

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT SITKA

SITKANS for RESPONSIBLE)
GOVERNMENT, MICHAEL LITMAN)
and JEFFREY FARVOUR,)
)
Plaintiffs,)
)
vs.)
)
CITY AND BOROUGH OF SITKA)
and COLLEEN PELLETT, Municipal)
Clerk,)
)
Defendants.)

Case No. 1SI-08-130 CI

DEFENDANTS' SUPPLEMENTAL BRIEF ON REMAND

I. Introduction.

On May 29, 2012, following remand from the Alaska Supreme Court in Sitkans for Responsible Government, Michael Litman, and Jeffrey Farvour v. City & Borough of Sitka and Colleen Pellett, Municipal Clerk, 274 P.3d 486 (Alaska 2012), decided April 20, 2012 ("SRG v. City and Borough of Sitka"),¹ this court held a status conference. Because of that conference, the court ordered supplemental briefing on the issues to be resolved on this remand. Defendants City and Borough

¹ SRG is no longer a party to this litigation because it has no standing. This court previously denied CBS' request to amend the caption. See, Order denying Defendants' Request to Amend Caption dated December 14, 2008. The remaining plaintiffs are Michael Litman and Jeffrey Farvour, who have sued CBS in their personal capacity.

of Sitka and Colleen Pellett² (collectively "CBS") submit this Supplemental Brief ordered by this Court on May 29, 2012, with attached affidavits and exhibits, including those previously filed on August 15, 2008 with CBS's Opposition to Motion for Preliminary Injunction and Brief on the Merits of Plaintiffs' Proposed Petition Applications. This Supplemental Brief addresses those issues to be decided on remand following SRG v. City and Borough of Sitka, 274 P.3d 486 (Alaska 2012), including the impact of the recent decision in Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough, 273 P.3d 1128 (Alaska 2012) (the "ACT" case), issued April 6, 2012, just before the Court's April 20, 2012 decision.

This Supplemental Brief is timely filed pursuant to the court's order at the May 28, 2012 hearing and the court's July 2, 2012 order granting CBS's June 28, 2012 unopposed request for an extension of time.

II. Issues to be resolved on remand.

The Supreme Court remanded this case to the trial court for a determination of the reasons CBS gave for originally rejecting Plaintiffs' Petition.³ The remaining reasons for rejecting Plaintiffs' Petition that require determination by this court are:

- (1) Whether the Petition is an unlawful appropriation;
- (2) Whether the language in the Petition is confusing, misleading, and/or inconsistent with existing Code and Charter;

² The City and Borough of Sitka Municipal Clerk, Colleen Pellett, married during the course of this case, changing her name to "Colleen Ingman."

³ 274 P.3d at 490, fn. 20.

- (3) Whether the Petition is an impermissible referendum that repeals Sitka laws necessary for the immediate preservation of the public peace, health and safety;
- (4) Whether the Petition is inconsistent with the Sitka Comprehensive Plan because it bypasses the procedure for amending the Sitka Comprehensive Plan; and
- (5) Whether the Petition impermissibly relates to administrative matters.

Resolution of any one of these issues in CBS's favor would cause this court to reject Plaintiffs' "initiative" as legally insufficient. However, in light of the Supreme Court's remand directing this court rule on all the remaining reasons which were given for rejecting Plaintiffs' Petition, this brief addresses those issues to be decided on remand.⁴

III. Relevant facts.

The facts leading up to this litigation remain unchanged. Rather than repeating those facts, the CBS directs the court to its Opposition to Motion for Preliminary Injunction and Brief on the Merits of Plaintiffs' Proposed Petition Applications; the Affidavit of Colleen Pellett in Opposition to Motion for Preliminary Injunction and Brief on the Merits of Plaintiffs' Proposed Petition Applications; and the Affidavit of Grant Miller in Opposition to Motion for Preliminary Injunction and Brief on the Merits of Plaintiffs' Proposed Petition Applications, filed with the court

⁴ Attached as Exhibit A, for the court's convenience, is the Memorandum of Decision dated November 18, 2008.

on August 15, 2008 and attached hereto.⁵ CBS incorporates the statement of facts and legal arguments in those documents as though fully set forth herein.⁶

IV. Discussion.

The law as it applies to the remaining issues on remand is essentially unchanged.⁷ For many of the same reasons previously argued by CBS to this court, Plaintiffs' Petition must be rejected as a matter of law. CBS requests this court rule on each separate basis given for initially rejecting the Petition pursuant to the Alaska Supreme Court's directive on remand.⁸

A. The Petition impermissibly relates to an appropriation of public assets.

1. The petition relates to an appropriation of public assets, which is not a lawful subject for initiatives or referendums.

⁵ Attached hereto as Exhibit B, is CBS's August 15, 2008 Opposition package to Plaintiffs' Motion to Schedule a Preliminary Injunction Hearing and Brief on the Merits of Plaintiffs' Proposed Petition Application, for the court's convenience.

⁶ See, Ex. B, pp. 2-24.

⁷ The ACT case, which was decided just days before the Alaska Supreme Court issued its decision in this case, resolves the justiciability question previously raised by this court. See discussion at section IV.A.2. of this Brief. In addition, in 2009, the Alaska Supreme Court decided Swetzof v. Philemonoff, 203 P.3d 471 (Alaska 2009), which establishes guidelines for determining when the subject of an initiative or referendum petition relates to administrative rather than legislative matters, which are prohibited by AS 29.26.110. See discussion at section IV.F., below, of this Supplemental Brief.

⁸ SRG, 274 P.3d at 490, fn. 20.

