



**OFFICE OF THE MUNICIPAL CLERK/
ELECTION OFFICIAL**

City and Borough of Juneau (CBJ)
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May 23, 2024

Tammy Ness (*via mail & email*)
P.O. Box 240454
Douglas, AK 99824

Re: Response to Petitioner Committee re: “Preserve Precinct Voting and Hand-Counting” Initiative Petition Affidavit

Dear Ms. Ness,

CBJ Law and Clerk staff have reviewed the Affidavit of Petitioners Committee “Preserve Precinct Voting and Hand-Counting” submitted on May 2, 2024.

In reviewing the initiative petition, I deemed the **Affidavit Form** and the **Petitioner’s Committee** portions sufficient. However, in accordance with CBJ Code 29.10.025, I am denying this initiative petition with respect to the **Proposed Measure Form** based on the reasons stated in the attached CBJ Law Department Legal Review memo dated May 23, 2024.

Enclosed with this letter are the CBJ Charter Article VII and CBJ Code 29.10 that govern the initiative and referendum process as well as a flow chart to help outline the process and the associated timeframes.

If you have any questions regarding this matter, please contact our office at 907-586-5278.

Sincerely,

Elizabeth “Beth” McEwen, MMC
CBJ Municipal Clerk/Election Official

Attachments:

Affidavit of Petitioners Committee “Preserve Precinct Voting and Hand-Counting” Initiative
May 23, 2024, Legal Review Memo from CBJ Law Department
CBJ Charter Article VII and CBJ Code 29.10
Initiative/Referendum Petition Flow Chart

cc: City Attorney Robert Palmer



MEMORANDUM

DATE: May 23, 2024
TO: Beth McEwen, CBJ Municipal Clerk
FROM: Robert Palmer, CBJ Municipal Attorney
SUBJECT: Certification of Preserve Precinct Voting & Hand-Counting Initiative

You asked whether the proposed initiative related to preserving precinct voting and hand-counting should be certified for signature collection. For the following reasons, I recommend you not certify this petition.

On May 2, 2024, a petitioner's committee submitted an initiative related to elections. While the petition includes multiple whereas clauses, the remaining petition states:

This initiative proposes that CBJ issue an Ordinance to amend CBJ Code **TITLE 29 - ELECTIONS**, whereby all municipal elections shall abide by the following core principles:

- A. The default method of elections shall be in-person at precinct locations.
- B. Election results shall be determined by hand-counting at precinct locations on Election Day continuously until completed.
- C. Traditional paper ballots will be used for all CBJ Elections; exception for absentee ballots.
- D. No ballot drop boxes will be used for any CBJ Elections.
- E. Absentee ballots shall be postmarked 7 calendar days before election day. The deadline for hand-delivered ballots is 8 pm on Election Day to the Clerk.
- F. The Clerk will properly vet incoming absentee ballots. Qualified absentee ballots will be delivered to Lemon Creek 04-125 precinct for hand-counting. Lemon Creek precinct will include a separate tally of total Absentee ballots on its **ERPD**.
- G. All precincts will report their final election results to the Clerk by phone and signed Election Results Precinct Document (ERPD) on Election Day. The **ERPD** shall be signed by individuals on the respective precinct hand-counting team and serves as verification of precinct results. The Clerk will total individual ERPDs to determine final election results and will publish to the public via standard means, followed by certified results.

THE AMENDED CITY AND BOROUGH OF JUNEAU CODE **TITLE 29 - ELECTIONS** TO BE EFFECTIVE 30 DAYS AFTER THE ELECTION IS CERTIFIED.

You are empowered to make the certification decision.¹ The following is offered to aid in your decision.

