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STATE OF WASHINGTON  
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No. 96839-0

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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In Re the Matter of the Recall of:

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

Respondents.

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RESPONDENT'S BRIEF

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## **I. INTRODUCTION**

This case presents whether a recall petition is legally and factually sufficient under RCW 29A.56.140 where it is based on disagreement with the Council's discretionary decisions to acquire real property. Such allegations are not legally sufficient. Additionally, allegations concerning an official parking his personal vehicles on a vacant Town lot do not rise to substantial conduct that merits recall under the statute. The trial court correctly rejected these allegations and dismissed the recall petitions.

## **II. COUNTERSTATEMENT OF THE CASE**

### **A. RECALL CHARGES 1-2 AGAINST COUNCIL AND 1-4 AGAINST MAYOR JACOBSON.**

The first set of charges of the recall petitions were filed by Mr. Wainwright arise from the Town's purchase of vacant property located at 20 Butler Street in Cathlamet. This lot is the last vacant lot and was desired for possible use as a park or green space. CP 102-3, 141, Charges 1 and 4 were made only against Mayor Dale Jacobson, alleging that he made an unconstitutional gift of funds when he agreed to pay \$1,000 to the prior owner as an earnest money deposit, prior to consummation of the sale, and by agreeing to the purchase of the Butler Street property CP 23, 141.

Charges 2-3 were filed against three Town Council Members, Jean Burnham, Sue Cameron and Ryan Smith, and Mayor Jacobson for

conspiracy and making an unconstitutional gift of funds to the prior owner by voting to complete the purchase of the Butler Street property. CP 24.

The Recall charges filed by Wainwright alleged that the Council made an unconstitutional gift of public funds by purchasing the Butler Street Property from the prior owner, former Council member Bernadette Goodroe. Wainwright alleged that the property was valueless because it was previously a contaminated site. CP 20. He also pointed to restrictions placed on the property by an environmental covenant, which requires that residual contaminants not be disturbed without approval by the Department of Ecology. CP 19-20. Although the covenant was not attached to the charges, it was introduced by Mr. Wainwright's declaration as Exhibit G. CP 217-225. The version of the covenant used by Petitioner showed the area of contamination in black and white, making it impossible to tell the extent of contamination. The color version introduced by Respondent's shows the extent of residual contamination in color, with the limited portion being along the retaining wall on the north boundary of the site. Respondent's Exhibit A. Supplemental CP \_\_\_\_.

Wainwright also alleged that the Council overpaid for the Butler Street property because an appraiser had rendered the opinion that it was only worth \$40,000, assuming no contamination. CP 20. The Council agreed to buy the property for \$68,000 after discussions in executive session

on June 18, 2018. CP 138. The Council, after returning to open session, approved the sale noting that the price had been negotiated down from the listed price of \$72, 200. CP 139. When one of the opponents contended that it would be a violation and asked the Town Attorney to opine, the Town Attorney replied that she did not think it would be a violation to buy the property at this price, despite the lower appraisal. CP 139.

The Butler Street property was a former gas station site which was the subject of an independent cleanup by the Bank of Pacific in 2003. The bank acquired the parcel in 1997 and built a parking lot on the adjacent property. CP 113. Contaminated soils were removed from the Butler Street property except for a small area adjacent to a retaining wall and under the parking lot that could not be removed. CP 115, 131. This action led to issuance of a No Further Action Determination by the Department of Ecology in February 2006. CP 109. Because there was residual contamination (estimated 30 yards) on site adjacent to the retaining wall, Ecology required an environmental covenant be recorded against the adjacent parking lot and Butler Street properties to prevent disturbance of the contamination. CP 217.

The residual contaminated soil is primarily on the parking lot property adjacent to the 20 Butler Street lot. There is only a small sliver of contaminated soil immediately next to the retaining wall on the Butler Street

property. The vast majority of the Butler Street property is not contaminated. This is shown by a color map which was attached to the covenant and introduced by the Respondents as Exhibit A. Supp. CP \_\_.<sup>1</sup>

After the cleanup was completed, the Bank of Pacific sold the property to David and Bernadette Goodroe in 2007 for \$75,000. CP 105. The Bank executed a hold harmless agreement with the Goodroes to protect them from liability due to the contamination. CP 120. This agreement provides that Bank (Seller) would hold the Buyers harmless and indemnify them from any liability for any environmental remediation or cleanup. CP 120. This obligation would survive the sale to Goodroe and would continue in effect in the event of subsequent sales of the property by Buyers and its successors and assigns. CP 120. Thus, the Bank bore the responsibility for addressing the contamination, not the Goodroes or eventually the Town.

The Town identified the 20 Butler Street property as the last available vacant property that could be used for a small “pocket park” to improve the quality of the downtown area and make it a more attractive place to visit. CP 141. The Town wanted to purchase the property and, in March 2018 agreed to pay \$1000 earnest money towards the intended

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<sup>1</sup> The trial court admitted it and had it marked. The transcript refers to it as Exhibit 8, but it is actually marked Exhibit A. ROP 13

purchase. CP 141. This payment was processed through the regular town voucher process by Council member Laurel Waller.

The Council negotiated with Mrs. Goodroe to buy the property, which had been listed at \$72,000. CP 139.. The Town learned she had paid \$75,000 in 2007 and it was assessed at \$75,000 in 2011. Although the assessment had fallen by 2018, Mrs. Goodroe was not willing to sell the property for only \$40,000, which was an opinion of value offered by an appraiser retained by the Town at the suggestion of Council Member Waller. CP 142. She was willing to come down to \$68,000. CP 142.

The Council discussed the price in executive session at its June 18, 2018 meeting. CP 139. After returning to open session, the Council discussed the proposed sale. During the discussion, Council Member Waller said she wasn't comfortable with the \$68,000 price because the appraisal had come in lower at \$40,000. She asked the Town Attorney if it was a violation. The Town Attorney replied that she did not think so. CP 139. The Council approved the purchase by a 3-2 vote, with Members Cameron, Burnham and Smith voting to approve. The Mayor did not vote.

