

What Is A Recall Process?

Source: City of Red Wing, online at <http://www.red-wing.org/1064/You-Ask-We-Answer>

What is a recall process?

A recall process is a set of steps residents can take to petition for a special election on the question of whether an elected official should be removed. This process is outlined in [the City of Red Wing Charter](#). You can read about the process under Section 6.12.

What can a Council member or Mayor be recalled for?

In accordance with the Minnesota Constitution and the City Charter, a Mayor or City Council member can only be removed if their conduct constitutes malfeasance or nonfeasance while in office. Few actions rise to the level of malfeasance or nonfeasance. If an action does not constitute malfeasance or nonfeasance, a city council may decide not to call a special election, as the Blue Earth, MN, City Council recently did.

Malfeasance has been defined by Minnesota courts as “evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful.” *Jacobsen v. Nagel*, 96 N.W.2d 569, 573 (Minn. 1959). Courts have explained that this is a very high standard, usually involving a felony conviction, bribery, or unduly profiting from one’s position as an elected official.

Nonfeasance has been defined by Minnesota courts as “neglect or refusal, without sufficient excuse, to do that which is the officer’s legal duty to do.” *Id.*

What is the first step in a recall process?

The first step in a recall process is that any five people who are registered voters in the city limits must form a committee for the purpose of bringing about a recall of any elected official (Council Member or Mayor) for malfeasance or nonfeasance while in office. In the case of the Mayor and Council Member At Large, the committee can be composed of registered voters from any ward of the City. In the case of all other Council Members, the committee must consist of registered voters from the ward or wards where the Council Member was elected.

The committee then must fill out and return a “Certification of Recall Committee” form to the City Clerk stating the committee’s intention to bring about a recall, the name of the elected official who the committee is seeking to remove, and a statement of 250 words or less that outlines the perceived grounds for removal. One certification form is required for each official being brought forward for re-

What happens if the City receives a petition with what the committee views as signatures from 20% of the registered voters in the correct ward?

The City will review the petition to determine if it meets the 20% minimum number of signatures for the proper ward(s) and ensure that every signature is from a registered voter in the correct ward(s). The City has five days to determine if a petition is irregular in any way. If the City determines that the petition has the necessary number of signatures from registered voters in the correct ward(s) and that the petition is not irregular in any other way, the City Clerk sends the petition to the City Council to be considered at the Council’s next regular meeting.

The Council will then decide whether to call a special election. If the Council determines that the allegations do not constitute malfeasance or nonfeasance, the Council has the option of declining to call a special election.

If a special election is held in the City of Red Wing, it is estimated to cost between \$4,000 and \$5,000 per ward. If all four wards had a special election, the estimated cost would be between \$16,000 and \$20,000.

What happens if the petition does not contain the necessary signatures?

If the petition does not contain the necessary number of legitimate signatures or is irregular in any way, the City will give the committee 10 more days in which to file additional signatures and to correct the petition in all other respects. No changes to the statement of the grounds for recall can be made. If the City finds the petition is still insufficient or irregular after those 10 days, the City Clerk must notify the committee of that fact, and the City Clerk will file the petition in his/her office as insufficient. After that, no further action is taken.

What are the stated grounds for recall that the committees have filed with the City?

To summarize, the recall committees state that Council members violated the Open Meeting Law regarding two issues – meeting in closed sessions in 2019 related to the purchase of the Bauer Built property, and meeting in closed sessions in 2021 related to the employment of Roger Pohlman. No other issues or disputes are part of the recall effort.

The following items are the stated grounds for recall:

- On June 24, 2019, Council members 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.
- On July 22, 2019, Council members again violated the Open Meeting Law at Minn. Stat. § 13D.01, Subd. 4.
- On October 14, 2019, Council members again violated the Open Meeting Law at Minn. Stat. § 13D.01, Subd. 4.
- On February 8, 2021, Council members violated Minnesota Open Meeting Law § 13D.04, Subd. 5, by meeting unlawfully without proper three days’ notice; further, Council members voted to go into closed session without first identifying the employee or the allegations against the employee, in violation of Minn. Stat. § 13D.01, Subd. 3.
- On February 19, 2021, Council members violated Minnesota Open Meeting Law § 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 is the background for the alleged grounds?

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 meet-

Red Wing’s City Council

Kim Biese - Ward 1

kim.beise@ci.red-wing.mn.us

Dean Hove - Wards 1 & 2

deanhove@charter.net

Andy Klitzke - Ward 2

andy.klitzke@ci.red-wing.mn.us

Evan Brown - Wards 3 & 4

evan.brown@ci.red-wing.mn.us

Becky Norton - Ward 3

becky.norton@ci.red-wing.mn.us

Erin Buss - Ward 4

erin.buss@ci.red-wing.mn.us

Laurel Stinson - At-Large

laurel.stinson@ci.red-wing.mn.us

Contact Entire City Council and the Mayor:

citycouncil@ci.red-wing.mn.us

- ing 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. Please see the audio recording of that June 24, 2019, closed session [see city link <http://www.red-wing.org/1064/You-Ask-We-Answer>].

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. Please see the audio recording of that July 22, 2019, closed session [see city link <http://www.red-wing.org/1064/You-Ask-We-Answer>].

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. Please see the audio recording of that October 14, 2019, closed session [see city link <http://www.red-wing.org/1064/You-Ask-We-Answer>].

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.

What is the basis for the closed meetings and the Council's next steps?

The Council closed each of the meetings referenced in the recall petition in accordance with the requirements of the Open Meeting Law. The City Council has historically closed meetings when discussing property acquisitions or sales, threatened or pending litigation, or preliminary consideration of allegations against employees—and the Open Meeting Law allows meetings to be closed for each of these reasons.

If a recall petition is filed with the City with the sufficient number of signatures, the Council will consider legal advice about its options, which would include the option to not call a special election if the Council determines the allegations do not amount to malfeasance or nonfeasance.

Copy written by: City Council Administrator Kay Kuhlmann , 51-385-3612 and kay.kuhlmann@ci.red-wing.mn.us.

Formatted and printed by Legalectric, Carol A. Overland, Red Wing, MN overland@legalectric.org