

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
5/3/2019 2:56 PM  
BY SUSAN L. CARLSON  
CLERK

No. 96839-0

SUPREME COURT  
OF THE STATE OF WASHINGTON

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In Re the Matters of the Recall of:

JEAN BURNHAM, DALE JACOBSON,  
RYAN SMITH and SUE CAMERON,

Respondents.

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APPELLANT'S OPENING BRIEF

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**A. INTRODUCTION**

Appellant William Wainwright is a member of the Concerned Citizens of Cathlamet, an unincorporated group of citizens that filed four separate recall charges against Cathlamet Councilmembers Jean Burnham, Sue Cameron and Ryan Smith, and Cathlamet Mayor Dale Jacobson (hereinafter, “the Town Officials”). The recall charges were filed on January 11, 2019.

On January 22, 2019, the Wahkiakum County Superior Court held a hearing to determine the sufficiency of the charges under RCW 29A.56.140. The trial court granted the Public Officials’ unopposed motion to consolidate the four recall charges into a single cause under Wahkiakum County Cause No. 19-2-00005-35. The court also ruled that it would receive and consider additional documents, written testimony, and authorities submitted by the parties at the time of the hearing. RP 18-19, 24, 33.

On January 25, 2019, the trial court dismissed all four recall charges, ruling that the allegations contained therein were legally insufficient.

Wainwright appeals.

**B. ASSIGNMENT OF ERROR**

The trial court erred by dismissing Wainwright’s recall charges against Burnham, Cameron, Smith, and Jacobson. The trial court’s dismissal raises four issues on appeal.

**First**, what is the trial court's role in the recall process under RCW 29A.56.140?

**Second**, what is the appellate standard of review of a trial court's ruling under RCW 29A.56.140?

**Third**, were the factual allegations in the recall charges and the supplemented court record "factually sufficient" under RCW 29A.56.140 and Washington common law?

**Fourth**, were the allegations of misfeasance, malfeasance, or violation of oath of office in the charges "legally sufficient" under RCW 29A.56.140 and Washington common law?

#### C. STATEMENT OF THE CASE

The four recall charges<sup>1</sup> and the supplemental materials accepted by the court at the sufficiency hearing<sup>2</sup> provide the following factual allegations. As discussed herein, these facts must not only be accepted as

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<sup>1</sup> The four separate charges seeking the recall of Jacobson, Burnham, Cameron, and Smith share identical factual allegations with regard to the purchase of Butler Street property. The charge against Mayor Jacobson includes an additional allegation regarding his unauthorized use of Cathlamet town property. To avoid making four citations to the record every time the recall charges are referenced herein, petitioner will reference only the Jacobson charge at CP 19 to 26. To review each individual recall charge, see CP 19 for Dale Jacobson, CP 49 for Sue Cameron, CP 77 for Ryan Smith, and CP 274 for Jean Burnham.

<sup>2</sup> The trial court has discretion to allow a recall petitioner to supplement the recall charges by providing additional factual allegations and evidence at the sufficiency hearing. *In re Recall of West*, 155 Wn.2d 659, 666, 121 P.3d 1190 (2005) ("[A]n alleged factually insufficiency in a recall petition may be, in the judge's sound discretion, cured by consideration of supplemental documentation, so long as the elected official has sufficient actual notice to meaningfully respond to the factual allegations supported by the proffered supplementation[.]). The trial court did so in this case. RP 18-19, 24, 33.

true, but all inferences therefrom must be drawn in favor of Wainwright.

On March 15, 2018, Cathlamet Mayor Dale Jacobson entered into an agreement with Bernadette Goodroe binding the Town of Cathlamet to purchase bare land commonly known as “20 Butler Street, Cathlamet, Washington.” (hereinafter, “the Goodroe Property”) CP 19 The Mayor did this without prior approval or direction from the Cathlamet Town Council. Bernadette Goodroe is a former Cathlamet Town Councilmember. CP 19 On that same date, at Mayor Jacobson’s direction, the Town of Cathlamet paid Goodroe \$1,000.00 toward the purchase price of \$68,000.00. CP 19, 141-42

At the time Jacobson entered into the agreement on behalf of the town, the Goodroe Property was known by him to be an environmentally contaminated site subject to severe use restrictions and ongoing monitoring requirements by the Department of Ecology. CP 19

Shortly after entering into the contract, Cathlamet Public Works Superintendent Duncan Cruickshank began corresponding with officials at the Washington Department of Ecology (“Ecology”) regarding the environmental problems with the property. On March 26, 2018, Tim Mullin from Ecology sent an email summarizing the problems with the Goodroe Property as follows:

- A. Petroleum related soil contamination exceeding the Model Toxics Control Act clean up levels were present on the site.

- B. Due to this contamination, an Ecology-imposed restrictive covenant limiting the use of and construction on the property remained in effect.
- C. The Town of Cathlamet would be liable for any subsequent clean-up or follow-up actions required under MTCA, as well as on going ground water monitoring at the site.
- D. The Goodroe Property is subject to a five-year periodic soil contamination review, and the site was overdue for a review.

