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NO. 93522-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

**IN THE MATTER OF THE RECALL OF MARC BOLDT, Clark
County Councilor; JEANNE STEWART, Clark County Councilor;
and JULIE OLSON, Clark County Councilor.**

Reply Brief of Appellant

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I. ARGUMENT

A. Standard of Review and Burden of Proof Regarding Requirements of Recall Statement of Charges

Courts are not to attempt to evaluate the truthfulness of the charges in a recall petition. In re Recall of Beasley, 128 Wn.2d 419, 427, 908 P.2d 878 (1996). Rather, the court's function is limited to evaluating the legal and factual sufficiency of the charges. In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 764, 10 P.3d 1034 (2000). An appellate court reviews the trial court's ruling de novo and applies "the same reviewing criteria as the superior court." Id.

A recall action under RCW 29A.56.110 must allege an official has committed an act or acts of malfeasance, or an act or acts of misfeasance while in office, or has violated the oath of office. RCW 29A.56.110. "Misfeasance" or "malfeasance" in office means any wrongful conduct that affects, interrupts, or interferes with the performance of official duty. RCW 29A.56.110(1). Additionally, "misfeasance" in office means the performance of a duty in an improper manner; and "malfeasance" in office means the commission of an unlawful act. RCW 29A.56.110(1)(a)-(b). "Violation of the oath of office" means the neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law.

Where commission of an unlawful act is alleged, the petitioner is required to demonstrate that the official intended to commit the act but

also that the official intended to act unlawfully. **Pearsall-Stipek**, 141 Wn.2d at 765.

The superior court is to consider only the sufficiency of the charges and not the truth of the charges. RCW 29A.56.140. The voters, rather than the court, consider the truth of the charges if the recall proceeds to the ballot. **In re Recall of West**, 155 Wn.2d 659, 662, 121 P.3d 1190 (2005). Further, the court is not to consider the motives of the persons filing the charges. **Janovich v. Herron**, 91 Wn.2d 767, 592 P.2d 1096 (1979).

“Charges are factually sufficient to justify recall when, ‘taken as a whole they ... state sufficient facts to identify to the electors and to the official being recalled acts or failure to act which without justification would constitute a prima facie showing of misfeasance.’” **West**, 155 Wn.2d at 665 (quoting **Chandler v. Otto**, 103 Wn.2d 268, 693 P.2d 71 (1984)). “Voters may draw reasonable inference from the facts; the fact that conclusions have been drawn by the petitioner is not fatal to the sufficiency of the allegations.” **Id.** The inferences must be supported by facts set forth in the statement of charges or supporting documentation. **In re Recall of Carkeek**, 156 Wn.2d 469, 128 P.3d 1231 (2006).

The recall statutes do not require the petitioner to have firsthand knowledge. **In re Recall of Reed**, 156 Wn.2d 53, 58, 124 P.3d 279

(2005). The ultimate questions are whether the voters are provided with sufficient information to evaluate the charges and whether the proponent has a basis in knowledge of the charges. In re Recall of Carey, 132 Wn.2d 525, 527, 939 P.2d 1221 (1997).

To be legally sufficient, the charges must clearly state conduct that, if true, would constitute misfeasance, malfeasance or a violation of the officer's oath of office. Beasley, 128 Wn.2d at 426.

B. A dispute of fact exists which requires the voters, not the court, to determine whether the targets of the recall knowingly met in violation of the OPMA and directed the County Manager to institute an investigation of Councilor Madore.

Respondents Boldt, Stewart and Olson ask this Court to rely solely on their most recent incantation of their version of events as stated in their attorney-drafted declarations rather than their unscripted statements made in the public meeting on April 20, 2016 where the Dean Contract was discussed by the Board. A fair review of the statements made in that meeting clearly contradict the later statements of the Respondents and would allow voters to conclude that the Respondent Councilors both violated, and intended to violate, the Open Public Meetings Act ("OPMA").

