

Nov 14, 2016, 4:42 pm

**RECEIVED ELECTRONICALLY**

Supreme Court No. 93522-0

Clark County Superior Court No. 16-2-01367-1

**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

---

**RESPONDENTS' BRIEF**

---

Shannon Armstrong, WSBA No. 45947  
ShannonArmstrong@MarkowitzHerbold.com  
Kristin M. Asai, WSBA No. 49511  
KrisitnAsai@MarkowitzHerbold.com  
MARKOWITZ HERBOLD PC  
3000 Pacwest Center  
1211 SW Fifth Avenue  
Portland, OR 97204-3730  
Telephone: (503) 295-3085  
Facsimile: (503) 323-9105

Attorneys for Respondents

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	RESTATEMENT OF THE ASSIGNMENTS OF ERROR .....	2
III.	RESTATEMENT OF THE CASE.....	3
	A.    Legal Framework .....	3
	B.    Factual and Procedural Background .....	5
IV.	STANDARD OF REVIEW .....	12
V.	ARGUMENT .....	12
	A.    Petitioner failed to state a legally sufficient charge relating to the county manager’s authorization of a contract with Rebecca Dean. ....	12
	B.    Petitioner failed to state a legally sufficient charge relating to the Councilors’ vote for the newspaper of record.....	22
	C.    Petitioner failed to state a legally sufficient charge relating to the county manager’s decision to reorganize the Department of Environmental Services.....	25
	D.    Petitioner failed to state a factually sufficient charge against the Councilors because the record shows they did not violate the law or intend to violate the law .....	30
	E.    Petitioner lacks standing to recall Councilor Olson because he is not a legal voter from her district. ....	32
	F.    Councilors are entitled to fees for defending this frivolous appeal.....	37
	G.    The Court should award RAP 14.3 costs.....	39
VI.	CONCLUSION.....	39

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Chandler v. Otto</i> , 103 Wn.2d 268 (1984) .....	3, 23, 24, 38
<i>Holiday v. City of Moses Lake</i> , 157 Wn. App. 347 (2010) .....	37
<i>In re Ackerson</i> , 143 Wn.2d 366 (2001) .....	17
<i>In re Heiberg</i> , 171 Wn.2d 771 (2011) .....	17
<i>In re Kelley</i> , 185 Wn.2d 158 (2016) .....	3, 4
<i>In re Recall of Carkeek</i> , 156 Wn.2d 469 (2006) .....	4, 12, 25, 31, 38
<i>In re Recall of Davis</i> , 164 Wn.2d 361 (2008) .....	18
<i>In re Recall of Estey</i> , 104 Wn.2d 597 (1985) .....	30
<i>In re Recall of Lakewood City Council Members</i> , 144 Wn.2d 583 (2001) .....	12, 14, 15
<i>In re Recall of Pearsall-Stipek</i> , 141 Wn.2d 756 (2000) .....	36
<i>In re Recall of Piper</i> , 184 Wn.2d 780 (2015) .....	37
<i>In re Recall of Sandhaus</i> , 134 Wn.2d 662 (1998) .....	4
<i>In re Recall of Wade</i> , 115 Wn.2d 544 (1990) .....	4, 32
<i>In re Recall of Ward</i> , 175 Wn.2d 429 (2012) .....	12
<i>In re Recall of Washam</i> , 171 Wn.2d 503 (2011) .....	12

<i>In re Recall of Wasson</i> , 149 Wn.2d 787 (2003) .....	3, 17, 31
<i>King Cty. v. Superior Court in &amp; for King Cty.</i> , 199 Wash. 591 (1939) .....	22, 23
<i>Matter of McNeill</i> , 113 Wn.2d 302 (1989) .....	20
<i>Matter of Recall of Beasley</i> , 128 Wn.2d 419 (1996) .....	27, 30
<i>Matter of Recall of Morrisette</i> , 110 Wn.2d 933 (1988) .....	21
<i>Miller v. City of Tacoma</i> , 138 Wn.2d 318 (1999) .....	14
<i>Smith v. Shannon</i> , 100 Wn.2d 26 (1983) .....	22
<i>Teaford v. Howard</i> , 104 Wn.2d 580 (1985) .....	33, 38
<i>Thayer v. King Cty.</i> , 46 Wn. App. 734 (1987) .....	22, 23
<i>Wash. Pub. Trust Advocates v. City of Spokane</i> , 120 Wn. App. 892 (2004) .....	13
<b>Statutes</b>	
26 U.S.C. § 103 .....	36
RCW 29.82 .....	33
RCW 29A.56.110 .....	19, 33, 34
RCW 29A.56.180 .....	36
RCW 36.72.075 .....	23
RCW 42.30.110 .....	14
RCW Chapter 36.40 .....	28
<b>Constitutional Provisions</b>	
Wash. Const. art. I, § 33 .....	33, 34, 35

**Regulations**

26 C.F.R. § 1.103-1..... 37

**Rules**

RAP 14.2..... 39

RAP 14.3..... i, 39

RAP 14.4..... 39

RAP 18.9..... 37

RAP 2.5..... 22

**Other Authorities**

Clark County Charter 2.6..... 26

Clark County Charter 3.2(B)(7)..... 8

Clark County Code 2.09.030 ..... 7, 20

WEBSTER’S THIRD NEW INT’L DICTIONARY  
UNABRIDGED 486 (2002) ..... 33

## I. INTRODUCTION

Respondents, Clark County Councilors Marc Boldt, Julie Olson, and Jeanne Stewart (collectively, “Councilors”), take their oath of office and public responsibilities seriously. They have consistently carried out their duties in accordance with the law and the advice of legal counsel from the Clark County Prosecutor’s Office. Although the Councilors have occasionally disagreed with their fellow Clark County Councilors Tom Mielke (“Petitioner”) and David Madore, those actions are not grounds for a recall. A recall is reserved for conduct clearly amounting to a knowing violation of the law.

The Superior Court recognized this high bar for demonstrating legal and factual sufficiency of recall charges and, after reviewing substantial evidence, determined Petitioner had not met his burden. Petitioner, however, appeals that ruling based on speculation of phantom meetings and alleged conspiracy amongst the Councilors. No evidence supports Petitioner’s theories. Instead, the record shows that the Councilors lawfully exercised their discretion and performed their duties in accordance with the law. Further, actions by the county’s executive, the county manager—made without the Councilors’ knowledge or direction—cannot support a recall against the Councilors, particularly when the record makes clear that the county manager acted within his authority.