The parties executed a purchase and sale agreement on June 29, 2018. CP 147. The transaction closed on July 16, when the property was conveyed to the Town and recorded. CP 142. The \$1,000 earnest money was properly credited towards the purchase of the property. CP 142, 158.

**B. RECALL CHARGES 5-6 AGAINST MAYOR JACOBSON.**

In addition to the charges stemming from the purchase of 20 Butler Street, Mr. Wainwright filed additional recall charges solely concerning Mayor Jacobson. These charges related to the Mayor's storage of trucks from his business on an adjacent vacant Town owned lot.

Wainwright alleged that the Mayor created a special privilege for himself by "exercising dominion and control" over the lots by storing his trucks there and disallowing others from parking on the lot. He did not describe who was denied the ability to park there, when the Mayor supposedly denied others the right to park there.

In fact, the lot is a vacant lot used by the public to park vehicles. CP 140. It is a large lot with plenty of room for the 4 vehicles that the Mayor sometimes parks there, and it is frequently used by local fishermen to park their vehicles and boat trailers. CP 141. The Mayor has not denied others the ability to park their vehicles there but was unable to respond to Wainwright's vague allegations which did not say who was denied permission, when this had occurred.

At the sufficiency hearing, Wainwright filed a declaration in which he added additional information. His interactions concerning the property were not with the Mayor, but were with the Town Clerk, Kerrie McNally.

It was McNally who told Wainwright he couldn't park there, not Mayor Jacobson. CP 237. When he pressed McNally about a lease or ordinance, McNally referred Wainwright to the Mayor, who Wainwright did not want to contact because he was "not on the best of terms" with him. CP 238. McNally then contacted the Mayor and told Wainwright that it would be OK to park there and that he should contact the Mayor. CP 238. Wainwright never did have any personal interaction with the Mayor about use of the vacant lot. CP 238.

### **C. PROCEDURAL HISTORY**

Petitioner Bill Wainwright filed four separate recall petitions containing the charges against Respondents with the Wahkiakum County Auditor on December 27, 2018. Six charges were levied against Mayor Jacobson. CP 19-26. Two identical charges (Charges 2-3) were made against Council Members Jean Burnham, (CP 274) Sue Cameron (CP 49-54) and Ryan Smith (CP 77-82).

The petitions were verified by the Auditor and transferred to the Prosecuting Attorney, who filed four recall petitions with Wahkiakum County Superior Court, on January 11, 2019. CP 16, 46, 74, 271. The prosecutor also prepared proposed ballot synopses as required by RCW 29A.56.130. Upon receipt thereof, the Court set each such petition for a sufficiency hearing for Tuesday, January 22, 2019 at 11:00 a.m.

On Friday, January 18, 2019, the Respondents filed a motion to consolidate the recall matters, CP 240, and a consolidated brief responding to the charges. CP 161. Declarations and exhibits were provided by Mayor Jacobson (CP 140) and Council Member Cameron to provide factual context and detail for the Court. CP 102.

On Tuesday, January 22, 2019, the morning of the sufficiency hearing, Petitioner Bill Wainwright filed a brief in support of the charges and four new declarations.<sup>2</sup> Wainwright's declaration contained three pages and 61 pages of exhibits. Exhibits A- H. Respondents had no opportunity, other than at the 11:00 a.m. hearing itself, to review and respond to these new materials. Two of the declarations were provided by individuals (Orr and Passmore) who claimed to have heard statements from Council Member Burnham concerning their motives in buying the Butler Street Property. The third declaration was provided by an individual (Lake) who claimed to have been told by others that they heard statements from Council Members Cameron and Smith concerning their motives in buying the Butler Street Property.<sup>3</sup>

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<sup>2</sup> Wainwright's counsel e-mailed Respondent's counsel at 4:50 p.m. on January 21, 2019 to provide the brief and declarations.

<sup>3</sup> No testimony was introduced to show Mayor Jacobson's motives, other than his own declaration.

On January 22, 2019, the Superior Court conducted the sufficiency hearing pursuant to RCW 29A.56.140. The Court consolidated the recall petitions and conducted a single hearing. CP 27, ROP 3. The court heard argument and took the matter under advisement. On January 25, 2019, the Court issued a written opinion rejecting the recall charges. CP 97. Wainwright appeals.

### **III. STANDARD OF REVIEW**

In recall proceedings, The courts act solely as gatekeepers in the recall process; the role is to ensure that the recall process is not used to harass public officials by subjecting them to frivolous or unsubstantiated charges. *In re Recall of Riddle*, 189 Wn.2d 565, 403 P.3d 849 (2017). Questions of factual and legal sufficiency are reviewed de novo by this Court. *Teaford v. Howard*, 104 Wn..2d 580, 590, 707 P.2d 1327 (1985); *In re Recall of Lindquist*, 172 Wn.2d 120, 131, 258 P.3d 9 (2011). Thus, the Supreme Court reviews recall petitions using the same criteria as the superior court. *In re Wade*, 115 Wn.2d 544, 547, 799 P.2d 1179 (1990); *Jewett v. Hawkins*, 123 Wn.2d 446, 447, 868 P.2d 146 (1994). Those standards are set forth below.

**A. GENERAL STANDARDS TO REVIEW SUFFICIENCY OF RECALL PETITIONS.**

A recall charge must be based on acts of malfeasance, misfeasance, or violation of oath of office. RCW 29A.56.110. Misfeasance and malfeasance both include “wrongful conduct that affects, interrupts, or interferes with the performance of official duty.” RCW 29A.56.110(1). Misfeasance additionally includes “the performance of a duty in an improper manner.” RCW 29A.56.110(1)(a). Malfeasance also includes “the commission of an unlawful act.” RCW 29A.56.110(1)(b). Finally, a violation of oath of office includes “the neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law.” RCW 29A.56.110(2).

