



CITY AND BOROUGH OF SITKA

A COAST GUARD CITY

MUNICIPAL CLERK'S OFFICE
100 Lincoln Street | Sitka, Alaska 99835
www.cityofsitka.com
clerk@cityofsitka.org
907-747-1811

September 29, 2023

VIA EMAIL AND REGULAR MAIL

Lawrence (Larry) T. Edwards
PO Box 6484
Sitka, AK 99835
larry@ltedwards.com

John C. Stein
2330 Sawmill Creek Rd
Sitka, AK 99835
john.c.stein@gmail.com

Re: Application for an Initiative Petition Limitation of Cruise Visitation in Sitka

Dear Mr. Edwards and Mr. Stein:

Your initiative petition was filed in person, with the Municipal Clerk's office, on September 15, 2023. That application seeks to call for an initiative petition limiting cruise visitation in Sitka.

Find attached the Notice of Determination for your application for an initiative petition.

Please contact me if you have questions. Thank you.

Sincerely,

Sara Peterson, MMC
Municipal Clerk

SP/ml

Cc: Brian Hanson, Municipal Attorney
John Leach, Municipal Administrator
Amy Ainslie, Planning Director
Mayor and Assembly Members

NOTICE OF DETERMINATION

Application for an Initiative Petition Limitation of Cruise Visitation in Sitka

I, the undersigned, the duly chosen, qualified Municipal Clerk of the City and Borough of Sitka, Alaska, and keeper of the records of the Assembly, **DO HEREBY CERTIFY:**

That an application for an initiative petition was filed with the Municipal Clerk on September 15, 2023;

That said application for an initiative petition seeks to limit cruise visitation in Sitka;

That said application for an initiative petition contains the signatures and residence addresses of 43 registered City and Borough of Sitka voters who will sponsor the petition;

That said application for an initiative petition contains the name and address of the prime sponsor: Lawrence (Larry) T. Edwards, P.O. Box 6484, Sitka, Alaska; and the name and address of the alternate sponsor: John C. Stein, 2330 Sawmill Creek Road, Sitka, Alaska;

That said application for an initiative petition contains the full text of the ordinance to be initiated;

That said ordinance is an impermissible appropriation of a public asset under Art. XI, Sec. 7, of the Alaska Constitution, and is legally insufficient under AS 29.26.110(a)(4), because it would be unenforceable as a matter of law, for those reasons stated in the attached memorandum from Municipal Attorney Brian E. Hanson, dated September 29, 2023, which is hereby incorporated by reference.

THEREFORE, I find that the application for an initiative petition filed on September 15, 2023 does not meet the requirements for an initiative petition set forth in AS 29.26.110, and an initiative petition will not be prepared.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City and Borough of Sitka this 29th day of September, 2023.



Sara Peterson, MMC
Municipal Clerk



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LEGAL DEPARTMENT

100 Lincoln Street | Sitka, Alaska 99835

www.cityofsitka.com

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907-747-1810

MEMORANDUM

To: Sara Peterson, Municipal Clerk

From: Brian E. Hanson, Municipal Attorney

Date: September 29, 2023

Subject: Application for Initiative Petition
entitled "Limitation of Cruise Visitation in Sitka" submitted September 15,
2023

Madam Clerk,

You have asked me to review an application for an initiative petition submitted by Larry Edwards, entitled "Limitation of Cruise Visitation in Sitka." which was received by your office on September 15, 2023. Because the proposed ordinance submitted with the application constitutes an impermissible appropriation under the Alaska constitution and contains enforcement provisions that are confusing, misleading, and incomplete, I recommend that you decline to certify the application.

I. The proposed initiative ordinance

The ordinance proposed by this ordinance would enact a new chapter in the zoning (land use) regulations of the Sitka General Code (SGC). The proposed ordinance establishes a port district, which essentially overlaps all other districts in the zoning regulations that are served by the Sitka road system, and limits the daily, weekly, and annual numbers of persons who disembark to the port district from certain cruise ships. The proposed ordinance regulates through a permit and scheduling system administered by municipal staff and applicable to the permittees, i.e., cruise ships which make port calls to Sitka. The proposed ordinance provides for: limits on visitation ashore by cruise passengers and crew; permit requirements for cruise ships making port calls; administration of scheduling; administration of permits; administration of the collection of cruise visitation data; and enforcement of permits and cruise visitation scheduling.

II. Analysis

Under Article VI, Section 6.01, of the Home Rule Charter of the City and Borough of Sitka (CBS): "The powers and rights of the initiative and referendum are reserved to the

people of the municipality as prescribed by law.” The Assembly, by ordinance, is tasked with the responsibility of regulating initiative procedures, subject to the requirements that an initiative must be signed by at least 20% of the number of qualified municipal voters who voted in the last regular election and that the petition be submitted at least 40 days prior to the election.

