

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF GOODHUE

FIRST JUDICIAL DISTRICT

Case Type: Civil Other/Ballot Omission
Writ of Mandamus

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

Petitioners,

Court File No. _____

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,

**PETITION FOR CORRECTION OF
BALLOT ERROR M.S.A. §204B.44 or
WRIT OF MANDAMUS
MINN. STAT. CH. 586**

and

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

Respondents.

Petitioners above-named, on behalf of themselves and all others similarly situated, pursuant to Minnesota Statutes, § 204B.44, hereby bring this Petition against Respondents above-named, for correction of a deliberate ballot omission or, alternatively, for a Writ of Mandamus directing the City of Red Wing to hold an election for the recall of six city councilmembers in accordance with the strictures of the municipal charter. In support of their Petition, by and through their undersigned attorney, Petitioners complain and allege as follows:

FACTUAL BACKGROUND

1. This is a petition by a group of Red Wing residents who have been denied their right to a recall election by the subjects of the recall themselves - - the Red Wing City Council (“City,” or “Red Wing”). The right to an election to determine whether public officials will be removed from office is protected for city residents under the Red Wing City Charter (“Charter”) at §§ 6.12 – 6.17 (attached hereto as Exhibit A).

2. This matter comes before this Court on largely undisputed facts.

3. The Charter provides several procedural safeguards to ensure due process for both city officials and voters. First, a committee of five registered voters from the pertinent ward must sponsor each recall petition. Ex. A at § 6.12. Next, the committee must file a certification describing the name of the officer, grounds for removal, and intention to recall. *Id.* Once this certificate is filed with the city clerk, it must be attached to each signature page prior to circulation to ensure that each signer is aware of the grounds upon which recall is sought. *Id.*

4. Grounds for removal from office of any council member or mayor of the city must include a description of the malfeasance or nonfeasance alleged to have been committed by the official in question in 250 words or less. *Id.* at § 6.12. The elected official is then allowed 500 words to answer these allegations, which must be published in the newspaper of record along with the announcement of the election. *Id.* at § 6.16.

5. Once the certificate is filed with the city clerk, the committee is under a strict 30-day timeline to gather the signatures of at least 20% of the registered voters in the city or ward

represented by the officer in question.¹ Ex. A at § 6.14. Upon delivery of the completed signature pages, and assuming procedural compliance,² the city clerk “...shall transmit it to the council without delay and shall also officially notify the person sought to be recalled of the sufficiency of the petition and of the pending action.” *Id.* At § 6.15.

6. On April 9, 2021, Petitioners submitted seven certificates to the Red Wing City Clerk, one for each city council member. Exs. E-J; Ex. B at 1. The clerk verified residency of the Petitioners and the signature collection process began shortly thereafter. *Id.*

7. Petitioners and dozens of other volunteers canvassed the community and returned the completed signature pages to the clerk on May 10, 2021. *Id.* Three of the seven petitions met the necessary signature threshold after the City completed its process of examining the pages for irregularities. *Id.* Three valid petitions, which met all procedural requirements, pertained to councilmembers Becky Norton, Andy Klitzke, and Laurel Stinson. *Id.* These individuals represent Wards 3, 2, and an At-Large position, respectively.

8. The Red Wing City Charter requires the clerk and council to return any signature pages not meeting the 20% threshold to the committee, which is then allowed ten days to remedy any shortfalls. Ex. A at § 6.14. On or about May 16, 2021, the signature pages were returned so the remaining necessary signatures could be gathered.

9. “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” for two more of the

¹ The actual number of verified signatures gathered by Petitioners has never been provided by the City of Red Wing. Petitioners were only told that the official number met the necessary threshold in all instances.

² This includes verification that committee members live in the appropriate ward(s), numerical sufficiency, proper affixation of the certificate to each signature page, an affidavit of each circulator who gathered signatures, and ensuring proper form of the petitions. *See gen.* Ex. A.

original seven petitions, which had been remedied by Petitioners. Ex. D at 1. These required the holding of an election for the potential recall of council members Evan Brown of Wards 3 and 4, and Erin Buss of Ward 4. Ex. C at 1.

