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

SITKANS for RESPONSIBLE GOVERNMENT and MICHAEL LITMAN & JEFFERY FARVOUR, Plaintiffs,	)	
vs.	)	
CITY AND BOROUGH OF SITKA and COLLEEN PELLETT, Municipal Clerk, Defendants.	)	1SI-08- 130 Civil

OPPOSITION TO DEFENDANTS' SUPPLEMENTAL BRIEF ON REMAND

Introduction

Plaintiffs, Sitkans for Responsible Government ("SRG"), Michael Litman and Jeffery Farvour (hereafter collectively referred to as SRG), file their opposition to the supplemental briefing filed by Defendants. Supplemental briefing was ordered by the court on May 29, 2012 in light of the decision rendered by the Alaska Supreme Court on April 20, 2012.

Overview

In general, the Alaska Supreme Court has adopted a rule of liberal construction pertaining to initiative procedures, favoring upholding proposed initiatives. The presumption that initiatives are required to be construed in a liberal manner in order to give effect to the right of citizens to engage in direct lawmaking is well established and should guide the court

in determining whether the initiative proposed by SRG should be placed on the ballot. As the Alaska Supreme Court has noted:

> In reviewing an initiative prior to submission to the people, the requirements of the constitutional and statutory provisions pertaining to the use of initiatives should be liberally construed so that the people are permitted to vote and express their will on the proposed legislation…all doubts as to technical deficiencies or failure to comply with the exact letter of procedures will be resolved in favor of the accomplishment of that purpose.[1]

(emphasis added.)

In ***Municipality of Anchorage v. Frohne***,[2] the Alaska Supreme Court held:

> 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. To that end all doubts as to technical deficiencies or failure to comply with the exact letter of procedure will be resolved in favor of the accomplishment of that purpose.[3]

In 2008, the trial court acknowledged that the power of the Sitka citizens to enact local legislation was "important" and to be "liberally construed." [***Memorandum of Decision***, 1SI-08-130 CI, November 12, 2008 at page 5]. Consistent with the mandate to liberally construe initiatives, the trial court further noted that generalized contentions that provisions of a proposed initiative violate law are "normally justiciable only after an initiative has been approved by voters." [***Memorandum of Decision***, 1SI-08-130 CI, November 12, 2008 at page 7-8 (footnote omitted)]. The trial court's point on justiciability is well founded and has

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[1] ***Boucher v. Engstrom***, 528P.2d 456, 462 (Alaska 1974)(quotations and citations omitted); ***see also***, ***Thomas v. Bailey***, 595 P.2d 1, 3 (Alaska 1979) ("The right of initiative and referendum, sometimes referred to as direct legislation, should be liberally construed to permit exercise of that right.")(citations omitted).

[2] 568 P.2d 3 (Alaska 1977).

[3] ***Id***, 568 P.2d at 8 (quotation and citation omitted); ***see also***, ***North W. Cruiseship v. Lieutenant Governor***, 145 P.3d 573, 577 (Alaska 2006).

been sustained numerous times.[4] Under the circumstances and given the obvious ruling by the Alaska Supreme Court in this matter, it would be appropriate and consistent with long-standing legal precedent for the citizens of Sitka to finally gain the opportunity to express their sentiments on the proposed initiative in an electoral vote.

Issues and Arguments

1. Does the Proposed Initiative Contain an Unlawful Appropriation?

A. Justiciability

Previously in this dispute, the trial court correctly observed that "… whether the application of the (proposed) ordinance is an appropriation is not justiciable at this time. [***Memorandum of Decision***, 1SI-08-130 CI, November 12, 2008 at page 11 (footnote omitted)]. Allowing the citizens of the City and Borough of Sitka to actually vote on the proposed initiative and reserve a judicial pronouncement on the issue of whether or not the proposed initiative contains an impermissible appropriation makes sense. The court is bound by common sense and precedent to rule on the unlawful appropriation issue only in the circumstances where the proposed initiative obviously contains an impermissible appropriation. Because the proposed initiative in this dispute does not contain any provision that obviously must be struck down, the obvious course of action the trial court is to allow for an election and review the issue in the context of a specific factual context if the electorate approves of the measure. Put another way, the issue of whether or not the supposed impermissible appropriation is ripe for determination can only take place <u>if</u> the electorate adopt the proposed measure and only when the language calling for a ratification of certain