That logic holds particularly true where the actions complained of were taken well within the county manager's authority. In addition, Petitioner is not a legal voter eligible to recall Councilor Olson, so he lacks standing to bring any recall allegations against her. Accordingly, this Court should affirm the decision of the Superior Court and find that all recall charges are legally and factually insufficient.

Because Petitioner's appeal is meritless, this Court should also award fees to the Councilors for continuing to defend Petitioner's baseless allegations. Indeed, Petitioner has abandoned one of his previous grounds for recall relating to access to the Clark County Prosecutor's Office, presumably because he recognizes that this charge—like all the recall charges—lacks legal merit. Petitioner is also raising legal arguments he conceded before the Superior Court. Petitioner's appeal is therefore frivolous and warrants an award of fees to the Councilors.

## **II. RESTATEMENT OF THE ASSIGNMENTS OF ERROR**

A. Did the Superior Court correctly conclude that the statement of charges against the Councilors was legally insufficient?

B. Did the Superior Court correctly conclude that the statement of charges against the Councilors was factually insufficient?

C. Did the Superior Court correctly conclude that Petitioner lacked standing to recall Councilor Olson because he is not a legal voter from the political subdivision that votes for her position?

### III. RESTATEMENT OF THE CASE

#### A. Legal Framework

In Washington, a public official may be recalled only for cause. *Chandler v. Otto*, 103 Wn.2d 268, 274, 693 P.2d 71, 74 (1984). To achieve this purpose, a recall petition must meet specific requirements to “free public officials from the harassment of recall elections grounded on frivolous charges or mere insinuations.” *Id.* These requirements mean that a recall petition must be both legally and factually sufficient before it can proceed to the next phase in the recall process. *Id.*

Legal sufficiency requires that a petition “state with specificity substantial conduct clearly amounting to misfeasance, malfeasance or violation of the oath of office.” *Id.* (citation omitted). To establish legal sufficiency, the petition must identify the standard, law, or rule that makes the officer’s conduct unlawful. *In re Kelley*, 185 Wn.2d 158, 164, 369 P.3d 494, 496 (2016). Lawful discretionary acts or legally justified conduct do not amount to legally sufficient charges. *In re Recall of Wasson*, 149 Wn.2d 787, 791-92, 72 P.3d 170, 172 (2003) (citation omitted).

Factual sufficiency requires sufficient facts to establish a prima facie showing of misfeasance, malfeasance, or a violation of the oath of office. *Id.* at 791 (citations omitted). A charge must therefore detail specific facts and may not rely solely on assumptions. *Kelley*, 185 Wn.2d at 165–66.

The petition must also demonstrate that the official intended to violate the law or commit an unlawful act. *In re Recall of Sandhaus*, 134 Wn.2d 662, 668, 953 P.2d 82, 85 (1998); *In re Recall of Carkeek*, 156 Wn.2d 469, 474, 128 P.3d 1231, 1233 (2006) (“[T]he facts must indicate an intention to violate the law.”). If the official submits an unrebutted declaration showing his or her lack of intent to violate the law, that evidence negates any inference of intent and requires dismissal of the petition. *See, e.g., Sandhaus*, 134 Wn.2d at 670-73 (dismissing petition where official stated that he assumed the auditor would procure bond, which refuted the allegation that he knowingly intended to violate the law); *In re Recall of Wade*, 115 Wn.2d 544, 550-51, 799 P.2d 1179, 1182-83 (1990) (affirming dismissal where officials stated in affidavits that they selected candidate based on qualifications, which refuted allegations of intentional discrimination).

## **B. Factual and Procedural Background**

Petitioner's recall allegations arise from three events that are briefly summarized below.

### **1. The county manager directed his staff to pursue an investigation of allegations by and against Councilor Madore.**

In early 2016, during the Board of County Councilors' ("Board") periodic review of the county's Comprehensive Plan, Councilor Madore made accusations against the members of the Clark County Prosecutor's Office and county staff about the accuracy of their statements relating to the Comprehensive Plan. (CP<sup>1</sup> 129, 132; Suppl. CP 1<sup>2</sup>.) Following Councilor Madore's public accusations, and during a public meeting of the Board on March 1, 2016, the deputy prosecuting attorney discussed the allegations with the Board and asked whether the Board wanted seek an independent investigation to examine the allegations. (CP 398, 404.) The Board did not make any decision regarding an investigation at that time. (CP 404.)

Then on March 2, 2016, the local union wrote a letter to the county alleging that Councilor Madore defamed county staff and created a hostile work environment. (CP 131.) Accordingly, before a public Board

---

<sup>1</sup> "CP" refers to the Clerk's Papers.

<sup>2</sup> "Suppl. CP" refers to the Supplemental Clerk's Papers dated October 19, 2016.

meeting on March 9, the Board met in executive session to discuss pending litigation with legal counsel, including whether to pursue the investigation. (CP 506–07, 510, 514.) The deputy prosecuting attorney then engaged the Board during the public meeting on March 9 in a further discussion about moving forward with an independent investigation. (CP 406.)

On March 15, 2016, the county’s Planning Director, Oliver Orjiako, also initiated a discrimination and whistleblower complaint against Councilor Madore. (CP 133.) The Board again met in executive session with legal counsel on March 23 to discuss the pending litigation. (CP 416–17.)

The record is clear, therefore, that after the date of Councilor Madore’s public accusations (March 1), all five Board members met during public meetings and executive sessions to discuss whether to conduct an investigation of the allegations by Councilor Madore. (CP 506–07, 510, 514.) The Board did not take a vote or authorize any contract during those executive sessions. (CP 507, 511, 514–15.) Nevertheless, the county manager attended those executive sessions and, based on the discussions in executive session, decided to move forward with an independent investigation of the allegations by and against Councilor Madore. (CP 518–19.)

The county manager directed his staff to find an independent investigator to examine Councilor Madore’s allegations against the county attorneys and staff. (CP 519.) The county manager also directed his staff to include the allegations by the local union and county staff against Councilor Madore in the investigation because they involved the same set of facts. (*Id.*) The county manager’s staff proposed the scope of work for the investigator. (*Id.*) The county manager did not discuss the scope of the investigation with the Board because the investigation did not require Board approval; it was within his authority under section 3.2(B) of the Clark County Home Rule Charter (“County Charter”) and consistent with his past practices regarding investigations of county employees. (*Id.*)

The county manager executed the contract with Rebecca Dean (“Dean Contract”) on March 25, 2016, pursuant to his authority under the County Charter and because it was within the dollar limitations of his authority under Clark County Code 2.09.030.<sup>3</sup> (CP 12, 519.) The county manager did not discuss the Dean Contract with any members of the Board prior to executing the contract. (CP 519.) The Councilors also did not discuss the Dean Contract with each other. (CP 507, 511, 515.)