CP 180-81.

This email was forwarded by Cruickshank to Mayor Jacobson and the Cathlamet Town Attorney, Heidi Heywood. CP 180. Cruickshank referenced the Town's liability for future environmental clean up, and stated "This was my fear when I heard the possibility of the Town buying the lot." CP 180. Kerrie McNally, Town of Cathlamet Clerk/Treasurer, forwarded the email to Councilor Sue Cameron, at Mayor Jacobson's request, stating "The Mayor asked me to forward this to you. Kinda ugly..." CP 180

Under the terms of Ecology's restrictive covenant, the Town would be prohibited from "drilling, digging, plac[ing] objects or us[ing] equipment which deforms or stress the surface beyond it's load bearing capability, piercing the surface with a rod, spike or similar item, bulldozing, or earthwork" on the property absent written consent of Ecology. CP 220. The

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Goodroe Property is bare land that cannot even be touched with a hand shovel absent permission from Ecology.

For the next four months, at the direction of Mayor Jacobson, various Cathlamet officials asked and re-asked the same questions regarding the environmental contamination at the site, the restrictive covenant limiting the use of the site, and the ongoing monitoring costs associated with the site. Ecology's answer never changed.

In an April 30, 2018, email to Cruickshank, Panjini Balaraju of Ecology re-confirmed that there were soil/groundwater contaminants on the site and that there was a restrictive covenant recorded against the Goodroe Property. CP 184

In June of 2018, the Town of Cathlamet retained Squires Appraisal Services, LLC, to appraise the Goodroe Property, and the appraisal was completed on June 12, 2018, CP 197-98. The appraiser found that the Goodroe Property had a fair market value of only \$40,000.00. Not only was this \$28,000.00 below the agreed price, the appraisal was based on a hypothetical assumption that Jacobson, Burnham, Cameron, and Smith knew as false.

Under "Site Comments," the appraiser conditioned the \$40,000.00 value on the following assumption: "It was noted by the City of Cathlamet at the engagement of the assignment that the subject site used to be a gas station. This appraisal is completed under the hypothetical condition that there is no

lasting environmental impact on the subject site because of it's previous use. This appraisal also does not take into account any necessary clean up that might possibly be necessary due to this previous use." CP 20, 200

Mayor Jacobson and Councilors Burnham, Cameron, and Smith knew that this assumption was false based on the City's ongoing communications with Ecology and, therefore, knew that the \$40,000.00 valuation was greatly inflated. Nonetheless, they moved forward with the plan to purchase the property for \$68,000.00.

Concerned that Cathlamet was going to purchase the contaminated property, Cruickshank reached out to Tim Mullin at Ecology by email on June 22, 2018:

The Town of Cathlamet is very close to buying 20 Butler from a private owner. As we look at the restrictive covenant, it seems to me that 20 Butler is not covered in the covenant. Does that mean that we can do as we wish with 20 Butler without restriction? Do I need to tell Ecology that we are buying the property? Frankly, this stuff scares me a lot. What should I be asking for as the public works director in my small town?"

CP 183

On July 10, 2018, Mullin sent another email to Cathlamet Town Officials re-iterating that (a) there was a restrictive covenant in place that limited construction on the Goodroe Property, and (b) there were ongoing environmental contamination issues with the property that would financially burden the city, including groundwater testing. CP 190

Kerrie McNally, the Cathlamet Clerk/Treasurer, responded, “Yes, we are aware of the ongoing monitoring of the site. Thank you.” CP 190

Cruickshank responded to Mullin with an email, requesting an estimate of what the groundwater monitoring costs would be, stating, “I literally have no idea where to start on that.” CP 192

Mullin responded, “As of now, there are too many variables to guess at a ballpark cost estimate – as it is unknown if any wells need to be repaired or re-developed (removing the silt buildup from a well) before monitoring them. Typically, when groundwater monitoring is required by Ecology at sites closed with a restrictive covenant, the sampling frequency is at least once every 18 months. Ecology determines the monitoring frequency during the periodic review process.” CP 192

The next day, on July 11, 2018, Cathlamet Town Attorney, Heidi Heywood, again discussed the Goodroe Property with Mullin, and wrote a follow-up email to memorialize the conversation. Mayor Jacobson received a carbon copy of the email. CP 191. In this email, the Town Attorney provides the following summary regarding the status of the Goodroe Property:

- a. The restrictive covenant applies to the property;
- b. The property is contaminated based on the last sampling that was done;
- c. The city would be required to do periodic environmental testing of the property every 18 months, including

groundwater testing, to keep the property in “No Further Action Status.” This would be done at the city’s cost.

