> 3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be

> characterized as administrative, even though they may also be said to involve the establishment of a policy.

As addressed in our memorandum, the recent amendments are to AMC 3.70, which was created years ago from Anchorage's personnel rules as a result of Municipality of Anchorage opting out of the State's Public Employment Relations Act ("PERA") in October of 1976,[5] and amended numerous times. They address numerous types of personnel and labor matters. They also involve specialized training and experience in personnel and labor matters, and financial costs and expenses related to collective bargaining.

It should be noted that the Utah case cited by the sponsors,[6] *Carter v. Lehi City,* 269 P.3d 141 (Utah 2012) specifically rejects this 3rd guideline accepted by the Alaska Supreme Court in *Swetzof.* We are, of course, bound to follow Alaska court decisions, not Utah's. The Utah Supreme Court's recent decision to dramatically change course and devise a new test does not mean the Alaska Supreme Court will do the same. In any event, the Utah case is readily distinguishable because the Utah Constitution is very different from Alaska's and allows for direct voter enactment of "any desired legislation," and repeal of "any law passed by the legislature," while the Alaska Constitution has specific restrictions.[7]

We have additional concerns regarding the constitutionality of the referendum, including to the extent to which the referendum may violate restrictions on appropriations[8] and

[5] *Anchorage Municipal Employees Association v. Municipality of Anchorage,* 618 P.2d 575, 575-77 (Alaska 1980).

[6] We appreciate the sponsors notifying us of the recent Utah Supreme Court's overruling of the *Shriver* decision. We have notified Westlaw, which is correcting the case history regarding the *Shriver* decision. However, it was just one decision in a line of cases that support the Municipality's rejection of the referendum because it addresses administrative rather than legislative matters. We referenced a number of non-Alaska cases, some cited by the Alaska Supreme Court in *Swetzof.*

[7] Utah Constitution, Art. VI, § 1, created in 1900; *see also Carter,* 269 P.3d at 148-49. Also note that only about half the states allow for initiatives and referendums. *Carter, Id.* In Alaska, that right is by statute for municipal initiatives/referendums, with the only specific reference to the Alaska Constitution limiting rights by prohibiting certain subject matters (Art. XI, § 7). *Sitkans for Responsible Government v. City & Borough of Sitka,* 274 P.3d 486, 492-93 (Alaska 2012). Alaska law on municipal initiatives and referendum is also distinguishable from Utah which subjects municipalities to the constitutional right of initiative and referendum, and states in the Utah Constitution at Art. VI, § 1(2)(b) that the voters may "require any law or ordinance passed by the law making body of the county, city, or town to be submitted to the voters thereof, as provided by statute, before the law or ordinance may take effect."

[8] Anchorage Municipal Charter §3.02(a).

enactments necessary to the immediate preservation of public health, safety, and welfare[9], but these concerns, while valid, arguably may not rise to the standard for pre-petition clearance and we do not address them here.

CONCLUSION:

The Municipal Attorney's Office has determined the Application is defective as a matter of law, under the legal requirements for submission of a referendum application. We recommend the Application be rejected pursuant to AMC subsection 2.50.020B.3.c.

[9] Initiatives and referenda cannot impermissibly address subject matter areas restricted by the Alaska Constitution at Art. XI, §7, including "law necessary for the immediate preservation of the public peace, health, and safety...."

MUNICIPALITY OF ANCHORAGE

ASSEMBLY MEMORANDUM

No. AM 278-2022

Meeting Date: May 10, 2022

FROM: **Assembly Vice Chair Constant**

SUBJECT: **AN ORDINANCE OF THE ANCHORAGE ASSEMBLY AMENDING ANCHORAGE MUNICIPAL CODE CHAPTERS 3.10 *GENERAL PROVISIONS (RESERVED)* AND 27.20 *SUPERVISORY BOARDS,* AND SECTIONS 2.70.030 AND 29.10.060, TO FULFILL THE REQUIREMENT OF ANCHORAGE MUNICIPAL CHARTER SECTION 7.01(b) THAT THE ASSEMBLY BY ORDINANCE MUST ESTABLISH SPECIFIC PROCEDURES FOR REMOVAL OF ELECTED OFFICIALS FOR BREACH OF THE PUBLIC TRUST.**

The ordinance submitted with this memorandum would fulfill a requirement of the Anchorage Municipal Charter that, to date, has been only partially addressed.