---

<sup>3</sup> Clark County Code 2.09.030 provides that the county manager has authority to execute contracts for professional services up to \$200,000 without prior approval from the Board if they are not funded by the general fund (or up to \$100,000 from the general fund). (CP 117.)

Consistent with his authority under section 3.2(B)(7) of the County Charter, the county manager decided to not post the proposed Dean Contract on the county website due to the sensitivity and confidentiality of the allegations involved in the proposed contract. (CP 519.) In particular, the county manager was concerned because the Dean Contract involved specific allegations against Councilor Madore. (*Id.*) This decision was consistent with past practice, as the county manager did not previously post contracts regarding investigations of county employees on the county website because that action would likely violate other confidentiality obligations of the county. (*Id.*)

During a public Board meeting on April 20, 2016, the county manager discussed the Dean Contract and his decision to not post the proposed contract on the website. (CP 189, 412.) The county manager explained that he believed that he had unanimous support from the Board to proceed with an investigation of Councilor Madore's allegations against the prosecuting attorneys and county staff based on discussions in prior meetings (even though he did not need the Board's support to execute the contract). (CP 189.) He also explained that because the Dean Contract involved investigations of one of the Board members, he decided that it was not appropriate to be posted on the website. (CP 189–90.) Councilor Olson and Councilor Boldt confirmed that the Board discussed whether to

pursue an investigation during the Board's lawful public meetings. (CP 191, 195.) Petitioner even confirmed that the Board had agreed to pursue an investigation, but believed the Board had not agreed to the scope of the investigation. (CP 194.) Again, that is because the county manager and his staff determined the scope of the investigation without the Board. (CP 519.)

The Councilors believed that the county manager had authority to execute the Dean Contract without Board approval and had discretion to not post the contract on the website. (CP 507, 511, 515.) The Board's legal counsel confirmed that the Board was permitted to discuss potential contracts involving litigation in executive session, that the county manager was authorized to enter contracts, and that the County Charter takes precedence over the county code. (CP 192, 198–99.) The Councilors relied on their legal counsel in determining that the county manager acted within his authority. (CP 507, 511, 515.)

**2. The Board held a public meeting on the official newspaper of record.**

At a public meeting on April 5, 2016, the Board considered bids from four newspapers to serve as the official newspaper of record for the county. (CP 408, 442.) During the meeting, the county's purchasing manager presented a staff report comparing the bids, presented his recommendation to the Board, and responded to questions from the Board.

(CP 408, 442–44.) The purchasing director advised the Board that *The Reflector*, a weekly publication, had previously “compromised the County’s ability to meet publishing deadlines and scheduled changes.” (CP 443.) He also testified that *The Reflector* does not serve the largest population and would require duplicate postings in *The Columbian*, a daily paper, meaning that selecting *The Reflector* would be more expensive in total publishing costs in the future. (CP 443, 511, 519.) After receiving the testimony, the Councilors voted for *The Columbian*. (CP 408.) Petitioner and Councilor Madore voted for *The Reflector*. (*Id.*)

**3. The county manager reorganized the Department of Environmental Services.**

In 2016, the county manager decided to reorganize the Department of Environmental Services and reallocate resources within other county departments to improve efficiency and reduce costs for the county. (CP 520.) The reorganization moved organization elements to other departments, but did not change the functions or budgets for those elements. (*Id.*)

Because the county manager’s action did not affect the budget, he had authority to make the reallocations without Board action. (*Id.*) The county manager made the decision on his own and did not receive direction from any member of the Board about reorganizing the Department of Environmental Services. (CP 508, 512, 516, 520.)

**4. Petitioner filed four charges against the Councilors.**

On June 28, 2016, Petitioner filed three identical statements of recall charges against the Councilors in Clark County Superior Court. (CP 7–46.) Petitioner alleged that the Councilors should be subject to recall based on four charges: (1) they “knowingly violated” the Open Public Meetings Act (“OPMA”) by hiring an outside investigator to investigate Councilor Madore; (2) they breached their fiduciary duty by grossly wasting public funds by awarding a contract to *The Columbian*; (3) they “purposely limited” the access of “political rivals” on the Board from obtaining advice from the Clark County Prosecutor’s Office<sup>4</sup>; and (4) they abdicated their statutory responsibilities by permitting the county manager to dissolve the Department of Environmental Services. (CP 11.)

The Superior Court held a sufficiency hearing on July 29, 2016.<sup>5</sup> (CP 500, 539.) As part of that hearing, the court reviewed evidence presented by the parties and legal argument on the four charges. (CP 500–01.) After considering the record, the court determined that all four charges were legally and factually insufficient, and that Petitioner lacked standing to initiate a recall against Councilor Olson because he was not

---

<sup>4</sup> Petitioner has not pursued this allegation in his present appeal.

<sup>5</sup> Upon receipt of the recall petitions, the entire Clark County bench recused itself and the petitions were assigned to a Cowlitz County Superior Court Judge.

part of the political subdivision that votes for her position. (CP 501–02, 598–608.)

#### IV. STANDARD OF REVIEW

This Court reviews the Superior Court’s sufficiency determination de novo. *Carkeek*, 156 Wn.2d at 473. Like the Superior Court, this Court must review a recall petition to ensure that “only legally and factually sufficient charges go to the voters.” *In re Recall of Ward*, 175 Wn.2d 429, 435, 282 P.3d 1093, 1097 (2012). This Court will not “consider claims insufficiently argued by the parties.” *In re Recall of Washam*, 171 Wn.2d 503, 515, 257 P.3d 513, 519 (2011).

This Court will “affirm the trial court’s factual conclusions so long as substantial evidence exists supporting the trial court’s conclusions.” *In re Recall of Lakewood City Council Members*, 144 Wn.2d 583, 587, 30 P.3d 474, 476 (2001).

