Municipality of Anchorage
Office of the Municipal Attorney
Memorandum

DATE: March 8, 2021

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

THRU: **KATHRYN R. VOGEL, MUNICIPAL ATTORNEY**

FROM: **JESSICA WILLOUGHBY, ASSISTANT MUNICIPAL ATTORNEY**

SUBJECT: **RECALL APPLICATION 2021-01**
Law Matter No. 20-1792

QUESTION PRESENTED

Does Recall Application 2021-01, seeking to recall Anchorage Assembly Member Forrest Dunbar, satisfy the statutory requirements for issuing a recall petition?

BRIEF ANSWER

No, Recall Application 2021-01 does not satisfy the statutory requirements for legal sufficiency. We recommend that Application 2021-01 be denied.

THE RECALL APPLICATION

On February 5, 2021, the Clerk's Office received an application for recall of Assembly Member Forrest Dunbar based on misconduct in office (Recall Application 2021-01, redacted and attached). Recall Application 2021-01 provided the following statement as grounds for recall (verbatim):

> Assembly member Forest Dunbar committed misconduct in office by violating Alaska statutes title II.V criminal law 11.41.530 by colluding and coercing via a coordinated 'shaming' campaign to compel Jacob Poindexter, as a pastor and representative of the religious community, to engage in conduct from which there is a legal right to abstain from, which included providing forced positive testimony to the AO66 building purchases. The coercive campaign was revealed in public records request E mails between Mr. Dunbar and Mr. Constant on July 13, 2020, in which Mr.

> Dunbar wrote "looks like our shame/prodding campaign worked!" to which Mr. Constant replied "haha. Whatever it takes to make you do your part." Private citizens should not be "made to do their part" under threat of a coordinated public shaming campaign by their representatives, and this behavior warrants recall from office.

APPLICABLE LAW

The Municipal Clerk is tasked with reviewing recall applications to determine whether the requirements of Alaska Statute 29.26.260 are satisfied.[1] The statute does not specify a timeframe in which the application review process must take place. The Clerk's Office has asked the Municipal Attorney's Office to provide an opinion on the sufficiency of the petition.

Alaska law places both procedural and substantive limitations on the right to recall. AS 29.26.260(a) requires each application to include: "(1) the signatures and residence addresses of at least 10 municipal voters who will sponsor the petition; (2) the name and address of the contact person and an alternate to whom all correspondence relating to the petition may be sent; and (3) a statement in 200 words or less of the grounds for recall stated with particularity." Recall is permitted only for cause, and there are three substantive statutory grounds for recall of a municipal official: "misconduct in office, incompetence, or failure to perform prescribed duties."[2]

The seminal case on recall in Alaska is *Meiners v. Bering Strait School District*,[3] where a recall petition was filed against all eleven members of the Bering Strait School Board. The *Meiners* court held that statutes relating to recall "should be liberally construed so that the people [are] permitted to vote and express their will."[4] The court did not want to create "artificial technical hurdles" blocking exercise of the recall power, noting that "the recall process is fundamentally a part of the political process."[5]

At issue in *Meiners* was whether the asserted grounds for recall were sufficient to meet the

---

1 AS 29.26.270(a).

2 AS 29.26.250.

3 687 P.2d 287 (Alaska 1984).

4 *Id.* at 296 (quoting *Boucher v. Engstrom,* 528 P.2d 456, 462 (Alaska 1974) (alteration in original)).

5 *Meiners*, 687 P.2d at 296.

statutory requirements. The court emphasized that it was up to the voters and not the court or certifying officer to assess the validity of the petition's allegations.[6] Instead, the sufficiency reviewer must determine whether the allegations, if true, are sufficient to meet one of the three grounds for recall under AS 29.26.250.[7]

In *von Stauffenberg v. Committee for an Honest and Ethical School Board*,[8] another school board recall case, again the issue before the court was whether the asserted grounds for recall were sufficient to meet the statutory requirements. There, petitioners alleged that school board members had committed "misconduct in office" and "failure to perform prescribed duties."[9] The court did not define either term. However, it did conclude that because the actions alleged (moving into executive session to consider a personnel matter) were a legally allowed exercise of discretion, the standards for recall were not met.[10]

From these two cases, we conclude that a recall petition need not be perfectly asserted, but still must be legally sufficient. Petitions must also be factually sufficient: articulate enough that the grounds for recall are understandable and that the elected official may appropriately respond in 200 words.