Before reviewing what was said during that April 20 meeting, it should be pointed out what was **not** said in the declarations of the

Respondents. Numerous times in the Respondents' Brief, Respondents argue "the county manager did not discuss the Dean contract with any members of the Board prior to executing the contract." See, Respondents' Brief at 7, citing to CP 519. But the declarations of County Manager McCauley and the Respondents do not actually say that. Each of the declarations of the Respondents do not indicate that there was no discussion of the Dean Contract. Rather, each of the Declarations say only that there was no discussion of "the scope" of the Dean Contract. CP 519, 515, 511, 507 (emphasis added). Indeed, the sworn testimony is carefully crafted and not accurately reflected throughout Respondent's Brief. Not discussing "the scope" of a contract is a far cry from discussing or directing that some contract be entered into and simply leaving the details up to the manager.

Moreover, review of the transcript from the April 20, 2016 meeting reveals a much more believable version of what actually transpired and dramatically conflicts with the Respondents' later-drafted and self-serving declarations that were prepared for the instant litigation. The thrust of the Respondents' argument is that there was no direction by the Respondents that the Dean Contract should be entered into and that it was Manager McCauley who acted *sua sponte* in hiring Dean.

This theory conflicts, however, with what Councilors Stewart, Boldt and Olson actually said during the April 20 meeting. Respondent Stewart stated during the April 20 meeting, “Well, [the hiring of an investigator] was an executive session item, and due to the sensitive nature, my assumption was that in an executive session on an emergency legal item that we could have a discussion **and reach an agreement that we would enter into a contract with an independent person to do research and prepare an investigative report** so we would know how to move forward.” CP 191 (emphasis added). Clearly, such a statement contradicts her later declaration.

Moreover, this was not a misstatement by Respondent Stewart because she reaffirms this position several minutes later saying, “[t]his is exactly the kind of thing we need legal counsel to work with us on, and we don’t have a legal counsel because he—he’s involved in the matter, that we have had to go to the outside, independent person to get an independent report to develop the facts. **And this is exactly what my concern was yesterday when we approved the contract**”. CP 194 (emphasis added). Notably, however, the Board Minutes from the April 19, 2016, meeting are devoid of any indication that such a contract was approved and notably, neither is there any indication in the April 19

minutes that the Board even went into executive session. See, <https://www.clark.wa.gov/sites/all/files/the-grid/041916Minutes.pdf>.

Moreover, Councilor Stewart was not alone in her conclusion that a contract had, in fact, been approved by a majority of the Board. Councilor Boldt's recollection, however, is that the approval was done in open session—perhaps to save Councilor Stewart from her apparent admission several minutes earlier that there had been an unnoticed executive session. Boldt states, “Well, we have talked about this investigation for a month or more. **We’ve all agreed—it was in open session, because there was really no use to have an executive session, I remember on this matter, so it was held in open session. We all said it needed to be—at least three of us said it needed to be investigated.** We needed to hire a contract, and it needed to be confidential. That is exactly what [County Manager] Mark [McCauley] did.” CP 195.

Even the Chief Civil Deputy Prosecutor (who strangely was advising the Board given he was one of the subjects of Councilor Madore's allegations) agreed that the Dean contract had been authorized. He states, “the Ordinance also doesn't require [the Dean Contract] to be pre-approved by the Board, and **it was pre-approved.**” CP 199 (emphasis added).

But notably, these statements contradict not only the later statements contained in the Declarations of the Respondents—i.e. that they did not instruct Manager McCauley to enter into a contract to investigate Councilor Madore—but also contradict the Board’s minutes that discuss whether an investigation should be undertaken. The minutes of the March 1, 2016 meeting state: “Chris Horne, Deputy Prosecuting Attorney, spoke about the recent concerns raised by Councilor Madore and asked for guidance from the Board on whether an independent investigation needed to be conducted. Further discussion ensued. **Chair Marc Boldt, Councilors Stewart and Olson stated no investigation was needed.** Councilor Madore stated he wanted an investigation.” CP 404 (emphasis added). The only other reference to an investigation in the Board’s minutes occurred on March 9, 2016 where it was still noted as an open topic. CP 157.

Councilor Madore’s statements in the April 20 meeting likewise indicated that he himself was unaware of any decision by the Board to direct McCauley to hire an investigator. This, of course, is probative of the Respondents meeting in secret to direct McCauley to enter into a contract to investigate Madore. The following interaction sheds light on what the positions of the parties were:

Councilor Madore: Well, it's that we need to follow process, and we can't somehow skip the process or short-circuit the process because somehow there's a—on a mutual understanding. We need to conduct the County's business according to Code in open public meetings, and if there are exceptions, that we should somehow understand what those exceptions are. We shouldn't find out that something happened in a newspaper when it should have been happening here in an open meeting.