#### V. ARGUMENT

**A. Petitioner failed to state a legally sufficient charge relating to the county manager’s authorization of a contract with Rebecca Dean.**

The Superior Court correctly found that the petition failed to state a legally sufficient charge relating to the Dean Contract because: (1) there is no evidence that a secret meeting occurred; and (2) any error relating to not posting the proposed contract on the county website belonged to the

county manager, not the Councilors. Thus, because both of Petitioner's theories for his recall charge relating to the Dean Contract legally fail, they cannot support a recall.

**1. Petitioner did not meet his burden to show that the Councilors knowingly attended a meeting in violation of the OPMA.**

Petitioner failed to state a legally sufficient violation of the OPMA because he did not (and could not) allege that the Councilors attended a meeting in violation of the OPMA and that they did so knowing it would violate the OPMA. Rather, the undisputed record shows that the Councilors never attended a meeting in violation of the OPMA and that all discussions about a potential investigation of Councilor Madore's allegations occurred during public meetings or lawful executive sessions.

To demonstrate an individual board member's violation of the OPMA, a person must show that a member of a governing body attended a meeting where the governing body took action in violation of the OPMA and that member had knowledge that the meeting violated the statute.

*Wash. Pub. Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 902, 86 P.3d 835, 840 (2004) (citations omitted). If the board member was advised that his or her actions were legal, and believed that he or she was complying with the OPMA, no "knowing" violation of the OPMA exists. *Miller v. City of Tacoma*, 138 Wn.2d 318, 331, 979 P.2d 429, 436 (1999)

(holding no knowing violation because council members believed they had complied with the law and relied on counsel).

In addition, because a governing body is permitted to hold executive sessions, a board member cannot violate the OPMA by attending a legally permissible executive session. *See* RCW 42.30.110(1) (noting that the OPMA’s requirement that meetings be open to the public may not be construed to “prevent a governing body from holding an executive session during a regular or special meeting” on specific topics). For example, a public body may convene an executive session to consider potential litigation against the county or one of its officials. RCW 42.30.110(1)(i).

Board members may discuss various courses of action related to pending or potential litigation in executive session so long as no vote occurs. *Lakewood City Council Members*, 144 Wn.2d at 587. In *Lakewood*, the recall petitioners argued that the city council members violated the OPMA because their failure to block the city manager’s decision to join a lawsuit constituted a “vote” in executive session. *Id.* This Court disagreed. *Id.* Instead, this Court found that because the city manager had authority and discretionary spending power to join the lawsuit, and discussed his decision with the council members in executive session without a vote, no violation of the OPMA occurred. *Id.*

Similarly here, the record shows that the Councilors never voted on the Dean Contract in executive session. (CP 507, 511, 515.) The Board discussed whether to pursue an independent investigation of Councilor Madore’s allegations at both public meetings and executive sessions, which the county manager attended. (CP 506–07, 511, 515, 518–19.) Based on those discussions and his authority under the County Charter, the county manager decided to pursue an investigation into all claims by and against Councilor Madore, and he directed his staff to find a qualified investigator. (CP 519.) The county manager and his staff determined the scope of the investigation and executed the contract. (*Id.*) Thus, like in *Lakewood* where this Court found no OPMA violation because no vote occurred, the record here shows that the Councilors did not vote on the proposed contract or attend a meeting in violation of the OPMA.

Petitioner refuses to accept this reality. Petitioner instead asks the Court to draw the inference that because the Dean Contract exists, and because he and Councilor Madore “were never notified of an executive session or other meeting of the [Board] when the hiring of [Rebecca] Dean” or the Dean Contract was discussed, that must mean the Councilors met secretly to approve the Dean Contract. (Br. of Appellant at 11.) That argument is both logically flawed and contradicted by the record.

As discussed previously, the declarations from all three Councilors and the county manager who attended the meetings conclusively show that the Councilors never met outside of a public meeting or a lawfully convened executive session with the entire Board, so the factual basis for Petitioner's argument is thus lacking. (*See* CP 507, 511, 515, 518–19.) Petitioner's argument also ignores the unrebutted record showing that the county manager decided to proceed with an investigation and decided the scope of the investigation without the Councilors' involvement. (CP 519.) Indeed, the record shows that all five members of the Board did not know the county manager hired Ms. Dean or the scope of her investigation until after the county manager executed the contract. (CP 507, 511, 515.) Petitioner's baseless speculation, despite contrary factual evidence, cannot support a legally sufficient claim for violations of the OPMA.

Moreover, even if an improper meeting occurred—which it did not—Petitioner failed to identify any evidence indicating that the Councilors *intended* to violate the OPMA. Rather, the record shows the Councilors believed they engaged in “a legitimate executive session” when they discussed the investigation and had no intention of violating the law. (CP 191, 507, 511, 515.) Petitioner's lack of evidence indicating the Councilors' intent to violate the OPMA is fatal to his recall charges.

*See Wasson*, 149 Wn.2d at 791 (“[T]he facts must show that the official intended to violate the OPMA.”).

Petitioner is also incorrect when he argues that the Councilors’ training on the OPMA and experience in public service is sufficient to indicate intent to violate the law. Although intent may be inferred from the circumstances, the inference cannot be “too conjectural.” *In re Heiberg*, 171 Wn.2d 771, 778, 257 P.3d 565, 569 (2011). Thus, a court may find an inference of intent when a public official receives specific warnings that his or her conduct will violate the law, but may not rely upon the official’s training or prior public service to show intent unless the training or prior service specifically advised against the conduct at issue. *Id.* And if the public official believed his or her conduct was lawful, or the action “bears all the hallmarks of a simple mistake, not an intent to violate the law,” that mistake cannot support a recall. *Id.* at 779.

Evidence showing that the official likely did not violate the law also vitiates any inference of unlawful intent. *In re Ackerson*, 143 Wn.2d 366, 373, 20 P.3d 930, 934 (2001) (holding no unlawful intent to convert campaign funds when reports showed the campaign expenditures exceeded the contributions).

Again, the record here shows that the Councilors did not meet secretly, did not vote on the Dean Contract, did not direct the scope of the

investigation, and did not believe their actions violated the law. (CP 507–08, 511–12, 515–16.) They were never specifically advised that the county manager’s actions were improper. Rather, legal counsel advised that the actions were within the county manager’s authority. (CP 192, 198–99.) This case is therefore in stark contrast to *In re Recall of Davis*, 164 Wn.2d 361, 369-70, 193 P.3d 98, 102 (2008), where the commissioner was subject to recall because she admitted to knowingly signing a memorandum potentially obligating the agency to pay financial benefits without the authority from the agency. Petitioner cannot point to any evidence here showing that the Councilors violated the law *or* that they did so knowingly. Rather, the undisputed evidence showing that no illegal meeting occurred negates any possibility that the Councilors intended to violate the OPMA.