SUFFICIENCY ANALYSIS

(1) Signature and residence addresses.
(2) Contact and alternate.

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) Statement of grounds.

The third statutory requirement for a recall petition is that it must contain "a statement in

---

6 *Id.* at 300 n.18.

7 *Id.*

8 903 P.2d 1055 (Alaska 1995).

9 *Id.* at 1060.

10 *Id*.

200 words or less of the grounds for recall stated with particularity."[11]

Applicants' statement regarding Assembly Member Dunbar is 139 words and alleges "misconduct in office." As discussed above, this office does not weigh in on the factual accuracy of the petition's allegations. Rather, assuming that the allegations are true, this office must determine whether the statement is factually and legally sufficient.

A. Factual Sufficiency

The applicants allege that Assembly Member Dunbar committed misconduct in office by "violating [AS] 44.41.530 by colluding and coercing via a coordinated 'shaming' campaign to compel Jacob Poindexter . . . . [into] providing forced positive testimony to the AO66 building purchase."[12] They allege that "[t]he coercive campaign was revealed in . . . emails. . . . . Mr. Dunbar wrote "looks like our shame/prodding campaign worked!" to which Mr. Constant replied "haha. Whatever it takes to make you do your part."[13]

For the factual sufficiency portion of our analysis, the inquiry is only whether a reader could understand the factual allegations and they are sufficiently specific to allow the accused to respond in 200 words. Applicants' statement of grounds identifies the allegation—misconduct based on an alleged violation of a specific Alaska criminal law—and provides factual specifics defining the allegation, including the name of the alleged target, and the dates and quotes from emails. This is sufficiently specific with respect to identifying particular emails and mentioning an identifiable person to enable a response.

We conclude that the grounds stated in Recall Application 2021-01 are factually sufficient.

B. Legal Sufficiency

The petition is legally insufficient because it alleges legal tactics of political persuasion that, if true, do not violate the law as alleged.

The petition alleges that Assembly Member Dunbar committed misconduct in office by violating AS 11.41.530 by conducting "a coordinated 'shaming' campaign" to force public testimony supportive of Assembly Ordinance 2020-66, as evidenced by emails in which Mr. Dunbar wrote, "looks like our shame/prodding campaign worked!"

---

11 AS 29.26.260(a)(3).

12 Recall Petition 2021-01.

13 *Id.*

As we have previously discussed in recall matters, "misconduct in office" is not defined in Alaska Statute or Anchorage Municipal Code. But when, as is here, a petition alleges misconduct due to an alleged illegality based on specific facts, our role is to first analyze whether the alleged actions violate the law.[14] Alaska caselaw is clear that legal discretion to perform the act means the act does not qualify as misconduct for recall purposes.

Von Stauffenberg modeled this analysis.[15] Petitioners there alleged that officials violated Alaska open meetings law by going into executive session to consider the continued employment of an elementary school principal. The court did not find that simply alleging an Alaska Open Meetings Act violation was sufficient for recall; rather the court analyzed whether going into executive session was a violation of the Alaska Open Meetings Act. The court found such action was not, because executive sessions were explicitly permitted by the Open Meetings Act itself. Thus, the Court concluded that, even assuming the petition's allegations were true, the targeted officials had not violated Alaska law and rejected the petitioner's allegations as not sufficient for recall.

Based on *von Stauffenberg*, the issue before us is not whether petitioner's allegation of illegal coercion is sufficient for recall but whether the basis of the allegation is sufficient for coercion. In other words, assuming the conduct alleged is true, is that conduct sufficient to establish a prima facie case for coercion under AS 11.41.530?

According to AS 11.41.530 (the statute is printed below in full for the reader's convenience):

> (a) A person commits the crime of coercion if the person compels another to engage in conduct from which there is a legal right to abstain or abstain from conduct in which there is a legal right to engage, by means of instilling in the person who is compelled a fear that, if the demand is not complied with, the person who makes the demand or another may
>
> (1) inflict physical injury on anyone, except under circumstances constituting robbery in any degree, or

---

[14] The inquiry ends if the petition alleges violation of a non-existent law or alleges activity to be illegal which is not, in fact, illegal. *Meiners*, 687 P.2d at 301. If the alleged activity is illegal, analysis may be required to determine whether a particular alleged illegality satisfies the standard of misconduct in office.

