

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

November 9, 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 October 25, 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,

A handwritten signature in blue ink that reads "Sara Peterson".

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 October 25, 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 41 registered City and Borough of Sitka voters who will sponsor the petition;

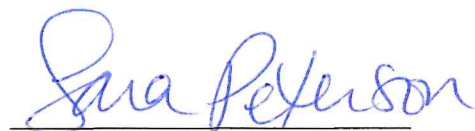
That said application for an initiative petition contains the name and address of the prime sponsor: Lawrence (Larry) T. Edwards, P.O. Box 6484, Sitka, Alaska; and the name and address of the alternate sponsor: John C. Stein, 2330 Sawmill Creek Road, Sitka, Alaska;

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

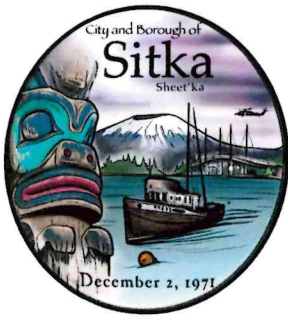
That said ordinance is legally insufficient under AS 29.26.110(a)(4), because it would be unenforceable as a matter of law, for those reasons stated in the attached memorandum from Municipal Attorney Brian E. Hanson, dated November 9, 2023, which is hereby incorporated by reference.

THEREFORE, I find that the application for an initiative petition filed on October 25, 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 9th day of November, 2023.



Sara Peterson, MMC
Municipal Clerk



CITY AND BOROUGH OF SITKA

A COAST GUARD CITY

LEGAL DEPARTMENT

100 Lincoln Street | Sitka, Alaska 99835

www.cityofsitka.com

legal@cityofsitka.org

907-747-1810

MEMORANDUM

To: Sara Peterson, Municipal Clerk

From: Brian E. Hanson, Municipal Attorney

Date: November 9, 2023

Subject: Application for Initiative Petition (the “Second Application”) entitled “Limitation of Cruise Visitation in Sitka”, submitted October 25, 2023

Madam Clerk,

You have asked me to review the Second Application for an initiative petition submitted by Larry Edwards, entitled “Limitation of Cruise Visitation in Sitka,” which was received by your office on October 25, 2023. Because the proposed ordinance submitted with the Second Application contains provisions that are confusing, misleading, and incomplete, I recommend that you decline to certify the application.

I. The proposed initiative ordinance

This is the second application for an initiative petition submitted by Mr. Edwards seeking to limit cruise visitation in Sitka. The first application was submitted on September 15, 2023 (the “First Application”), and rejected by you, in consultation with me, on September 29, 2023. Instead of creating a “port district” which overlays public lands within the City and Borough of Sitka (“CBS”) as the First Application attempted, the Second Application proposes an ordinance which imposes daily, weekly, and annual caps on cruise visitors to Sitka without changing the zoning text or zoning map. The proposed ordinance establishes a regulatory system that requires CBS staff to develop and maintain a cruise visitation schedule and permit system with the cruise lines and port facilities (private and public). In addition, the proposed ordinance imposes duties on cruise ships and port facilities (private and public) to collect and report “data”. The proposed ordinance provides for enforcement of permits, cruise visitation scheduling, and data requirements.

II. Analysis

Under Article VI, Section 6.01, of the Home Rule Charter of the 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 Sitka General Code (“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 not 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 that appears 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 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

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).

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 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

Applying the above test for determining whether an initiative constitutes an appropriation, it is my opinion that the initiative doesn’t take control of a public asset from the Assembly. Rather, the proposed ordinance is a regulatory system of public and private assets, i.e., cruise lines and port facilities, that doesn’t usurp the authority of the Assembly to materially control the public assets. The property ordinance doesn’t “give-away” public assets, nor does it relinquish “control” over public assets. Rather, it permissibly regulates by imposing duties on cruise lines and port facilities to comply with visitor caps, obtain permits, and collect and report data.

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).

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

⁷ *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)).