Under Section 2.40.040.B of the SGC, an initiative petition must:

1. *Embrace only a single comprehensive subject; and*
2. *Set out fully the ordinance or resolution sought by the petition; and*
3. *State upon the petition, when circulated, the date of first circulation of the petition, the name of the petitioner and where he/she can be reached; and*
4. *Contain the statements, when circulated, that the signatures on the petition must be secured within ninety days from the date of the first circulation and that all signators are qualified voters in the municipality; and*
5. *Have the required number of signatures as set out in the Charter, spaces for each signature, the printed name of each signer, the date each signature is affixed, the residence and mailing addresses, and one of the following identifiers: Voter ID number, Social Security number, or birth date of each signer; and*
6. *A statement, with space for the sponsor’s sworn signature and date of signing, that the sponsor personally circulated the petition, that all signatures were affixed in the presence of the sponsor, and that the sponsor believes the signatures are those of the persons whose names they purport to be; and*
7. *Signers must be qualified voters in the municipality; and*
8. *Space for indicating the total number of signatures on the petition.*

The Alaska Statutes (AS) also address the initiative process at the municipal level. AS 29.26.110 provides that an application for an initiative petition must be signed by at least ten voters who will sponsor the petition and the municipal clerk must certify the application if the clerk finds that the application is in **proper form** and the matter is **legally sufficient** in that the proposed ordinance (emphasis added):

- (1) is not restricted by AS 29.26.100;*
- (2) includes only a single subject;*
- (3) relates to a legislative rather than to an administrative matter; and*
- (4) would be enforceable as a matter of law.*

A. Form of application

I have not conducted a review of the application as to form or signature sufficiency. I presume you will perform that function.

B. Legal sufficiency of proposed ordinance

1. The proposed ordinance is restricted by AS 29.26.100.

AS 29.26.100 provides: “[t]he powers of initiative and referendum are reserved to the residents of municipalities, except the powers do not extend to matters restricted by art. XI, sec. 7 of the state constitution.” Also, AS 29.10.030(c) provides: “[a] charter may not permit the initiative and referendum to be used for a purpose prohibited by art. XI, sec. 7 of the state

constitution.” Under Article XI, Section 7, of the Alaska Constitution, an initiative may not be used to “dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation” (emphasis added). A municipal clerk has the discretion to reject an application for initiative petition if she/he determines it “violates any of the[se] liberally construed restrictions on initiatives,” and the courts may review the clerk’s decision right away.¹

The only restriction at issue is whether the proposed ordinance is an “appropriation”. An initiative proposes to make an appropriation if it “would set aside a certain specified amount of money or property for a specific purpose or object in such a manner that it is executable, mandatory, and reasonably definite with no further legislative action.”² Although appropriation is often understood to refer to money, an initiative setting aside land, or any other type of government property, may also be an appropriation.³

The proposed ordinance which establishes a port district in the zoning maps of the CBS is an impermissible appropriation of a public asset, i.e., the streets and land owned by the CBS within the port district. The Assembly, and only the Assembly, retains control over the allocation of these public assets among competing needs.⁴ “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.”⁵

The Alaska Supreme Court has adopted a two-part test for determining whether an initiative 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 where the initiative would have that effect, we have looked to the “two core objectives” of the

¹ *Alaska Action Center, Inc. v Municipality of Anchorage*, 84 P.3d 989, 992 (Alaska 2004) (citing *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003) and *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999)).

² *Alaska Action*, 84 P.3d at 993 (citing *City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, 1157 (Alaska 1991)).

³ *Alaska Action*, 84 P.3d at 993 (citing *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979)(land) and *Pullen v. Ulmer*, 923 P.2d 54, 63 (Alaska 1996)(wild salmon)).

⁴ *Alaska Action*, 84 P.3d at 994.

⁵ *Pullen*, 923 P.2d at 58 (citations omitted).