Anchorage Municipal Charter section 7.01(b) provides, in part, "[t]he assembly by ordinance shall establish procedures for removal of elected officials for breach of the public trust, including provision for notice, a complete statement of the charge, a public hearing conducted by an impartial hearing officer, and judicial review."

In 1994, Assembly adopted AO 93-54(S-1) to adopt Charter-required provisions for members of the Assembly and Anchorage School Board. See attached. The ordinance was codified at (for Assembly Members) Anchorage Municipal Code section 2.70.030 *Removal from office*, and (for School Board members) AMC 29.10.060 *Removal of members from office*.

The ordinance submitted with this memorandum applies like provisions to elected members of service area boards, and to the mayor. Provisions applicable to Assembly members, providing that "unexcused absence from three consecutive meetings" and "Failure to attend 75 percent of meetings in a 24-month period," are "actions constituting breach of the public trust" would not apply to either service area board members (who must comply with the attendance requirements in AMC 27.20.070), or to the mayor. In lieu of those provisions, actual or attempted

"official misconduct," which is defined Alaska Statute 11.56.850[1] and, as to the mayor, ordering or knowingly allowing a person appointed by the mayor to order a municipal employee to engage in an unlawful act are enumerated as executive-specific actions that would constitute breach of the public trust.

Last, the ordinance also amends Title 2 and Title 29 to clarify potential procedural ambiguities, and to better conform to section 7.01(b) of the Charter, which provides that proceedings for removal of an elected official may be initiated by "a majority" of all members of the assembly (or the school board in the case of removal of a school board member), rather than a super-majority.

There are no anticipated economic effects from this Code change.

I request your support for the ordinance.

Prepared by: Assembly Counsel's Office

Respectfully submitted: Assembly Vice Chair Christopher Constant
District 1, Downtown Anchorage

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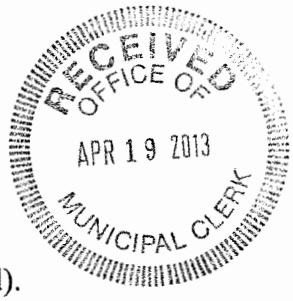
[1] *See* AS 11.56.850 *Official Misconduct*

(a) A public servant commits the crime of official misconduct if, with intent to obtain a benefit or to injure or deprive another person of a benefit, the public servant
- (1) performs an act relating to the public servant's office but constituting an unauthorized exercise of the public servant's official functions, knowing that that act is unauthorized; or
- (2) knowingly refrains from performing a duty which is imposed upon the public servant by law or is clearly inherent in the nature of the public servant's office.

(b) Official misconduct is a class A misdemeanor

Criminal conviction under AS 11.56.850 requires proof beyond a reasonable doubt. As expressed in the ordinance, facts established by a preponderance of the evidence that a mayor engaged in actual or attempted official misconduct would establish breach of the public trust.

Date : April 12, 13



To: Barbara Jones, Municipal Clerk

From: Andy Holleman, Primary Committee Petition Sponsor

Subject: Petition for Referendum of AO No. 2013-37(S-2)(as amended).

Dear Ms. Jones,

In response to the April 15, 2013 Memorandum from the Office of the Municipal Attorney, identifying problems with referendum petition application 2013-1, we are today submitting a revised application that we believe satisfies the concerns raised in that Memorandum.

- We have identified the ordinance for which repeal is sought using the citation the Memorandum uses on page 3: AO No. 2013-37(S-2)(as amended).
- We have attached the full ordinance.
- We have not provided a summary. The Municipal Code 2.50.020(B) does not require a summary as part of the petition application. This should eliminate any concern regarding whether the summary is misleading or confusing.