However, where commission of an unlawful act is alleged, the petitioner is also required to show knowledge of facts indicating an intent to commit an unlawful act. *In re Recall of Telford*, 166 Wn.2d, 148, 158, 206 P.3d 1248 (2009); *In re Wade*, 115 Wn.2d at 549. “This means that for the factual sufficiency requirement to be satisfied, the petitioner is required to demonstrate ‘not only that the official intended to commit the act, but also that the official intended to act unlawfully.’” *In re Recall of Pearsall-Stipek III*, 141 Wn.2d 756, 765, 10 P.3d 1034 (2000) (quoting *In re Recall of Pearsall-Stipek II*, 136 Wn.2d 255, 263, 961 P.2d 343 (1998));

*see also In re Recall of Telford*, 166 Wn.2d at 158 (finding the intention to commit an unlawful act required for both factual and legal sufficiency). Additionally, an unlawful act must be committed “in office.” RCW 29A.56.110.

The Superior Court shall consider only the sufficiency of the charges and not the truth of the charges. RCW 29A.56.140. The voters, rather than the Court, consider the truth of the charges if the recall proceeds to the ballot. *In re Recall of West*, 155 Wn.2d 659, 662, 121 P.3d 1190 (2005). Further, the Court will not consider the motives of the persons filing the charges in determining their sufficiency.<sup>4</sup> *Janovich v. Herron*, 91 Wn.2d 767, 773, 592 P.2d 1096 (1979). Charges in a recall action, must be both factually and legally sufficient. *In re Recall of Lee*, 122 Wn.2d 613, 616, 859 P.2d 1244 (1993); *In re Recall of Hurley*, 120 Wn.2d 378, 379, 841 P.2d 756 (1992); *In re Recall of Wade*, 115 Wn.2d at 547.

## **B. FACTUAL SUFFICIENCY**

To be factually sufficient, the petition for recall of an elected official must state in detail the acts complained of, and the petitioner must have knowledge of identifiable facts that support the charges. *Pearsall-*

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<sup>4</sup> Although a recall petitioner’s motives play no part in determining the legal and factual sufficiency of a recall petition, *In re Recall of Pearsall–Stipek II*, 136 Wn.2d 255, 267, 961 P.2d 343 (1998), a petitioner’s motives are relevant to determining bad faith. *In re Recall of Piper*, 184 Wn.2d 780, 786, 364 P.3d 113 (2015); *In re Recall of Lindquist*, 172 Wn.2d 120, 136–39, 258 P.3d 9 (2015).

*Stipek III*, 141 Wn.2d at 765. Mere conjecture, however, will be insufficient to enable the electorate to make an informed decision and is thus factually insufficient. *In re Recall of Pearsall-Stipek I*, 129 Wn.2d 399, 404-05, 918 P.2d 493 (1996); *In re Recall of Beasley*, 128 Wn.2d 419, 428-430, 908 P.2d 878 (1996).

The statute requires specificity as to what acts were taken that constitute misfeasance, malfeasance or violation of the oath by each official. In relevant part, RCW 29A.56.110 requires:

The charge shall state the act or acts complained of in concise language, give a detailed description including the approximate date, location, and nature of each act complained of, be signed by the person or persons making the charge, give their respective post office addresses, and be verified under oath that the person or persons believe the charge or charges to be true and have knowledge of the alleged facts upon which the stated grounds for recall are based.

A recall petition alleging a violation of law must allege facts showing that the official intended to violate the law. Although the charge may include conclusions, it must provide facts that support the conclusions. *Chandler v. Otto*, 103 Wn.2d 268, 270, 693 P.2d 71 (1984); *In re Recall of Feetham*, 149 Wn.2d 860, 870, 72 P.3d 741, 746 (2003). Second, a recall petition must “specify why such acts constitute misfeasance, malfeasance or violation of the oath of office.” *Teaford v. Howard*, 104 Wn.2d at 587.

### C. LEGAL SUFFICIENCY.

Recall charges must also be legally sufficient. Legal sufficiency requires that the charge “state with specificity ‘ “substantial conduct clearly amounting to misfeasance, malfeasance or violation of the oath of office.” *Pearsall-Stipek II*, 136 Wn.2d at 263-64 (quoting *In re Recall of Wade*, 115 Wn.2d 544, 549, 799 P.2d 1179 (1990) (quoting *Teaford v. Howard*, 104 Wn.2d 580, 584, 707 P.2d 1327 (1985)); *In re Recall of Lakewood City Council Members*, 144 Wn.2d 583, 585, 30 P.3d 474 (2001). The charge must not only demonstrate the facts supporting the charge but must show that the acts were wrongful. See *In re Recall of McNeill*, 113 Wn.2d 302, 308, 778 P.2d 524 (1989). The requirement of legal sufficiency “protects an elected official from being subjected to the financial and personal burden of a recall election grounded on false or frivolous charges.” *Teaford*, 104 Wn.2d at 585.

Officials cannot be recalled for exercising their discretion unless that discretion was exercised in a manifestly unreasonable manner. *In re Recall of Lindquist*, 172 Wn.2d at 132, citing *In re Recall of Reed*, 156 Wn.2d 53, 59, 124 P.3d 279 (2005). An attack on the official’s judgment in exercising discretion is not a proper basis for recall. *Jewett v. Hawkins*, 123 Wn.2d 446, 450–51, 868 P.2d 146 (1994 “If a discretionary act is the focus of the petition, the petitioner must show that the official exercised

discretion in a manifestly unreasonable manner.” *Jewett*, 123 Wn.2d at 448 (citing *Chandler*, 103 Wn.2d at 274, and *Greco v. Parsons*, 105 Wn.2d 669, 672, 717 P.2d 1368 (1986)). Mere disagreement with a discretionary decision, in contrast, is not sufficient. *In re Recall of McNeill*, 113 Wn.2d at 308; *Jewett*, 123 Wn.2d at 450-51.