The Plaintiffs' Petition impermissibly seeks to appropriate a public asset of CBS. This is an impermissible use of the initiative and referendum process, which may not be used to make or repeal appropriations. Alaska Const., Art. XI, sec. 7. "One of the purposes of this constitutional limitation on initiatives is to ensure that the legislature, and only the legislature retains control over the allocation of state assets among competing needs."⁹ "The usual rule is 'to 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."¹⁰

The Alaska Supreme Court has adopted a two-part test for determining whether an initiative or referendum petition constitutes an appropriation.

We use a two-part inquiry to determine whether a particular initiative makes an appropriation. First, we determine whether the initiative deals with a public asset. In a series of cases, we have determined that public revenue, land, a municipally-owned utility, and wild salmon are all public assets that cannot be appropriated by initiative. Second, we determine whether the initiative would appropriate that asset. In deciding whether the initiative would have that effect, we have looked to the two "core objectives" of the limitation on the use of the initiative power to make appropriations. One objective is preventing "give-away" programs that appeal to the self-interest of voters and endanger the state treasury.

⁹ Alaska Action Center v. Municipality of Anchorage, 84 P.3d 989, 994 (Alaska 2004) (quoting Pullen v. Ulmer, 923 P.2d 54, 62 (Alaska 1996)).

¹⁰ Pullen v. Ulmer, 923 P.2d 54, 58 (Alaska 1996) (citing, City of Fairbanks v. Fairbanks Convention & Visitors Bureau, 818 P.2d 1153, 1155 (Alaska 1991)).

The constitutional delegates were concerned that "[i]nitiatives for the purpose of requiring appropriations [would] pose a special danger of 'rash, discriminatory, and irresponsible acts.'" The other objective is preserving legislative discretion by [ensuring] that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs.¹¹

The policy for limiting direct legislation relating to appropriations is it "tempt[s] the voter to [prefer] ... his immediate financial welfare at the expense of vital government activities."¹² This rationale applies as much to allocations of physical property as it does to allocations of money.¹³ Plaintiffs' Petition impermissibly jeopardizes CBS's legislative authority and discretion to control the allocation of its public assets among the competing needs of the community.

The Alaska Supreme Court has determined that acts involving the transfer of state land are appropriations because public land is a primary asset of the state treasury.¹⁴ Similarly, the proposed ordinance submitted by Plaintiffs in its application affects land transfers of CBS which impermissibly results in an appropriation. Section 3 of the Petition would require voter ratification if CBS sells or disposes of real property located at SCIP valued at over \$500,000 or to lease property valued at over \$750,000. This effectively limits the CBS from

¹¹ Citizens for Taxi Reform v. Municipality of Anchorage, 151 P.3d at 422-23 (Alaska 2006).

¹² See Pullen, 923 P.2d at 61 (citations omitted).

¹³ McAlpine v. University of Alaska, 762 P.2d at 81, 88-89 (Alaska 1988).

¹⁴ Thomas v. Bailey, 595 P.2d 1 (Alaska 1979).

appropriating one of its public assets, its real property. Pursuant to Thomas v. Bailey, this petition impermissibly seeks to regulate appropriations of the CBS and is therefore invalid.

The case of Alaska Action Center, Inc. v. Municipality of Anchorage,¹⁵ is analogous to this situation. In that case there was an attempt to dedicate, by initiative, a piece of municipal property as park land to prevent the municipality from developing land for use as a golf course. The Court reviewed the initiative under the Pullen objectives and concluded that it resulted in the allocation of a resource among competing demands, by taking away land from the developers and allocating it for parkland. This was an impermissible use of the initiative.

Plaintiffs' Petition seeks to require voter ratification for future sale or disposal of public real property at SCIP valued at \$500,000 or more or for leases of property at SCIP valued at \$750,000 or more.¹⁶ These actions would have the effect of limiting CBS' authority and discretion to appropriate and allocate its real property assets located at SCIP. This court previously concluded the land at the SCIP is a public asset of the CBS.¹⁷

2. Whether the Petition constitutes an impermissible appropriation is ripe for judicial review.

¹⁵ 84 P.3d 989 (Alaska 2004).

¹⁶ See, Ex. B, p. 33.

¹⁷ See, Ex. A, p. 8.

Based on the foregoing, CBS contends, and has maintained throughout this litigation, that the Petition impermissibly seeks to make or repeal appropriations of public assets. Previously, this court determined whether Plaintiffs' Petition impermissibly appropriates public assets at the SCIP was not justiciable at that time, reasoning that an answer could not be known until voters ratified or rejected a lease or sale of land at the SCIP.¹⁸ The court explained:

Whether or not a particular future public vote on a lease or sale of lands at SCIP would be an appropriation or repeal of an appropriation cannot be known until such a question is framed in the context of an actual transfer and put to the voters.

Nor can the court assess the impact a future vote might have on the City's ability to administer assets and allocate resources. There is presently no particular transfer, disposition or lease for which the initiative seeks voter considerations. Rather, the initiative subjects laws that have yet to be drafted, by assembly members yet unknown, to the consideration of voters who have yet to be identified. Therefore, the court finds the determination of whether the application of the ordinance is an appropriation is not justiciable at this time.¹⁹

Since this court's 2008 Memorandum of Decision, and just prior to the Supreme Court's opinion of the appeal in this case, the Alaska Supreme Court issued its opinion in the ACT case which resolves the issue of justiciability raised by this court.²⁰ There the Court concluded that an initiative which would require

¹⁸ Id., at 9-11.

¹⁹ Id., at 10-11.