CP 191

On July 11, 2018, the day before Cathlamet was scheduled to close on the purchase of the Goodroe Property, Attorney Heywood sent Mayor Jacobson an email advising him not to close on the purchase due to the environmental issues associated with the property. CP 227-30. Heywood’s recommendations were clear--do not purchase the Goodroe Property until the issues surrounding the Ecology’s restrictive covenant and the Town’s future liability for groundwater monitoring and toxic clean-up are resolved. At the very least, she recommended, the Town should wait until it had an estimate of what the ongoing monitoring costs would be. CP 227-30

Mayor Jacobson not only ignored Attorney Heywood, he did the exact opposite of what she recommended. Mayor Jacobson signed a statement on behalf of the Town of Cathlamet formally acknowledging the existence of the Department of Ecology’s restrictive covenant and binding the Town of Cathlamet to comply with its “restrictions and obligations.”<sup>3</sup> CP 215

Mayor Jacobson closed on the purchase of the Goodroe Property the next day, July 12, 2018, giving former councilmember Bernadette Goodroe \$68,000.00 and transferring her liability for the ongoing monitoring and toxic clean-up of the contaminated property to the Town of Cathlamet.

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<sup>3</sup> A copy of the restrictive covenant can be found beginning at CP 217.

Jacobson, Burnham, Cameron and Smith were fully aware that the \$40,000.00 appraised value was based on the false assumption that the property was not environmentally contaminated and developable. Rather than demanding a price reduction or walking away from the transaction altogether, they chose to pay former town councilor Goodroe an additional \$28,000.00, an increase of seventy percent. These facts are undisputed in the record.

Three weeks after the purchase, on August 3, 2018, Cruickshank's and Heywood's fears were confirmed. On that date, Cruickshank received an estimate for the groundwater monitoring costs associated with the property. Cruickshank forwarded the email to Mayor Jacobson, stating: "Oh, my! This is from the company that the Port used for their permitting etc. The numbers speak for themselves. I have another similar quote out and will see if it is much different. This should probably be distributed to the Council . . . "

CP 193

The numbers were disturbing, and Cruickshank's ominous ". . ." was well deserved. The cost of monitoring the groundwater at the site would be \$18,200.00 in the first year and \$9,200.00 every eighteen months thereafter. CP 193. The purchase of the property not only handed former councilor Goodroe \$68,000.00, it transferred her open-ended liability for environmental monitoring and clean-up to the Town of Cathlamet.<sup>4</sup>

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<sup>4</sup> The email from Maul Foster states, "To conduct an initial site walk, prepare the work plan, develop the wells, conduct the first sampling event, and report to Ecology, you are looking at \$18,200.00. Every 18 months after that we would just need to sample and report and that recurring cost every 18 months is \$9,200.00." CP 193

Shortly after voting to purchase the Goodroe Property, Sue Cameron admitted to Tanya Waller, a fellow councilmember, that her motivation for voting in favor of the purchase was that “I was just trying to help out my friend.” CP 235. Ryan Smith later admitted that the town council’s motivation in purchasing the property was that “we were just trying to help out a friend.” CP 236. Jean Burnham admitted, whilst at a community brown-bag luncheon, that the town councilors voted to buy the Property because “we wanted Bernadette Goodroe to get her money back.” CP 231, 233

Based on these facts, Wainwright’s recall charges allege that Jacobson, Burnham, Cameron, and Smith engaged in conduct amounting to misfeasance, malfeasance, and violation of oath of office.

The charges also specifically allege that Mayor Jacobson made a gift of public funds to Goodroe by contracting with her to purchase the worthless property and delivering \$1,000.00 earnest money without first obtaining approval from the Town Council. The charge articulates Washington’s prohibition of gifts of public funds, quoting Article 8, Section 7 as follows:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

CP 23

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The charge alleges that Mayor Jacobson conspired with Burnham, Cameron, and Smith to make a gift of public funds to Bernadette Goodroe by purchasing the worthless, contaminated property for \$68,0000.00. CP 23

The charge also alleges that Mayor Jacobson, by entering into the contract to purchase the Goodroe Property and delivering \$1,000.00 to Goodroe violated RCW 42.23.070(2). The charge quotes the statute as follows:

No municipal official may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer's services as such an officer unless otherwise provided by law.

CP 24

With regard to Councilors Burnham, Cameron, and Smith, Wainwright's recall charges allege that the councilors intentionally made a gift of public funds in violation of the Washington State Constitution and that they conspired to do the same with Mayor Jacobson. CP 23

Appellant's recall charge against Mayor Jacobson also included an additional allegation with regard to his personal use of property owned by the Town of Cathlamet. CP 24-25. Mayor Dale Jacobson operates a propane sales and delivery company known as "Active Enterprises, Inc.," in Cathlamet, Washington. The Town of Cathlamet owns real property adjacent to and across the street from the Mayor's business. Beginning in January of 2016, Mayor Jacobson used town-owned parcels for the operation of his business

and excluded others from using these properties. Jacobson stored and repaired his propane trucks on the parcels and also used the property as an area to vent his propane trucks. CP 173, 175, 237-38

Although Mayor Jacobson has not leased this property or otherwise compensated the Town of Cathlamet or otherwise paid a dime of rent, he treats the property as his own by using it for his business, excluding others from using the property, and granting conditional permission to some city residents subject to his direction and control. CP 25

The record contains two specific examples of how Mayor Jacobson would pick and choose who would be allowed to use the property. For example, in the spring of 2017, Steve Lake, a citizen of Cathlamet, contacted Town Clerk/Treasurer Kerrie McNally to discuss parking his trailer on this property. McNally refused, stating “[W]e do not allow that.” CP 238