“[A] legally cognizable justification for an official’s conduct renders a recall petition insufficient.” *Id.* “[A]n elected official cannot be recalled for appropriately exercising the discretion granted him or her by law.” *In re Recall of Reed*, 156 Wn.2d at 59; *In re Recall of Olsen*, 154 Wn.2d 606, 610, 116 P.3d 378 (2005). This may be true, “even, under some circumstances, when the official actually violated the law.” *In re Recall of Carkeek*, 156 Wn.2d 469, 474, 128 P.3d 1231(2006). For example, in one case the court found a legally cognizable justification where the recall was based on a county official’s failure to complete an action that was demonstrably impossible, even though the county council had ordered that it be done. *Greco v. Parsons*, 105 Wn.2d at 671-72 (county council had ordered auditor to redraw voter precincts within 32 days). In another case, an elected official’s neighbors attempted to recall the official, alleging that he had acted improperly in seeking an anti-harassment restraining order against them that would have barred their attendance at meetings otherwise open to the public. The court held that

the elected official's action was justified based on his fear of violence, even though the request for the anti-harassment order was unsuccessful. *Carkeek*, 156 Wn.2d at 475.

When a petition charges that the elected official has violated the law, the petitioners must show that they “at least have knowledge of facts which indicate an intent to commit an unlawful act.” *In re Recall of Kast*, 144 Wn.2d 807, 813-814, 31 P.3d 677, 681 (2001); *In re Recall of Wade*, 115 Wn.2d 544, 549, 799 P.2d 1179 (1990). While some inferences are permissible in a recall petition, on the whole, the facts must indicate an intention to violate the law. *In re Recall of Carkeek*, 156 Wn..2d at 474; *In re Recall of Telford*, 166 Wn.2d at 158.. The Petitions must show specific facts supporting such an intent for each of the Cathlamet Officials that are sought to be recalled. The petitions here utterly fail under this standard.

## **I. ARGUMENT**

### **A. THE RECALL CHARGES ARE MOOT AS TO COUNCIL MEMBERS BURNHAM, CAMERON AND SMITH.**

The issues presented for recall as to three of the Council members are now moot. Council Members Smith, Burnham, and Cameron occupy Council Positions 1, 2 and 3 respectively. None of the three incumbents

filed to seek re-election.<sup>5</sup> There is insufficient time to gather signatures prior to the November general election, at which time all three council members' seats are up for election.

Pursuant to RCW 29A.56.150:

“(1) The sponsors of a recall demanded of any public officer shall stop circulation of and file all petitions with the appropriate elections officer not less than six months before the next general election in which the officer whose recall is demanded is subject to reelection.

“(2) ... If the decision of the superior court regarding the sufficiency of the charges is appealed, the one hundred eighty ... day period for the circulation of signatures begins on the day following the issuance of the decision by the supreme court.” Therefore, signatures for a recall petition may not be gathered within the six-month period prior to the general election for those who are subject to reelection at the end of that six-month period.

Because the court will not complete its review and issue its opinion before the 180 day period barring circulation of the petitions for signature is up, this case is moot as to the Council Members who are not seeking reelection. *In re Recall Charges Against Seattle Sch. Dist. No. 1 Directors*, 162 Wn.2d 501, 506, 173 P.3d 265 (2007). However, the case is not moot as to Mayor Jacobson, who faces identical charges stemming from the acquisition of the Butler Street Property.

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<sup>5</sup> Petitioner Bill Wainwright is a candidate for one seat on the Town Council.

**B. THE CATHLAMET OFFICIALS CANNOT BE RECALLED FOR LEGITIMATE EXERCISE OF THEIR DISCRETION IN DECIDING TO PURCHASE THE BUTLER AVENUE PROPERTY.**

**1. The Recall Charges fail to sufficiently allege the specific conduct relied upon to form the basis of the recall.**

The sufficiency of a recall petition must be determined from its face. *In re Recall of Zufelt*, 112 Wn.2d 906, 914, 774 P.2d 1223 (1989); *In re Recall of Carey*, 132 Wn.2d 525, 527, 939 P.2d 1221 (1997). On its face, the petition does not show that the Council intended to violate a law or the Constitution. Where violation of the law is relied upon, the petition must allege facts that show the violation was intentional. Conclusory allegations of intent are insufficient.

Many of the critical factual allegations and basis for these charges is shown in the declarations submitted on the morning of the sufficiency hearing. These included details of the hearsay basis for Wainwright's knowledge. The declarations of Orr and Passmore are hearsay and should have been stricken. The declaration of Lake is double hearsay, as it relays statements that Lake was allegedly told by others who said they heard certain statements from council members.

Petitioner cites *West* to allow a recall petitioner to supplement the charges with additional factual allegations and evidence at a sufficiency

hearing. He correctly notes that elected officials must have sufficient actual notice to meaningfully respond. Brief at 2, n.2. However, here the Council did not have any opportunity to meaningfully respond because the declarations were filed the morning of the sufficiency hearing and were e-mailed to counsel at 4:50 p.m. the night before.

**2. The decision to purchase the Butler Street Property was a legitimate exercise of discretion by the Council, which is not a valid basis for recall.**

The Superior Court rejected Charges 1 and 2 against the Council Members and 1-4 against Mayor Jacobson because the decision to purchase 20 Butler Street was a discretionary decision and not an unconstitutional gift of public funds. This decision was legally and factually sound.

**a. A majority of the Council and the Seller reasonably disagreed with the appraiser's opinion as to value and believed that property had unique value to the Town as the last vacant lot on the main downtown street.**

By statute, the Town has the discretionary authority to buy such real estate as deemed necessary for the benefit of the town. RCW 35.27.370(2). It cannot be questioned that the decision to purchase real property is within the discretionary authority of a town council. RCW 35.27.010. See *Miller v. City of Pasco*, 50 Wn.2d 229, 233, 310 P.2d 863, 865 (1957) (decision to sell real property discretionary); RCW 47.52.050 (authority to acquire property for road purposes discretionary). As a discretionary decision, it is

not a basis for recall of the Council members merely because Mr. Wainwright disagrees. See *In re Recall of McNeill*, 113 Wn.2d at 308; *Jewett*, 123 Wn.2d at 450-51.