[4] ***See, e.g., Pebble Ltd. P'ship ex rel Pebble Mines Corp v. Parnell***, 215 P.3d 1064, 1077 (Alaska 2009) (citing ***Alaskans for Efficient Gov't, Inc. v. State,*** 153 P.3d 296, 298 (Alaska 2007)).

land transactions, already specified in the current Sitka General Code (SRG), is applied to an actual factual circumstance.

B. There is no Appropriation in the Proposed Initiative

The trial court concluded previously that: "On its face SRG's initiative does not appropriate public assets." [***Memorandum of Decision***, 1SI-08-130 CI, November 12, 2008 at page 10]. In any event, the CBS still maintains that the proposed initiative contains an impermissible appropriation. [***Defendants' Supplemental Brief*** on Remand, pages 4 - 15]. The CBS's continued argument on this point cannot be sustained as a matter of sound procedure or based on the proposed initiative or supported by relevant case law.

Nothing in the proposed initiative directly appropriates money or resources of the CBS. Instead, if enacted by the voters, the proposed initiative would harmonize existing ordinances related to land use and provide for voter ratification in circumstances where significant disposals or leases of public land are contemplated. While the proposed initiative obviously deals with a public asset, the measure is not a prohibited appropriation be cause it does "not result in the allocation of an asset entirely to one group at the expense of another."[5] In addition, it is obvious that one of the "core objectives" articulated by the Alaska Supreme Court when considering initiatives is to limit the use of the initiative process from becoming a "give away" program.[6] The proposed initiative is the antithesis of a "give away" program and actually structured to serve as a check on a potentially mis-guided disposal of public assets as it only seeks public ratification in limited circumstances already contained in the SGC.

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[5] ***Id*** at 1077 (citing ***Pullen v. Ulmer***, 923 P.2d 54, 63-64 (Alaska 1996).

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

The proposed initiative submitted by SRG, now the subject of yet more judicial review, seeks only to establish a procedure where the residents of Sitka would be allowed to express their authority through a vote on a matter of significant public interest. The proposed initiative clarifies and simplifies existing property disposal ordinances. Nothing on the face of the proposed SRG initiative appropriates land or funds contrary to the requirements of the Alaska Constitution.

A useful test to determine whether an appropriation is part of the proposed initiative has been articulated in ***City of Fairbanks. v. Fairbanks Convention & Visitors Bureau***[7] where the court called for an analytical framework seeking to determine:

> whether (an) initiative would set aside a certain specified amount of money or property for a specific purpose or object in such a manner that is executable, mandatory, and reasonably definite with no further legislative action.[8]

The proposed SRG initiative in no way seeks to appropriate or repeal an appropriation and accordingly should be allowed to go forward.

C. Is the Appropriation Issue in this Dispute Still In Question?

Given the trial court's decision in 2008, the continued contention by the CBS that the proposed initiative contains an impermissible appropriation is curious. The Alaska Supreme Court noted in the appellate decision governing this case that the trial court had "found unsupported a third reason (for turning down the initiative petition) - that the initiative was illegally used to make an appropriation."[9] The observation by the Alaska Supreme Court

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[7] 818 P 2d 1153 (Alaska 1991).

[8] ***Id***.

[9] ***Sitkans for Responsible Government v. City and Borough of Sitka***, 274 P.3d 486, 490 footnote 20 (Alaska 2012).

noting that the trial court specifically determined that the proposed initiative did not contain an impermissible appropriation underscores the fact that the appropriation issue was not appealed by the CBS. The CBS should not now be allowed to again argue an issue previously decided as if judicial proceedings were like some of decisional smorgasbord with an endless opportunity litigate, re-litigate and litigate again a position already made and on which a ruling has been entered.