Similarly, Bill Wainwright contacted McNally in September of 2018 to ask whether he could park his boat on the property for a couple of weeks. She told Wainwright, “No, we don’t do that.” Wainwright asked whether he could sign a month-long lease on the property, and McNally stated, “No, we don’t rent or lease this property.” When pressed on whether there was an ordinance or other rule that prohibited parking on the property, McNally stated “No, Mayor Jacobson determines who is going to park there and you will need to ask him.” The discussion ended. CP 238

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Thirty minutes later, McNally called Wainwright back and stated that the Mayor would give him permission to park on the property, but that Wainwright needed to personally meet with the Mayor so that he could instruct him regarding where and how to park on the property. CP 238

Wainwright's declaration goes beyond the two examples described above, generally describing the Mayor's conduct as follows:

I have witnessed Mayor Jacobson using the property across the street from him as an extension of his business property. He stores his trucks on the property and releases propane from the truck's tanks while on the property. He does not make occasional use of the property as he insinuates in his declaration. His trucks are stored on this property. Attached as Exhibit B is an aerial photo taken from the tax assessor's website showing the trucks parked on city property. Attached as Exhibit C are photographs that I took of the property with his trucks present on December 10, 2018.

CP 238

Mayor Jacobson filed a declaration in opposition to Wainwright's recall charge. Noticeably absent from that declaration was testimony that he paid rent or otherwise compensated the Town of Cathlamet for storing his company vehicles on Town property. CP140. The Mayor admitted that he used the town property for his business purposes, but denied excluding others from the same use.

The recall charge alleges that Mayor Jacobson's conduct constitutes misfeasance, malfeasance, and violation of oath of office. The recall charge also alleges that Mayor Jacobson made a gift of public funds to himself in

violation of Article 8, Section 7, of the Washington State Constitution by exercising ownership-like dominion and control over Town property and converting the property to his own use. The charge also alleges that Jacobson gave himself a special privilege in violation of RCW 42.23.070(1), quoting the statute as follows:

No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself, or others.

CP 25

**D. ARGUMENT**

**I. The trial court's role under RCW 29A.56.140 is "highly limited."**

"Article I, Section 33 of the Washington State Constitution provides citizens with a substantive right to recall an elected official." *In Re Recall of Pepper*, 189 Wn.App. 546, 553, 403 P.3d 839 (2017). The court must be careful not to infringe on this constitutional right by placing unnecessary procedural hurdles in front of petitioners. It is not the court's place to decide the truth of the charges at issue--"It is the voters, not the court, who will ultimately act as the fact finders." *Id.* at 553-54. The Washington Supreme Court has referred to its role in the recall process as "very limited," *In Re Recall of Reed*, 156 Wn.2d 53, 57, 124 P.3d 279 (2005), and "highly limited," *In Re Recall of West*, 155 Wn.2d 659, 662, 121 P.3d 1190 (2005).

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In *Re Recall of West*, the Washington Supreme Court succinctly articulated the different roles that the courts and the voters play in the recall process:

First, we note that the role of the courts in the recall process is highly limited, and it is not for us to decide whether the alleged facts are true or not. It is the voters, not the courts, who will ultimately act as the fact finders. **We merely function as a gatekeeper to ensure that the recall process is not used to harass public officials by subjecting them to frivolous or unsubstantiated charges.** Accordingly, our role is limited to ensuring that only legal and factually sufficient charges go to the voters.”

155 Wn.2d 659, 662, 121 P.3d 1190 (2005)(emphasis added).

In serving this gatekeeping function, the court must refrain from determining the truth or falsity of the allegations presented by the recall charge and must also resist the urge to weigh the evidence. It is the sole responsibility of the voters to determine whether the factual basis for a recall charge is true or false. *Recall of Kast*, 144 Wn.2d 807, 813, 31 P.3d 677 (2001).

Under RCW 29A.56.140, the court must determine whether the charges are both “factually sufficient” and “legally sufficient.” *In re Beasley*, 128 Wn.2d 419, 425-26, 908 P.2d 878 (1996).

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**II. The standard of review on appeal is de novo.**

The Washington Supreme Court reviews a trial court's sufficiency decision under RCW 29A.56.140 under the *de novo* standard. *Recall of Bolt*, 177 Wn.2d 168, 1735, 298.3d 710 (2013)(citing *In re Recall of Pearsall-Stipek*, 129 Wn.2d 399, 403, 918 P.2d 493 (1996)); *Pepper*, 189 Wn.2d at 554, 403 P.3d 839.

“When [the Supreme Court] review[s] a trial court's decision, the court will apply ‘the same reviewing criteria as the superior court.’” *In Re Recall of Kast*, 144 Wn.2d 807, 813, 31 P.3d 677 (2001)(quoting *Pearsall-Stipek*, 141 Wn.2d at 764, 10 P.3d 1034).

