



MINNESOTA  
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## CITY COUNCIL MEETING STAFF REPORT

To: City Council  
 From: Teri Swanson, City Clerk and Kay Kuhlmann, City Council Administrator  
 Agenda Item No.: 10.F. Consider Action Related to Recall Petition Received for Council Member Dean Hove  
 Meeting Date: July 12, 2021

**Recommended Action** – City Council is asked to take action related to Council Member Hove's recall petition. The petition met the 20% of registered voters' requirement. The two alternatives are to:

1. Pass a motion to decline calling a special recall election for Council Member Hove, or
2. Adopt Resolution No. 7666 calling for a special recall election. The attached resolution calls for a special recall election concerning Council Member Hove.

### **Attachments**

1. Pages 16-18 of the City Charter - Recall
2. Resolution No. 7666

**Background** – Chapter 6, Sections 6.12 – 6.17 address the citizens' right for recall of elected leaders. The recent effort seeks the recall of all seven City Council members.

- On April 9, 2021, seven Certification of Recall Committees were submitted and confirmed by the City Clerk to be registered voters representing the appropriate ward(s).
- On May 10, petitions from all seven recall efforts were returned to City Hall for counting. The City Clerk completed the verification count on Sunday, May 16, 2021, returning petitions that had irregularities. Section 6.13 of the Charter requires the petitions to include "a certificate identical with that filed with the clerical officer." The certification on the recall petitions for Council Member Dean Hove (Wards 1 & 2) was different than the certificate filed with the clerical officer.

Of the seven recall initiatives, five recall efforts reached 20% of the registered voters for the appropriate ward(s).

Section 6.14 of the Red Wing City Charter provides for the recall committee to be given 10 days in which to file additional signature papers and to correct the petition in all other respects.

- On May 24, 2021, the City of Red Wing received recall petitions that did meet the Red Wing City Charter Section 6.14 Filing of Petition requirements related to the recall of Council Member Evan Brown from the office of City Council Wards 3 & 4; and Council Member Erin Buss from the office of City Council Ward 4.

- On May 24, 2021, City Council approved a motion by a 6:1 vote to decline calling a special recall election for Council President Norton (Ward 3), Council Member Klitzke (Ward 2) and Council Member Stinson (Wards 1,2,3,4).
- On June 7, 2021, the City of Red Wing received a new Certification of Recall Committee form intending to bring about a recall of Council Member Dean Hove from the office of City Council Wards 1 & 2.
- On June 14, 2021, City Council approved a motion by a 6:1 vote to decline calling a special recall election for Council Member Brown (Wards 3 & 4) and Council Member Buss (Ward 4).
- On July 6, 2021, the City of Red Wing received recall petitions, that did meet the Red Wing City Charter Section 6.14 Filing of Petition requirements related to the recall of Council Member Dean Hove from the office of City Council Wards 1 & 2

The Charter states, "Any five registered voters may form themselves into a committee for the purpose of bringing about the recall of any election Council Member or Mayor of the City for malfeasance or nonfeasance in office." This statement in the City Charter makes it clear that a Council Member may only be recalled for malfeasance or nonfeasance in office. Additionally, the Minnesota Supreme Court has held that an elected official of a charter city can only be removed from office if the official has engaged in malfeasance or nonfeasance, as set forth in the Minnesota Constitution.

The City Council has received legal advice for each meeting alleged to have been an open meeting law violation. A summary of the allegation and the City's position is below.

***1. The first assertion is that on June 24, 2019, each of six Council members named violated the Open Meeting Law at Minn. Stat. § 13D.01, Subds. 3 and 4 by discussing impermissible topics beyond the closed session notice for purchase of the Bauer Built property.***

*What happened and the legal foundation:* The City Council voted unanimously to go into closed session on June 24, 2019, to consider the purchase of the Bauer Built property. The Open Meeting Law allows governing bodies to go into closed session to, among other things, develop or consider offers or counteroffers for the purchase of real property. See Minn. Stat. § 13D.05, subd. 3(c).

Minnesota Statutes Section 13D.01, subdivision 3, provides that "[b]efore closing a meeting, a public body shall state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed." The Council President stated the grounds allowing the meeting to be closed by noting the statute that allowed for the closed session. The Council President also described the subject that would be discussed at the closed session. Following is what the Council President stated:

"The Open Meeting Law Minnesota Statute Section 13D.05, subdivision 3(c) allows City Council to close a meeting to develop and/or consider offers for the purchase of real property. Staff is asking the Council to close the meeting to develop an offer to purchase property at 1511 Old West Main Street, owned by MTRE Red Wing, Minnesota, LLC, Bauer Built. The property ID is 55-535-0580 and 55-535-0529. With that I'll entertain a motion to go into closed session."

The other provision that the committees allege was violated does not apply to closed sessions. Minnesota Statutes Section 13D.01, subdivision 4, provides:

(a) The votes of the members of the state agency, board, commission, or department; or of the governing body, committee, subcommittee, board, department, or commission on an action taken **in a meeting required by this section to be open to the public** must be recorded in a journal kept for that purpose.