I. Analysis.

This *Affidavit of Petitioner's Committee* was refiled after a similar initiative titled "Method of Elections" was denied for improper form. A companion election code referendum petition was certified on April 24, 2024.²

Alaska courts generally do not review initiative challenges unless and until it is approved by the voters.³ "However, exceptions to this rule exist where the proposed legislation is challenged on the basis that it does not comply with the constitutional and statutory provisions regulating initiatives and referendums, or where it is challenged as clearly unconstitutional or unlawful."⁴ "In matters of initiative and referendum, we have previously recognized that the people are exercising a power reserved to them by the constitution and the laws of the state, and that the constitutional and statutory provisions under which they proceed should be liberally construed."⁵

The Alaska Constitution and CBJ Charter provide citizens the right to propose initiatives.⁶ Incorporating the initiative restrictions of CBJ Charter and the Alaska Constitution, CBJC 29.10.025 provides some of the legal requirements for certification of an initiative:

- **Affidavit form.** Certification shall be denied if the affidavit is not substantially in the required form.⁷ Notably, "The affidavit shall set out in full the proposed initiative ordinance, resolution, or other measure..."⁸

¹ *Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989, 992 (Alaska 2004) (concluding the Municipal Clerk has discretion to reject an initiative if it violates any of the restrictions on an initiative).

² Referendum Petition to Repeal Ordinance 2023-24, An Ordinance Amending the Elections Code Relating to Election Procedure (Received April 9, 2024).

³ *Price v. Kenai Peninsula Borough*, 331 P.3d 356, 359 (Alaska 2014); *Municipality of Anchorage v. Holleman*, 321 P.3d 378, 382 (Alaska 2014).

⁴ *Price*, 331 P.3d at 359; *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422 (Alaska 2006) ("In matters involving initiatives, we 'construe voter initiatives broadly so as to preserve them whenever possible. However, initiatives 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").

⁵ *Price*, 331 P.3d at 359; *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 898 (Alaska 2003).

⁶ Alaska Constitution, Article XI, Section 1; CBJ Charter Article 7; *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage* ("*Anchorage Citizens*"), 151 P.3d 418, 422 (Alaska 2006) (applying the Alaska Constitution initiative provisions to a unified/home rule municipality).

⁷ CBJC 29.10.025(b)(2).

⁸ CBJ Charter 7.2(a) ("The affidavit shall set out in full the proposed initiative ordinance, resolution, or other measure; or cite the ordinance, resolution, or other measure to be referred.").

- **Proposed measure form.** Certification shall be denied if the proposed measure to be initiated is not in the required form:
 - (i) The measure shall be confined to one subject; and
 - (ii) The measure may not include subjects restricted by Charter section 7.1 or article XI, section 7 of the Alaska Constitution.⁹
- **Petitioner's committee.** There are fewer than five qualified members on the committee.¹⁰

Because I understand the Clerk's Office is reviewing the initiative for sufficiency of the petitioner's committee signatures, I will focus my analysis on form.

A. The form of the proposed ordinance in the affidavit is confusing and misleading.

The public interest in informed lawmaking requires a petition to be presented clearly and be comprehensible.¹¹ A petition that is confusing or misleads voters invalidates the important screening function that the signature requirement provides in the initiative process:

The signature-gathering requirement ensures that only propositions with significant public support are included on the ballot. But when a petition, including its title and summary, is confusing or misleading, petition signers may not understand what they are signing. Signatures on a confusing or misleading petition therefore may or may not indicate support for the measure.¹²

This proposed measure is confusing and misleading in multiple ways:

1. **Title.** The title of this proposed measure is "Preserve Precinct Voting & Hand-Counting" but the substance of the measure only provides seven "core principles." There are no legal provisions in this petition that preserve precinct voting or hand-counting. Because the substance of the proposed ordinance does not actually preserve precinct voting and hand-counting of ballots, the title is misleading and confusing.¹³ Thus, the petition is misleading and confusing.
2. **Prefatory clause.** The petition's prefatory clause is misleading and confusing: "This initiative proposes that CBJ issue an Ordinance to amend CBJ Code Title 29 - Elections, whereby all municipal elections shall abide by the following core principles." That language suggests this

⁹ CBJC 29.10.025(b)(2) and (c); CBJC 29.10.030 (petition format requirements); see A.S. 29.26.110(a) (requiring initiatives for non-home rule municipalities so satisfy similar requirements).

¹⁰ CBJC 29.10.025(b)(3); see A.S. 29.26.110(a).

¹¹ *Citizens for Implementing Med. Marijuana ("CIMM") v. Municipality of Anchorage*, 129 P.3d 898, 901 (Alaska 2006) (concluding a petition was confusing and misleading); *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1219 (Alaska 1993).

