IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MIDTOWN CITIZENS COALITION and PETER MJOS, Plaintiffs, vs. MUNICIPALITY OF ANCHORAGE and Municipal Clerk BARBARA JONES in her official capacity, Defendants.	)	Case No. 3AN-20-09614 CI

ORDER REGARDING CASE MOTIONS 1 & 2

I. INTRODUCTION

Before the court are cross-motions for summary judgment regarding the legal sufficiency of a petition to recall Anchorage Municipal Assembly member and chairman Felix Rivera. Midtown Citizens Coalition and Peter Mjos (collectively "Plaintiffs") assert in Case Motion No. 1 that the Anchorage Municipal Clerk should not have certified the recall petition against Mr. Rivera on the basis proffered—that he failed to perform his prescribed duties when he continued to preside over a meeting of the Anchorage Municipal Assembly despite the physical presence of more persons than allowed by Emergency Order 15 ("EO-15").

The Municipality of Anchorage and Barbara Jones—the Anchorage Municipal Clerk—(collectively "Defendants") argue in their opposition and in Case Motion No. 2

that whether Mr. Rivera failed to perform prescribed duties is a question properly left to the voters once all of the statutory requirements to hold a recall election have been met.

Plaintiffs replied to Defendants' opposition to Case Motion No. 1, and Russell Biggs filed an amicus brief opposing Plaintiffs' *Motion for Summary Judgment*. The time to file an opposition to Defendants' cross-motion has not yet expired and no opposition has been filed.[1]

The question before the court is whether the allegation that Mr. Rivera failed to perform a prescribed duty when he presided over a meeting of the Anchorage Municipal Assembly allegedly in violation of EO-15 is a legally sufficient prima facie basis for a recall election, assuming that the other statutory requirements are satisfied.

As further explained below, controlling constitutional, statutory, and common law require the court to conclude that the allegation is legally sufficient—if recall petitioners satisfy the remaining procedural requirements to hold a recall election, the voters of the Municipality of Anchorage, District 4 will decide whether the allegation that Mr. Rivera failed to perform prescribed duties is true and, if so, whether it merits his recall from elected office.

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[1] The court was left with the impression following the January 21, 2021, oral argument that briefing is complete in Case Motion Nos. 1 & 2. If Plaintiffs intend to file an opposition to Case Motion No. 2, a notice to the court to that effect should be filed as soon as possible.

II. BACKGROUND

On July 31, 2020, Mayor Ethan Berkowitz issued EO-15 in response to the COVID-19 pandemic pursuant to AMC 3.80.060H.[2] EO-15 was in effect from August 3, 2020, to August 30, 2020—it contained certain mandates and prohibitions promulgated in an effort to stanch the spread of COVID-19, and it was generally applicable to persons within the geographic borders of the Municipality of Anchorage.

EO-15 included a prohibition against political gatherings of more than 15 persons. On August 11, 2020, a meeting of the Anchorage Municipal Assembly was held.[3] At some point, Anchorage Municipal Attorney Kate Vogel affirmed that there were 15 persons present at the meeting.[4] "Approximately two minutes (125 seconds) later," assembly member Jamie Allard asked Mr. Rivera for permission to make a comment.[5] Mr. Rivera granted Ms. Allard permission and she stated on the record "[w]e have 17 [persons present]."[6] "After thanking [Ms.] Allard for her comment Rivera looked around the room and the Regular Meeting proceeded."[7]

On September 28, 2020, the Anchorage Clerk's Office received an application to put the question of whether Mr. Rivera should be recalled to the voters. The application asserted that Mr. Rivera committed both misconduct in office and that he failed to perform prescribed duties when—as Assembly Chair—he allowed the August 11, 2020,

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2 Defs.' Opp'n and Cross-Mot. for Summ. J. Ex. 1 (EO-15).
3 Pls.' Mem. in Supp. Of Mot. for Summ. J. 4.
4 *Id.* at 6.
5 *Id.*
6 *Id.* at 6–7.
7 *Id.* at 7.

meeting to proceed even though it was possible that for some period of time there were 17 persons present in contravention of EO-15.[8]

The Municipal Clerk determined that the recall application was legally insufficient vis-à-vis the misconduct allegation because "misconduct in office requires some component of dishonesty, private gain, or improper motive," none of which were alleged in the application.[9] But the Municipal Clerk concluded that—under Alaska's recall statutes and the case law interpreting them—an allegation that a chair of the Anchorage Municipal Assembly failed to manage an Assembly meeting in accordance with the law—here, EO-15—is a legally sufficient allegation of a "failure to perform prescribed duties," thus the Municipality of Anchorage by and through the Municipal Clerk certified the recall application.