We anticipate the Municipality will contend again that the proposed referendum addresses administrative rather than legislative acts and therefore is not an appropriate subject for a referendum. Based on our review of relevant authority, we believe this analysis is mistaken. We intend to submit a short letter next week addressing this issue.

Thank you,

Andy Holleman
301-7004

MUNICIPALITY OF ANCHORAGE

Office of the Municipal Attorney

Memorandum

DATE: December 15, 2015

TO: Amanda K. Moser, Deputy Municipal Clerk, and
Barbara A. Jones, Municipal Clerk

FROM: William D. Falsey, Municipal Attorney WDF
Deitra L. Ennis, Deputy Municipal Attorney DLE
Dean T. Gates, Assistant Municipal Attorney DTG

SUBJECT: **REFERENDUM APPLICATION 2015-5: RESPONSE TO SPONSORS' LETTER OF DEC. 14, 2014**
Dept. of Law Matter No. N15-3410

QUESTION:

Should the Clerk's office issue to the sponsors of Referendum Application 2015-5 a master-petition form that puts to voters the question of whether AO 2015-96(S-2)(as amended) shall "remain law"?

BRIEF ANSWER:

Subject to the following discussion, our brief answer is no. Presenting to voters the question of whether "[a law] shall remain law" exposes the Municipality and the sponsors to a greater risk of successful legal challenge. Asking whether a law should "be repealed": (1) better accords with the Anchorage Municipal Charter and Code; (2) avoids inconsistency with state practice; (3) is more intuitive, in that it follows the usual practice of a "yes" vote representing the "action alternative," while a "no" vote represents the "no action" alternative; and (4) is more consistent with prior municipal practice. Further, (5) the Municipality is aware that asking whether a law shall "remain law" has caused actual voter confusion in the past.

To better ensure that the results of a referendum vote will not be disturbed, we advise that the question to be put to voters in a referendum election should be whether the subject law should "be repealed."

BACKGROUND:

On November 25, 2015, sponsors submitted to the Municipal Clerk an application for a referendum petition titled, "Gender Identity & Sexual Orientation Amendments." The application proposed to circulate to voters the following question:

> Shall AO No. 2015-96(S-1) (as amended), an ordinance adding sexual orientation and gender identity to Title 5 of the Anchorage Municipal Code, remain law?

Our office advised that the Clerk's office could issue a petition "master form" to the sponsors of Referendum Application 2015-5 that included language that differs from that which was proposed by the sponsors. The sponsors object to the revised language, which they describe in a December 14, 2015 letter as "cumbersome," but have advised that they would accept a petition that reads:

> Shall AO No. 2015-96(S-1) (as amended), which amended the Equal Rights Title of the Anchorage Municipal Code (Title 5) to prohibit discrimination within the Municipality on the bases of sexual orientation or gender identity in the sale, rental or use of real property, financing, employment, places of public accommodations, educational institutions, and practices of the municipality; to codify certain religious and other exemptions; and to expand the lawyer's role in fact-finding conferences before the Anchorage Equal Rights Commission, remain law?
>
> A "yes" vote is a vote to keep the ordinance in place. A "no" vote is a vote to repeal the ordinance.

This language, including revisions suggested by the sponsors, would have the effect of a reversing the meaning of "yes" and "no" from the meaning those terms would have in an election asking whether a law should "be repealed."

DISCUSSION:

I. APPLICABLE MUNICIPAL LAW DEFINES A REFERENDUM AS A PROPOSITION TO DETERMINE WHETHER A LAW SHOULD "BE REPEALED".

The Anchorage Municipal Charter guarantees to the people of Anchorage the "right of referendum."[1] "Referendum" is a defined term in the Charter—it the process of "repealing" an ordinance by vote of the people:

> "Referendum" means the process of repealing an ordinance or resolution by vote of the people without assembly action.[2]

The Anchorage Municipal Code similarly defines a "referendum" as "ballot proposition presented to the voters . . . to determine whether an ordinance or resolution already approved shall be repealed":

> *Referendum* means a ballot proposition presented to the voters after submission of petitions signed by a specified number of qualified voters to determine whether an ordinance or resolution already approved shall be repealed by popular vote.[3]

Municipal Code presumes that voters will be able to "favor repeal":

> If a majority of those voting favor repeal of the legislation referred, that legislation is repealed upon certification of the election.[4]

Fundamentally, a municipal referendum should be presented to voters as a ballot proposition asking voters whether a law "shall be repealed," because that is what the Charter and Code require; it flows from the definition of what a municipal referendum is.