[15] 903 P.2d 1055 (Alaska 1995).

commit any other crime;
(2) accuse anyone of a crime;
(3) expose confidential information or a secret, whether true or false, tending to subject a person to hatred, contempt, or ridicule or to impair the person's credit or business repute;
(4) take or withhold action as a public servant or cause a public servant to take or withhold action;
(5) bring about or continue a strike, boycott, or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the person making the threat or suggestion purports to act;
(6) testify or provide information or withhold testimony or information with respect to a person's legal claim or defense.

(b) It is a defense to a prosecution under (a)(2), (3), or (4) of this section that the defendant reasonably believed that the accusation or exposure was true or that the lawsuit or other invocation of official action was justified and that the defendant's sole intent was to compel or induce the victim to take reasonable action to correct the wrong that is the subject of the accusation, exposure, lawsuit, or invocation of official action or to refrain from committing an offense.

(c) Coercion is a class C felony.

The Alaska Court of Appeals analyzed coercion in *Powell v. State*.[16] In that case, the court said that "the State was required to prove that Powell compelled someone to act or to refrain from acting in the face of a demand from Powell that if Powell's demand was not complied with, Powell would inflict physical injury on someone or commit some other illegal act."[17] The Court examined the evidence—multiple letters that Powell had written— and found nothing that contained "any explicit demand for specific action or restraint from action on the part of anyone."[18] The Court dismissed the charge.

In this instance, petitioners have provided an email exchange as the basis for their

---

16 12 P.3d 1187 (Alaska Ct. App. 2000).

17 *Id.* at 1190.

18 *Id*.

allegation of coercion. The emails, however, do not include any suggestion that Assembly Member Dunbar compelled anyone to act or refrain from acting in the face of a demand from Dunbar that if Dunbar's demand was not complied with, he would inflict physical injury or commit some other illegal act on someone. The emails say a "shame/prodding campaign" worked, but do not contain any explicit demand for specific action or restraint of action on the part of Mr. Poindexter, the alleged target. There is no mention of testimony, threats, consequences, or even any communication from Assembly Member Dunbar to Mr. Poindexter at all. The emails are not a sufficient basis for a finding that Assembly Member Dunbar violated Alaska law.

Even reading the allegations liberally, the charge of misconduct that Assembly Member Dunbar was involved with a shaming or prodding campaign to encourage members of the public to testify in support of an ordinance falls short of stating a sufficient basis for recall. Such conduct is lawful and constitutionally protected. A politician's gathering of support when legal and constitutional is not misconduct. In addition, coercion is not bringing to light who has or has not voted in a previous election.[19] Nor is coercion publicizing who has or has not testified in favor of legislation. Both are public record. Legislators may make use of the public record just as private citizens may; and it is well established that legislators enjoy the same free speech rights as private citizens under both the U.S. and Alaska Constitutions.[20] Petitioners may disagree with Assembly Member Dunbar's tactics but lawful conduct cannot be the basis of a recall petition premised on misconduct in office.

CONCLUSION

For these reasons, we recommend denying as legally insufficient Application 2021-01 that seeks to recall Assembly Member Dunbar for misconduct in office.

---

[19] *See* Michelle Theriault Boots, *Alaska voters upset about public-shaming mailers, but experts say they work*, Anchorage Daily News, Oct. 27, 2014 at https://www.adn.com/politics/article/mailings-use-public-shaming-tool-motivate-voters-anger-experts-say-they-work/2014/10/28/ (last visited 3/4/21).

[20] *See Alsworth v. Seybert*, 323 P.3d 47, 58 (Alaska 2014) ("[L]egislators' First Amendment rights are as broad as those of private citizens.") (citing *Bond v. Floyd*, 385 U.S. 116, 136–37 (1966) and *Thoma v. Hickel*, 947 P.2d 816, 821 (Alaska 1997) (recognizing First Amendment rights of government officials)); Alaska Const, art. I, sec. 5.