¹² *CIMM*, 129 P.3d at 901; *Faipeas*, 860 P.2d at 1221.

¹³ *CIMM*, 129 P.3d at 902 (concluding a misleading or confusing title can render a petition legally insufficient).

initiative would order the legislative body, the CBJ Assembly, to issue an ordinance to amend CBJ Code Title 29. An initiative cannot compel the legislative body to enact an ordinance, especially when such a mandate would violate other CBJ Charter provisions.¹⁴ There is also uncertainty as to what such an ordinance would be required to contain to satisfy such a mandate. Because the prefatory clause does not clearly describe what happens if the voters were to adopt this measure and it appears to violate, at a minimum, the ordinance procedure of the CBJ Charter, the prefatory clause is misleading and confusing. Thus, the petition is misleading and confusing.

3. **Substance of ordinance.** The substance of the petition is misleading and confusing. While the measure proposes seven “core principles,” the ordinance never enacts the substantive legal provisions to amend CBJ Code Title 29 to apply those “core principles,” despite the petition title and the enactment clause stating CBJ Code Title 29 is amended.¹⁵ Additionally, the form of the ordinance fails to comply with the ordinance requirements of CBJC 01.20.020, which are required pursuant to CBJ Charter 5.1. Because the substance of the measure is not in the correct form and it does not actually have provisions that amend sections of CBJ Code Title 29, the substance of the ordinance is misleading and confusing. Thus, the petition is misleading and confusing.

4. **Enactment clause.** The enactment clause of the petition is misleading and confusing, which provides: “The amended City and Borough of Juneau Code Title 29 – Elections to be effective 30 days after the election is certified.” That enactment clause states Title 29 of the CBJ Code would be amended by this petition. However, the enactment clause conflicts with the prefatory clause because it only proposes the CBJ issue an ordinance. Additionally, the enactment clause misleads voters because there is no substantive provision of this ordinance; The core principles are simply policy statements, which have no legal effect.¹⁶ Because the enactment clause purports to adopt an ordinance yet there is no substantive text in the ordinance and it conflicts with the prefatory clause, the enactment clause is misleading and confusing. Thus, the petition is misleading and confusing.

¹⁴ *E.g.*, CBJ Charter 5.3(a) Ordinance Procedure (“An ordinance may be presented for consideration only by a member or committee of the assembly or by the manager at any regular or special meeting of the assembly.”); CBJ Charter 3.12(f) (requiring five affirmative votes to enact an ordinance).

¹⁵ *CIMM*, 129 P.3d at 903 (“The text of the proposition itself is deficient because it does not explain whether it creates or abolishes rights”); *Alaska Action Ctr.*, 84 P.3d at 995 (“Without any of the substantive sections of the initiative, the policy statement and severability clause have no legal effect and cannot go before the electorate.”).

¹⁶ *Alaska Action Ctr.*, 84 P.3d at 995 (“Without any of the substantive sections of the initiative, the policy statement and severability clause have no legal effect and cannot go before the electorate.”).

In summary, this petition is misleading and confusing because the title, the prefatory clause, the substance of the ordinance, and the enactment provision are not in the proper form and fail to sufficiently inform the voters what they would be voting for. If the petitioners cure the improper form issues identified above and submit another subsequent petition, the petitioners are encouraged to consider whether any of the proposed items involve prohibited appropriations, like appropriating limited municipal resources, or if a provision is clearly illegal.¹⁷

Thus, I recommend you reject certification of this petition.

¹⁷ CBJC 29.10.025(b)(2) & (c)(2); *Hughes v. Treadwell*, 341 P.3d 1121, 1125–26 (Alaska 2015); *Price*, 331 P.3d at 359; *Carmony v. McKechnie*, 217 P.3d 818, 820 (Alaska 2009) (stating that a court may review a challenged initiative under a “clearly unconstitutional or clearly unlawful” standard pre-enactment); *Anchorage Citizens*, 151 P.3d at 422 n. 2 (“The municipal clerk may not reject the measure on other constitutional grounds unless controlling authority leaves no room for argument about its unconstitutionality.”); *Mahoney*, 71 P.3d at 899-900.