**2. The Councilors cannot be subject to recall for the county manager’s decision to not post the Dean Contract on the county website.**

Petitioner’s second legal theory to support his recall charges relating to the county manager’s decision to not post the Dean Contract on the county website also fails because the Councilors did not direct his conduct and their failure to correct the action is not a recallable offense. Properly framed, Petitioner’s argument is that the Councilors violated the law because once they learned that the county manager did not post the

proposed contract on the website, they should have remedied that omission somehow (and even though Petitioner did not take any action himself). (Br. of Appellant at 17–18, 21–22.) Petitioner is mistaken for three reasons.

First, a public official may only be subject to recall for violations of his or her duties. *Kelley*, 185 Wn.2d at 166. RCW 29A.56.110 provides that a legal voter may initiate a recall by preparing a detailed description of a public official’s acts of malfeasance, misfeasance, or violations of the oath of office. “Malfeasance” is defined as wrongful conduct that affects, interrupts, or interferes with the performance of official duty; “misfeasance” is the performance of an official duty in an improper manner, and “violation of the oath of office” is the “neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law.” RCW 29A.56.110(1)–(2). Each basis for recall requires the public official to commit an improper act in relation to his or her legal duties. Thus, a recall charge based on a failure to act is legally insufficient when the law does not impose a duty on the public official to take the requested action. *Kelley*, 185 Wn.2d at 166 (holding recall charge based on failure to adequately investigate to be legally deficient because the law does not impose a duty to investigate).

Petitioner has failed to identify any duty on the Councilors to post the Dean Contract on the website. The Clark County Code 2.09.030 directs that for those contracts, “*the county manager* will publish all contracts and staff reports on the Clark County website including a summary of the contract purpose, funding sources, and contract term.” (CP 118 (emphasis added).) Notably, this rule does not require any action by the Board. The Councilors therefore had no independent duty to post the proposed contract on the website.

Second, this Court rejected the argument that a public official could be subject to recall for failing to object or remedy a public executive’s contract decisions. In *Matter of McNeill*, the voters alleged that the city council violated the law by failing to provide proper notice and opportunity for public comment on the city manager’s contract modification. 113 Wn.2d 302, 305, 778 P.2d 524, 526–27 (1989). The voters argued that the city council impliedly ratified the city manager’s conduct because it was aware of the proposed modification and failed to object. *Id.* This Court disagreed, and explained that failing to act is not an unlawful action by the city council and does not constitute substantial conduct clearly amounting to misfeasance, malfeasance, or a violation of the oath of office. *Id.* In addition, this Court noted that the city manager

had responsibility over the city's contracts, and the voters therefore could not show that the city council acted outside of its discretion. *Id.*

Similarly here, the county manager had authority to execute contracts up to certain amounts and for specific subject areas, including contracts for professional services like the Dean Contract. (CP 117, 425–26.) The county manager believed that he had discretion to not post the proposed contract based on his understanding of his authority and his past practice dealing with contracts for sensitive personnel investigations. (CP 519.) The Councilors cannot be recalled for failing to interfere with the county manager's decisions within his discretion. Moreover, if the Councilors had an alleged duty to act, that duty would equally apply to Petitioner who similarly did not interfere with the county manager's actions.

Finally, a public official cannot be recalled for the acts of subordinates done without the official's knowledge or direction. *Matter of Recall of Morrisette*, 110 Wn.2d 933, 936, 756 P.2d 1318, 1320 (1988). Thus, even if a public official could be legally responsible in tort for a subordinate's misconduct, that law does not apply to recall charges. *Id.*

Again Petitioner has no evidence or allegations showing that the Councilors are responsible for the county manager's decision. Petitioner has no evidence that the Councilors knew about the proposed contract

before it was executed or that they knew the county manager did not intend to post the contract on the website. Thus, even if the county manager violated the county code by not posting the Dean Contract on the website, the Councilors cannot be subject to recall for the county manager's actions.

**B. Petitioner failed to state a legally sufficient charge relating to the Councilors' vote for the newspaper of record.**

The Councilors' individual decisions to vote for granting the newspaper of record contract to *The Columbian* were lawful exercises of discretion that do not provide grounds for a recall. This Court held decades ago that government officials have "wide discretion in choosing an official newspaper." *Thayer v. King Cty.*, 46 Wn. App. 734, 739, 731 P.2d 1167, 1170 (1987) (citing *King Cty. v. Superior Court in & for King Cty.*, 199 Wash. 591, 610, 92 P.2d 694, 701 (1939)). Petitioner conceded this point during the sufficiency hearing (CP 501, 557–59)<sup>6</sup>, but nonetheless now argues that "[s]tate law provides little discretion when awarding such a contract." (Br. of Appellant at 23.) Petitioner is incorrect. But even if the Councilors were constrained in their decision-

---

<sup>6</sup> Because Petitioner did not argue this issue at the sufficiency hearing, instead conceding that the charge as pled did not meet legal sufficiency based on applicable case law, this Court may decline to consider the issue. See RAP 2.5; *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983) ("Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.").

making, the newspaper selected by the Councilors is the least expensive bidder based on the evidence presented to the Board during their public meeting, so the Councilors complied with their statutory obligations.

Under RCW 36.72.075, a county “shall let a contract to a legal newspaper qualified under this section to serve as the official county newspaper for the term of one year . . . .” To be qualified, the newspaper must be published in the county, and after a bidding process, the contract should be given “to the best and lowest responsible bidder, giving consideration to the question of circulation in awarding the contract, with a view to giving publication of notices the widest publicity.” RCW 36.72.075. But circulation is not the determinative factor. *Thayer*, 46 Wn. App. at 739. Instead, public officials “are given wide discretion” in selecting an official newspaper, and their choice violates the law only when they act arbitrarily and capriciously. *Id.* at 739-40; *see also King Cty.*, 199 Wash. at 610 (upholding board’s newspaper selection that had limited circulation and was published by a political group). When exercising discretion, public officials are presumed to be acting lawfully and “such presumption can be overcome only by proof that the officers acted without justification or fraudulently.” *Chandler*, 103 Wn.2d at 275.