**III. The charges against Burnham, Cameron, Smith, and Jacobson were “factually sufficient.”**

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 the acts or failure to act which would constitute prima facie showing of misfeasance, malfeasance, or violation of the oath of office. *West*, 155 Wn.2d at 665, 121 P.3d 1190 (citing *Chandler v. Otto*, 103 Wn.2d 268, 274, 693 P.2d 74 (1984)). “In this context, ‘prima facie’ means that, accepting the allegations as true, the charge on its face supports the conclusion that the official committed misfeasance, malfeasance, or a  
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violation of oath of office.” *Pepper*, 189 Wn.2d at 555, 403 P.3d 839 (quoting *In re Recall of Wade*, 115 Wn.2d 544, 548, 799 P.2d 1179 (1990)).

The charge must also include “the approximate date, location, and nature of each act complained of.” RCW 29A.56.110. However, the charge may include conclusions and inferences from the factual allegations stated therein. The reviewing court must give the recall petitioner the benefit of all reasonable inferences from the facts—**“Voters may draw reasonable inferences from the facts; the fact that conclusions have been drawn by the petitioner is not fatal to the sufficiency of the allegations.”** *West*, 155 Wn.2d at 665, 121 P.3d 1190. *See also Pepper*, 189 Wn.2d at 555, 403 P.3d 839.

In short, the “court must determine ‘whether, accepting the allegations as true, the charges on their face support the conclusion that the office abused his or her position.’” *In re Recall of Bolt*, 177 Wn.2d 168, 173-74, 298 P.3d 710 (2013)(quoting *In Re Recall of Wasson*, 149 Wn.2d 787, 792, 72 P.3d 170 (2003)). The recall charge must be “read broadly, as a whole, and in favor of the voter.” *West*, 155 Wn.2d at 666, 121 P.3d 1190.

A review of the recall charges and the supplemental information submitted at the sufficiency hearing, provides the court, and more importantly the voters, with myriad names, dates, places, documents, and sworn statements setting forth the factual basis for the charges. There is simply no

argument that the voters of the Town of Cathlamet, and the Town Officials, are not sufficiently informed regarding the facts and circumstances of the recall charges. The Town Officials made no significant effort to dispute this at the trial court level,<sup>5</sup> and the trial court found no reason to even address factual sufficiency in its ruling. CP 91

Viewed broadly, taken as a whole, and construed in favor of the voter, the factual allegations of the charges against the Town Officials show that they caused the Town of Cathlamet to purchase contaminated property from former councilmember Goodroe out of a desire to give Goodroe \$68,000.00 and relieve her of the ongoing burden of owning the property.

Councilors Burnham, Cameron, and Smith all admitted that they voted in favor of the purchase to “help out their friend” and to help Goodroe “get

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<sup>5</sup> Cathlamet Officials spend two sentences on factual sufficiency in their brief at CP 253, and the remainder of their argument regarding factual sufficiency on Mr. Wainwright’s lack of personal knowledge of every fact alleged in the charges. CP 253-255. The Town Officials did complain regarding Wainwright’s lack of personal knowledge of all of the facts stated in the recall charges. However, there is no requirement that the person signing the recall charge have first-hand knowledge of the facts stated therein. *Pepper*, 189 Wn.2d at 555, 403 P.3d 839 (citing *In re Recall of Reed*, 156 Wn.2d 53, 58, 124 P.3d 279 (2005)) (“The individual making the recall charge must have knowledge of the alleged facts on which the stated grounds for recall are based, however, this knowledge need not be firsthand, personal knowledge.”). He or she must only be able to demonstrate some knowledge of these facts beyond mere insinuation, speculation, and conjecture. *Id.* at 555, 403 P.3d 839.

In response to the Town Officials’ complaints regarding his alleged lack of knowledge, Wainwright came forward and filed a declaration explaining his investigation into the recall charges and attaching the appraisal, Cathlamet official emails, photographs, and other documents upon which the charges were based. Wainwright also submitted sworn statements from witnesses that he had interviewed. While some of this information would not be admissible in a civil trial, there is no such requirement in a recall proceeding, and it cannot be said that Wainwright’s belief in the facts stated in the recall charges are merely based on mere insinuation, speculation, and conjecture.

her money back.” All three were aware of the environmental contamination on the property, the ongoing burden to monitor and clean up this contamination, and the restrictive covenant that severely limited the use of the property. What is more, when given an appraisal that valued the property at \$40,000.00, assuming none of the aforementioned maladies existed, Burnham, Cameron, and Smith chose to pay \$28,000 more than the appraised value of the property. If the appraised value of the property was \$40,000.00 without the environmental contamination, then it naturally follows that the property is worth substantially less than \$40,000.00 with the environmental contamination. This is an inference that the voters can and will make. Paying \$40,000.00 for the contaminated property with knowledge that appraisal was factually undermined would have been bad enough, but Burnham, Cameron, and Smith took it five steps further by paying Goodroe an additional \$28,000.00 above the appraised value.

Councilors Burnham, Cameron, and Smith can argue all they want that there were other justifications for purchasing the property despite the contamination and paying \$28,000.00 above the inflated-appraised value, but they need to make these arguments to the voters, not the court.