10. Later that same night, and despite the procedural sufficiency of the petitions in all regards,³ the Red Wing City Council voted 6 to 1 to protect themselves and deny Petitioners' right to a special election for the potential recall of councilmembers Norton, Klitzke, and Stinson.⁴ *Id.* It is this unilateral act, a brazen conflict of interest which is unsupported by any process or procedure in the City Charter and unprecedented in Minnesota jurisprudence, that is the subject of this lawsuit.

11. On June 14, 2021, the City Council again voted 6-1 to ignore its mandate under the Charter and deny the voters a recall election to decide upon the removal of councilmembers Brown and Buss. Ex. D at 2. At this point, five valid petitions had been returned to the clerk and council, and each of the five targets of those petitions had voted with the majority not to subject themselves to an election where the voters may have removed them.

12. Although Petitioners originally collected more than enough signatures to remove a sixth member, Dean Hove of Wards 1&2, there was a typo on the original certificate filed with the clerk which led to the rejection of their efforts. So, Petitioners dutifully began the certification and collection process once again, and returned completed and sufficient petitions

³ *See Id.* Red Wing claims an “irregularity” unrelated to compliance with the Charter, which gives rise to this litigation.

⁴ Available at 10.D. http://red-wing.granicus.com/GeneratedAgendaViewer.php?view_id=3&clip_id=2512, last accessed August 5, 2021.

on July 6, 2021 for an election to remove councilman Hove. *Id.* This, too, was denied by the Council 6-1 on July 12, 2021.⁵

13. The Charter at § 6.12 requires Petitioners to identify the malfeasance which may serve as the grounds for removal from office. To satisfy this provision, Petitioners provide five examples of potential violations of the Minnesota Open Meeting Law (OML), Minn. Stat. §§ 13D.01-.07 (2021), by each sitting member of the council who is the subject of the recall effort.

14. Rather than leaving the question to the voters as the Charter intends, the Red Wing City Council effectively pre-litigates the malfeasance allegations unilaterally across several pages of “City Council Staff Reports” between May 24th and July 12th. *See* Ex. B, C, D. Unsurprisingly, the question of whether malfeasance was committed was decided in its own favor.

15. No procedural defects in any of the petitions are alleged by the City. The only cited basis for denial of the recall election is the City’s claim that malfeasance has not been committed by any councilmember, and that they are therefore insulated from risking removal from office.

16. Petitioners bring this Petition pursuant to Minn. Stat. §204B.44 because they seek prompt judicial review and remedial action by the Court. The Court must direct the City of Red Wing to hold a special election, per the terms of the Charter, to allow the voters to decide whether council members Norton, Klitzke, Stinson, Brown, Buss, and Hove should be removed from office.

⁵ Available at 10.F. http://red-wing.granicus.com/GeneratedAgendaViewer.php?view_id=3&clip_id=2563, last accessed August 6, 2021.

17. Minnesota Statutes § 205.10 subd. 3(a) provides that the ballot language for a February special election to recall the councilmembers in question must be submitted no later than November 26, 2021.

18. Without immediate intervention by the Court, Petitioners will suffer irreparable harm as Red Wing has refused to hold an election which is its duty under the Charter.

PARTIES

19. Petitioner George Hintz is a registered voter and resident of the City of Red Wing, Minnesota, a home rule charter city. Petitioner Hintz lives in Ward One, and he signed and helped to circulate the Petition for the recall of council member Dean Hove.

20. Petitioner Peter Lang is a registered voter and resident of the City of Red Wing, Minnesota, a home rule charter city. Petitioner Lang lives in Ward Two, and he signed and helped to circulate the Petition for the recall of council member Andy Klitzke.