Because the Councilors had wide discretion to choose the official newspaper and acted within their authority, their vote for *The Columbian*

newspaper does not support a recallable offense. *See Chandler*, 103 Wn.2d at 274 (holding a public officer “cannot be recalled for appropriately exercising the discretion granted him or her by law”). Here, the relevant Board minutes show that the Councilors lawfully exercised their discretion by discussing the newspaper contract during a public meeting along with the purchasing manager’s recommendation to award the contract to *The Columbian*. (CP 443, 507, 511, 515.)

The evidence presented to and considered by the Councilors shows that they voted for the newspaper with comparably high circulation at a lower total cost for the county, which is consistent with the Councilors’ authority and the statute. The staff report showed that *The Reflector*, a weekly publication, had slightly higher total circulation (paid and unpaid) than *The Columbian*’s daily paid circulation, but noted that the county’s prior use of *The Reflector* “compromised the county’s ability to meet publishing deadlines and scheduled changes,” required duplicate postings, and did not serve the largest population. (CP 442–43.) The purchasing manager testified that due to publishing requirements, such as immediate legal notices, when the county used *The Reflector*, the county needed to distribute duplicate notices into *The Columbian*. (CP 443, 511.) The purchasing manager therefore explained that using *The Reflector* would have cost the county more money than *The Columbian*. (CP 511, 519.)

Petitioner, however, argues that the Councilors somehow violated their duties by awarding the contract to a newspaper that was allegedly “very critical” of Councilor Madore and Petitioner, and therefore voters could infer that the Councilors granted the contract “as a reward for the aggressive attacks on their political opponents . . . .” (Br. of Appellant at 24–25.) No evidence supports Petitioner’s speculation. Petitioner does not identify any facts tying the Councilors’ decision to the allegedly critical reporting. Indeed, the Councilors confirm that they did not consider reporting about Councilor Madore in their decision-making. (CP 507, 511, 515.)

The record shows the Councilors considered circulation, cost, and the advice of their staff in making the newspaper selection. Thus, because a legally cognizable justification exists for the official’s actions, Petitioner’s charge is not legally sufficient. *Carkeek*, 156 Wn.2d at 475.

**C. Petitioner failed to state a legally sufficient charge relating to the county manager’s decision to reorganize the Department of Environmental Services.**

Like the allegations regarding the Dean Contract, Petitioner cannot state a legally sufficient charge against the Councilors relating to the reorganization of the Department of Environmental Services. That is because the county manager made the relevant decisions and actions, not the Councilors. So even if the county manager’s actions violated the

law—which they did not—those actions cannot support a recall charge against the Councilors.

**1. The Councilors are not legally responsible for the county manager’s actions within his authority.**

The county manager (not the Board) has the authority over and makes all decisions regarding administrative departments, including the Department of Environmental Services. Under section 3.2(A) of the County Charter, the county manager has the power to supervise all administrative departments. (CP 425, 520.) The county manager’s authority includes the power to reorganize the administrative departments, and he does not need the Board’s consent to make decisions about the departments within his authority. (CP 520.) Indeed, section 2.6 of the County Charter separates the legislative and executive functions and prohibits the Board from interfering with the county manager’s executive authority. (CP 425.) Thus, in accordance with his authority, the county manager (not the Board) made the decision to reorganize the Department of Environmental Services. (CP 508, 512, 516, 520.)

The Councilors’ alleged failure to act in response to the county manager’s actions cannot support a recall because they had no duty to interfere with his actions. As discussed previously, a recall charge based on a failure to act is legally deficient unless the public official had a duty

to act. *See Kelley*, 185 Wn.2d at 166. And conclusory allegations based on conjecture cannot support a legally sufficient charge. *Matter of Recall of Beasley*, 128 Wn.2d 419, 426, 908 P.2d 878, 882 (1996).

Here, the Councilors had no authority over the county manager's executive decision-making and were prevented under the County Charter from interfering with his authority. (CP 425.) Petitioner's speculation that the Councilors were "obviously informed" of the county manager's decision because they did not comment on his actions at the next board meeting is not supported by the record. (*See Br. of Appellant at 28.*) Instead, the record shows that the Councilors had no knowledge of the county manager's decision until after he reorganized the department, and that they did not direct him to take any action. (CP 508, 512, 516, 520.) Because the record shows the Councilors had no role in the county manager's decision to reorganize the department, Petitioner's speculation that the Councilors' dissolved the department in response to Director Benton's whistleblower allegations is contradicted by the record and not relevant to his recall charge. Petitioner's speculation that Councilor Boldt was "politically motivated and not structurally expedient" is similarly contradicted by the record, and cannot support a recall. (*See Br. of Appellant at 29.*)

**2. The county manager’s decision to reorganize departments did not affect the Board’s budget responsibility.**

The Superior Court properly rejected Petitioner’s attempt to invent a violation of the Councilors’ budget responsibilities relating to the county manager’s decision because the reorganization did not affect the budget. Petitioner’s claim that the county manager’s action required a resolution or correction from the Board is not supported by the record. Again, the unrebutted record shows that the county manager did not expand or reduce the budget, so Petitioner’s theory for an alleged violation of the Councilors’ budget responsibilities is legally deficient.

The Board, as the legislative body for the County, has the power to adopt budgets for the County. (CP 424); *see also* RCW Chapter 36.40. Under the relevant rules, the county auditor or chief financial officer prepares a proposed budget and proposes it to the Board. RCW 36.40.040. The Board must review the budget each year and make any revisions or additions it deems appropriate. RCW 36.40.050. The Board also holds hearings on the proposed budget, and then fixes a final budget after the hearings. RCW 36.40.070–.080. Specifically, RCW 36.40.080 provides that the Board “shall fix and determine each item of the budget separately and shall by resolution adopt the budget as so finally determined and enter the same in detail in the official minutes of the board, . . .” Once the

Board fixes the budget, the expenditures “shall constitute the appropriations for the county for the ensuing fiscal year; and every county official shall be limited in the making of expenditures or the incurring of liabilities to the amount of the detailed appropriation items or classes respectively.” RCW 36.40.100.

Petitioner argues that RCW 36.40.080 prevents the county manager from reorganizing administrative departments, but that argument is not supported by the statutory text or the record. Instead, the text plainly requires the Board to fix each “*item* of the budget separately,” but does not require the Board to fix each administrative *department*. Similarly, RCW 36.40.100 sets a limit on expenditures and liabilities that may be incurred after the budget has been adopted, but does not prevent the county manager from reorganizing a department when the action does not affect the budget. Petitioner therefore has no legal basis to restrict the county manager’s executive authority.