By contrast, putting to voters the question of whether a law "shall remain law" would expose the Municipality to claims that it had forwarded to voters a form of referendum not consistent with the language of the Anchorage Municipal Charter and Code. The form of a ballot question has, in fact, led to litigation and invalidation of an

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1 ANCHORAGE MUNICIPAL CHARTER at § 2(1).

2 *Id.* at § 17.13(i) (emphasis added).

3 AMC 2.50.010 *Definitions* (emphasis added).

4 AMC 2.50.090 *Effect of Vote* (emphasis added).

election result in the past, where a state ballot question "so far departed from the constitutionally prescribed form of ballot that the electorate's right to vote on the question was impermissibly infringed."[5]

We see no reason for the Municipality to incur that risk, when it can be easily and entirely avoided by using the language of the Charter and Code.

II. THE STATE OF ALASKA HAS ADOPTED A SIMILAR PRACTICE OF PUTTING TO VOTERS THE QUESTION OF WHETHER A LAW SHOULD "BE REJECTED."

The definition of "referendum" adopted in the Anchorage Municipal Charter and Code is also consistent with state practice.

At the state level, the preparation of ballot propositions for referenda is entrusted to the Lt. Governor.[6] By statute, the Lt. Governor must draft referendum propositions so that a "yes" vote is "a vote to reject the act referred":

> (a) The lieutenant governor, with the assistance of the attorney general, shall prepare a ballot title and proposition upon determining that the petition is properly filed. The ballot title shall, in not more than 25 words, indicate the general subject area of the act. The proposition shall, in not more than 50 words for each section, give a true and impartial summary of the act being referred. In this subsection, "section" means each section of the Alaska Statutes created, amended, or repealed in the Act, and each section of the Act that does not create or amend codified law.
>
> (b) The proposition prepared under (a) of this section shall comply with AS 15.80.005 and shall be worded so that a "Yes" vote on the proposition is a vote to reject the act referred.[7]

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5 *Boucher v. Bomhoff*, 495 P.2d 77, 78 (Alaska 1972) (the state election official's wording of a referendum question on the ballot, "REFERENDUM As required by the Constitution of the State of Alaska Art. XIII, Section 3, Shall there be a constitutional convention?" deviated from the prescribed form of the question, "Should there be a Constitutional Convention?" and led the court to invalidate the election).

6 *See* AS 15.45.410 *Preparation of ballot title and proposition.*

7 *Id.* (emphasis added).

This codified practice is consistent with language from the Alaska Constitution, which suggests that voters in a referendum election should be given the choice to "favor the rejection of an act referred":

> If a majority of the votes cast on [an initiative] proposition favor its adoption, the initiated measure is enacted. If a majority of the votes cast on [a referendum] proposition favor the rejection of an act referred, it is rejected. The lieutenant governor shall certify the election returns. An initiated law becomes effective ninety days after certification, is not subject to veto, and may not be repealed by the legislature within two years of its effective date. It may be amended at any time. An act rejected by referendum is void thirty days after certification. Additional procedures for the initiative and referendum may be prescribed by law.[8]

To the best of our knowledge, in every referendum proposition ever presented to voters in a statewide election in which voters were given the choice to vote "yes" or "no," a "yes" vote was vote to reject the law.[9]

Aside from our use of "repeal" (stemming from the term's use in the Anchorage Municipal Charter and Code), and the State's use of "reject" (stemming from that term's use in the State Constitution and Statutes), we see no reason why municipal practice should differ from state practice. Indeed, because municipal and statewide referenda may appear on the very same ballot,[10] we believe significant policy considerations weigh heavily in favor of the Municipality adopting a presentation of referenda that is consistent with the state practice.