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. 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 “ensur[ing] that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs.” (emphasis added)⁶

The proposed ordinance amounts to a zoning text amendment (a change to the text of Title 22 of the SGC) and a zoning map amendment (a change to the official zoning maps of the CBS). SGC 22.30.380 regulates amendments to the zoning text and zoning maps. Section A describes how amendments may be initiated:

- A. *Initiation of an Amendment. An amendment to the zoning code or other official controls may be initiated by:*
 1. *The assembly requesting the planning commission to set the matter for hearing and recommendations.*
 2. *The planning commission with the concurrence of the administrator.*
 3. *One or more property owners directly affected by a proposal through a petition to the city.*
 4. *Citizen advisory committees or organizations through a petition to the city.*
 5. *The municipal administrator or his designee*

The proposed ordinance is an invalid means of initiating zoning amendments under SGC 22.30.380.A. Further, SGC 22.30.380.E. states: “Amendments to the development regulations or other official controls shall be adopted by the Assembly by ordinance after a public hearing on the planning commission’s recommendations”. The proposed ordinance usurps the authority of the Assembly to make zoning amendments by ordinance and usurps the right of the Planning Commission to review and make recommendations on those amendments.

Applying the above test for determining whether an initiative constitutes an appropriation to the proposed ordinance, it is my opinion that the initiative takes control of a public asset from the Assembly among competing needs. The clear effect of the proposed ordinance is to allow the voters to control public land with a zoning text amendment and zoning map amendment. This usurps the authority and control provided to the Assembly by law.

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

The zoning changes proposed by the proposed ordinance violate the Alaska constitution because it has the effect of making an appropriation of public assets and because it interferes with the Assembly's exclusive ability to control public assets among competing issues. Therefore, the proposed ordinance fails to satisfy AS 29.26.110(a)(1).

2. The proposed ordinance includes only a single subject.

The proposed ordinance pertains to a single subject, the limitation of cruise visitation in Sitka. Therefore, the proposed ordinance satisfies AS 29.26.110(a)(2).

3. The proposed ordinance relates to a legislative rather than administrative matter.

The proposed ordinance relates to a legislative rather than administrative matter. "The purpose of the administrative exclusion is to avoid crippling a previously enacted policy."⁷ Most recognized tests for distinguishing legislative from administrative proposals look to the temporal lengths of the policy, whether the initiative deals with an overall policy, rather than a small segment of an existing policy, and whether it establishes a new law or policy. Here, the proposed ordinance would limit cruise visitation in Sitka. This is an overall policy established by new law. Therefore, the proposed ordinance satisfies AS 29.26.110(a)(3).

4. The proposed ordinance would not be enforceable as a matter of law.

AS 29.26.110(a)(4) prohibits ordinances that are unenforceable as a matter of law. The Alaska Supreme Court has adopted a "differential attitude toward initiatives"⁸ and "construe voter initiatives broadly so as to preserve them whenever possible."⁹

(a) Constitutionality

"There is a presumption of constitutionality which attaches to statutes and rules."¹⁰ "It basically follows from this presumption that a clerk must presume an initiative to be constitutional absent clear authority establishing its invalidity."¹¹

⁷ *Swetozof v. Philenanoff*, 203 P.3d 471, 481 (Alaska 2009).

⁸ *Yute Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985)

⁹ *Hughes v. Treadwell*, 341 P.3d 1121, 1125 (Alaska 2015)

¹⁰ *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003).

¹¹ *Id.*

The Alaska Supreme Court has long recognized that when initiative petitions meet formal requirements for filing, the laws they propose to adopt are ordinarily not subject to immediate challenge: “The general rule is that a court should not determine the constitutionality of an initiative unless and until it is enacted.”¹² There are two exceptions to this general rule. First, where the initiative is challenged on the basis that it does not comply with the state constitutional and statutory provisions regulating initiatives, courts are empowered to conduct pre-election review. Second, courts are also empowered to conduct pre-election review of initiatives where the initiative is clearly unconstitutional or clearly unlawful.¹³ When challenges are grounded in general contentions that the provisions of an initiative are unconstitutional the “[municipal clerk] may only reject the measure if ‘controlling authority’ leaves no room for argument about its unconstitutionality.”(emphasis added)¹⁴ Absent controlling authority, the court should not decide this type of challenge until the initiative has been enacted by the voters.¹⁵

Stakeholders are claiming that the proposed ordinance is unconstitutional on numerous grounds, including, but not limited to: Privileges and Immunities Clause (“right to travel”)(Art. IV, Sec. 2, U.S. Constitution); Due Process Clause (14th Amendment, Sec. 1, U.S. Constitution); Takings Clause (5th Amendment, U.S. Constitution); Commerce Clause (5th Amendment, U.S. Constitution); Supremacy Clause (“federal preemption”)(Art. VI, U.S. Constitution); Contract Clause (Art. I, Sec. 10, U.S. Constitution); Tonnage Clause (Article I, Sec. 10, U.S. Constitution). The stakeholders threaten that certification of the proposed ordinance will result in a legal challenge, with that legal challenge not in the best interest of the CBS, nor the tourism industry. The stakeholders apparently desire that the issues raised by the proposed ordinance be left to Assembly review which would consider the interests of the tourism industry, stakeholders, and the community.