Plaintiffs now bring this action seeking declaratory relief that the recall petitioners' allegation that Mr. Rivera failed to perform prescribed duties is insufficient as a matter of law, and an injunction requiring (1) that the Municipal Clerk decertify the recall application filed against Mr. Rivera; and (2) that the Municipality of Anchorage refrain from placing the recall of Mr. Rivera on the ballot in April.

III. LEGAL STANDARD

Alaska R. Civ. P. 56(c) provides that summary judgment should be granted if the pleadings, depositions, admissions, interrogatories, affidavits, or other admissible

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8 *See* Defs.' Opp'n and Cross-Mot. for Summ. J. 3–4.

9 *Id.* at 4 (internal quotation marks omitted).

evidence show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law.[10]

The standard for finding a genuine issue of fact is lenient. All reasonable inferences—or inferences that a reasonable fact finder could draw from the evidence—are drawn in favor of the non-movant.[11] The burden begins with the moving party, who must make a prima facie showing that it is entitled to judgment on the established facts as a matter of law. Upon such a showing, the non-moving party must demonstrate that there is a genuine issue of fact by showing that it can produce admissible evidence reasonably tending to dispute the movant's evidence.[12]

The non-moving party cannot rely on mere allegations, mere assertions of fact in pleadings and memoranda, or unsupported assumptions and speculation.[13] The non-moving party must only present some, i.e., more than a mere scintilla, of contrary evidence to survive a motion for summary judgment.[14]

IV. DISCUSSION

Plaintiffs advance two arguments: (1) Mr. Rivera's violation of EO-15—if there was, in fact, a violation—was *de minimis* and does not reach the "for cause" threshold required to institute a recall election under Alaska law; and (2) Mr. Rivera cannot be

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10 *Broderick v. King's Way Assembly of God*, 808 P.2d 1211, 1215 (Alaska 1991).
11 *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 449 (Alaska 2002).
12 *Broderick*, 808 P.2d at 1215.
13 *Witt v. State Dep't of Corrections*, 75 P.3d 1030, 1033 (Alaska 2003).
14 *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005).

recalled for his discretionary management of an Assembly meeting, regardless of whether petitioners agree with how he conducted the meeting.

Defendants respond that a court reviewing the legal sufficiency of a recall petition sits in the posture of a court evaluating an Alaska R. Civ. P. 12(b)(6) motion to dismiss and must take factual allegations as true, and furthermore, even if the court could inquire into the alleged facts, there is no *de minimis* exception under Alaska law mandating that an alleged ground for recall must reach a certain threshold of severity to be certified.

Additionally, Defendants agree that Mr. Rivera cannot be recalled for exercising the discretion granted to him by law, but they argue that the law does not expressly grant Mr. Rivera the discretion to preside over an Assembly meeting in contravention of EO-15. Thus, Defendants take the position that the voters must decide whether Mr. Rivera presided over an Assembly meeting in contravention of EO-15—and, if so, whether that merits his recall from office. The court agrees.

A. *The court cannot inquire into the veracity of the facts alleged by recall petitioners, and there is no de minimis exception under Alaska law*

Plaintiffs first argue that even accepting petitioners' factual allegations as true, Mr. Rivera's failure to expel the two persons who may have been present at the August 11, 2020, meeting in excess of the 15 persons allowed under EO-15 was so inconsequential that it cannot meet the requirement under Alaska law that a recall petition must be for cause. Their position is essentially a normative argument that there should be a requirement that—to be legally sufficient—an alleged basis for recall must reach a certain *de minimis* threshold of seriousness. This argument fails for two reasons: (1) it

impermissibly requires the court to inquire into the facts alleged by petitioners; and (2) there is no *de minimis* exception under Alaska law.