The CBS finds comfort in the ***Alliance of Concerned Taxpayers, Inc.,***[10] a case that was rendered in a situation where the public sought to ratify large expenditures proposed in the context of annual budgetary considerations by a local government. In the current dispute, SRG seeks only to harmonize land use planning according to established ordinances already in place within the CBS. The practical impact of the proposed initiative, if adopted by the electorate, essentially eliminate the extraordinary provisions for land use in a small area of the entire CBS and treats all lands held by the CBS in a uniform and harmonious fashion.

Application of the ***Alliance of Concerned Taxpayers, Inc ("ACT"),*** case to the dispute now before the trail court is not justified based on the obvious contextual differences. Not only did the ***ACT*** dispute involved budgetary consideration related to potentially controversial capital projects that were intertwined in the local government's annual budgetary considerations, the decision by the Alaska Supreme Court in the ***ACT*** case was made before the decision that now governs this dispute. If logic and reason have any basis in judicial decision making, it is entirely appropriate to assume that the Alaska Supreme Court was aware of the ***ACT*** opinion when the unanimous court ruled on April 20, 2012 that the

[10] 273 P. 3d 1288 (Alaska 2012).

CBS's claim that proposed initiative could be "illegally" used to "make an appropriation" was "unsupported."[11]

If the CBS believed the Alaska Supreme Court overlooked the decision in the ***ACT*** case and somehow failed to apply the correct law when entering the Opinion in the current dispute, why did the CBS not avail themselves of the opportunity to seek rehearing as set out in the Appellate Rules?[12] The argument by the CBS that the ***ACT*** case is somehow controlling in the instant dispute is wrong and illogical. The context of the ***ACT*** case compared to the current dispute is different. The proposed initiative is not an appropriation and instead would only require a ratification vote in circumstances already specified in local law if the measure is enacted by the electorate in Sitka.

The CBS failed to raise the appropriation issue on appeal. The CBS then failed to seek a rehearing with regard to their theory that the Alaska Supreme Court didn't properly apply the correct legal standards when issuing its April 2012 Opinion in this dispute. These failures, coupled with the obvious factual differences between the current case and the ***ACT*** case do not sustain or support the argument made by the CBS that it is entitled to a favorable judgment on the appropriation issue.

2. Is the Proposed Initiative Confusing and Misleading?

The CBS continues to claim the proposed initiative is "confusing and misleading" and "inconsistent with existing SGC provisions. [***Defendants' Supplemental Brief*** on Remand, pages 15 - 18]. The final word on this particular aspect of this dispute seemingly should be

[11] 274 P.3d 486, 490 (footnote 20).

[12] ***See, e.g***., Alaska Rules of Appellate Procedure 506.

reserved for the Alaska Supreme Court, which concluded: "the petition is neither confusing nor misleading."[13]

3. Does the Proposed Initiative Interfere with CBS Comprehensive Plan?

Whatever perceived conflicts the CBS believes might come into play if the initiative is adopted by the citizens of Sitka, the Alaska Supreme Court gave firm guidance on how to resolve the supposed conflict by noting: "If Sitka believes there is a conflict between SGC 18.20.010 and the Sitka Charter … (then) the city should amend either its Charter or the ordinance.[14] The Supreme Court then pointedly added: "It (the CBS) may not be heard to argue that a citizen initiative, which merely attempts to extend to all transactions a Sitka law currently applicable only to some transactions, is contrary to law…"[15]

Given that the proposed initiative would, if enacted, require the CBS to use the same ordinances and standards already adopted in the SGC for similar transactions throughout Sitka, the CBS's arguments on this point strain credibility and must be denied.

4. Does the Proposed Initiative Interfere with the Immediate Preservation of the Public Pease, Health and Safety?

The CBS offers in support of its argument on this point the notion that the proposed initiative is: "in actuality … a referendum." [***Defendants' Supplemental Brief*** on Remand, pages 23 - 24]. The CBS then seems to suggest that the proposed initiative and what it now characterizes as a "…referendum" is confusing [***Defendants' Supplemental Brief*** on Remand, page 24, footnote 71].

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[13] 274 P.3d 486, 493-495.

[14] ***Id***. at 493.

[15] ***Id***.