²⁰ See, ACT, 273 P.3d 1128 (Alaska 2012).

voters to ratify, and thus allow voters to veto, any capital improvement project over a certain dollar amount had the effect of diluting the Assembly's exclusive control over the budget and therefore was an impermissible appropriation.²¹ In ACT, the Court addressed whether an initiative is unconstitutional when it allocates away from a particular purpose.²² The court concluded that the initiative in ACT would require that voters be permitted to allocate public assets even though the ordinance created by the initiative did not itself allocate those assets.²³ The court explained, "Practically, 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 issues."²⁴

Like the initiative at issue in the ACT case, the Petition at issue here similarly restricts the appropriation power of the CBS Assembly. The Petition will give the voters the ability to veto a sale, lease, or other transaction of land at the SCIP which impermissibly infringes on the Assembly's exclusive control over appropriations.

The recent ACT case resolves this issue and establishes it is ripe for judicial determination. The ordinance that would be created by Plaintiffs' Petition has the

²¹ Id., at 1136-1139.

²² Id., at 1137.

²³ Id., at 1138.

²⁴ Id.

same result as that in ACT: it would require voters to allocate public assets in contravention of the express limitations of Alaska Const., art. XI, § 7.

3. **CBS did not waive its right to raise the ACT case on remand, or any of the other issues remanded on appeal.**

i. **Sitka did not "waive" its arguments on remand.**

At the recent court hearing held May 28, 2012, counsel for Plaintiffs suggested that CBS waived its ability to argue the appropriations issue on remand in light of the ACT case.²⁵ Counsel's argument is spurious and produces an absurd result since there was no reason for CBS to appeal this court's favorable decision. This court did not decide the appropriations issue, finding it to be not justiciable until a vote of the electorate occurred.²⁶ On appeal, the Alaska Supreme Court reversed this court's decision as to the only two issues appealed: (1) being contrary to existing law, and (2) not being confusing or misleading and also remanded the case for further proceedings consistent with its opinion.²⁷ In footnote 20 of its opinion, the Supreme Court noted that regarding all the other issues that were not decided, the "trial court[] *should* rule on all reasons given for rejecting citizen petitions" because "piecemeal litigation and piecemeal appeals can delay and potentially thwart the ability of the people to initiate laws or to decide not to do

²⁵ On May 7, 2012, CBS filed a Notice of Supplemental Authorities, giving the court notice of the ACT case.

²⁶ See, Ex. A, pp. 9-11.

²⁷ SRG, 274 P.2d at 490, 495.

so."²⁸ The Supreme Court has remanded the case back to this court to issue rulings on the other grounds upon which CBS originally rejected Plaintiffs' Petition, which includes the appropriations issue.²⁹

CBS waived no right to raise arguments on the issues not ruled upon by this court in this subsequent remand of SRG's appeal. CBS has always maintained the Petition impermissibly results in an appropriation. Furthermore, remand is precisely the relief CBS requested an appeal from the Supreme Court to resolve the several undecided dispositive issues, and remand is exactly what occurred.³⁰

Finally, the ACT case was not decided when this court initially decided this case or when SRG appealed this matter. As a matter of pure practicality, CBS could not have cited law that did not exist at the time of SRG's appeal. This new common law precedent requires this court to revisit the appropriations issue.

ii. **The ACT case requires this court find the Petition impermissibly appropriates a public asset.**

The law of the case doctrine is "grounded in the principle of stare decisis" and "akin to the doctrine of res judicata."³¹ It generally "prohibits the

²⁸ Id., at 490, fn. 20.

²⁹ The court previously found the appropriation argument "unsupported." Id. The ACT case resolves this matter.

³⁰ See, Exhibit C, attached, which is an excerpt from the CBS' Brief of Appellees filed with the Alaska Supreme Court on October 6, 2009.

³¹ Beal v. Beal, 209 P.3d 1012, 1016-1017 (Alaska 2009).

reconsideration of issues which have been adjudicated in a previous appeal in the same case."³² Decisions on such issues become the "law of the case" and should not be reconsidered on remand or in a subsequent appeal except "where there exist 'exceptional circumstances' presenting a 'clear error constituting a manifest injustice.'"³³ However, a prior decision should be overruled when the rule is no longer sound because of changed conditions.³⁴ A court may reconsider its prior decision based on intervening case law that could not have been considered when the initial decision was rendered.³⁵

This case involves changed conditions where there has been an intervening change of controlling authority. CBS rejected the initiative proposal, in part, because it constituted an appropriation of a public asset in violation of Alaska Const., art. XI, § 7. This court did not rule on the appropriations issue, but concluded the issue was not ripe and therefore non-justiciable.³⁶ Specifically, this court reasoned that whether or not an unlawful appropriation would result from Plaintiffs' Petition could not be known until a vote held under the proposed

³² Id.

³³ Id., (citation omitted).

³⁴ See, Alaska Railroad Corp. v. Native Village of Eklutna, 142 P.3d 1192, 1201 (Alaska 2006).

³⁵ See, Price v. S. S. Fuller, Inc., 639 P.2d 1003, 1008 (Alaska 1982) (*trial court was not required to reexamine summary judgment ruling absent a showing of an intervening change in law.*).