III. PUTTING TO VOTERS THE QUESTION OF WHETHER A LAW SHALL "BE REPEALED" IS MORE CONSISTENT WITH VOTER INTUITION AND THE NEAR UNIVERSAL PRACTICE OF "YES" REPRESENTING AN ENDORSEMENT OF A PROPOSED ACTION, WHILE "NO" REPRESENTS A VOTE TO MAINTAIN THE STATUS QUO.

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8 ALASKA CONST. ART. XI, § 6. *Enactment* (emphasis added).

9 *See* Referendum 13SB21 *An Act relating to the Oil and Gas Production Tax, Interest Rates and Overdue Taxes, and Tax Credits* (Aug. 19, 2014); Referendum 00GAME *An Act Relating to Management of Game* (Nov. 7, 2000); *Referendum Relating to Voter Registration* (Chapter 211, SLA 1968) (Nov. 5, 1968).

10 *Cf.* Sample Ballot of Nov. 4, 2014 Statewide General Election (featuring three statewide initiatives and, in Anchorage, a referendum on AO2013-37(S-2)).

The result suggested by applicable law and conformance with state practice is also most compatible with typical voting procedures and, we believe, voter intuition. A referendum determines whether a law currently on the books should be removed. The "action" at issue is whether the law should be repealed. The "no-action alternative" is to permit the law to remain in effect.

The typical practice in voting procedures is for "yes" to be a vote in favor of a proposed action, and for "no" to be a vote *not* to take the action proposed. Indeed, in parliamentary procedure, we are not aware of an exception to this rule.[11]

Even absent controlling law and the strong policy reasons to adopt a convention for municipal referenda consistent with state statutes, to best conform to expected practices and voter intuition, we would advise that "yes" equate to the "action alternative"—a vote in favor of repeal.

IV. THE MUNICIPALITY'S TYPICAL PRACTICE HAS BEEN TO PUT TO VOTERS THE QUESTION OF WHETHER AN ORDINANCE SHALL "BE REPEALED," NOT WHETHER AN ORDINANCE SHALL "REMAIN LAW."

The approach we recommend is also most consistent with the Municipality's own prior actions.

To the best of our current knowledge, with only two exceptions, all referenda that have appeared on a municipal ballot have asked voters whether an ordinance shall "be repealed."

1986: In a ballot proposition entitled "REPEAL OF SIGN REGULATIONS," voters were asked:

> Shall Ordinance Number AO 85-159 codified as AMC Chapters 21.45 and 23.40 as adopted on September 17, 1985 be repealed?[12]

1992: In a ballot proposition entitled "REFERENDUM ALASKA NATIVE CULTURAL CENTER," voters were asked:

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11 *See generally* ROBERT'S RULES OF ORDER NEWLY REVISED (11th ed. 2011).

12 The ballot proposition also featured the following explanatory language:

> A YES vote would repeal the current prohibitions on the use of rooftop, portable, off-premise, and other limitations on signs. A NO vote would retain the current prohibitions on the use of rooftop, portable, off-premise, and other limitations on signs. (AO 86-204 (as amended)).

> Shall AO 90-46, an ordinance authorizing the lease of lands within the Far North Bicentennial Park for the establishment of an Alaska Native cultural center be repealed?

April 1997: In a ballot proposition entitled, "REPEAL OF ORDINANCE AO 96-132," voters were asked:

> Shall Anchorage Ordinance 96-132, which rezoned the 40 acres generally located north of W. 104th Avenue and west of King Street, from I-2 (heavy industrial) to PLI-SL (public lands and institutions with special limitations) so that a correctional institution (such as a prison, jail, reformatory, or detention center) could be built on that site, be repealed?