The confusion issue, while apparently looming large in the minds of CBS's counsel, has been addressed and disposed of by the Alaska Supreme Court. The CBS then goes on to claim in a lengthy and confusing passage that what the CBS calls the referendum violates the inherent "police powers" of the CBS.

Michael Litman and Jeffrey Farvour believe it is both self-evident and abundantly obvious from even a cursory reading of the proposed initiative that they and the other citizens desiring to place the initiative on the ballot are not seeking to meddle in the CBS's genuine "police powers" or otherwise harm the ability of their government to respond to issues related to protecting peace, health, safety, welfare and morals of their community, particularly in a situation where the CBS might be required to act promptly in a manner calculated to protect the public The briefing on this point by the CBS offers nothing in the way of a tangible example of how the public safety would be obviously harmed under any conceivable circumstances that might plausibly arise within Sitka were the voters of Sitka allowed to cast ballots on whether or not to adopt the proposed initiative. Indeed, the speculative and argumentative prose used by the CBS on this particular issue has Orwellian police state overtones that demand dismissal and beg the larger question of whether the current counsel for the CBS would sanction any initiative that restricts the political or policy prerogatives of the CBS Assembly or perhaps impinge on the discretion of the employees and officials at the CBS.

5. Does the Proposed Initiative Impermissibly Encroach on Administrative Matters?

The simplistic claim by the CBS that the proposed initiative would affect the "administrative matters" of CBS is certainly true. [***Defendants' Supplemental Brief*** on Remand, pages 29]. However, that there might be some miniscule impact on the

administration of local government in Sitka if the proposed initiative is adopted is not sufficient reason to strike down the initiative.

The proposed initiative obviously and clearly contemplates a different and new legislative regime. There is no inherent attempt in the proposed initiative to micro-manage or meddle in the daily administrative duties of the employees of the CBS. The proposed initiative simply would simply require that all lands owned by the CBS are managed to a single set of standards already embodied in law.

The arguments advanced by the CBS related to the "administration" of local government again call forth the question: Are there any matters the local residents of Sitka could address via the local initiative process that somehow don't encroach on the prerogatives of the CBS Assembly or the administrative duties of employees or other individuals appointed by the CBS Assembly? More than any other argument advanced by the CBS, the characterization by the CBS that what is clearly legislation proposed by the local citizens is somehow administrative and therefore impermissible, illustrates the genuine nature of this dispute. The instant dispute really is about the allocation of power in Sitka's local government and whether the CBJ Assembly and bureaucrats will share any amount of political power with the citizens. That Alaska provides local citizens with the ability to enact local legislation is not without restriction, but the extreme position advanced by the CBS, at least in this dispute, would effectively destroy the ability of the citizens to engage in legally sanctioned direct lawmaking. One can fairly ask if the CBS Assembly enacted the precise language as is proposed in the citizen initiative would it constitute an impermissible encroachment on administrative matters. Such a course of action would likely have an impact on how land management is administered if the CBS Assembly enacted an ordinance identical to the

proposed initiative. But an impact on how the bureaucrats administer a program doesn't support the claim that a proposed legislative enactment is somehow administrative in nature and therefore prohibited. The proposed initiative contains language that sets out policy and legislative intent that would very likely be followed by CBS staff if adopted by CBS Assembly. The citizens of Sitka, as part of their legal right to engage in direct law making, have the same ability in these circumstances to enact an ordinance compared to the CBS Assembly and it is necessary for the trial court to treat the citizens of Sitka with equality.

Conclusion

For the reasons set out in this memorandum, the court should declare that the proposed initiative submitted by SRG is sufficient under relevant law and allow the citizens of Sitka to vote on the proposed initiative

DATED this 24th day of August, 2012 at Juneau, Alaska.

LAW OFFICE OF
JOSEPH W. GELDHOF

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Joseph W. Geldhof
Alaska Bar # 8111097

CERTIFICATION
I certify that on August 24, 2012
a copy of this document was sent to
the City and Borough of Sitka
Municipal Attorney via FAX transmission
at: (907) 747-7403. An additional
copy of this document and the proposed
Order was sent to Michael Gatti,
Counsel for the City and
Borough of Sitka at: (907) 276-5093.

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Joseph W. Geldhof