

STATE OF MINNESOTA
COUNTY OF GOODHUE

DISTRICT COURT
FIRST JUDICIAL DISTRICT

George Hintz, Peter Lang,
Judith Kjome, Stephen Lind,
Betty Kalember, and Sheryl Voth,

Petitioners,

Court File No. 25-CV-21-1564

v.

City of Red Wing, Minnesota,
Becky Norton, Dean Hove,
Andy Klitzke, Evan Brown,
Erin Buss, and Laurel Stinson,
in their official capacities as
Red Wing City Council members,

and

Teri Swanson, in her official capacity
as Red Wing City Clerk,

Respondents.

**NOTICE OF MOTION
AND
MOTION TO INTERVENE**

Please take notice that on _____ at _____, Red Wing VOTERS will bring a Motion to Intervene as Respondent for hearing before the Honorable Judge _____, of Goodhue County District Court, 454 West 6th Street, Red Wing, Minnesota, or as soon thereafter as counsel can be heard. [This Notice of Motion and Motion and proposed stipulation has been circulated to Petitioners' attorney and Respondent's attorney.]

This Motion is made pursuant to Minnesota Rule of Civil Procedure, 24.01 Intervention of Right and 24.02 Permissive Intervention, in order to assert the defenses set forth in its proposed Answer, of which a copy will be filed immediately should this Intervention be granted.

This Motion is made the grounds of Red Wing VOTERS' interest in the fundamental

right to vote and preserving the integrity of open, free, and fair elections, specifically, the City of Red Wing elections of 2018 and 2020. Red Wing VOTERS is an association of voters in Red Wing who oppose the recall effort, representing voters who elected Red Wing City Council members and their interests. Red Wing VOTERS has a defense to Petitioners' claim for “correction of ballot error M.S. A. §204B.44,” which, if Petitioners prevail, would have the detrimental impact of invalidating the 2018 and 2020 elections through a recall of six of seven duly elected City Council members and disenfranchising the voters who elected these City Council members. If Petitioners prevail, Red Wing VOTERS would suffer irreparable harm. Red Wing VOTERS has an interest in those issues focused on the broad rights of citizens and voters under the Charter and correct interpretation thereof, an interest distinct from the interests of, and not represented by, the City of Red Wing.

Regarding questions of facts, the facts are mostly undisputed, other than one material and demonstrably false statement¹ in the Petition, some material omissions², and other conclusory statements interpreting facts. Red Wing VOTERS has obtained documentation regarding some facts through multiple Data Practices Requests. None of the many pages of the actual Recall Petitions are included by Petitioners as Exhibits, nor are any of the many pages of City identified invalid signatures due to illegibility, incorrect birthdays, incorrect Ward of signer, and multiple lines filled out by same person, or the May 16, 2021 letter rejecting the Dean Hove Petitions. See Exhibits E-J.

¹ See false statement, Petition, para. 12, that “there was a typo on the original certificate filed with the clerk which led to the rejection of their efforts.” Exhibit F does not include the THREE “Certification of Recall Committee – Dean Hove,” #1 submitted to City and Certified 4/9/2021; #2 NOT Certified by City and yet attached to back of Petitions filed May 10, 2021 and rejected by City in letter of May 16, 2021; and #3, Certified by City June 7, 2021 and accompanying Petitions filed with City July 6, 2021.

² Regarding omissions, see e.g., Petition, para. 8, which states that signature pages were returned, but there is no mention of the May 16, 2021 rejecting all of the Dean Hove petitions as invalid. This is a material omission. Only one of the three Dean Hove 5 person Recall Committee petitions is included as Exhibit F.

The many legal questions that Petitioners have raised and inferred in the above-captioned Petition are more murky than factual issues, because there is admittedly no case law, no precedent, that is directly on point. See Petition, p. 4, para. 10; p. 11, para. 45. There is, however, relevant case law, including specifically regarding Minn. Stat. §204B.44 and a City's responsibility and role in placing issues on the ballot.

Red Wing VOTERS, has an interest in the determination of, and would address the following legal issues raised directly and by inference in the above-captioned Petition:

- Is a recall election a right? Petitioners argue, without support, that there is a “right” to a recall election, that “the right to a recall election itself is not discretionary, nor is it within the purview of the council’s authority to refuse under the circumstances at bar,” and that the City cannot refuse to schedule an election, that because the Petition was procedurally sufficient, the City must hold an election. Petition, p. 4, para. 10; Conclusion p. 11-12; see also Petition, paras. 5, 7, 15, 40, 41, 43). Again, case law regarding Minn. Stat. §204B.44 related to a City’s decision to put an issue before the voters should apply.
- Is the presence of a “250 word statement” alone sufficient legally to trigger a recall election, or is there a review for sufficiency? The City Charter requires malfeasance and/or nonfeasance, and the Petitioners “250 word statement” is the basis for determination of malfeasance and/or nonfeasance. Charter, §6.15; see Charter §6.12 (Petitioners admit that “The Charter at §6.12 requires Petitioners to identify the malfeasance which **may** serve as the grounds for removal from office.” Petition, para. 13 (emphasis added). “May” is not a guarantee that the drafting of a statement is a legally sufficient demonstration of malfeasance and/or nonfeasance.
- Another fundamental legal question, notably not directly addressed by Petitioners, is whether “procedural sufficiency” alone is sufficient to trigger a recall election. Petitioners repeatedly point out “procedural sufficiency” requirement, but they neglect the issue of legal sufficiency of the issues raised in the “250 word statement” claiming malfeasance and/or nonfeasance. Petition, para. 5, 7, 15, 40 (Only under very limited circumstances may an elected body refuse to place a procedurally valid measure on the municipal ballot, and none are present here.), 41, 43.
- In this situation, how is malfeasance defined? Petitioners also argue, again without support, that:

The term “malfeasance” as applied to the recall of *state* officials must not be read to forbid charter cities from determining for themselves what does

and does not meet this standard.

Petition, p. 11, para. 45. There is firm precedent that a City Charter shall not be interpreted contrary to state law. See *Bicking, Id.*, p. 312 (quoting *State ex rel. Lowell v. Crookston* , [252 Minn. 526, 528](#), [91 N.W.2d 81, 83](#) (1958; *St. Paul Citizens for Human Rights v. City Council* , [289 N.W.2d 402, 405](#) (Minn. 1979).

- Another fundamental legal question at issue, also argued in the Petition without support, is whether it is for the voters to decide, in a recall election, whether there has been malfeasance and/or nonfeasance on the party of the City Council. Petition, p. 5, para. 14; p. 8-9, para 36.
- Another legal issue raised by Petitioners, without support, is an attempted burden shift from Petitioners to City Council members:

Finally, even if all the other procedural protections are satisfied, and the voters opt to remove the elected official at the election, the councilmember in question has at least one remaining avenue of relief – the Courts. If the recalled official feels that his/her conduct does not rise to the level of malfeasance, a lawsuit brought by the member to adjudicate this question would be proper.

Petition, p. 10, para. 43. This notion has no basis in law.

Intervention of Right

Red Wing VOTERS seek intervention in the above-captioned case as a matter of right.

The right to vote is a fundamental constitutional right, a right in which Red Wing VOTERS have a material interest. The Petition of Hintz, Lang, Kjome, Lind, Kalember, and Voth is an effort to invalidate the City of Red Wing’s 2018 and 2020 elections, in which Becky Norton, Dean Hove, Andy Klitzke, Evan Brown, Erin Buss, and Laurel Stinson won seats to the City Council, and effort that, if successful, would disenfranchise the voters of Red Wing by invalidating the 2018 and 2020 City of Red Wing elections.

Neither the Petitioners nor the Respondents represent the Red Wing VOTERS interest, as the Petitioners are attempting to remove the duly elected Council members Becky Norton, Dean Hove, Andy Klitzke, Evan Brown, Erin Buss, and Laurel Stinson from office, and the Red Wing

City Attorney is representing the interests of the City, the City Council members and City Clerk in their official capacities, distinct from the interests of voters. The Red Wing VOTERS primary interest is to preserve the City of Red Wing's free and fair 2018 and 2020 elections. No other party adequately represents this interest, and no other party has that focus.

Permissive Intervention

In the alternative, if Red Wing VOTERS are not granted intervention of right, Red Wing VOTERS seek permissive intervention in the above-captioned case.

Red Wing VOTERS asks that our request to intervene, with all the rights and responsibilities of a party, be granted. Recall is an extraordinary remedy for malfeasance and/or nonfeasance on the part of elected officials. Petitioners have failed to demonstrate a legally sufficient basis for a claim of malfeasance and/or nonfeasance, and repeatedly argue that the Petitions submitted to the City are procedurally sufficient, neglecting to address their responsibility to demonstrate legal sufficiency. Red Wing VOTERS, if granted intervention, will address the issues above in which it has an interest, and any other issues affecting and specific to Red Wing VOTERS as this case unfolds.

August 16, 2021



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ACKNOWLEDGEMENT

Red Wing VOTERS, hereby acknowledges by its undersigned attorney, pursuant to Minn. Stat. §549.211, that costs, disbursements, and reasonable attorney and witness fees may be awarded at the court's discretion herein for acts of bad faith, the assertion of a frivolous claim or defense, the assertion of unfounded position solely to delay or harass, or the commission of a fraud upon the court.

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