(b) The vote of each member must be recorded on each appropriation of money, except for payments of judgments, claims, and amounts fixed by statute.

(Emphasis added.) This section does not apply to closed sessions as stated in the language above. Moreover, the Council does not take action on the purchase of property in closed session so there would not be any votes to record. Rather, the Council votes on purchase agreements in open sessions in accordance with the Open Meeting Law as discussed below.

The City ultimately purchased the Bauer Built property. The City approved the purchase agreement for the Bauer Built property at an open meeting on November 12, 2019, consistent with the Open Meeting Law. See Minn. Stat. § 13D.05, subd. 3(c) (“an agreement reached that is based on an offer considered at a closed meeting is contingent on approval of the public body at an open meeting”).

Because the property has been purchased by the City, the closed session tape is now a public document.

***2. The second assertion is that the six said Council members again violated the Open Meeting Law, Minn. Stat. § 13D.01, Subd. 4, on July 22, 2019.***

What happened and the legal foundation: As noted in No. 1 above, Section 13D.01, subdivision 4, is not applicable to closed sessions. The City did go into closed session on July 22, 2019, to consider an offer on the Bauer Built property and to develop a counter-offer. The Council's action to close the meeting was taken in accordance with the Open Meeting Law, which allows meetings to be closed to consider offers on real property and to develop counter-offers. Because the property has been purchased by the City, the closed session tape is now a public document.

***3. The third assertion is that on October 14, 2019, the six said Council members again violated the Open Meeting Law at Minn. Stat. § 13D.01, Subd. 4.***

What happened and the legal foundation: As noted in No. 1 above, Section 13D.01, subdivision 4, is not applicable to closed sessions. The Council's action to close the meeting was taken in accordance with the Open Meeting Law, which allows meetings to be closed to consider offers on real property and to develop counter-offers.

Because the property has been purchased by the City, the closed session tape is now a public document.

***4. The fourth assertion is that on February 8, 2021, all seven Council members violated the Open Meeting Law, Minn. Stat. § 13D.04, Subd. 5, by meeting unlawfully without***

***proper three days' notice and by going into closed session without identifying the employee or the allegations against the employee.***

*What happened and the legal foundation:* Numbers 4 and 5 relate to an employment matter. On Monday, February 8, 2021, the City Council went into closed session for preliminary consideration of allegations against an employee. Minnesota Statute Section 13D.05, subdivision 2(b) states that a public body "shall close one or more meetings for preliminary consideration of allegations or charges against an individual subject to its authority." The statute states that the meeting must be open at the request of the individual who is the subject of the meeting. Minn. Stat. § 13D.05, subd. 2(b). The employee did not elect to have the meeting open, and so it was closed.

The February 8 Council meeting was also a regular meeting and so three days' notice of the closed session was not required. Three days' notice is only required for special meetings. See Minn. Stat. § 13D.04, subd. 2. The agenda for a regular meeting can be amended at the meeting.

In addition, the law does not require the Council to disclose the identity of the employee before going into closed session under this exception to the Open Meeting Law. See Minn. Stat. § 13D.05, subd. 2(b). (That is required when a meeting is closed to conduct an evaluation of an employee, but not when a meeting is closed for the preliminary consideration of allegations. Compare Minn. Stat. § 13D.03, subd. 3(a) with Minn. Stat. § 13D.05, subd. 2(b).) There is also no requirement that the allegations against an employee be disclosed publicly before closing a meeting for preliminary consideration of allegations, and the City does not do that when it closes a meeting for this purpose because allegations against an employee are private personnel data under the Minnesota Government Data Practices Act. Minn. Stat. § 13.43, subd. 2.

***5. The final assertion is that all seven Council members violated the Open Meeting Law, Minn. Stat. § 13D.05, subd. 2(b), by voting unlawfully to deny an open City Council session for consideration of disciplinary action against Chief Roger Pohlman, thus infringing upon the rights of the public and Chief Pohlman to hear allegations against Chief Pohlman and to hear the reasoning and deliberations of the City Council, which led to his termination.***

*What happened and the legal foundation:* On Friday, February 19, 2021, the City Council voted to go into closed session pursuant to the attorney-client privilege. The Open Meeting Law allows a meeting to be closed pursuant to the attorney-client privilege. See Minn. Stat. § 13D.05, subd. 3(b). The Council President stated that the meeting was being closed pursuant to the attorney-client privilege and noted the subjects to be discussed as follows:

"The Open Meeting Law, Minnesota Statutes section 13D.05, subdivision 3(b), allows the City Council to close a meeting pursuant to the attorney-client privilege. The purpose of the closed session is for the Council to meet with the City Attorney to receive legal advice regarding a proposed agreement and release of all claims related to an employee. During the closed session, the City Attorney will advise the Council on the legal meaning of the proposed terms and the legal considerations and pros/cons of entering into the proposed agreement. There is a need for absolute confidentiality because the City's position would be compromised if such discussions took place in public and could be overheard by the other party. Accordingly,

pursuant to the law I have cited, I will hereby entertain a motion that this meeting will be closed pursuant to the attorney-client privilege. I'm looking for a motion to go into closed session under Minnesota Statutes section 13D.05, subdivision 3(b), to consider and discuss a proposed employment agreement.”