Chairman Boldt: Okay. Very good.

Councilor Mielke: And that could be that we agree with that.

Chairman Boldt: Yep. Okay.

Councilor Stewart: And there is a provision for that, which is legal matters, pending legal matters. There are exceptions to that rule.

Councilor Mielke: I think we're in agreement that we should try to follow Code.

Chairman Boldt: Okay, yeah. Very good. Moving on.

Councilor Madore: I am not done. I'm not done. Chris Horne, you mentioned—you said it was pre-approved, and my assertion is that it was not pre-approved. This Board—

Councilor Olson: It was pre-approved by this Board.

Councilor Madore: The minutes would say so, and they don't say so.

Councilor Olson: We don't take minutes in executive session.

Councilor Madore: No, I'm not—and neither do we take action in executive session. I would assume that you are not referring to an executive session.

Mr. Horne: I am not sure that I used the word pre-approved.¹ I said this contract did not follow the normal practice that the Code contemplated because **the Board discussed it and approved the**

¹ In fact, Mr. Horne did use the word "pre-approved". CP 199.

execution of the agreement by a vote that I think—actually, if there was any opposition to the vote, I think it was Councilor Mielke who thought that it was unnecessary and that nothing good would come out of it, and they had concerns about the employees. And so if there was anybody who voted no, I think it was Councilor Mielke maybe, but I know that the other four members, including yourself, specifically voted in favor of going forward with this investigation and that you supported that. So whatever term you use, you voted for it. Beyond that—well, I hope I answered your question.

CP 201-203 (emphasis added).

So what the Respondents now argue—that Manager McCauley acted independently with no direction—is not supported by the record and, in fact, contradicts the record. Indeed all three of the Respondent Councilors contemporaneously stated that they had authorized the investigation and this was confirmed by Deputy Prosecutor Horne.

Why then is there such a disconnect between these statements and the declarations of the Respondents that were made for this litigation? Which statements are to be believed: the statements that were made virtually contemporaneously with the hiring of Dean or the ones made months later solely for the purpose of litigation?

Indeed the Declarations of Appellant and Councilor Madore each indicate that no discussion of the Dean Contract took place with them—despite the statements to the contrary by Respondents during the April 20, 2016 meeting. The Appellant declares in his Declaration, “[t]he hiring of

Rebecca Dean was never discussed by the BOCC, either in an open meeting, executive session or special session **that I was informed of**. At most, we had a discussion about hiring an outside investigator to look into Councilor Madore's allegations against Community Planning Director Oliver Orjiako, Deputy Prosecutors Chris Horne and Christine Cook." Suppl. CP 9 (emphasis added).² Likewise, Councilor Madore, in his Declaration states that the discussions concerning the hiring of an outside investigator "were very preliminary and did not result in a final action or consensus on what the scope of the investigation would entail or who might perform the investigation." Suppl. CP 2.

What reconciles these very different versions presented by the five councilors as to what the circumstances were with hiring Dean is the logical, and supportable, conclusion that there were very general discussions about the merits of the investigation and that the Respondent Councilors then met in secret and decided to direct McCauley to hire Dean to investigate Councilor Madore. This explanation would reconcile the documentary record with the contemporaneous statements made by the Respondents and would be supported by the Declarations of Appellant and Councilor Madore. The current version of facts proposed by Respondents

² "Supp. CP" refers to the Supplemental Clerk's Papers as numbered by this Court on October 19, 2016.

cannot be reconciled with the record including their own contemporaneous, and contradicting, Declarations.

Respondents argue that a contract such as the Dean Contract need not be approved by the Board because it allegedly is within the statutory authority of the Manager to enter into such contracts. Respondents' Brief at 7-8, citing Clark County Charter 3.2(B)(7). This is a red-herring of an argument because the Charter is not as expansive as the Respondents argue. All that Section 3.2(B)(7) states is that the county manager may "sign or cause to be signed on behalf of the county all deeds, contracts and instruments not specifically assigned by the charter or ordinance." CP 115. So what this clause really states is that the manager is designated to be the one to execute contracts on behalf of the County when it is not specified that another has the authority to so execute contracts—it does not vest independent authority to the Manager to decide to enter into contracts such as the Dean Contract.

