



MUNICIPALITY OF ANCHORAGE

Office of the Municipal Attorney

Memorandum

DATE: December 15, 2015

TO: Amanda K. Moser, Deputy Municipal Clerk, and
Barbara A. Jones, Municipal Clerk

FROM: William D. Falsey, Municipal Attorney *WDF*
Deitra L. Ennis, Deputy Municipal Attorney *DLE*
Dean T. Gates, Assistant Municipal Attorney *DZ*

SUBJECT: **REFERENDUM APPLICATION 2015-5: RESPONSE TO SPONSORS’
LETTER OF DEC. 14, 2014**
Dept. of Law Matter No. N15-3410

QUESTION:

Should the Clerk’s office issue to the sponsors of Referendum Application 2015-5 a master-petition form that puts to voters the question of whether AO 2015-96(S-2)(as amended) shall “remain law”?

BRIEF ANSWER:

Subject to the following discussion, our brief answer is no. Presenting to voters the question of whether “[a law] shall remain law” exposes the Municipality and the sponsors to a greater risk of successful legal challenge. Asking whether a law should “be repealed”: (1) better accords with the Anchorage Municipal Charter and Code; (2) avoids inconsistency with state practice; (3) is more intuitive, in that it follows the usual practice of a “yes” vote representing the “action alternative,” while a “no” vote represents the “no action” alternative; and (4) is more consistent with prior municipal practice. Further, (5) the Municipality is aware that asking whether a law shall “remain law” has caused actual voter confusion in the past.

To better ensure that the results of a referendum vote will not be disturbed, we advise that the question to be put to voters in a referendum election should be whether the subject law should “be repealed.”

BACKGROUND:

On November 25, 2015, sponsors submitted to the Municipal Clerk an application for a referendum petition titled, “Gender Identity & Sexual Orientation Amendments.” The application proposed to circulate to voters the following question:

Shall AO No. 2015-96(S-1) (as amended), an ordinance adding sexual orientation and gender identity to Title 5 of the Anchorage Municipal Code, remain law?

Our office advised that the Clerk’s office could issue a petition “master form” to the sponsors of Referendum Application 2015-5 that included language that differs from that which was proposed by the sponsors. The sponsors object to the revised language, which they describe in a December 14, 2015 letter as “cumbersome,” but have advised that they would accept a petition that reads:

Shall AO No. 2015-96(S-1) (as amended), which amended the Equal Rights Title of the Anchorage Municipal Code (Title 5) to prohibit discrimination within the Municipality on the bases of sexual orientation or gender identity in the sale, rental or use of real property, financing, employment, places of public accommodations, educational institutions, and practices of the municipality; to codify certain religious and other exemptions; and to expand the lawyer’s role in fact-finding conferences before the Anchorage Equal Rights Commission, remain law?

A “yes” vote is a vote to keep the ordinance in place. A “no” vote is a vote to repeal the ordinance.

This language, including revisions suggested by the sponsors, would have the effect of a reversing the meaning of “yes” and “no” from the meaning those terms would have in an election asking whether a law should “be repealed.”

DISCUSSION:

I. APPLICABLE MUNICIPAL LAW DEFINES A REFERENDUM AS A PROPOSITION TO DETERMINE WHETHER A LAW SHOULD “BE REPEALED”.

The Anchorage Municipal Charter guarantees to the people of Anchorage the “right of referendum.”¹ “Referendum” is a defined term in the Charter—it the process of “repealing” an ordinance by vote of the people:

“Referendum” means the process of repealing an ordinance or resolution by vote of the people without assembly action.²

The Anchorage Municipal Code similarly defines a “referendum” as “ballot proposition presented to the voters . . . to determine whether an ordinance or resolution already approved shall be repealed”:

Referendum means a ballot proposition presented to the voters after submission of petitions signed by a specified number of qualified voters to determine whether an ordinance or resolution already approved shall be repealed by popular vote.³

Municipal Code presumes that voters will be able to “favor repeal”:

If a majority of those voting favor repeal of the legislation referred, that legislation is repealed upon certification of the election.⁴

Fundamentally, a municipal referendum should be presented to voters as a ballot proposition asking voters whether a law “shall be repealed,” because that is what the Charter and Code require; it flows from the definition of what a municipal referendum is.