The committees cite Section 13D.05, subdivision 2(b), as the basis for the alleged violation, but that statute was not the ground upon which the Council closed the meeting; rather, the Council closed the meeting pursuant to the attorney-client privilege. The employee does not have the right to require a meeting that is closed pursuant to the attorney-client privilege be open, as the City Council is the client receiving advice. For that reason, the Council determines whether there is a need for absolute confidentiality based on the attorney-client privilege to close a meeting at which it will receive legal advice related to negotiations concerning a proposed employment agreement and a release of potential legal claims. City councils have the right to receive an attorney's advice on a potential agreement and release of legal claims in confidence, just as citizens have a right to confidentiality with their legal representatives.

**Discussion** – The City Charter includes language that the City Council shall by resolution provide for the holding of a special recall election if 20% or more of the registered voters sign petitions supporting this. As noted above, however, the recall of an elected official is only proper if the grounds for the recall rise to the level of malfeasance or nonfeasance. As discussed by the City Attorney at the April 26, 2021 Council meeting, the Minnesota Supreme Court held in the *Claude v. Collins* case, that a city council member's violation of the Open Meeting Law did not amount to malfeasance. The City Attorney also referred to Minnesota court cases that stand for the proposition that a violation of the Open Meeting Law does not amount to nonfeasance unless three separate violations of the law are proven in three separate court actions. Here, no court has found that any Council Member violated the OML; rather, the petitions only include allegations. Based on this, staff recommends the City Council pass a motion to decline calling a special recall election.

**Financial impact** – It is possible that the recall committee will seek legal recourse. This may be an expensive experience; however, the cost of a special election will be sizeable also. It is also possible that the City will be involved in litigation if the City calls a special election because an individual Council member(s) could initiate legal action if a special election is called and they do not agree that the grounds for the recall allege malfeasance or nonfeasance.

**Alternatives** – The City Council's options include the following, as well as any others the Council may suggest:

- 1) Pass a motion to decline calling a special recall election for Council Member Hove on the basis that the grounds for recall in the petition are insufficient to constitute malfeasance or nonfeasance on the part of the Council Member; or
- 2) Adopt Resolution No. 7666, calling for a special recall election of Council Member Hove.

**Recommendation** – Council is asked to either pass a motion to decline calling the special election or, adopt Resolution No. 7666 calling for a special recall election. The attached resolution calls for a special recall election concerning Council Member Hove.

## RESOLUTION NO. 7666

### *Resolution Ordering a Special Recall Election*

**WHEREAS**, on April 9, 2021, the City of Red Wing received a Certification of Recall Committee form intending to bring about a recall of Council Member Dean Hove from the office of City Council Wards 1 & 2; and

**WHEREAS**, on May 10, 2021, the City of Red Wing received Recall Petitions that did not meet the Red Wing City Charter requirements related to the recall of Council Member Dean Hove from the office of City Council Wards 1 & 2. Section 6.13 of the Charter requires the petitions to include "a certificate identical with that filed with the clerical officer." The certification on the recall petitions was different than the certificate filed with the clerical officer; and

**WHEREAS**, on June 7, 2021, the City of Red Wing received a new Certification of Recall Committee form intending to bring about a recall of Council Member Dean Hove from the office of City Council Wards 1 & 2; and

**WHEREAS**, on July 6, 2021, the City of Red Wing received Recall Petitions, that did meet the Red Wing City Charter Section 6.14 Filing of Petition requirements related to the recall of Council Member Dean Hove from the office of City Council Wards 1 & 2; and

**WHEREAS**, although Section 6.15 of the Red Wing City Charter provides that a special recall election be held not less than 45 nor more than 60 days after the Council meeting calling the special election, Minnesota Statutes Section 205.10 provides that special elections must be held on certain dates; and

**WHEREAS**, Minnesota Statutes Section 205.10 preempts the City Charter, and thus, in accordance with that law, the special recall election must be held on November 2, 2021, in order to meet the notice and filing period requirements of state law; and

**NOW, THEREFORE, BE IT RESOLVED**, by the City Council of the City of Red Wing, that:

1. The City Council hereby acknowledges the Recall Petitions have met Section 6.14 Filing of Petition requirements related to the recall of Council Member Dean Hove from the office of City Council Wards 1 & 2.
2. A special recall election is to be held for the Council Member Wards 1 & 2 seat on November 2, 2021.
3. The filing period for the special election is August 24-September 7, 2021.

Adopted this \_\_\_\_ day of \_\_\_\_\_, 2021.

\_\_\_\_\_  
Becky Norton, Council President

Attest:

\_\_\_\_\_  
Teri L. Swanson, City Clerk

(seal)

Presented to the Mayor at \_\_\_\_\_ p.m. on this \_\_\_\_ day of \_\_\_\_\_, 2021.

Approved this \_\_\_\_ day of \_\_\_\_\_, 2021.

\_\_\_\_\_  
Michael Wilson, Mayor

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