With regard to Mayor Jacobson, the charge also provides enough evidence that, when viewed broadly in favor of the voters, taken as a whole, and all inferences given to the voters, supports the finding that he caused the

Town of Cathlamet to purchase the contaminated property out of a desire to help Goodroe. Although Mayor Jacobson never admitted this to anyone, unlike Burnham, Cameron, and Smith, the voters may reasonably infer this motivation from his dogged determination to pay \$68,000.00 for the property regardless of the harm it inflicted on his town. Mayor Jacobson initiated this whole debacle by ordering the Town of Cathlamet to tender \$1,000.00 earnest money to Goodroe and agreeing that the purchase price would be \$68,000.00. He was intimately involved in the four-month discussion between Cruickshank and the Department of Ecology regarding the existence of contaminants on the property, the ongoing nature of the Town's liability to monitor and clean-up these contaminants, and the severe use restrictions imposed by Ecology's restrictive covenant. When instructed by the Town of Cathlamet's attorney to delay closing on the property until after these issues could be resolved, or at the very least an environmental consultant could be hired to advise the town, Mayor Jacobson pushed forward and closed on the transaction. Mayor Jacobson was fully aware of the appraised value of the property and that the \$40,000.00 valuation was undermined by the falsity of one of its critical assumptions. Nonetheless, he advocated for and closed on the purchase of the property for \$68,000.00.

While Mayor Jacobson can offer an alternate explanation for his conduct, the facts of the charge, if believed by the voters of Cathlamet, support

a finding that he initiated and pushed forward the purchase of Goodroe's worthless, contaminated property for the purpose of helping Goodroe.

The same is true with regard to Mayor Jacobson's conversion of Town property for his personal business use. The record establishes that Mayor Jacobson not only made use of Town property to further his business, he granted himself sole dominion and control of that property. The record establishes that Mayor Jacobson flat out refused to allow some people to use the property, but others he gave conditional permission to use the property. All the while, he made unlimited use of the property for his own use. There is ample evidence in the record from which the voters could find that Mayor Jacobson exercised dominion and control over town property as if he personally owned it, thereby converting the town-owned property to his personal business use.

**IV. The charges against Burnham, Cameron, Smith, and Jacobson are "legally sufficient."**

In *Kast*, the Washington Supreme Court restated the definition of "legally sufficient" as follows:

Legally sufficient means that an elected official cannot be recalled for *appropriately* exercising the discretion granted him or her by law. To be legally sufficient, the petition must state with specificity substantial conduct clearly amounting to misfeasance, malfeasance, or a violation of other of office.

*Kast*, 144 Wn.2d at 815, 21 P.3d 677 (quoting *Chandler v. Otto*, 103 Wn.2d 268, 274, 693 P.2d 71 (1984))(emphasis

added).

“Misfeasance” and “malfeasance” mean “any wrongful conduct that affects, interrupts, or interferes with the performance of official duty.” RCW 29A.56.110(1). “Misfeasance” also includes the performance of an official duty in an “improper manner,” and “malfeasance” includes the commission of an unlawful act. RCW 29A.56.110(a) and (b). “Violation of the oath of office” means “neglect or failure by an elective public officer to perform faithfully a duty imposed by law.” RCW 29A.56.110(2).

If the public official’s wrongful conduct was undertaken as part of a discretionary function, the official may only be recalled if he or she “exercised discretion in a manifestly unreasonable manner.” *Bolt*, 177 Wn.2d at 175, 298 P.2d 710 (quoting *In re Recall of Shipman*, 125 Wn.2d 683, 685, 886 P.2d 1127 (1995)).

This is the point where the trial court’s analysis took a wrong turn. At page 3 of the *Court’s Ruling on Recall Petition*, the court states:

The purchase of property for public use by town officials is a fundamental governmental purpose. This precludes this Court from delving into the adequacy of the consideration that was exchanged for the purchase price, or the alleged donative intent of the Town Council Members and Mayor. **As there is no legal basis of the claim of gift of public funds, a recall based on the discretionary decision to purchase land for public use cannot be said to be manifestly unreasonable.** Therefore, the charges in the Recall Petition relating to the purchase of real property located at 20 Butler St are legally insufficient.

CP 93 (emphasis added)

This was legal error. Wainwright does not need to prove a gift of public funds to prove misfeasance or violation of oath of office under RCW 29A.56.110. Malfeasance only requires proof of an unlawful act. While violation of a statute or constitutional provision can be malfeasance, nothing in the statutory definition of misfeasance or violation of the oath of office requires this. The court erred when it took Washington's rigid, narrow definition of gift of public funds and applied it to the general allegation of misfeasance and violation of oath of office. As stated herein, the court was required to view those terms broadly, to view the allegations in the charge "as a whole," and construe all inferences in favor of the voter.

"Misfeasance" is the performance of an official duty in an improper manner." RCW 29A.56.110(a). The factual allegations in the charge, if found to be true by the voters, support a finding that Jacobson, Burnham, Cameron, and Smith acted improperly by causing the Town of Cathlamet to purchase worthless, or greatly devalued property, from Bernadette Goodroe at one hundred and seventy percent of its appraised value, knowing that even the appraised value was greatly inflated, all the while being motivated by a desire to help Goodroe "get her money back."