21. Petitioner Judith Kjome is a registered voter and resident of the City of Red Wing, Minnesota, a home rule charter city. Petitioner Kjome lives in Ward Three, and she signed and helped to circulate the Petition for the recall of council member Becky Norton.

22. Petitioner Stephen Lind is a registered voter and resident of the City of Red Wing, Minnesota, a home rule charter city. Petitioner Lind lives in Ward Four, and he signed and helped to circulate the Petition for the recall of council member Evan Brown.

23. Petitioner Betty Kalember is a registered voter and resident of the City of Red Wing, Minnesota, a home rule charter city. Petitioner Kalember lives in Ward Four, and she signed and helped to circulate the Petition for the recall of council member Erin Buss.

24. Petitioner Sheryl Voth is a registered voter and resident of the City of Red Wing, Minnesota, a home rule charter city. Petitioner Voth lives in Ward Three, and she signed and helped to circulate the Petition for the recall of council member Laurel Stinson.

25. Respondent City of Red Wing is a home rule charter city under the laws of the State of Minnesota with the capacity to sue and be sued. The City, through its City Council, is the legal entity responsible for the refusal to hold a special election for the recall of public officials consistent with the Charter.

26. Respondent Becky Norton is a Red Wing City Council member who voted to deny the right of the people to a recall election.

27. Respondent Andy Klitzke is a Red Wing City Council member who voted to deny the right of the people to a recall election.

28. Respondent Laurel Stinson is a Red Wing City Council member who voted to deny the right of the people to a recall election.

29. Respondent Evan Brown is a Red Wing City Council member who voted to deny the right of the people to a recall election.

30. Respondent Erin Buss is a Red Wing City Council member who voted to deny the right of the people to a recall election.

31. Respondent Dean Hove is a Red Wing City Council member who voted to deny the right of the people to a recall election.

32. Respondent Teri Swanson is the Red Wing City Clerk who is responsible for the inspection, handling, and transmission of recall petitions in the City.

ANALYSIS

33. Red Wing, like other home rule charter cities, has broad authority to regulate its affairs, and home rule charters prevail over general statutes pertaining to subjects proper for municipal regulations. *State ex. rel. Lowell v. Crookston*, 252 Minn. 526, 91 N.W.2d 81, 83 (1958). Under Minnesota Statutes, and consistent with the State Constitution, a home rule charter “may provide for the establishment and administration of all departments of a city government, and for the regulation of all local municipal functions, as fully as the legislature might have done.” Minn. Stat. § 410.07.

34. Minnesota Statutes § 410.20 provides that a municipal charter may “...provide for the recall of any elective municipal officer and for removal of the officer by vote of the electors of such city...”

35. The defining characteristics of a home rule charter city are initiative, referendum, recall, and charter amendment power under Minnesota Statutes Chapter 410. Red Wing reserves all these rights broadly for its voters.

Due Process Safeguards in the Charter

36. The Red Wing City Charter provides that “The people of Red Wing reserve for themselves the power, in accordance with the provisions of (the) Charter... to recall elected public officials through the petition process.”⁶ Critically, the voters’ right to recall is not

⁶ Red Wing City Charter at § 6.01, available at <http://lf.ci.red-wing.mn.us/weblink/0/doc/169294/Page1.aspx>. Last accessed August 5, 2021.

subservient to the whims of the subjects of the recall themselves, nor is it the province of the Red Wing City Council to “allow” the recall election to take place.

37. A review of the Charter bears this out: once a sufficient number of signatures has been gathered:

...the clerical officer *shall* transmit it to the Council without delay and *shall* also officially notify the person sought to be recalled of the sufficiency of the petition and of the pending action. The Council *shall*, at its next meeting, by resolution provide for filing dates and other provisions necessary for the holding of a special recall election not less than 45 nor more than 60 days after such meeting...

Ex. A at § 6.15 (emphasis added).

38. The presence of the repeated, directive language in § 6.15 makes it clear that the framers of the Charter were aware of the potential for abuse by sitting councilmembers.