Nov.1997: In a ballot proposition entitled, "REPEAL OF CURFEW LAW," voters were asked:

> Anchorage Municipal Code Section 8.05.440 which establishes a curfew for minors be repealed?

2007: In a ballot proposition entitled, "REFERENDUM TO REPEAL AO 2006-86(S) SECOND HAND SMOKE ORDINANCE," voters were asked:

> Shall Anchorage Ordinance 2006-86(S), relating to a prohibition of smoking in public places, to extend second hand smoke control, be repealed?

As noted above, we are aware of only two exceptions to this rule, neither of which provides a good or defensible model for future referenda, for reasons already stated and added to below.

1993: In a ballot proposition entitled, "REFERENDUM ON ADDITION TO PROTECTED CLASSES," voters were asked,

> Should AO 92-116(S), which adds sexual orientation to the list of protected classes for the purpose of public employment or municipal contractors, remain law?

The Alaska Supreme Court held that this referendum had proceeded to the ballot unlawfully, and noted deficiencies with its language.[13] As a result of the Court's decision, the April 1993 Municipal Ballot was presented to voters with a coversheet that read:

> Pursuant to Alaska Supreme Court Order No. S-5605, the election on Proposition One (Anchorage Municipal Ordinance 96-116(S)) has been stayed. Therefore, IF YOU VOTE ON PROPOSITION ONE YOUR VOTE WILL NOT BE COUNTED.

This is a result that we seek to avoid.

2013: In a ballot proposition entitled, simply, "Municipality of Anchorage Proposition No. 1," voters were asked:

> Shall AO No. 2013-37(S-2)(as amended), an ordinance amending Anchorage Municipal Code chapter 3.70, Employee Relations, remain law?

To the best of our understanding, as a result of the unusual set of circumstances that led to the AO37 referendum going to voters, *the AO37 ballot-proposition language did not receive a legal review.*

Sponsors of the AO37 referendum submitted two referendum applications. In the first application, the sponsors proposed the following petition language:

> PETITION TITLE: REFERENDUM PETITION TO REPEAL AO 37
>
> PROPOSED PETITION: In accordance with Section 3.02 of the Home Rule Charter for the Municipality of Anchorage and Section 2.50 of the Anchorage Municipal Code, we the undersigned qualified voters of the Municipality of Anchorage submit this Referendum Petition calling for the repeal of Anchorage Ordinance 37 ("AO 37") enacted on March 26, 2013, amending Section 3.70, Employee Relations, of the Anchorage Municipal Code.

[13] *See Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1218 n.3 (Alaska 1993).

> AO 37 makes numerous changes to the Anchorage Municipal Code that affect municipal employees. Among the changes, AO 37 limits collective bargaining for municipal employees; introduces a managed competition program for potential outsourcing of certain city services; removes certain public employees from collective bargaining; gives the Municipality additional control over staffing, scheduling, equipment, benefits, overtime, and leave; eliminates binding arbitration for contractual impasse resolution; prohibits strikes; and limits annual pay and benefit increases.
>
> Therefore, we the undersigned registered voters of the Municipality of Anchorage request the following question be placed before the voters of the Municipality of Anchorage as a referendum question:
>
> > Shall AO 37, an ordinance amending Anchorage Municipal Code chapter 3.70, Employee Relations, remain law?
> >
> > Yes [ ] No [ ]

The Municipal Attorney's office advised the Municipal Clerk to reject this application on technical grounds; the application cited the wrong version of AO37 and did not include a full text copy of ordinance. The Department of Law also suggested that the sponsor's summary of AO37 was inconsistent with the Alaska Supreme Court's decisions in the *Faipeas* and *Citizens for Implementing Medical Marijuana* cases.

In response to the Municipal Clerk's resulting refusal to certify the application, the sponsors tried again. The sponsors submitted a second application that corrected the technical deficiencies and omitted any summary of AO37, so as to "eliminate any concern regarding whether the summary is misleading or confusing."