Here the Town Council approved purchase of the last vacant property on the main street in Cathlamet for \$68,000. This was less than the \$75,000 paid by the prior owner and less than the \$72,000 asking price. Neither such factor was addressed by the appraisal, which acknowledged that there was no commercially zoned bare land lots sold in the last 3 years. The appraiser did not consider the value of this property to the public for park purposes. CP 104. The appraiser ignored the prior purchase price of the land in 2007 and did not address the owner's opinion as to its value. Simply put, the owner would not sell the property for \$40,000. CP 142. Washington's definition of fair market value is the amount of money which a purchaser willing, but not obliged, to buy would pay an owner willing, but not obligated, to sell, taking into consideration all uses to which the property is adapted and might in reason be applied. *Cascade Court Ltd. P'ship v. Noble*, 105 Wn.App. 563, 567, 20 P.3d 997 (2001). This definition requires consideration of what the owner's opinion as to value would be.

The negotiation of a price to acquire property is a classic exercise of municipal discretion. The process cannot be reduced to a single opinion as

to value but requires consideration of both the willingness of the seller and buyer to pay. That is what occurred here.

It is undisputed that the Seller would not have sold the property for \$40,000, which is \$35,000 below what was paid for the property in 2007 and what it was assessed at in 2011. CP 105, 143. The Town was faced with the alternative of negotiating down the \$72,000 asking price or passing up this unique property. It chose to successfully negotiate a \$7,000 reduction in the price from the \$75,000 that the seller had previously paid.

Below, the petitioner suggested that the Town was in a position to strong-arm the owner into a forced sale at market or below market price. CP 162. Such a result ignores the reality of condemnation proceedings, where a municipality is obligated to pay fair market value as just compensation. Where there is a disagreement over this value, the remedy is a court proceeding which costs the Town further attorney's fees and creates the risk that the owner's opinion as to value would prevail. The town could further be obligated to pay, not only its own attorney's fees in a condemnation proceeding, but also the condemnee's. The town reasonably avoided this result, and significant possible expense, by negotiating a fair price which was below both the list price and below the prior purchase price.

If the Petitioner is correct that the Council may be recalled for buying property in excess of an appraiser's opinion as to value, then all

council members must be wary of losing their position when negotiating for a unique property, for which there is no comparable alternative. This property was the last vacant parcel off Main Street in downtown Cathlamet. CP 102-103, 141. It presented a unique opportunity to develop a public open space or park to attract people to come to the downtown area. *Id.*

Fortunately, the law does not permit recall for the exercise of discretion by officials vested with that power. *Recall of Lindquist*, 172 Wn.2d at 132. Nor does Petitioner show that the decision to purchase the property, which is what a willing buyer and seller agreed to in an arm's length transaction, was a manifest abuse of that discretion. CP 142. Instead, they rely on after-the-fact emails that project costs to monitor the remaining contamination, Brief at 9, ignoring completely the hold harmless and indemnification from Bank of Pacific. The Council's exercise of discretion was reasonable because they knew that any such costs would be borne by the Bank, not the Town.

**b. The Council reasonably believed that the property had minimal contamination.**

Much of the petitioners' argument centers on the Council's decision to acquire property subject to a restrictive covenant. Petitioner overstates the level of contamination on the property and the extent of the restriction and reaches the fallacious conclusion that the property is worthless. Brief

at 11. In actuality, the independent remedial action approved by Ecology in 2002 resulted in removal of the petroleum contamination except for traces left adjacent to the retaining wall on the northerly edge of the property. This allowed Ecology to determine that no further remedial action is needed at the site. CP 111. Ecology's report on the property confirms that "all accessible petroleum impacted soil was removed and a small quantity was left in place right adjacent to the retaining wall." CP 131. The residual contamination is shown on the colorized exhibit submitted to the Superior Court, which identifies the remaining contaminants in red. CP \_\_\_.

The covenant applies, by its own terms, to limit removal of the retaining wall and parking lot "in the area of residual petroleum hydrocarbon constituents shown in Attachment A". CP 220. Most of this area is on the 58 Main Street portion that is owned by the bank. *Id.* The amount on the Town acquired portion is immediately adjacent to the retaining wall, extending on the property by a few inches to a foot.

The Council understood the limited extent of the remaining petroleum hydrocarbons and its presence will not interfere with any contemplated use of the property. CP 104. The Town reasonably believed that the property could be used for the park purposes, a legitimate public purpose, and exercised its discretion to acquire the last vacant parcel along Main Street.

**c. The Council reasonably believed that the Bank of Pacific agreed to hold future purchasers harmless from liability associated with the minimal remaining contamination.**

In addition to the Council's understanding of the limited nature of residual contamination on the property, the Council also correctly understood that the Bank of Pacific, which owned the property when the contamination occurred, had expressly assumed responsibility for future remedial action and maintenance. CP 103. The Bank agreed to hold the property owner harmless from any liability for any remediation or clean up which might be required. This obligation would "survive the sale of the property" and continued "in effect in the event of the subsequent sale of the property by buyers and its successors and assigns." CP 120.

Petitioners argue that the Council and Mayor "disregarded their attorney's instructions by proceeding with the transaction. As a legal matter, the discretion to purchase property lies with the Council and their attorney cannot "instruct" them how to act. He can provide advice, which he did. That advice included the opinion that "[g]iven the way the hold harmless and restrictive covenant are written, it appeared to me that the exposure to the Town for ongoing cleanup costs was minimal." CP 229. The Council, as the client, is entitled to determine if it should proceed or delay or spend additional money on more advice. The council decided,

given the wording of the hold harmless and covenant, to proceed. This was within the Council's lawful discretion.

Thus, petitioners' allegations that the acquisition could result in liability to the Town are unfounded and were reasonably rejected by the Council in making its decision to acquire the 20 Butler Street Property. The Recall charges omit this level of detail, largely because the petitioner is ignorant of the true facts and has no personal knowledge of the scope of the restrictions that leads to the erroneous conclusion that the property is worthless. As such, the charges submitted by Petitioner are factually insufficient to inform the voters as basis underlying the Council's decision.