In fact, reliance on the Charter would indicate that a manager would know that he did not have authority to independently call for an investigation of a Councilmember without approval from the Board for at least two reasons. First, it is the Board itself, which is responsible for enacting its own operating rules. See Charter section 2.6. CP 113. Second, and more importantly, the Charter admonishes the different

branches of Clark County Government not to interfere with other branches. Charter section 1.5 states “Each branch is to dutifully fulfill its responsibilities, and shall not extend its authority into the other branch, as defined by this Charter.” CP 112.

Moreover, just from a logical standpoint, the idea that a Manager who serves at the pleasure of the Board would go out on a limb and—by himself—order an investigation into one of his five bosses if he did not know he had the approval of a majority of the Board is not credible and makes no sense.

The question thus boils down to whether or not a reasonable person viewing the record could differ as to whether the Respondents knowingly violated the OPMA. **Wood v. Battle Ground School Dist.**, 107 Wn. App. 550, 27 P.3d 1208 (2001). The statements Respondents made in the April 20 meeting, a meeting that was necessarily temporally close to when the secret meeting must have occurred, controvert their later declarations. Because of their nature, secret meetings are undertaken in an effort to reduce their evidentiary “footprint”. As such, a trier of fact should be allowed to infer that contradictory statements of the Respondents³ allows the inference that there was a secret meeting and that

³ It should not go unnoticed that the Respondent’s statements in the April 20 meeting not only contradict their later declarations, but—tellingly—contradict statements made during the April 20 meeting by both Respondents and Appellant (and Councilor Madore).

such a meeting was undertaken in knowing violation of the OPMA. This determination is a matter reserved to the voters of Clark County and not this Court or the trial court.

C. By Dissolving the Environmental Services Department, the Respondents abdicated their budgetary responsibility as proscribed by both State and Local Law.

Respondents allege that the City Manager was within his power to dissolve a Department arguing this dissolution was allowed without Board notice or approval because it allegedly did not impact the budget.

Respondents alternatively argue that it is not an act of malfeasance, misfeasance or a violation of their oaths of office to allow a subordinate to do something that violates the County Code or Charter or is illegal so long as the Councilors did not affirmatively direct the Manager to perform the illegal act. Respondents are wrong on all counts.

First, dissolution of the Environmental Services Department did impact the budget and was illegal and a violation of the County Code and Charter if done without approval of the Board. The Board designated more than \$28 million dollars, later adjusted by the Board to more than \$29 million dollars, for the Department of Environmental Services in the 2015-2016 biennial budget. In Clark County Resolution No. 2014-12-03 adopted on December 2, 2014, entitled "In the Matter of Adopting the

2015/2016 Biennial Budget for Clark County”, the Resolution required

that

2) Any budget shifts between General Fund operating departments of between funds must be approved by the Board as specified in RCW 36.40.100

3) The budget process, as currently defined, will remain in force, and all county department budgets will be loaded in the General Ledger at the detailed expenditure line item level.

4) Regular payroll and benefits are defined as Objects 110, 111, 125, 191, 192, 193, 210, 211, 221, 220, 222,223, 236, 261 and 262. Any request to transfer among appropriation lines that would increase or decrease the above objects must be submitted to the Budget Director or designee, in writing. ...

5) All other Objects not otherwise listed as regular payroll and benefits in Paragraph 4 above are determined and maintained by Departments, including intergovernmental transfers, capital items or internal service charges assigned to Departments. Any transfer of these appropriations must be coordinated through the Budget Director or designee, in writing...

BE IT FURTHER RESOLVED that the attached staff listing represents the change in staffing by department...

Resolution No. 2014-12-03 at pages 1 and 2, available on the County Grid at

<https://www.clark.wa.gov/sites/all/files/the-grid/1202/4BiennialBudget.pdf>

The Environmental Services Department had a line item in the Budget for more than \$28 million dollars, which by the time of the Manager’s elimination of the Department had been adjusted in accordance with the Resolution and policy to more than \$29 million, for this Department. The Manager’s elimination of this Department and re-assignment of its duties and some of its staff to other departments **did** alter

the budget, and did specifically violate County requirements. The Manager was **not** authorized to take this action without notice to and approval of the Board.