The Municipal Attorney's office never drafted a summary. The Department of Law instead advised, incorrectly, that the sponsors' second application should not be certified on grounds that it addressed improper subject matter. The question was litigated, and the Municipality lost.[14] After the Alaska Supreme Court ruled that the AO37 referendum did not address improper subject matter, the proposition requested by

[14] *See Municipality of Anchorage v. Holleman*, 321 P.3d 378 (Alaska 2014).

the sponsors was placed on the ballot, unaccompanied by any summary of AO37, and apparently without any additional legal scrutiny.[15]

We would not advise the Clerk's office to certify an application modeled on the unusual language that appeared in the enjoined AO 92-116(S) referendum, or the litigated and then under-scrutinized AO37 referendum.

V. UNLIKE "SHALL [A LAW] REMAIN LAW," SHALL A LAW "BE REPEALED" DOES NOT HAVE A DOCUMENTED RECORD OF BEING CONFUSING.

Finally, it is well-known within the Municipality that voters were *actually confused* by the AO37 referendum. Some of this confusion was documented in news reports:

> Even some union members were confused. Outside of the Anchorage Bible Fellowship, Clarence Olhausen, a carpenter with Carpenters Local 1281, said that when he got to the voting booth, he wasn't exactly sure whether he needed to choose "yes" or "no" to vote to repeal the measure. He ended up guessing correctly, casting a "no" vote.[16]

This fact, too, informs our opinion.

CONCLUSION:

To better ensure that the results of a referendum vote will stand, we advise that the question to be put to voters in a referendum election should be whether the subject law should "be repealed."

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[15] *Cf. id.* (not discussing the language of the proposed ballot proposition); Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Cross Motion for Summary Judgment, *Holleman v. Municipality of Anchorage*, Case No. 3AN-13-06812CI (Alaska Sup. Ct. Aug. 21, 2013) (not discussing the language of the proposed ballot proposition).

As noted above, the proposition that appeared on the ballot in the Nov. 4, 2014 election was entitled, "Municipality of Anchorage Proposition No. 1." It did not expressly inform voters that they were being asked to participate in a referendum election.

[16] *See, e.g.*, Devin Kelly, *Anchorage Voters Favor Unions in Repealing Mayor Sullivan's Labor Law Rewrite*, ALASKA DISPATCH NEWS (Nov. 4, 2014), available at: http://www.adn.com/article/20141104/anchorage-voters-favor-unions-repealing-mayor-sullivans-labor-law-rewrite

Putting to voters the question of whether AO2015-96(S-2)(as amended) shall "be repealed": (1) better accords with the Anchorage Municipal Charter and Code; (2) avoids inconsistency with state practice; (3) is more intuitive, in that it follows the usual practice of a "yes" vote representing the "action alternative," while a "no" vote represents the "no action" alternative; (4) is more consistent with prior municipal practice; and (5) permits the Municipality to avoid using language known to have caused voter confusion in the past.

That said, our office takes the sponsors' point that, at 75-words, the revised petition language we previously suggested may be too dense for the public to easily digest.[17] We therefore suggest the following revision, which better tracks the instruction contained in Anchorage Municipal Code section 28.40.010D.1.b. that a ballot proposition should be composed of a "summary description" and a "question."

> Voters are asked whether to repeal an ordinance, AO 2015-96(S-1)(as amended), which amended the Equal Rights Title of the Anchorage Municipal Code (Title 5). The ordinance prohibits discrimination within the municipality on the bases of sexual orientation or gender identity in several covered areas: in the sale, rental or use of real property; in financing practices; in employment practices; in public accommodations; in educational institutions; and in practices of the municipality. The ordinance codified certain religious and other exemptions. The ordinance also expanded the lawyer's role in fact-finding conferences before the Anchorage Equal Rights Commission.
>
> *A "yes" vote is a vote to repeal the ordinance. A "no" vote is a vote to keep the ordinance in place.*
>
> *Shall AO 2015-96(S-1)(as amended) be repealed?*

[17] We note also that certain press reports quoted our suggested language in an abbreviated and ungrammatical manner, suggesting that, as a single sentence, it may have been difficult to parse.