Petitioner also cannot state a legally sufficient charge based on the county manager’s alleged transfers of funds between divisions because those transfers did not occur. (CP 520.) The record makes clear that the county manager exercised his lawful authority to allocate costs within the budget and did not need approval from the Board to do so. (*Id.*) The county manager also confirmed that the reorganization did not affect the

budget. (*Id.*) Petitioner’s assumption that the county manager’s action “obviously” involved a transfer of funds between departments is therefore not supported by the record and cannot support a legally sufficient charge against the Councilors. Moreover, the Councilors had no duty to interfere with or correct the county manager’s actions, so they cannot be subject to recall for the county manager’s conduct.<sup>7</sup>

**D. Petitioner failed to state a factually sufficient charge against the Councilors because the record shows they did not violate the law or intend to violate the law.**

In addition to the lack of legal sufficiency, the recall charges are factually insufficient because they do not state sufficient facts showing that the Councilors intended to (or did) violate the law. The Councilors did not intend to violate the law and continue to believe that their conduct was lawful. They relied on advice from legal counsel to determine their legal obligations, so they could not commit a “knowing” violation of the law sufficient to support a recall. *Beasley*, 128 Wn.2d at 426-27 (reversing order finding charges sufficient when contract modifications taken at advice of counsel); *In re Recall of Estey*, 104 Wn.2d 597, 605, 707 P.2d 1338, 1343 (1985) (affirming dismissal when action allegedly in violation of the OPMA was taken on advice of counsel). Thus, because

---

<sup>7</sup> Petitioner’s speculation that the county manager must have discussed his decision with the Councilors based on his military background is entirely speculative and refuted by the record.

Petitioner did not identify any evidence indicating that the Councilors intended to violate the law, the Superior Court properly dismissed the charges. *See, e.g., Carkeek*, 156 Wn.2d at 474 (“[T]he facts must indicate an intention to violate the law.”); *Wasson*, 149 Wn.2d at 791 (“[T]he facts must show that the official intended to violate the OPMA.”).

As discussed, the record is devoid of any facts indicating that the Councilors violated or intended to violate the law. The Councilors confirm that they did not believe the Board had violated the OPMA in relation to the Dean Contract and never intended to violate the OPMA. (CP 507–08, 511–12, 515–16.) The Councilors did not vote on the Dean Contract in executive session. (CP 507, 511, 515.) They did not discuss the Dean Contract or the scope of the investigation with one another or the county manager. (*Id.*) The record also shows that the Councilors believed the Dean Contract was a matter within the county manager’s authority, and did not believe it should have been posted on the county website due to its content. (*Id.*)

The Councilors each exercised their discretion appropriately in voting for *The Columbian* as the county’s official paper. (*Id.*) None of the Councilors voted for *The Columbian* based on its articles about Councilor Madore. (*Id.*) Accordingly, the Councilors’ actions were within their lawful discretion.

The record also shows that none of the Councilors had any involvement in the county manager's decision to reorganize the Department of Environmental Services. (CP 508, 512, 516, 520.) Both the county manager and the Councilors believed that the county manager had the authority to reorganize the department, and that his conduct was lawful. (*Id.*) The Councilors also relied upon counsel's advice as to their actions, and always believed that they were following the law and counsel's advice. (CP 507–08, 511–12, 515–16.) The Councilors' unrebutted testimony is conclusive evidence that they did not intentionally violate the law. *See, e.g., Wade*, 115 Wn.2d at 550-51 (dismissing based on affidavits showing the public officials did not intentionally discriminate).

**E. Petitioner lacks standing to recall Councilor Olson because he is not a legal voter from her district.**

The Superior Court also correctly determined that Petitioner, a District 4 voter, lacks standing to recall Councilor Olson, who was elected by and currently represents a separate voting district. As the County Auditor recognized, Petitioner is “not a registered voter of the political subdivision of the officer being recalled” with respect to Councilor Olson, who represents District 2. (CP 20, 510.) Petitioner was not entitled to vote for Councilor Olson's position and would not be entitled to vote in

her recall election. Accordingly, he is not a legal voter from her constituency that has standing to initiate recall proceedings against her.

Article I, section 33, of the Washington Constitution, states, “Every elective public officer in the state of Washington . . . is subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state[.]” The Legislature accordingly adopted the recall statutes, RCW Chapter 29.82<sup>8</sup>, “as the scheme for carrying out the recall power” set forth in the Washington Constitution. *Teaford v. Howard*, 104 Wn.2d 580, 583, 707 P.2d 1327, 1329 (1985).

Under RCW 29A.56.110, “any legal voter of the state or of any political subdivision” can “demand the recall and discharge of any elective public officer of the state or of such political subdivision.” RCW 29A.56.110. Although “political subdivision” is not defined in the statute, this Court recognized that the recall statute allows “an officer’s constituency” to initiate recall proceedings against the public officer. *Teaford*, 104 Wn.2d at 583. A “constituency” is generally understood as “a body of citizens or voters that is entitled to elect a representative to a legislative or other public body.” WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 486 (2002). Accordingly, the recall statute

---

<sup>8</sup> RCW Chapter 29.82 was recodified as RCW Chapter 29A.56 in 2004.

authorizes only those citizens entitled to elect a public official with the power to initiate recall proceedings against that public official. Put simply, a person who can legally vote for the official—at the state, county, city, or district level—is also the only person who can recall that official.

This plain interpretation of the statutory text is consistent with the Constitution and a common sense understanding of the intent of recall proceedings. Because a particular political constituency has the power to elect a public official, and the official serves at the will of those voters, that constituency should be the only one with the power to recall its elected official.

To read RCW 29A.56.110 to allow “any legal voter” in Washington state to initiate a recall, even though he or she was never entitled to vote for that elected position, would lead to absurd results. For example, Petitioner suggests that the statute allows any voter in the state to recall and discharge any elective officer of the state because the impacts of the officer’s legislation “could be felt just as acutely—or perhaps more acutely—by non-constituents.” (Br. of Appellant at 37.) Petitioner’s reading of the statute divorces the term “any legal voter” from the following phrase “of the state, or of the political subdivision of the state.” His interpretation would allow one district voter to initiate a recall of a state senator elected by the residents of an entirely separate district, even

though the voter was not entitled to vote in the initial election of the state senator. That result is not contemplated by the Constitution or the recall statute.