"Violation of Oath of Office" means "neglect or failure by an elective

public officer to perform faithfully a duty imposed by law.” RCW 29A.56.110(2). Jacobson, Burnham, Cameron, and Smith vigorously contend that the Goodroe property was acquired as part of an essential government function and that they acted in accordance with their discretionary duties. There is simply no argument that purchasing valueless land for the purpose of helping a former councilmember “get her money back” would be the failure to faithfully perform this duty.

Furthermore, the recall charges provide sufficient facts for the voters of Cathlamet to determine that the conduct of Jacobson, Burnham, Cameron, and Smith were manifestly unreasonable. The trial court’s legal conclusion that the outcome of the gift of public funds analysis dictates the outcome of the “manifestly unreasonable” analysis is without support in Washington law. The Town of Cathlamet may need pencils, and buying pencils may be a government function, but that does not mean that the Town Officials would be free of the threat of recall if they had bought a single pencil from Goodroe for \$1,500.00. What if they had paid \$1,000,000.00 for the Goodroe property? Even if the gift of public funds inquiry is so rigid as to preclude any analysis of consideration, there is no reason that a recall could not be made for such a manifestly unreasonable purchase.

And finally, the trial court believed that the “Court” was precluded “from delving into the adequacy of the consideration” because the purchase

was a discretionary function. However, RCW 29A.56.140 precludes the Court from delving into any factual question. That is the role of the voters, not the court. The voters have every right to delve into the adequacy of the consideration when the recall petition makes out a prima facie case for misfeasance due to a manifestly unreasonable discretionary act. A public official can be recalled for undertaking a discretionary act if, when viewed as a whole and construed in favor of the voter, the recall charge provides evidence the act was taken in a “manifestly unreasonable manner.” *Bolt*, 177 Wn.2d at 175, 298 P.2d 710. It is difficult to conceive of an offense more worthy of recall than distributing the Town’s treasury to former councilmembers for the purpose of helping her “get her money back.”

The voters have the right to find that it was manifestly unreasonable for Burnham, Cameron, and Smith to vote in favor of buying contaminated land so that they could help their friend get her money back. The trial court had no right to take this decision away from the citizens of Cathlamet. It was manifestly unreasonable for the Councilors to vote in favor of paying \$68,000.00 for land that, if in pristine condition would be worth \$40,000.00, all the while being fully informed that the land was contaminated. No one denies that the Town paid Goodroe one hundred seventy percent the appraised value of the property. No one denies that the basic assumption of the appraisal, i.e., no environmental contamination, was false and, therefore, even the

\$40,000 valuation was inflated. No one denies that the Councilors were fully aware of this. No one denies that the Councilors voted without having any information regarding the future cost of groundwater monitoring, which was revealed after closing to be \$18,200.00 the first year and \$9,200.00 every eighteen months thereafter—forever. If anything, the Goodroe Property had a negative value. The Town Officials can stubbornly deny that the property was valueless, but the matter must be settled in the voting booth as there is ample justification for a reasonable voter to find that the Councilors' votes were manifestly unreasonable.

The same is true with regard to Mayor Jacobson's conduct in initiating, driving forward, and closing on the purchase of the Goodroe Property. All of the knowledge attributed to the Councilors in the above paragraph was known to Mayor Jacobson. Moreover, the Mayor was intimately involved in Cruickshank's months long email exchange with multiple Department of Ecology officials. These communications established that the property was contaminated, that the Town of Cathlamet would take on the responsibility for future monitoring and clean-up of the contamination, and that a restrictive covenant was in place that rendered the property undevelopable. When instructed by the Town's attorney to not close on the purchase pending resolution of these issues and, at the very least, consultation from an environmental expert regarding the future costs associated with the

property, the Mayor bulled forward. The voters have the right to decide whether it was manifestly unreasonable for the Mayor to ignore the advice of the town attorney and close on a transaction that handed former councilmember Goodroe \$68,000.00 in return for valueless land that will cost the Town thousands of dollars in environment monitoring until the end of time. The trial judge may have personally disagreed with this factual conclusion based on his reading of the record, but that was not his place to do so.

The charge against Mayor Jacobson also includes the violation of RCW 42.23.070(2), which provides:

No municipal official may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer's services as such an officer unless otherwise provided by law.

Mayor Jacobson has no discretion to violate the law, and RCW 42.23.070 is not subject to the rigid, two-prong test applicable to the gift of public funds context. The facts presented in the recall charge against him makes out a prima facie case for the violation of RCW 42.23.070(2)'s prohibition of the direct or indirect giving of gifts. The voters have the right to decide whether the Mayor's conduct in initiating the purchase of the Goodroe Property and ramrodding the transaction through closing despite the warnings and advice of Cruickshank, the Department of Ecology, and the

Town attorney was a gift.