³⁶ See, Ex. A, pp. 9-11.

language of the initiative proposal, assuming the initiative went to ballot and was approved by Sitka voters.³⁷

The ACT case squarely addresses the issues previously raised by this court and answers those questions presented by this court affirmatively: that Plaintiffs' Petition application results in an unlawful appropriation of public assets by requiring voter ratification of any sale, lease, or disposal of municipal property in the SCIP. As the ACT case demonstrates, the court need not wait until a vote by the electorate ratifying or vetoing a sale or lease of land occurs in order to determine that it impermissibly removes the exclusive power of allocating public assets away from the Assembly. In ACT, the Alaska Supreme Court found the initiative that created an automatic vote to approve or reject capital projects above a certain amount was an appropriation, holding:

Referring capital projects to voters, however, will almost invariably result in voters "vetoing" certain projects, at which point there is nothing the Borough can do to go forward with the project. In ACT's view this means that the municipal funds are still available to be used at the Borough's discretion. But the voters' ability to veto capital projects, even prior to budget approval, 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.³⁸

The Alaska Supreme Court further explained:

³⁷ Id.

³⁸ 273 P.3d at 1138 (emphasis added).

While the ordinance itself does not allocate public assets, it requires that voters be permitted to allocate those resources. Practically, 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.³⁹

This court previously concluded that SCIP property was a public asset.⁴⁰ Thus, the elections proposed by the Petition application violate Alaska law because it has the effect of making or repealing an appropriation of public assets. The Municipal Clerk properly rejected Plaintiffs' Petition application.

iii. Judicial notice.

Additionally, the court is required take judicial notice of the ACT case. Alaska Rule of Evidence 201 provides, in part, that "the court shall take judicial notice of the common law."⁴¹ The common law is the rule of decision in Alaska, to the extent it is not inconsistent with the Alaska Constitution, any laws passed by the Alaska legislature, or the federal constitution.⁴² The "common law" is the "accumulated expressions of various judicial tribunals," Howarth v. Pfeifer,⁴³ and now includes the ACT decision recently issued by the Alaska Supreme Court.

³⁹ Id., (emphasis added).

⁴⁰ See, Ex. A, p. 8.

⁴¹ Alaska R. Evid. 201(b).

⁴² AS 01.10.010.

⁴³ 443 P.2d 39, 44 (Alaska 1968).

Opposing counsel's position that CBS waived its right to cite to the ACT case asks this court to ignore controlling law.

B. The Petition is confusing and misleading.

The language of the Petition is confusing and misleading whether it is an initiative or referendum and is inconsistent with existing SGC provisions. Confusing and misleading language of a proposed petition is valid grounds for refusing to certify a petition application.⁴⁴ This is because confusing and misleading petitions frustrate the ability of voters to express their will.⁴⁵ "[The] main concern should be that all matters (legislative enactment, initiative petitions, and even proposed resolutions) should be presented clearly and honestly to the people of Alaska."⁴⁶ This applies equally to the citizens of Sitka.

The title of the proposed Petition submitted to the Municipal Clerk is:

An Ordinance of the City and Borough of Sitka, Alaska, Repealing And/Or Reenacting Portions of Title 2 & Title 18 of the Sitka General Code to Require that the Sale, Lease or Disposals of Real Property within Sawmill Cove Industrial Park be Consistent with and Conform to the Property Disposal Ordinance Contained in Title 18, including a Public Vote if Necessary.⁴⁷

⁴⁴ Citizens for Implementing Medical Marijuana v. Municipality of Anchorage, and Greg Moyer, Clerk, 129 P.3d 898 (Alaska 2006) (hereafter cited as "CIMM").

⁴⁵ Id., at 902.

⁴⁶ Id., at 901 (citing Faipeas, 860 P.2d at 1219).

⁴⁷ See, Ex. B, p. 47.

Use of the language "repeals and/or reenacts" certain provisions of the Sitka General Code creates substantial confusion as to the effect and intent of the proposal and therefore is misleading to the voters. This language also calls into question whether the application is an initiative, which regulates future activity, or whether it is a referendum, which would repeal a past act of the Assembly.⁴⁸ This causes confusion and is misleading since it does not directly address what precisely will be repealed and what precisely will be reenacted. This confusion results in the voters not knowing or misunderstanding the actual effect of the proposed petition.

Prima facie evidence of the confusion created by the Petition exists in this Court's own footnote 23 at p. 10 in its Decision, which states "the initiative does not impact short-term leases or small sales at the SCIP site."⁴⁹ As explained here, the Petition repeals a number of SCIP property procedures, subjecting such procedures to SGC Title 18. Currently, short term leases are approved simply by the Municipal Administrator under SGC 2.38.080A.7. Sales of SCIP property currently under SGC 2.38.080 only require a resolution (one Assembly hearing). The Petition would require all SCIP property leases and sales to be approved by ordinance (two hearings of the Assembly and special publication), in addition to a public vote if the sales or leases involved property above a certain value.

⁴⁸ Alaska Const., art. XI, § 1.

⁴⁹ See, Ex. A, p. 10.

There are also a number of other inconsistencies and conflicting code provisions created by the Petition between SGC at Title 18 and SGC at Chapter 2.38 regarding land disposal, that were addressed in the Clerk's Affidavit. These are summarized below:

- Petition does not repeal SGC 18.12.010B that exempts sales of SCIP municipal property valued at more than \$500,000 and leases valued at more than \$750,000 from being subject to a retroactive public vote.
- Petition requires a retroactive public vote regarding sales, transfers or leases of SCIP property of a certain value, including tidelands, but does not amend SGC 18.16.170, which specifically exempts certain SCIP tideland property from any retroactive public vote.
- The Petition would by initiative/referendum enact or amend ordinances regarding property disposal. Sitka Charter at Section 11.14 provides that only "[t]he assembly shall enact ordinances governing property disposals."
- Petition did not repeal references to the SCIP Board of Directors' authorities and duties which also includes land transactions review, recommendations and actions, but then states that SCIP land transaction are to follow Title 18, which contains no reference to SCIP Board of Directors. SGC 2.38.080 entitled "General Powers" was not repealed that provides that the SCIP Board shall be responsible for the "operation, maintenance, development and marketing of the municipally owned and operated Sawmill Cove Industrial Park."⁵⁰

These inconsistencies and conflicts were pointed out to the Plaintiffs in the Clerk's letters and attachments denying the Petition applications, but the Plaintiffs chose not to correct the errors.⁵¹ Since they did not correct the conflict with subsequent Petitions, it appears they want these inconsistent and conflicting

⁵⁰ See, Ex. B, pp. 59-65.