"All elected public officials in the State, except judicial officers, are subject to recall by the voters of the . . . political subdivision from which elected; [p]rocedures and grounds for recall shall be prescribed by the legislature."[15] "Grounds for recall are misconduct in office, incompetence, or failure to perform prescribed duties."[16] Prescribed duties are both the duties expressly inscribed in law, and the implicit duties necessary to the effectuation of the express duties.[17] A court reviewing the legal sufficiency of a recall position must accept the facts alleged in the petition as true, similar to a court considering whether to dismiss a complaint for failure to state a claim.[18]

Plaintiffs argue that the court should conclude that because the duty to enforce laws lies with the executive and not the Assembly, Mr. Rivera was under no express duty to enforce EO-15 at the August 11, 2020, meeting. Plaintiffs also ask the court to consider circumstantial facts regarding the allegations contained in recall petitioners' application and conclude that that the allegation at issue here is *de minimis* and does not satisfy on a prima facie basis the requirement in Alaska that recall be for cause.

The court agrees that Mr. Rivera was not under an express duty to ensure that the August 11, 2020, meeting strictly complied with EO-15—EO-15 itself had no provision specifically requiring the chair of the Assembly to abide by its strictures, and the court is

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15 ALASKA CONST. art. XI, § 8.
16 AS 29.26.250.
17 *See Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 300 (Alaska 1984).
18 *Id.* at 300 n.18.

aware of no law specifically mandating that the Assembly chair must at all times comply with generally applicable emergency orders issued by the mayor. Rather, the issue is whether as chair, Mr. Rivera was under an implicit duty to ensure that the August 11, 2020, meeting remained at 15 persons or fewer at all times in conformity with EO-15. Under *Meiners*, whether an elected official's alleged failure to act in accordance with the law amounts to a failure to perform a prescribed duty must be resolved by the voters.[19]

Plaintiffs rely on the Municipal Attorney's statements that the meeting was in compliance with EO-15 before and after Ms. Allard's comment that 17 persons were in the room in support of their contention that any violation of EO-15 by Mr. Rivera was *de minimis*. This reliance on facts extrinsic to the recall application illustrates the difficulty with implementing Plaintiffs' proposed *de minimis* exception—to weigh whether an allegation in support of recall meets the *de minimis* threshold and is legally sufficient, a court would often need to inquire into facts outside of the 200-word statement in the recall petition[20] and then evaluate the truth or falsity of those facts and how they might affect the truth or falsity of the allegations contained in the recall application.[21] This is not permitted under *Meiners*.[22]

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19 *Id.* at 299–300.

20 AS 29.26.260(a)(3).

21 Plaintiffs asserted at oral argument that it is implicit in *von Stauffenberg v. Comm. for Honest & Ethical Sch. Bd.*, 903 P.2d 1055 (Alaska 1995) that courts may look outside of the facts contained in a recall petition to weigh whether an allegation is serious enough to meet the threshold required to be considered "for cause" because the *von Stauffenberg* court relied on the minutes of an executive session, which were not contained in the official 200-word statement of the petitioners in that case. The *von Stauffenberg* court did not look to the minutes to evaluate the relative strength or weakness of an allegation,

Setting aside the practical difficulties with applying Plaintiffs' proposed *de minimis* exception standard, the more fundamental problem is that no such standard exists in Alaska law. At the constitutional convention, some delegates warned that without clearly articulated standards for recall, the mechanism could be abused for political purposes with recall petitions being filed for petty and pretextual reasons.[23] Others—such as Delegate Hellenthal, who expressed his "faith in the people" that even if no grounds were required, there would not be efforts to recall officials for petty offenses such as walking against red lights—believed that the lack of a requirement of specific grounds for recall would not result in a surplus of vexatious recall petitions wholly lacking in merit.[24]

An alternate view was advanced by Delegate Fischer who argued that recall is inherently political, and that so long as procedural requirements are satisfied, recall

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or its truth or falsity, but rather to establish that a school board acted lawfully under a specific statute, precluding the voters from determining that the school board failed to perform a prescribed duty as a matter of law, as discussed further *infra*.

[22] If the court were to agree with Plaintiffs that the Municipal Attorney certified that there were 15 or fewer persons present at the August 11, 2020, meeting just before and after it was announced that 17 persons were present, meaning that the meeting proceeded in violation of EO-15 for a matter of minutes, and that this is so trifling as to not be considered a violation of the chair's prescribed duties as a matter of law, the court would be determining that the allegation of the recall petitioners that the chair failed to perform prescribed duties is false in contravention of the clear guidance from the Alaska Supreme Court that this is a question that should properly put to the voters. *See von Stauffenberg*, 903 P.2d at 1060.

[23] 2 Proceedings of the Alaska Constitutional Convention 1238–39 (January 5, 1956). For another example, it was argued that recall should only be allowed for allegations involving "moral turpitude." *Id.* at 1208–09 (January 4, 1956).