I can find no “controlling authority” as to the constitutionality of the proposed ordinance. The numerous claims that the proposed ordinance violates the Federal constitution are legitimate and arguable. However, there appears to be no “controlling authority” that leaves no room for argument about its unconstitutionality. There appears to be no factually similar case – no case on point – which is conclusive about unconstitutionality.

¹² *Alaskans for Efficient Government, Inc. v. State*, 153 P.3d 296, 298 (Alaska 2007)(citing *State v. Trust the People*, 113 P.3d 613, 614 n.1 (Alaska 2005))

¹³ *Id.*

¹⁴ *Alaska Action*, 84 P.3d at 992 (citing *Mahoney*, 71 P.3d at 900)

¹⁵ *Id.*

The only case I can find that has the potential to become “controlling authority” is a pending case in the U.S. District Court for the District of Maine entitled *Association to Preserve and Protect Local Livelihoods v. Town of Bar Harbor*.¹⁶

Apparently, the ordinance enacted by initiative petition in the *Bar Harbor* case is the model for the proposed ordinance in this matter. The facts here are remarkably similar in the *Bar Harbor* case, making the *Bar Harbor* case a likely case on point. However, no decision has issued in the *Bar Harbor* case. The *Bar Harbor* case was tried in July 2023 and post-trial briefs have been filed or will be filed soon. I understand a decision is expected by no later than the end of this year. That decision could be the “controlling authority” for a determination by you as to the constitutionality of the proposed ordinance. But, under these circumstances of no existing “controlling authority”, you should presume the proposed ordinance to be constitutional. Therefore, in this respect, the proposed ordinance satisfies AS 29.26.110(a)(4).

(b) Confusing, misleading, and incomplete enforcement provisions

The proposed ordinance must be reviewed to consider its legal sufficiency, and it must be worded carefully enough to be enforced. Initiatives must be drafted clearly enough so that the voters know what they are voting on and so future disputes over the initiative’s meaning are avoided.¹⁷

Here, the enforcement provisions of the proposed ordinance are confusing, misleading, and incomplete. On its face, the proposed ordinance is incomplete as proposed Section 22.26.090.C states “[b]y initiative measure, the people of Sitka ask the assembly to consider determining appropriate fines and penalties specific to violations of this chapter.” If not expressly, this section implies the proposed ordinance is incomplete as to enforcement. This section goes on to state that the existing code sections referenced for enforcement, i.e., 22.30.290 and .300, “appear to fall far short of countering potential financial gains if there are intentional violations, and fines and penalties should be at levels which condone or encourage such violations.” This language not only unveils the incompleteness of the proposed ordinance, it renders the enforcement provisions of the proposed ordinance confusing and misleading. Should the ordinance be enforced with existing code, which the sponsors admit is inadequate, or with future code adopted by a future assembly? In this sense, the voters won’t know what they are voting on. There is sure to be future disputes over enforcement, including when determining fines and penalties and the applicability of existing enforcement provisions in the zoning code.

¹⁶ Civil Action No. 1:22-cv-416-LEW.

¹⁷ See *Citizens for Implementing Medical Marijuana v. Municipality of Anchorage*, 129 P.3d 898, 901 (Alaska 2006); see also *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1215 (Alaska 1993); See also *Sitkans for Responsible Government v. City & Borough of Sitka*, 274 P.3d 486, 494 (Alaska 2012).

To add to the confusion, proposed subsection B of 22.26.090 provides that existing enforcement provisions of the zoning code “are applicable unless they are clearly inapplicable to the purpose, intent, regulations, permits or schedule of this chapter and cannot be construed to apply.” The only thing clear about that provision is that it will undoubtedly create future disputes over its meaning and the applicability of the existing provisions of the zoning code.

In my opinion the enforcement provisions of the proposed ordinance are confusing, misleading, and incomplete; and, consequently, unenforceable as a matter of law.¹⁸ Therefore, in this respect, the proposed ordinance fails to satisfy AS 29.26.110(a)(4).

III. Conclusion

For the foregoing reasons, I recommend you reject the application for the initiative petition.

Sincerely,



Brian E. Hanson

BEH/ml

¹⁸ In addition, the purpose section of the proposed ordinance contains a significant number of political and legal opinion statements that do not specifically address what the proposed ordinance does and, therefore, is misleading. An initiative may be rejected if the purpose sections are misleading. *Faipeas v. Municipality of Anchorage*, 129 P.2d 1214, 1215 (Alaska 1993).