39. Despite this language, due process protections are nonetheless required for the elected officials who may find themselves the targets of a recall election. No fewer than four of these safeguards are present in the recall process.

40. First, and most importantly, this lawsuit concerns the right to *hold an election*. This case does not turn on the definition of malfeasance in a charter city, although five potential examples of OML violations is certainly sufficient for the voters to decide that removal from office is warranted.⁷ Rather, the question is whether the City is justified in protecting its own officials from the *risk* of being recalled by the voters at an election. 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.

⁷ The six Certifications submitted to the City Clerk prior to signature collection are attached hereto as Exhibits E through J. These include the allegations of malfeasance related to each councilmember.

41. Next, it is no trivial matter to organize dozens of volunteers to gather thousands of signatures on a short timeline and dodge the procedural snares to withstand the scrutiny of the city clerk and council. This requirement is in place to ensure that any effort to qualify a recall petition for the ballot is no small undertaking; it requires dedication and time. Presumably, any committee formed for this purpose would think twice before launching a frivolous attempt.

42. After the signatures are gathered, the Charter specifically provides the councilmember the opportunity to defend him or herself in 500 words against the allegations made in the recall petitions. Ex. A at § 6.16. This statement must be published alongside the notification of the election as another due process guarantee before the elected official may be removed.

43. 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.

Denial of the Recall Election is Bad Public Policy

44. To grant the councilmembers themselves de facto veto power over the *possibility* they may be held to account for their own alleged misconduct is inconsistent with the express provisions of the Charter and the intentions of the legislature in drafting the home rule charter amendment. It would also eliminate the very accountability to the electorate the Charter and Constitution are designed to protect.

45. 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. This would constitute a huge transfer of authority away from the voters in charter cities and is without precedent.

46. If the drafters of the Charter had intended to allow the City Council a process to determine for themselves whether their own conduct “rises to the level of malfeasance,” they would have done so. No such process exists in the Charter.

47. Allowing the City to nullify a right under the Charter sends a dangerous signal to the electorate. A conflict of interest like this would present an unthinkable abuse of authority in any other context. Red Wing’s use of its bully pulpit in this manner has a chilling effect on future citizen involvement in the direct democracy process.

48. Voter ballot measures will always present an inherent conflict with the desires of the City Council, which is particularly true as it pertains to recall elections. The legislature and the framers have taken precautions to ensure that Charter rights reserved for the voters are protected. To validate the denial of the recall election in Red Wing effectively deletes these powers and rewards the City government for ignoring them. This is terrible public policy.

CONCLUSION

Despite representations to the contrary, this is not a matter of politics. Reasonable minds can disagree about whether removal from office is warranted, and Petitioners encourage all residents of the City to turn out and vote one way or another. But 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. The exercise of voter rights is contentious by nature because, if it were the popular decision, the council would have taken action itself. For a healthy city with a balance of power, measures like the recall effort must be respected and the special election must be held.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully request that this Court issue an Order pursuant to Minnesota Statutes § 204B.44 directing the City of Red Wing to hold a recall election to allow the voters to determine whether councilmembers Becky Norton, Dean Hove, Andy Klitzke, Evan Brown, Erin Buss, and Laurel Stinson, should be removed from office. Alternatively, Petitioners seek a Writ of Mandamus under Chapter 586 directing the City to abide by the terms of its Charter and schedule an election for the same purpose forthwith.

Petitioners also recognize the right of each councilmember to resign under the terms of Charter § 6.17. Should this Court order a special election, Petitioners have no objection to the 10-day window for resignation being reinstated for each member.

Dated: August 6, 2021

/s/ Gregory J Joseph

Gregory J Joseph (#0346779)

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Acknowledgement

I hereby acknowledge that, pursuant to Minn. Stat. §549.211, subd. 3, sanctions may be imposed by this Court if it determines that Minn. Stat. §549.211, subd. 2, has been violated.

Dated: August 6, 2021

/s/ Gregory J Joseph
Gregory J Joseph (#0346779)

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