⁵¹ See, for example, Ex. B, pp. 53-58, Outside Counsel's August 5, 2008 Memorandum responding to the Second Application for Citizens Petition at page 2.

provisions. The public, asked to vote on this initiative, is unaware of Plaintiffs' position.⁵²

This issue was previously addressed in CBS' Opposition at pages 2, 9-13, and 19-20, and Clerk's Affidavit; Plaintiffs' Supplemental Brief at page 5-7.

The Petition does not contain the SGC provisions related to short term leases or small sites that are being repealed so that voters may not cast an informed vote. Because the Petition does not address these requirements, it fails due to improper form as confusing and misleading.⁵³ Confusing and misleading language of a proposed petition are valid grounds for refusing to certify a petition application.⁵⁴

For these reasons, the Sitka Municipal Clerk properly rejected the Plaintiffs' Petition because it is confusing and misleading.

C. The Petition impermissibly interferes with the Comprehensive Plan. (Plan Inconsistency)

The Alaska Supreme Court's decision in Griswold v. City of Homer,⁵⁵ applies to this case. There, the Court held that an initiative bypassing the Homer Advisory

⁵² Furthermore, the Assembly would not be able to amend any of the initiative changes, if approved, for one year after an election. See, Sitka Charter § 6.01.

⁵³ CIMM, 129 P.3d 898 (Alaska 2006), Faiveas v. Municipality of Anchorage, 860 P.2d 1214 (Alaska 1993).

⁵⁴ CIMM, 129 P.3d 898 (Alaska 2006).

⁵⁵ 186 P.3d 558 (Alaska 2008).

Planning Commission and an ordinance of the city council exceeded even the city council's own legislative power and was therefore invalid.⁵⁶

Pursuant to Sitka Charter, the Sitka Comprehensive Plan ("Comprehensive Plan") has been adopted by the Assembly as a guideline for the orderly and systematic development of Sitka, and is to be followed. Sitka Charter § 8.02, entitled "Comprehensive Plan," provides:

(a) **Planning Commission Recommendation.** Upon receipt from the administrator of a proposed comprehensive plan or proposed modification of the existing plan, the assembly shall refer such proposal to the Planning Commission which shall within a time specified by the assembly report its recommendations thereon.

(b) **Hearing and Adoption.** After receipt of the recommendations of the Planning Commission, the assembly shall hold a public hearing on the proposed comprehensive plan, the assembly shall refer such proposal to the Planning Commission which shall within a time specified by the assembly report its recommendations thereon.

(c) **Purpose.** The comprehensive plan shall serve as a guide to all future assembly action concerning land use and development regulations, urban renewal programs and expenditures for capital improvements.

(d) **Implementation.** The assembly shall by ordinance adopt land use and development, rehabilitation, conservation and renewal programs for:

(1) The alleviation or prevention of slums, obsolescence, blight or other conditions of deterioration.

⁵⁶ *Id.*, at 560; see also, *Carmony v. McKechnie*, 217 P.3d 818 (Alaska 2009) (holding initiative petition application properly rejected as inconsistent with comprehensive plan.)

- (2) The achievement of the most appropriate use of land.
- (3) Before acting on any proposed ordinance concerning land use and development regulations, urban renewal or expenditures for capital improvements, where such ordinance refers to a matter covered by the comprehensive plan, the assembly may refer the proposal to the Planning Commission, which shall within a time specified by the assembly and prior to the public hearing on the proposed ordinance, report its recommendations thereon.
- (4) Upon adopting any such ordinance, the assembly shall make findings and report on the relationship between the ordinance and the comprehensive plan, and in the event that the ordinance does not accord with the comprehensive plan, the plan shall be deemed to be amended in accordance with such findings and report.⁵⁷

The latest version of the Comprehensive Plan, entitled "2007 City and Borough of Sitka Comprehensive Plan Update," approved by the CBS Planning Commission and the Assembly, contains numerous references to the Sawmill Cove Industrial Park (SCIP). Included in this Comprehensive Plan at 2.5 under "Urban Commercial and Industrial Goals and Policies" is a section entitled "Sawmill Cove Industrial Park," which states:

Sawmill Cove Industrial Park

2.5.5. To pursue economic development and productive use of property acquired from the former Alaska Pulp Corporation.

2.5.6. To develop business opportunities and provide jobs by leasing or selling the Industrial Park property to individuals and corporations.

⁵⁷ See, Ex. B, pp. 67-68.

2.5.7. To utilize property management methods which more closely correspond to private sector transactions.⁵⁸

The Comprehensive Plan also includes several plans for the development of SCIP.⁵⁹ These include plans for multipurpose deep water dock, harbor development, solid waste recycling, and transportation, to name a few.⁶⁰ Chapter 2.38 of the Sitka General Code establishes the SCIP ordinances to implement those plans identified by the Comprehensive Plan.⁶¹ SCIP is part of the Comprehensive Plan.⁶² Pursuant to statutory scheme, the Comprehensive Plan has been adopted by the Assembly as a guideline for the orderly and systematic development of SCIP. That plan includes the establishment of a Board of Directors.⁶³ It also includes the requirement for the disposal, sale, purchase, trade, as well as short and long-term leasing of property in SCIP.⁶⁴ CBS has also adopted a SCIP land use plan and has designated SCIP as a separate zoned

⁵⁸ Id., at 77-78.