With regard to Mayor Jacobson's use of Town property for his business, the Mayor does not have discretionary authority to make a gift of public funds to himself. The Mayor does not deny that he pays nothing for the right to store and repair his vehicles on Town property, or the right to exclude from or conditionally allow others to use the property. The charge alleges that the Mayor's rent-free use of Town property for his business has been constant and ongoing for years. The Mayor challenges the manner in which his free use of the property is described in the recall charge, but he admits that he pays no rent. And any factual discrepancy regarding the nature of his conduct must be resolved by the voters, not the courts.

Furthermore, the Mayor has provided no Cathlamet Code provision or Washington state law that confers on him the discretionary power to say who may or may not use City property and under what conditions. Even if he had this discretion, granting himself dominion and control over Town property without paying rent would be misfeasance in that it is improper for the Mayor to use his discretionary authority to give himself special access and control of Town property. It would be a violation of oath of office in that giving himself special access and control of Town property is not the "faithful" performance of a duty imposed by law.

The recall charge also alleges that Mayor Jacobson granted himself the

special privilege to exercise dominion and control over Cathlamet Town property for the purpose of pursuing his own business interests. RCW 42.23.070(1) prohibits this conduct, stating “No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself, or others.” The recall charge provides a prima facie case for the violation of RCW 42.23.070(1).

It cannot reasonably be disputed that it is misfeasance, malfeasance, and a violation of the oath of office for a public official to convert publicly owned property to his or her own business use. This not only constitutes a self-gift of public funds, it is an indisputable “special privilege” in violation of RCW 42.23.070(1).

The only question before the court is whether the factual allegations in the recall charges and the supplemental materials submitted by Wainwright, if found to be true by the voters, constituted misfeasance, malfeasance, and/or a violation of the oath of office. In making this determination, the trial court must view the charges broadly and as a whole, accept the factual allegations as true, and draw all reasonable inferences in favor of the voter. The trial court erred by doing none of these things.

Instead of viewing the allegations broadly, taking them as a whole, the trial court focused on the two examples provided by Wainwright as if these represented the whole of the allegations. A full reading of the recall petition

and the materials provided to the court demonstrates a pattern of conduct that goes well beyond the Mayor's refusal to allow Mr. Lake to use the land and his begrudging, grant of permission to Wainwright. The court erred in narrowly viewing the allegations of the recall charge when it was required by the law to broadly view the allegations.

Instead of accepting Wainwright's allegation of ongoing conduct as true, the trial court utterly ignored it, excluding it from its analysis completely.

Instead of giving Wainwright the benefit of all reasonable inferences from the factual allegations, the trial court construed these inferences in favor of Mayor Jacobson. The trial court inferred that the two examples provided by Wainwright were the only two times the Mayor has refused or conditioned a citizen's right to use public land that he himself uses freely. The trial court was obligated to make the opposite inference that, based on Wainwright's observations of the Mayor's exclusive use of the property, the two examples provided by Wainwright were not the only two times the Mayor had acted wrongfully. The trial court inferred that because it was McNally, the clerk/treasurer that told Wainwright and Lake that they could not use the property, it was McNally who was excluding people from using the property, not the Mayor. The more reasonable inference, and the one the trial court must make, is that McNally was acting at the direction of the Mayor, particularly given the description of her telephone exchange with Wainwright. It makes

no sense that McNally would on her own accord and without direction from the Mayor lock the citizens of Cathlamet out of the property.

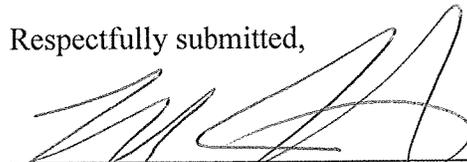
In short, the trial court weighed the factual arguments made by Mayor Jacobson and Wainwright and came down in favor of Mayor Jacobson. In doing so, the trial court went beyond its gatekeeping function and usurped the voters' right to make this decision.

**E. CONCLUSION**

The court should reverse the trial court's order dismissing Wainwright's recall petition against Jacobson, Burnham, Cameron, and Smith and remand this matter to the trial court for formulation of a ballot synopsis.

DATED: May 3, 2019.

Respectfully submitted,



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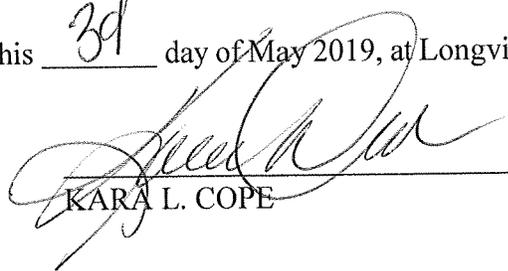
MATTHEW J. ANDERSEN, WSBA #30052  
Of Attorneys for Appellant

CERTIFICATE

I certify that on this day I caused a copy of the foregoing APPELLANT'S OPENING BRIEF to be mailed, postage prepaid, and emailed to Respondent's attorney, addressed as follows:

Jeffrey S. Myers  
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DATED this 3d day of May 2019, at Longview, Washington.

  
KARA L. COPE

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**Superior Court Case Number:** 19-2-00005-7

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