More significantly, however, this discretionary decision is legally insufficient to support a recall charge. As held most recently by this Court in *In re Lindquist*, 172 Wn.2d at 132:

To be legally sufficient, the petition must state with specificity " 'substantial conduct clearly amounting to misfeasance, malfeasance or violation of the oath of office.' " *In re Recall of Wade*, 115 Wash.2d 544, 549, 799 P.2d 1179 (1990) (quoting *Teaford*, 104 Wash.2d at 584). "[A] legally cognizable justification for an official's conduct renders a recall petition insufficient." *Id.* "[A]n elected official cannot be recalled for appropriately exercising the discretion granted him or her by law." *Reed*, 156 Wn.2d at 59.

The decision to buy and sell real estate is committed to the discretion of the Town Council under RCW 35.27.370(2). The Council's decision to acquire this last vacant lot on the main street was rational, did not create the

“parade of horrors” imagined by Petitioner, was for a fundamental government purpose to provide a park area and was not an abuse of their discretion as a matter of law. Thus, this charge against the Council Members fails.

**3. The decision to purchase the last vacant property on the main downtown street is not a gift of public funds and is not legally sufficient to permit recall of the Council.**

Petitioners allege that the Town’s purchase of the last vacant land usable for park purposes in downtown Cathlamet amounts to a gift of funds. Petitioner is incorrect in this allegation, as the Superior Court correctly determined.

Under *CLEAN v. State*, 130 Wn.2d 782, 797–98, 928 P.2d 1054, 1061–62 (1996), *as amended* (Jan. 13, 1997), a two-pronged analysis is employed to determine whether a gift of state funds has occurred. First, the court asks if the funds are being expended to carry out a fundamental purpose of the government? If the answer to that question is yes, then no gift of public funds has been made. The determination that the expenditure is for a fundamental purpose of government, such as acquisition of property for park use, ends the analysis.

The second prong comes into play only when the expenditures are held to not serve fundamental purposes of government. *CLEAN* at 798. Only then will the court focus on the consideration received by the public

for the expenditure of public funds and any alleged “donative intent” of the appropriating body in order to determine whether or not a gift has occurred. *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 39, 785 P.2d 447 (1990); *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 702, 743 P.2d 793 (1987); *see also Scott Paper Co. v. City of Anacortes*, 90 Wn.2d 19, 33, 578 P.2d 1292 (1978) (“if intent to give a gift is lacking the elements of a gift are not present, and Art. 8, §7 does not apply”).

The trial court adopted this analysis, citing *Hudson v. City of Wenatchee*, 94 Wn.App. 990, 995, 974 P.2d 342 (1999). There the Court held:

A two-pronged analysis is used to determine whether a gift of public funds has occurred. *CLEAN v. State*, 130 Wn.2d 782, 797, 928 P.2d 1054 (1996). The court must initially determine if the funds are being expended to carry out a fundamental purpose of the government. If they are, no gift or loan of public funds has been made. *Id.*; *Brower v. State*, 137 Wn.2d 44, 62, 969 P.2d 42 (1998). If the expenditures are not serving a governmental purpose, the court must then determine if a gift has occurred by focusing on the consideration received by the public and the donative intent of the governmental entity. *CLEAN*, 130 Wn.2d at 798, 928 P.2d 1054.

At the sufficiency hearing, Petitioner cited *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 743 P.2d 793 (1987) to contend that opposing counsel was making false statements and was not accurately representing the law. ROP 11, 17. Petitioner no longer relies on

this case to support the fallacious argument that the court should second-guess the adequacy of consideration paid for a valuable asset acquired for a fundamental governmental purpose. This case preceded the Supreme Court's decision in *CLEAN*, which Respondents submit is controlling on the issue.

Instead, without citation to authority, petitioner questions the adequacy of the consideration, likening the purchase of the Butler Street property to paying \$1500 for a pencil or \$1 million for the property. Brief at 24. The facts are against this position. The Council did not pay \$1 million but paid less than the \$72,000 asking price. CP 139.

Petitioner contends that the court cannot determine whether the council exercised its discretion in a manifestly unreasonable manner but must leave this up to the voters. Brief at 25, citing *In re Recall of Bolt*, 177 Wn.2d 168, 175, 298 P.3d 710 (2013). *Bolt*, however, does not support this conclusion. There, the Supreme Court found legally insufficient charges that a mayor should be recalled for personnel decisions involving discretion. The court rejected this charge because the petitioner failed to show an abuse of discretion. *Id.*

If Petitioner's argument is correct, the Court in *Bolt* would not have found the charge insufficient, but instead would have been forced to pass the allegation onto the voter to determine if it was an abuse of discretion.

Instead, the *Bolt* court exercised its gatekeeping function to reject a charge that the Court did not find to be a manifest abuse of discretion as legally insufficient. 177 Wn.2d at 175-176. It follows that the determination of whether discretion is abused is a matter of law, to be determined by the Superior Court in reviewing the sufficiency of the charges. Judge Richter correctly applied this standard and Petitioner's argument fails.

**4. The decision to pay earnest money to a purchaser is not a gift of public funds and was approved by the Council and is not legally sufficient to permit recall of the Council.**

Charges 1 and 4 against Mayor Jacobson are also insufficient. Charge 1 concerns payment of earnest money credited towards the purchase. This was not an unconstitutional gift of funds for the same reasons stated above. It was part of the \$68,000 price paid by the Town. This is not addressed or explained by the Recall Petition, which again appears to lack personal knowledge about the deal and how it came about, even though the receipt and credit for the \$1,000 earnest money payment is reflected in Section 3 of the Purchase and Sale Agreement. CP 158.

Petitioner also fails to explain how a conveyance of earnest money as part of a real estate deal constitutes a gift in violation of RCW 42.23.070(2). That section allows officials to carry out their duties, such as entering into agreements for acquisition of property. It is uncontested that the Council approved this action, so it is not an ultra vires action. CP

139. It is further uncontested that the earnest money was properly credited towards the purchase price of the property. CP 141-142. This is not malfeasance or unlawful in any way. Petitioner's allegations do not show any wrongful conduct and are legally insufficient.