Second, it is an act of misfeasance, malfeasance, and a violation of the Councilors' Oaths of Office to allow their subordinate to violate the County's requirements and to abdicate their responsibility as elected officials to fulfill their budgetary duties. The cases cited by Respondents do not hold otherwise. Rather, Respondents cite to cases for the same general principal, i.e. that an "official cannot be held responsible for conduct beyond his knowledge or ability to direct." **In re Recall of Reed**, 156 Wn.2d 53, 59, 124 P.3d 279 (2005). But that is not this case. Here, the events were not beyond the Councilors' knowledge, nor were the events beyond their ability to direct. The Respondent Councilors were explicitly notified of the Manager's intention to eliminate the Department, fire its director, and shift the remainder of the \$29 million in funds allocated to the Department elsewhere within the County. Appellant and Councilor Madore objected to the event and urged the Respondents to stop it. Respondents chose to let the Manager—whom they lawfully had the ability to control on this issue—to behave illegally and the Respondents chose not to do their duty as the law required to have such a budgetary transfer come before the Board at a public meeting for a discussion and

vote. Appellant has adequately alleged an act of misfeasance, malfeasance or a violation of the oath of office on this Court.

D. The Paper of Record Issue was not waived and constitutes a separate and adequate ground to support recall.

Appellant did not waive his claim regarding the selection of the paper of record claim. Appellant's argument and filings below make clear that he was raising the claim, and would appeal the claim if deemed insufficient. The fact Appellant's counsel acknowledged authority relied upon by Respondents suggesting broad discretion under state law regarding choice of a paper of record did not waive the Claim and this Claim is properly before this Court on appeal. CP 545.

The Clark County Charter is more stringent than state law regarding the criteria for the County's paper of record contract. Charter Section 8.8 reads in relevant part:

All purchases, contracts and bonds subject to bid procedures shall be advertised and, unless all bids are rejected, shall be awarded on the basis of sealed bidding to the lowest responsible bidder. Elected or appointed officials and employees shall not directly benefit from contracts made by, through or under their supervision. No county elected official shall accept any employment or compensation from any county contractor during a term of office.

CP 433 (emphasis added).

The “lowest responsible bidder” was the Reflector with a larger circulation and a lower ad rate. CP 277, 279. The fact the County delayed placing its ads so it sometimes had to publish in a daily did not make the Columbian the lowest responsible bidder. The County did not show that placing ads timely, at the lower ad rates of the Reflector, with an occasional secondary publication in the higher ad-rate Columbian would be a more costly measure for the County than using the Columbian with its higher ad rate for every legal notice. Based on the County Charter, the Councilors were obliged to select the Reflector with its greater circulation and lower ad rate and did not have the discretion to select the higher ad rate newspaper with smaller circulation. Councilors Boldt, Stewart and Olson nevertheless voted instead to award the contract to the higher ad rate and lower circulation newspaper the Columbian. This choice alone was an act of malfeasance, misfeasance or a violation of their Oath of Office under the facts of this case.

Further, the fact the Columbian was selling coffee mugs with a message and cartoon mocking their political rival Madore and publishing editorials and cartoons mocking their political rivals Madore and Appellant provide evidence by which voters are authorized to infer the Councilors were motivated by improper considerations selecting the more

expensive and lower circulation newspaper.⁴ The issue should have been allowed to go to voters.

E. The express language of the Recall Statute does not limit the ability for non-constituents to initiate recall proceedings.

Respondents propose reading the term “constituent” into RCW 29A.56.110 and that only a member of an officer’s “constituency” may initiate recall, and they cite to dicta in Teaford v. Howard, 104 Wn.2d 580, 583, 707 P.2d 1327 (1985), for that proposition. This was not a disputed issue in Teaford and, moreover, what Teaford stands for is tautologically true—i.e. that a constituent may initiate recall proceedings.

But the operative language of RCW 29A.56.110 clearly contemplates a wider universe of potential initiators than just the target’s constituents. As explained in Appellant’s initial brief, we know this from the statute itself. Because, first, the statute facially provides “any legal voter of the state, or of the political subdivision of the state” implies a broader class of initiators than mere constituents. Second, the allowance of “organizations” to initiate recalls further divorces the recall statute from the notion that only “constituents” can initiate recall actions since an organization is no one’s constituent.