⁵⁹ Id., at 72-89.

⁶⁰ Id.

⁶¹ Id., at 92-97.

⁶² Id., at 71-91.

⁶³ SGC 2.38.020; see, Ex. B, pp. 93-94.

⁶⁴ SGC 2.38.080, see, Ex. B, pp. 94-95.

district.⁶⁵ The Comprehensive Plan also includes criteria, which have been codified at SGC 2.38, for the disposal of property in SCIP. Moreover, the Comprehensive Plan references liberal land disposal procedures at SCIP to pursue economic development and develop business opportunities at the SCIP.⁶⁶

The Court in Griswold not only rejected amendments to zoning requirements regarding big box stores proposed by a citizens' initiative, but also by an ordinance of the city council that both bypassed the Homer Advisory Planning Commission.⁶⁷ The Griswold court found this exceeded even the city council's own legislative power and was therefore invalid. It determined the petition and referendum process for municipalities are not constitutionally based, and therefore the plan procedures must be followed even if the city council acted on the matter.⁶⁸ Here, even if the SCIP land disposals only required review and recommendation by SCIP directors, the principals of Griswold apply equally. The Griswold court explained,

voters, who have no obligation to consider the views of the planning commission or be informed by its expertise, cannot use the initiative process to eliminate the planning commission's role in "areawide" land use planning and regulation, and thus potentially undermine the comprehensive plan for "systematic and organized" local development.⁶⁹

⁶⁵ See, Ex. B, pp. 126-27 ("Affidavit of Grant Miller").

⁶⁶ See, Ex. B, pp.59-65 ("Affidavit of Colleen Pellett").

⁶⁷ See, 186 P.3d at 560-66.

⁶⁸ Id.

⁶⁹ Id., at 563.

Similarly here, under Plaintiffs' Petition, the electorate will have no obligation to consider the views of the SCIP Board of Directors, be informed of its expertise, or the planning considerations of the Sitka Comprehensive Plan and the planning authority delegated to the CBS, pursuant to its home rule powers, to the SCIP Board of Directors. Plaintiffs' Petition prevents SCIP Board of Directors from exercising the review and recommendation power delegated to it and ignores the Comprehensive Plan.

Eliminating a step in the process, whether that step be presentation to the Planning Committee, SCIP Board of Directors, or some other board or commission, results in the conclusion that a citizen's petition avoiding such processes is legally impermissible. Plaintiffs' Petition does just that. Under existing code, which would not be amended by the Plaintiffs' Petition, the SCIP Board of Directors must review and make recommendations to the Assembly, required prior to any change regarding SCIP property.⁷⁰ These procedural steps will be bypassed by Plaintiffs' Petition in violation of state law, municipal code, and Sitka Charter. Thus, the principals enunciated by the Alaska Supreme Court's decision in Griswold apply to the Petition in this case. For these reasons, the Municipal Clerk properly rejected the Petition.

E. The Petition impermissibly interferes with laws which are necessary for the immediate preservation of the public peace, health, and safety.

⁷⁰ SGC 2.38, see Ex. B, pp. 92-97.

Although the Petition is, on its face, an "initiative," in actuality it is a referendum.⁷¹ Plaintiffs impermissibly seek to directly legislate in an area restricted by the Constitution. The Alaska Constitution provides that referenda may not apply to "law necessary for the immediate preservation of the public peace, health, and safety."⁷² These restrictions require strict compliance.⁷³

Though constitutional and statutory provisions authorizing initiatives and referenda are to be liberally construed,⁷⁴ this liberal construction must be balanced by the constitutional restrictions in article XI, section 7 of the Alaska Constitution. The balancing of these two important constitutional rights is explained in Citizens Coalition for Tort Reform v. McAlpine.⁷⁵ There, the court held:

This tension between the power granted versus the restriction imposed is common in cases involving interpretation of constitutional provisions governing direct legislation. Compare 1 C. Sands, Sutherland Statutory Construction § 4.09, at 135 (Rev. 4th ed. 1985) ("It has been held that provisions authorizing direct popular participation in law-making should be liberally construed so as not to restrict its use.") with *id.* ("On the other hand, strict

⁷¹ See, Ex. A, p. 13; see also section IV.B., above, regarding the confusion created by Plaintiffs' Petition.

⁷² Alaska Const., art. XI, § 7.

⁷³ Citizens Coalition for Tort Reform v. McAlpine, 810 P.2d 162 (Alaska 1991); see also, Citizens for Legislative Reform v. State, 887 P.2d 960 (Alaska 1994).

⁷⁴ See, Municipality of Anchorage v. Frohne, 568 P.2d 3, 7-8 (Alaska 1977) (citations omitted).

⁷⁵ 810 P.2d 162 (Alaska 1991).

compliance is required with conditions and procedures prescribed for making law by [initiative]."). Plainly, the restrictions of article XI, section 7 are important conditions on the initiative right that require strict compliance.⁷⁶

The court further explained that, regarding the restrictions in art. XI, sec. 7 of the Alaska Constitution,

[t]he restrictions on permissible subjects for direct legislation represent 'a recognition . . . that certain particularly sensitive or sophisticated areas of legislation should not be exposed to emotional electoral dialogue and impulsive enactment by the general public.'⁷⁷

In balancing these interests, the court explained that the restrictions of art. XI, sec. 7 of the Alaska Constitution must also be liberally construed:

... 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.⁷⁸

⁷⁶ Id., at 169.