This Court has consistently rejected similar allegations of unauthorized action to purchase property without Council authority. *In re Recall of Bolt*, 177 Wn.2d at 183–84; *In re Recall of Heiberg*, 171 Wn.2d 771, 257 P.3d 565 (2011). In *Bolt*, the Court noted the ratification of the purchases by Council and lack of intent to violate the law, stating:

First, we note that (1) the need to purchase the equipment was discussed at town council meetings prior to purchase; (2) the purchases were unique opportunities to buy used equipment at significantly reduced prices and would not have been available if Mayor Bolt and Councilman Jenson had waited for the next council meeting for approval; and (3) the purchases were ratified by the town council after the fact, including by some of the recall petitioners themselves who are members of the town council. Even setting aside these facts, however, this charge fails because the recall petitioners never identified the standard, rule, or law violated by Mayor Bolt and Councilman Jenson. They do not point to any purchasing policy or town ordinance that requires authorization by the council prior to purchase. *Cf. In re Recall of Heiberg*, 171 Wn.2d 771, 774, 257 P.3d 565 (2011) (reviewing a recall charge based on a mayor's equipment purchase prior to council authorization when such authorization was required by town ordinance).

Even if the recall petitioners did identify a law or rule against purchasing equipment prior to approval by the town council, there is no indication that Mayor Bolt and Councilman Jenson had an intent to violate such a law.

In *Heiberg*, the Court reviewed a recall charge against a mayor who purchased a truck for the town without obtaining approval from the town council or requesting bids, as required by state law and town ordinance. *Heiberg*, 171 Wn.2d at 774. Upon finding out that he needed authorization, the mayor attempted to obtain ratification from the council and, failing that, he fully reimbursed the town for the purchase. *Id.* at 779, 257 P.3d 565. The Court found that there was no factual basis to infer that the mayor intended to violate the law when he purchased the truck and found that the recall charge was factually insufficient. *Id.*

Similarly, in this case there is no basis to infer an intent to violate the law by paying earnest money for a purchase that was then presented to and approved by Council. The mayor's actions were taken with full knowledge of Council, and the payment was processed through regular channels, being sent by Council Member Waller who served on the voucher committee. CP 142. Because there is no intent to violate any law, the direction and payment of earnest money is legally insufficient to support Recall Charges 3-4 against Mayor Jacobson.

**a. The Petition is Factually Insufficient Because It Fails to Allege Sufficiently Detailed Facts to Support Recall Charges Against the Cathlamet Officials.**

Here, Petitioner has no knowledge of the alleged acts of any of the individual council members. The petition makes sweeping charges but

does not state the acts complained of or give any description of the date, location and nature of the acts of these officials that is complained of. The lack of specific allegations against the Cathlamet Officials suggests a political motive, rather than seeking to protect against specific acts of misfeasance, malfeasance or breaches of their oaths.

**b. Petitioner Wainwright Lacks the Requisite Personal Knowledge to Support a Recall Petition.**

RCW 29A.56.110 requires that “the person ... making the charge ... have knowledge of the alleged facts upon which the stated grounds for recall are based.” “Although there is no requirement that the petitioner have firsthand knowledge of the facts, he or she must have some knowledge of the facts underlying the charges.” *In re Recall of Wasson*, 149 Wn.2d 787, 791, 72 P.3d 170 (2003); *In re Recall of Ackerson*, 143 Wn.2d 366, 372, 20 P.3d 930 (2001). Specifically, “the petitioner must have knowledge of identifiable facts which support the charges.” *In re Recall of Carey*. 132 Wn.2d at 527. A simple belief that the charges are true is insufficient. *In re Recall of Beasley*, 128 Wn.2d at 425.

*In re Recall of Roberts*, 115 Wn.2d 551, 799 P.2d 734 (1990), is instructive and shows how conjectural allegations similar to those made in this case are insufficient to support a recall. There, the petitioner alleged conspiracy to violate the Open Public Meetings Act in the passage of a

moratorium ordinance. The Court found the allegations to be factually insufficient because, on its face, it did not contain details concerning any meeting alleged to violate the Act and was not based on personal knowledge of any violation. *Id.*, 115 Wn.2d at 554. The Court further refused to allow a petition based on speculation and conjecture, stating:

Nor is there any evidence whatsoever that respondents agreed in advance to support the proposed ordinance. Furthermore, Greenway had no knowledge that respondents agreed that the ordinance would be introduced at the April 19 meeting and be passed the following day in violation of the council's usual practice. Greenway merely surmised that respondents had made such an agreement based on what had happened at the April 19 and 20 meetings. Report of Proceedings, at 8-9. Greenway therefore had no knowledge, other than conjecture, to support his charges. *In re DeBruyn*, 112 Wn.2d 924, 930, 774 P.2d 1196 (1989) (conjectural knowledge insufficient).

*Id.*, 115 Wn.2d at 554-555.

Here, the Recall Charges allege no specific personal conduct of the Cathlamet Officials other than speculation as to their motives for casting a vote to acquire the Butler Street property. Wainwright lacks personal knowledge of their motivations. He did not provide any basis until the morning of the sufficiency hearing, after the Council had already responded. He submitted hearsay allegations claiming that council members stated they

wanted to prevent the Wallers<sup>6</sup> and the Lakes. Another declaration from Paige Lake claimed that Tanya Waller and Prudy Diem told her that council members said they were trying to help a friend in approving the sale. CP 235. This is double hearsay. Neither shows that Wainwright had personal knowledge but was instead relying on rumor and gossip as to the Council's intent. Neither is consistent with the fact that the price did not make the prior owner whole but was negotiated down so that Ms. Goodroe took a \$7,000 loss on the property. CP 142.

This Court has been cautious when allowing reliance on hearsay, such as statements made in media articles. As most recently held in *in re Davis*, 164 Wn.2d 361, 369, 193 P.3d 98 (2008), the Court has held that generally, media articles do not form a sufficient basis for the personal knowledge required by law. *See In re Recall of West*, 155 Wn..2d at 666, n. 3; *See also, In re Recall of Beasley*, 128 Wn..2d at 427-428.

The conclusory vague allegations in the Recall Charges were insufficient. The supplemental declarations are factually insufficient and are inadmissible hearsay from disgruntled rivals denied the opportunity to themselves acquire the property. Such vengeful baseless accusations against the Cathlamet Officials simply cannot be allowed to support a recall.