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

Like the First Application, the constitutionality of the Second Application is at issue. See my analysis in the First Application. I continue to assert there is no “controlling authority” as to the constitutionality of the proposed ordinance. The numerous claims by stakeholders that the proposed ordinance violates the federal and state constitutions continue to be legitimate and arguable. However, there appears to me to be no “controlling authority” that leaves no room for argument about its unconstitutionality. As I pointed out in my analysis of the First Application, there appears to me to be no factually similar case – no case on point – which is conclusive about unconstitutionality. Under these circumstances of non-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 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.¹⁰

Here, certain provisions of the proposed ordinance are confusing, misleading, and incomplete as follows:

(1) Under proposed SGC 25.01.030(A)(2), the application of daily caps, in the context of satisfying the intent of “equal opportunity among applicants” under proposed SGC 25.01.040(B)(2) (emphasis added), is confusing, misleading, and incomplete. The stated goal under proposed SGC 25.01.040(B)(2) is for the department(s) to take “reasonable care” that “early applicants, or cruise lines with larger vessels or large fleets of vessels, won’t preempt an equal and fair opportunity for others to secure pre-season approval, for spots on the schedule which suit them” (emphasis added). There is no direction on how to satisfy these goals, nor is there criteria/standards for administration of these goals. There are no specified costs or bids for obtaining the permits. There are no specified criteria/standards for issuing permits. There are no specified criteria/standards for scheduling daily caps among the various daily cap limits. How

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 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).

do the department(s) decide what daily caps to apply to each day of the week? The proposed code recites platitudes like “reasonable effort,” “even-handed,” “encourage a collaborative effort,” and “fair shot,” without providing specifics or direction. The only approach available appears to be “first come, first served,” which clearly doesn’t provide “equal opportunity among applicants.”

(2) Under proposed SGC 25.01.050(A) and (B), the Planning Department is charged with crafting permits for cruise ships and port facilities necessary to ensure compliance with the “persons ashore” caps. However, the eligibility for those permits and the duties under those permits are not worded carefully enough to be enforced. This section recognizes that “[a] permit system is needed” but gives no specifics or direction as to what that permit system should be. The proposed code merely summarily states “[t]he permits shall be written to be enforceable”. The voters don’t know what kind of permit system they are voting on and, surely, there will be future disputes over the permit system.

(3) Proposed SGC 25.01.050(C) and SGC 25.01.060(A)(3)-(5) and (B)(2)-(5) requires that “data” be collected and reported by the permittees. Although the “data” required to be collected and reported appears adequately specified, it is confusing, misleading, and incomplete as to the responsibilities between the permittees. It appears port facilities have the duty to collect and report when the cruise lines are “not prepared to do so” (emphasis added). It is ambiguous as to what is meant by “not prepared to do so”. Can the cruise lines refuse without cause or must they show cause? Who makes the determination? These proposed code sections also put dual responsibility on the cruise ships and the port facilities to report all “data”. The proposed code fails to direct the permittees what to do if there is conflicting “data” and whose responsibility it is, if any, to reconcile those differences.

(4) Under proposed SGC 25.01.080(A) and (B), port calls are barred by ships failing to obtain the required permit or a third offense for exceeding its authorized “persons ashore” during a port call. These enforcement provisions are contradictory with proposed SGC 25.01.070 which prohibits interference with disembarkation and embarkation of seafarers and passengers. On one hand, as an enforcement mechanism cruise ships are barred from making port calls. On the other hand, the proposed code says there will be no interference with seafarers and passengers from coming ashore. Clearly, the voters won’t know what they’re voting on and future disputes over the meaning of this proposed code is likely.

(5) Under proposed SGC 25.01.080(C), fines are imposed for “failing to collect and/or report required accurate data or . . . accurately segregate data”. Both cruise ships and port facilities have the duty to collect and report data. However, if there is any inconsistency between the reported data, it is unclear who is responsible to reconcile the inconsistency, and how. Further, it is unclear whether these inconsistencies could and should be treated as violations. There are no provisions for correcting minor/clerical errors, or allowance for corrective action, before it is determined that a violation has occurred.

(6) Under proposed SGC 25.01.080(E), the code provides “[i]f it is determined that the reporting of data is or may be fraudulent, the matter shall be referred to an appropriate prosecutor”. This provision is confusing, misleading, and incomplete in many ways. Who makes the determination? What criteria/standards should be applied to determine whether the data is or may be fraudulent? Is “may be fraudulent” an appropriate standard to forward to a

prosecutor? What due process is afforded the accused? Who is an “appropriate prosecutor”? This section is not worded carefully enough to be enforced.

In my opinion, the above listed provisions of the proposed ordinance are confusing, misleading, and incomplete; and, consequently, unenforceable as a matter of law.¹¹ 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

¹¹ 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).