⁷⁷ Id., at 170 (citing Thomas v. Bailey, 595 P.2d 1 (Alaska 1979) (additional citations omitted)).

⁷⁸ Id., at 168 (footnotes omitted) (emphasis added).

The constitutional limitation on the referral to the electorate of "laws necessary for the immediate preservation of the public peace, health, or safety" was explained during the constitutional convention. There, Delegate V. Rivers moved an amendment which provided, in part: "The referendum shall not be applicable to such laws as are necessary for the immediate preservation of the public peace, health or safety"⁷⁹ During the debate of this amendment, Delegate Rivers explained:

Well, the present act is geared to the emergency clause. Now who would determine what an emergency was, whether or not it carried an emergency clause or not, I don't know, but it might well be that some particular act that had a grave bearing on the public health or welfare or safety could be passed without an emergency clause, and I feel that any act that affects the public health, safety or peace or also affects the current operations of our institutions, the immediate effect upon them, I think should not be subject to a referendum. It puts a little sense I think in this use of the term "emergency act" because an emergency act [...] could be declared when it actually was not, and some emergency acts that were actually, in effect, emergency could also be left without an emergency clause. This would pin down a limitation upon the breadth and scope of the use of the referendum for that that might materially upset our everyday functioning of government.⁸⁰

Thus, Delegate Rivers' explanation of this amendment establishes that he was concerned that the referendum could operate to impair the exercise of laws necessary to preserve the public peace, health and safety (i.e., the police power)

⁷⁹ 2 Proceedings of Alaska Const. Conv., 1037.

⁸⁰ Id., at 1038 (emphasis added).

and could impair the daily operations and functions of government. He believed that laws affecting public's health, safety, and peace, and not just emergency laws, be restricted by art. XI, sec. 7 of the Alaska Constitution. Delegate Rivers' amendment was adopted by a 40-10 vote.

The "police power" is not susceptible to exact definition and knows no limitations.⁸¹ It refers to the power of the government to provide for the public order, peace, health, safety, welfare, and morals.⁸² The police power embraces government authority to prefer the public good over private interests⁸³ and government authority to regulate to promote economic welfare, public convenience, and general prosperity of the community.

Land use, planning and zoning are included in the police power of the government. A leading scholar in land use planning matters describes police power:

Police power in the land-use control context encompasses zoning and all other government regulations which restrict private owners in their development and use of land. The police power is inherent in the sovereign power of the state to regulate private conduct to protect and further the public welfare. Courts have universally held that this power includes within its scope all manner of laws deemed necessary by the legislature to promote public health, safety, morals or the general welfare.⁸⁴

⁸¹ See, E. McQuillin, The Law of Municipal Corporations, § 24:3 (3d ed. rev. 2007).

⁸² Id., at § 24:5.

⁸³ Id., at § 24:2.

⁸⁴ 1 Ziegler, Rathkopf's The Law of Zoning and Planning, § 1:01 (1991).

Furthermore, "planning connotes a systematic development contrived to promote the common interest in matters that have from the earliest times been considered as embraced within the police power.⁸⁵ In Alaska, police powers include the power to plan and zone and are necessary to provide for the uniform and orderly development.⁸⁶ A municipality's planning power must be liberally construed.⁸⁷

Here, the SCIP ordinances, Comprehensive Plan, and the ordinance proposed by Plaintiffs' Petition are the type of laws intended by the framers of the Alaska Constitution to be restricted from referendum because these are laws which affect the public health safety, peace and welfare – in other words, the police power. The CBS is a home rule municipality and under its home rule powers has delegated the planning, development, and administration of SCIP to the SCIP board of directors. The SCIP was designed to promote the public peace, safety and health by providing for the uniform and orderly development. The SCIP is an integral part of the Sitka's Comprehensive Plan. Under these processes, the lawmakers of the CBS have concluded that the plans and laws adopted for the orderly development of the SCIP are necessary for the immediate preservation of

⁸⁵ 1 Anderson, American Law of Zoning, § 1.03 (2 ed. 1986).

⁸⁶ See, Griswold, 186 P.3d at 565 (citing Transamerica Title Ins. Co. v. City of Tucson, 157 Ariz. 346, 757 P.2d 1055, 1059 (Ariz. 1988)).

⁸⁷ See, Alaska Const., art X, § 1; Liberati v. Bristol Bay Borough, 584 P.2d 1115 (Alaska 1978); AS 29.10.010 - .200, 29.35.400 - .420.

the public health, safety, and welfare. As a component of the Comprehensive Plan, the laws adopted which regulate SCIP are necessary for the immediate preservation of the public health, safety, and welfare of the CBS.

The Petition thus interferes with laws which are immediately necessary for the public health, safety and peace because of the adoption of the CBS Assembly creating SCIP, its procedures, the discussion of SCIP in the Comprehensive Plan, and the express delegation of authority to a governmental unit under AS 29.35, whose powers must be liberally construed pursuant to Alaska Const., art. X, § 2. Therefore, if the petition is a referendum, it falls within the restrictions in Alaska Const., art. XI, § 7. The Municipal Clerk properly rejected Plaintiffs' Petition on this ground.