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<sup>6</sup> The dissenting Council members who voted against the Town's acquisition, secured the appraisal and were apparently interested in personally acquiring the 20 Butler Street property for themselves were Tanya Waller and Laurel Waller.

**5. The Superior Court correctly rejected the recall charges against the Town Council based on the purchase of 20 Butler Avenue.**

Judge Richter properly rejected the charges as failing to allege an unconstitutional gift of public funds. He determined that the charge is legally insufficient because there is no basis for a claim of a gift of public funds where the purchase of property is for a fundamental governmental purpose. CP 99. Judge Richter correctly refused to assess the adequacy of consideration in an acquisition of property for fundamental government purposes, which is an inherently discretionary task. CP 99. He therefore determined that there was no basis for recalling the Council based on the discretionary decision to purchase a lot for public use that cannot be said to be manifestly unreasonable. Thus, this Court should affirm his ruling that Charges 1 and 2 against the Council and Charges 1-4 against Mayor Jacobson are legally insufficient.

**C. THE PETITION FAILS TO ALLEGE SUBSTANTIAL CONDUCT BY THE MAYOR IN OFFICE THAT CREATES A SPECIAL PRIVILEGE BY PARKING VEHICLES ON A VACANT TOWN LOT.**

**1. The recall charges that the Mayor denied others the ability to park so as to create a special privilege were admittedly false.**

Petitioners charge that the Mayor created a special privilege under RCW 42.23.070 by parking vehicles from his business on an adjacent

vacant lot and denying others the right to do the same. The vague allegations in the original charges did not specify where and to whom the Mayor excluded others from its use or granted conditional permission but made the conclusory allegation that he exercised “dominion and control” and “treats the property as his own”. CP 24-25.

After the Mayor responded to the charges, pointing out the factual inadequacy of its vague allegations, the petitioner, Mr. Wainwright, filed a declaration on the morning of the sufficiency hearing to provide the details required to be in the charges themselves. His new declaration alleged that the Town Clerk, Kerrie McNally, not Mayor Jacobson denied him permission, but that the Mayor reversed the Clerk and approved parking for Mr. Wainwright on this property. CP 237-38.

The declaration shows the factual and legal inadequacy of the charge against Mayor Jacobson. The allegation in the Charges filed with the Auditor is admittedly false. Contrary to the recall charges, Wainwright and others were allowed to park on the Town’s vacant lot, which has “plenty of room” and has “always been available for public parking.” CP 141. Indeed, it is frequently used by fishermen to park vehicles and boat trailers while they are fishing on the river. *Id.*

The declaration from Wainwright not only rebuts his own recall charge, it confirms that the Mayor did not use it to create a “special

privilege” under RCW 42.23.070. The declaration shows that the property was not denied to members of the public, confirming the Mayor’s declaration. CP 141. It further creates a factual inadequacy by offering contradictory and inconsistent factual allegations to any voters who might consider the charge. See *In re Recall of Cy Sun*, 177 Wn.2d 251, 262, 299 P.3d 651 (2013) (rejecting charge as factually and legally insufficient where factual underpinnings of this charge are vague).

**2. The charges concerning creation of a special privilege were not based on substantial conduct of the Mayor in office.**

The allegations about parking on a neighboring vacant lot do not amount to substantial conduct of the Mayor in office that constitute misfeasance, malfeasance or violate his oath of office. Appellants cite no case law supporting such a claim.

Similar allegations were rejected in *In re Bolt*, 177 Wn.2d at 178 (de minimis use of city resources not substantial conduct forming a basis for recall). There, the Mayor and a Council member were charged with abusing public resources by using a town vehicle to do volunteer work and stopped at a neighbor’s house for coffee while using that vehicle.

To the contrary, the court has found misuse of town resources based on allegations of substantial misconduct where an elected official abuses his office by using Town resources to investigate his political opponents, which

was upheld as a basis for recall in *In re Recall of Cy Sun*, 177 Wn.2d at 257–58. There, the mayor’s demand that police investigate a pamphlet criticizing the mayor was not only a misuse of Town resources but also an improper interference with the police officers’ official duties, which fell within the definition of “misfeasance, malfeasance, or violation of the oath of office.” No such conduct is involved by the Mayor’s parking of his vehicles on the Town’s vacant lot.

**3. The Superior Court correctly rejected the recall charges against the Mayor.**

Judge Richter correctly found that the allegations that Wainwright was denied use of the adjacent property were contradicted by his own affidavit and that the Mayor did not exclude others so as to create a special privilege in violation of RCW 42.23.070. Moreover, he correctly held that the parking of vehicles on a Town lot is not substantial conduct that amounts to mis-feasance, malfeasance or violated Jacobson’s oath of office. This finding should be affirmed.

**D. THE SUPERIOR COURT NEEDS TO REVISE THE BALLOT TITLES TO FAIRLY INFORM THE VOTERS OF ANY CHARGES DEEMED SUFFICIENT.**

The Superior Court did not rule on the adequacy of the proposed ballot titles prepared by the prosecuting attorney’s office. The Respondents suggested alternative ballot language to succinctly and directly describe

what is alleged to be the basis for recall. The legislature has vested the responsibility for this decision in the superior court. RCW 29A.56.140 (“The superior court shall correct any ballot synopsis it deems inadequate. Any decision regarding the ballot synopsis by the superior court is final.”) *In re Recall of West*, 155 Wn.2d at 664. Thus, if any of the charges are found sufficient, the Court must remand to the Superior Court to consider the adequacy of the ballot titles.

## V. CONCLUSION

The Court should affirm the Superior Court’s ruling that the recall charges are not sufficient and dismiss the recall proceedings filed by Petitioner Bill Wainwright in this matter.

Respectfully submitted this 3rd day of June, 2019.



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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I have caused to be served via E-Service and U.S. Mail the foregoing document in this matter, upon the Appellant at the address below:

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Longview, WA 98632-7934

DATED this 3<sup>rd</sup> day of June, 2017.



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Jeffrey S. Myers

**LAW LYMAN DANIEL KAMERRER & BOGDANOVICH**

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