Petitioner's interpretation also ignores the purpose of a representative democracy—where smaller groups elect individuals to represent their interests in a larger group of similarly elected individuals. While one state representative may vote on federal legislation that affects the interests of another state's citizen, the out-of-state citizen's interests are represented by his or her own state representative. And when a county is divided into voting districts, each district elects its own public official to represent the interests of that district. Because only voters from a particular district can vote for that district's representative, only voters from that particular district can demand the recall of its representative.

Councilor Olson represents District 2 in Clark County. (CP 510.) She was elected by that constituency, is accountable to that constituency, and can be recalled only by that constituency. Petitioner represents District 4 and is entitled to vote in that district. (CP 504.) Petitioner is not a member of Councilor Olson's constituency, and is therefore not entitled to vote in that district. Accordingly, the Superior Court correctly determined that Petitioner is not entitled to initiate a recall of Councilor Olson.

Petitioner’s argument that the signature gathering process is the only means to protect against a recall by non-constituents is also not supported by the statutes. RCW 29A.56.180 provides that a party demanding the recall of a public official must secure a certain amount of signatures supporting the recall based on the number of legal voters for that official’s position in the preceding election. The signature requirement is not intended to be the first protection against a recall from non-constituents, but is instead the opportunity for the constituency to decide if an allegedly illegal act is sufficiently severe to warrant a recall election. *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 769–70, 10 P.3d 1034, 1042 (2000).

Petitioner’s additional arguments in support of his interpretation are equally flawed, as they rely on the use of the phrase “political subdivision” in income tax statutes and regulations that have no relation to Washington’s recall statutes. (Br. of Appellant at 41–42.) The use of the term “political subdivision” in taxing authorities is not relevant here because that phrase is specifically defined in those regulations to relate to the purpose of the taxing regulations, and Petitioner cites no authority even suggesting that the Washington Legislature considered the federal income tax statutes when enacting the recall statute. *See* 26 U.S.C. § 103 (excluding interest on state or local bond from gross income); 26 C.F.R. §

1.103-1 (determining interest upon obligations of a state, territory, or political subdivision). This Court should therefore reject Petitioner’s argument.

**F. Councilors are entitled to fees for defending this frivolous appeal.**

Petitioner’s recall allegations are based on assumptions and theories about events that never occurred. Despite the Superior Court’s clear ruling and Petitioner’s lack of supporting authority, Petitioner pursued this appeal. The Councilors therefore request attorney fees on the grounds that Petitioner’s appeal is frivolous.

Under RAP 18.9(a), the appellate court may require a party or counsel who files a frivolous appeal to pay terms or compensatory damages to the other party or the court. “An appeal is considered frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal.” *Holiday v. City of Moses Lake*, 157 Wn. App. 347, 356, 236 P.3d 981, 986 (2010). Filing a recall petition based on conclusory allegations, without a reasonable inquiry into the factual and legal basis of the claims, or for purposes of political harassment is grounds for an award of fees. *In re Recall of Piper*, 184 Wn.2d 780, 789–91, 364 P.3d 113, 117–18 (2015).

Here, Petitioner’s legal arguments supporting the recall charges and his standing to initiate a recall against Councilor Olson are not supported by the record or applicable precedent. The case law regarding recall petitions is clear that a recall petitioner must show “substantial conduct clearly amounting to misfeasance, malfeasance or violation of the oath of office,” and that the official intended to violate the law. *Chandler*, 103 Wn.2d at 274; *Carkeek*, 156 Wn.2d at 474. Petitioner failed to meet either standard, and relied only on speculation and insinuation to support his charges. Petitioner conceded to the Superior Court that his charge relating to the newspaper of record was insufficient based on the broad discretion given to public officials, but now tries to ignore that clear precedent. Additionally, the only applicable law regarding standing to bring recall charges shows that only a member of a public official’s constituency may initiate recall proceedings against that official. *Teaford*, 104 Wn.2d at 583. Yet Petitioner pursues this appeal without any relevant supporting authority. Petitioner’s appeal, therefore, does not present a debatable legal issue upon which reasonable minds might differ and appears to have been brought for political purposes. The appeal is frivolous and warrants an award of fees to the Councilors.

**G. The Court should award RAP 14.3 costs.**

RAP 14.2 provides that a substantially prevailing party on review is entitled to costs. RAP 14.3 enumerates the eligible costs. Because this Court should find in favor of the Councilors, it should award all eligible costs to the Councilors, which will be detailed in the Councilors' cost bill pursuant to RAP 14.4.

**VI. CONCLUSION**

The Superior Court correctly dismissed all recall charges against the Councilors because the charges are not legally or factually sufficient. The judgment of the Superior Court should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of November, 2016.

By: */s/ Kristin M. Asai*

---

Shannon Armstrong, WSBA No. 45947  
Kristin M. Asai, WSBA No. 49511  
MARKOWITZ HERBOLD PC  
3000 Pacwest Center  
1211 SW Fifth Avenue  
Portland, OR 97204-3730  
Telephone: 503.295.3085

571510

**DECLARATION OF SERVICE**

I, Kristin M. Asai, declare under penalty of perjury under the laws of the State of Washington that I am an attorney employed by Markowitz Herbold PC and that on November 14, 2016, I served the **RESPONDENTS' BRIEF** on the following counsel for parties at the addresses shown below:

Michele Earl-Hubbard  
Allied Law Group LLC  
PO Box 33744  
Seattle, WA 98133

- U.S. Mail
- Facsimile
- Hand Delivery (\_\_\_ copies)
- Email  
Michele@alliedlawgroup.com  
(Per Agreement of Counsel)

Nicholas Power  
Law Office of Nicholas Power  
540 Guard St., Suite 150  
Friday Harbor, WA 98250

- U.S. Mail
- Facsimile
- Hand Delivery (\_\_\_ copies)
- Email nickedpower@gmail.com  
(Per Agreement of Counsel)

DATED this 14th day of November, 2016, at Portland, Oregon.

MARKOWITZ HERBOLD PC

By: */s/ Kristin M. Asai*

---

Shannon Armstrong, WSBA No. 45947  
 Kristin M. Asai, WSBA No. 49511  
 1211 SW Fifth Avenue, Suite 3000  
 Portland, OR 97204-3730  
 Telephone: 503.295.3085  
 Attorneys for Respondents