[24] *Id.* at 1210.

should be permitted without the need to state any grounds whatsoever.[25] Mr. Fischer further argued that to require specific grounds for recall would ensure that each recall petition would end up in court to determine whether the stated ground was satisfied.[26]

After spirited debate on the issue, the compromise solution was to decline to specify grounds for recall in Alaska's Constitution, but to expressly delegate the delineation of grounds for recall to the legislature.[27] The legislature, via the political process, eventually settled on the three grounds in AS 29.26.250 listed *supra*.[28] There is no statutory requirement that asserted grounds must pass a *de minimis* threshold, and the Alaska Supreme Court has directed that a ground for recall need not be overly technical—so long as the facts upon which the ground is based are stated with sufficient particularity to allow the targeted official to respond to the allegation—the question of whether the alleged ground merits the official's recall should be left to the voters.[29]

B. *There is no express, legal basis for the chair of the Anchorage Assembly to preside over Assembly meetings in a manner contrary to the provisions of emergency mayoral orders*

Plaintiffs' second argument is that as chair of the Anchorage Assembly, Mr. Rivera is afforded the discretion to preside over meetings of the Assembly as he sees fit, subject to certain bounds. Plaintiffs argue that under *von Stauffenberg*, Mr. Rivera cannot be recalled for exercising discretion granted to him by law.

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25 *Id.* at 1215.
26 *Id.*
27 *Id.* at 1239–40 (January 5, 1956).
28 *See Meiners v. Bering Strait Sch. Dist.*, 687 P.2d 287, 295 (Alaska 1984).
29 *See id.* at 296–97.

In *von Stauffenberg*, a group of citizens of the Haines Borough attempted to recall five of seven members of the Haines Borough School Board ("the Board").[30] One of the allegations against the Board was that it "[failed] to perform prescribed duties by attending an improper, closed door executive session, in violation of Alaska law, concerning the superintendent's decision on the retention of [a principal]."[31]

The *von Stauffenberg* court held that this allegation failed as a matter of law because under the Alaska Open Meetings Act, "certain excepted subjects may be discussed in an executive session including 'subjects that tend to prejudice the reputation and character of any person,' " and the minutes of the executive session showed that the Board's discussion of the principal fell squarely within that exception.[32] Because the executive session was expressly authorized by statute, the recall petitioners' allegation that the closed-door meeting was in violation of Alaska law was legally insufficient.

Here, no statute or provision of the Anchorage Municipal Code expressly grants the chair of the Anchorage Assembly the legal right to preside over Assembly meetings in violation of emergency orders lawfully issued by the mayor. Public policy in Alaska vis-à-vis recall as determined by the delegates to the constitutional convention, elected members of the Alaska legislature, and the Alaska Supreme Court mandates that the voters must determine whether Mr. Rivera's conduct was a reasonable exercise of his discretion under the circumstances, or whether it merits his recall from office.

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30 *von Stauffenberg v. Comm. for Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1057 (Alaska 1995).

31 *Id.*

32 *Id.* at 1060 (quoting AS 44.62.310(c)(2)).

V. CONCLUSION

The court agrees with the parties that the facts material to determining the legal sufficiency of the remaining ground for recall are not in dispute, even if the facts underpinning the allegation against Mr. Rivera are disputed.

This court cannot inquire into the truth or falsity of the allegations against Mr. Rivera. There is no *de minimis* exception under Alaska law allowing a reviewing court to conduct its own independent analysis of whether an allegation in support of recall is of a sufficient magnitude to satisfy Alaska's requirement that recall be for cause. And there is no express basis in law granting the chair of the Anchorage Assembly the discretion to preside over meetings in violation of emergency orders issued by the mayor.

Accordingly, if the remaining procedural requirements are satisfied, the voters of the Municipality of Anchorage, District 4 must decide whether recall petitioners' allegation against Mr. Rivera that he failed to perform a prescribed duty on August 11, 2020, is true such that he should be recalled from office. **Case Motion No. 1 is DENIED** and **Case Motion No. 2 is GRANTED**.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 25 January 2021.

Dani Crosby
Superior Court Judge

I certify that on 1-25-21 a copy
of the above was mailed to each of the
following at their address of record:

K. Baker, T. Amodio, R. Botstein, S. Severin

CCt

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Judicial Assistant