F. The Petition impermissibly relates to administrative matters.

The Plaintiffs' Petition affects the administrative matters of CBS and therefore is an invalid initiative or referendum proposal. The power of the people to propose and enact laws by petition "is restricted to legislative ordinances, and does not extend to administrative measures."⁸⁸ The test of what is legislative verses administrative has been explained in a leading treatise on municipal law:

The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to

⁸⁸ Wolf v. Alaska State Housing Authority, 514 P.2d 233, 235 n.13 (Alaska 1973) (citing E. McQuillin, The Law of Municipal Corporations, section 16.55 (3rd Ed. 1969)); AS 29.26.110(a)(3); AS 29.35.010(8); AS 29.35.010(9); Charter 4.04; SGC 3.28.

make a new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plans; whereas, it is administrative in nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.⁸⁹

The purpose of the administrative exclusion is to avoid crippling a previously enacted policy.⁹⁰ In another case decided after this court's 2008 decision, Swetzof v. Philemonoff, the Alaska Supreme Court identified three useful guidelines for determining whether an initiative impermissibly extends to administrative measures.⁹¹ Those guidelines, adopted from a Kansas Supreme Court decision, are:

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.
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

⁸⁹ See, E. McQuillin, Law of Municipal Corporations, § 16:54 at 409-410 (3d ed. rev. 2004).

⁹⁰ Swetzof v. Philemonoff, 203 P.3d 471, 481 (Alaska 2009).

⁹¹ Id., at 479-82.

administrative, even though they may also be said to involve the establishment of a policy.⁹²

Applying these guidelines to Plaintiffs' Petition, it is clear that the Petition impermissibly relates to administrative matters. First, the Petition does not create new law but rather executes existing CBS law relating to SCIP property planning and disposal procedures. Second, the Petition deals with only a small segment of the overall policy developed for SCIP under the Comprehensive Plan and SCIP Board of Directors. Finally, under the third guideline, relating to expertise and specialized training in municipal affairs necessary to make rational choices, the Petition fits within this guideline as it will interfere with CBS's operation, management and financing of the SCIP development, in accordance with the objectives in the Comprehensive Plan. The Petition at issue here does not prescribe a new law, policy, or plan; rather, it impermissibly impacts the procedure already in place for selling and disposing of real property owned by the municipality. Plaintiffs' Petition, therefore, is an impermissible attempt to affect administrative matters of the CBS.

The Sitka General Code establishes SCIP to be managed and administered by a board of directors appointed by the Assembly.⁹³ The board of directors make

⁹² *Id.*, at 477 (quoting *City of Wichita v. Kansas Taxpayers Network, Inc.*, 255 Kan. 534, 874 P.2d 667 (Kan. 1994)). The Kansas opinion identified a fourth guideline but the Alaska Supreme Court determined it to be inapplicable to Alaska law because it ran counter to the rule of construction that initiatives are to be liberally construed. *Id.*, at 479.

⁹³ See, Ex. B, pp. 92-97.

recommendations to the Assembly regarding the development of SCIP. Plaintiffs' Petition therefore impermissibly interferes with the municipal administration of its property at SCIP.

Title 29 of the Alaska Statutes expressly delegates to municipalities the authority to establish by ordinance formal procedures for acquisition and disposal of land and interests in land by the municipality.⁹⁴ This express delegation of authority to establish such procedures is an administrative function to carry out the legislative delegation of authority. The Charter expressly provides that it is the Assembly that shall adopt ordinances for the conveyance or lease or to authorize the conveyance or lease of any lands of the municipality.⁹⁵

The proposed Petition seeks to regulate an administrative matter because it would require voter approval for sale of SCIP property or any other municipal property by CBS if it is valued over \$500,000, and \$750,000 if the property is leased. The proposed language, in Section 2 of the proposed ordinance in Plaintiffs' Petition states that its purpose is to regulate the administration of CBS municipal property. The proposal states that

... the purpose of the ordinance is to require *that the administration* and disposals of tidelands, submerged land, and other real property in the SCIP take place and is governed by Title 18 of the SGC and, as necessary that

⁹⁴ AS 29.35.090.

⁹⁵ See, Sitka Home Rule Charter, Art. III, § 3.01(7).

disposals of property within the SCIP are subject to a public vote.⁹⁶

Under the test asserted above, the proposed ordinance relates to an administrative matter because it requires future voter approval to sell or dispose of SCIP property or other municipal property. This is contrary to the established plan for the administration and use of this municipal property and public asset. The proposal contravenes SGC 2.38.080, which delegates specific powers to the SCIP Board of Directors, because it undermines the omnibus authority of the Board of Directors to address administrative issues associated with the disposal of SCIP property. Similar to Griswold, Plaintiffs' Petition here would impermissibly bypass the SCIP board of directors, who have been delegated substantive roles in recommending planning and development decisions for SCIP property.

For these reasons, the proposed Petition relates to an administrative matter beyond the scope of the voters' initiative and referendum powers and is therefore an impermissible use of the petition process. The Municipal Clerk properly rejected the Petition for this reason.

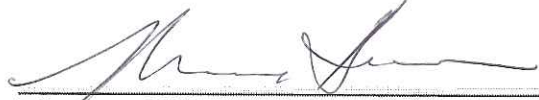
V. Conclusion.

Any one of the above issues is dispositive that Plaintiffs' Petition is legally insufficient and constitutionally prohibited. For these reasons, the Sitka Municipal Clerk properly rejected the Petition. The court must do the same.

⁹⁶ See, Ex. B, p. 33 (emphasis added).

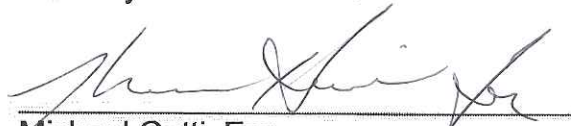
Dated at Sitka, Alaska, this 9th day of July, 2012.

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CERTIFICATE OF SERVICE

This certifies that on this 9 day of July, 2012, a true and correct copy of the foregoing was served via U.S. mail and/or facsimile on:

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