⁴ CP 309-314, see also <http://www.columbian.com/dont-do-stupid-stuff-mugs/>.

Moreover, Appellant's hypothetical that a voter from one district might initiate a recall of a representative from another district is not doing violence to representative democracy, as Respondents allege, because the target is still protected from being recalled by both the signature gathering process of RCW 29A.56.190 and the special recall election pursuant to RCW 29A.56.250.

From a policy standpoint, it really should not matter who might be able to sufficiently allege misfeasance or malfeasance—just as long as someone can sufficiently articulate sufficient grounds to justify that the matter be put before the electorate. Indeed, the facts in the present case sharply bring this aspect into focus. Here, the Board is comprised of five members none of whom are a constituent of their fellow Board members (with the exception being that all are constituents of the chair). Barring them from making allegations of misfeasance or malfeasance is ill advised since the Board members have a particular vantage that makes them often the only people who can observe violations of the OPMA and other violations occasioned in executive sessions. To rule otherwise would insulate board members from recall as long as their misdeeds are undertaken without the direct knowledge of a constituent. Such would be the antithesis of the open and accountable government Washington strives to have. To successfully cause recall in Washington is difficult enough

without artificially limiting the class of persons who can file a statement of charges to the voting constituents of the target.

F. Attorney's Fees and Costs are Not Appropriately Awardable in the Present Matter.

Respondents seek fees pursuant to RAP 18.9(a) arguing that Appellant's allegations are based on assumptions and theories about events that never occurred. There is no basis for attorney's fees because, in fact, the record supports reversal, and even if not reversal, at a minimum has been shown to contain a significant dispute of fact to demonstrate that reasonable good faith arguments supporting Appellant's arguments exist thus making fee shifting unavailable.

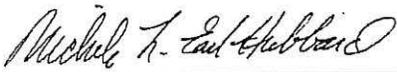
All of Appellant's claims are made in good faith and with factual basis. The inconsistencies identified in the record pertaining to the Dean Contract as well as the abdication of legislative duties by allowing Manager McCauley to invade the provenance of the BOCC as the body that establishes and can alter budgets are both equally sufficient to not only avoid fee shifting under RAP 18.9(a) but point to serious misadministration of government. Even if Appellant did not succeed on all his claims or even abandoned a claim (he didn't) that would not support fee shifting.

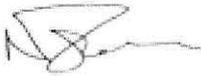
Likewise Respondents' argument that fee shifting is appropriate

based on their jurisdictional claim is entirely without merit. As explained at length, there is no reported case (or unreported case, for that matter) on point that identifies the limits of standing to bring recall charges. Second the language of the recall statute gives standing to a larger class of initiators than mere constituents. And third, valid public policy considerations support a broad reading of the recall statute.

Respondents provide no evidence to support their insinuation that the recall action was nefariously motivated or done with other improper motive. Indeed, Appellant has a long and unblemished history of public service. For the above reasons, the request for fees pursuant to RAP 18.9(a) should be denied.

Respectfully submitted this 28th day of November 2016.

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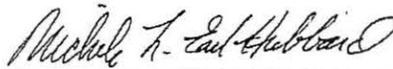
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on November 28, 2016, I filed a copy of the foregoing document with the Supreme Court and caused a true and correct copy to be delivered by email pursuant to agreement to the following:

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From: Michele Earl-Hubbard [mailto:michele@alliedlawgroup.com]
Sent: Monday, November 28, 2016 11:31 AM
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Subject: Filing in Case No. 93522-0, IN THE MATTER OF THE RECALL OF MARC BOLDT, Clark County Councilor; JEANNE STEWART, Clark County Councilor; and JULIE OLSON, Clark County Councilor.
Importance: High

Attached for filing in Case No. 93522-0, IN THE MATTER OF THE RECALL OF MARC BOLDT, Clark County Councilor; JEANNE STEWART, Clark County Councilor; and JULIE OLSON, Clark County Councilor, is the **Reply Brief of Appellant**.

This filing is made by attorney Michele Earl-Hubbard, WSBA # 26454, attorney for Appellant Tom Mielke. My contact information is below.

This email further constitutes service on all parties pursuant to agreement.

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