By contrast, putting to voters the question of whether a law “shall remain law” would expose the Municipality to claims that it had forwarded to voters a form of referendum not consistent with the language of the Anchorage Municipal Charter and Code. The form of a ballot question has, in fact, led to litigation and invalidation of an

¹ ANCHORAGE MUNICIPAL CHARTER at § 2(1).

² *Id.* at § 17.13(i) (emphasis added).

³ AMC 2.50.010 *Definitions* (emphasis added).

⁴ AMC 2.50.090 *Effect of Vote* (emphasis added).

election result in the past, where a state ballot question “so far departed from the constitutionally prescribed form of ballot that the electorate’s right to vote on the question was impermissibly infringed.”⁵

We see no reason for the Municipality to incur that risk, when it can be easily and entirely avoided by using the language of the Charter and Code.

II. THE STATE OF ALASKA HAS ADOPTED A SIMILAR PRACTICE OF PUTTING TO VOTERS THE QUESTION OF WHETHER A LAW SHOULD “BE REJECTED.”

The definition of “referendum” adopted in the Anchorage Municipal Charter and Code is also consistent with state practice.

At the state level, the preparation of ballot propositions for referenda is entrusted to the Lt. Governor.⁶ By statute, the Lt. Governor must draft referendum propositions so that a “yes” vote is “a vote to reject the act referred”:

(a) The lieutenant governor, with the assistance of the attorney general, shall prepare a ballot title and proposition upon determining that the petition is properly filed. The ballot title shall, in not more than 25 words, indicate the general subject area of the act. The proposition shall, in not more than 50 words for each section, give a true and impartial summary of the act being referred. In this subsection, “section” means each section of the Alaska Statutes created, amended, or repealed in the Act, and each section of the Act that does not create or amend codified law.

(b) The proposition prepared under (a) of this section shall comply with AS 15.80.005 and shall be worded so that a “Yes” vote on the proposition is a vote to reject the act referred.⁷

⁵ *Boucher v. Bomhoff*, 495 P.2d 77, 78 (Alaska 1972) (the state election official’s wording of a referendum question on the ballot, “REFERENDUM As required by the Constitution of the State of Alaska Art. XIII, Section 3, Shall there be a constitutional convention?” deviated from the prescribed form of the question, “Should there be a Constitutional Convention?” and led the court to invalidate the election).

⁶ See AS 15.45.410 *Preparation of ballot title and proposition*.

⁷ *Id.* (emphasis added).

This codified practice is consistent with language from the Alaska Constitution, which suggests that voters in a referendum election should be given the choice to “favor the rejection of an act referred”:

If a majority of the votes cast on [an initiative] proposition favor its adoption, the initiated measure is enacted. If a majority of the votes cast on [a referendum] proposition favor the rejection of an act referred, it is rejected. The lieutenant governor shall certify the election returns. An initiated law becomes effective ninety days after certification, is not subject to veto, and may not be repealed by the legislature within two years of its effective date. It may be amended at any time. An act rejected by referendum is void thirty days after certification. Additional procedures for the initiative and referendum may be prescribed by law.⁸

To the best of our knowledge, in every referendum proposition ever presented to voters in a statewide election in which voters were given the choice to vote “yes” or “no,” a “yes” vote was vote to reject the law.⁹

Aside from our use of “repeal” (stemming from the term’s use in the Anchorage Municipal Charter and Code), and the State’s use of “reject” (stemming from that term’s use in the State Constitution and Statutes), we see no reason why municipal practice should differ from state practice. Indeed, because municipal and statewide referenda may appear on the very same ballot,¹⁰ we believe significant policy considerations weigh heavily in favor of the Municipality adopting a presentation of referenda that is consistent with the state practice.

III. PUTTING TO VOTERS THE QUESTION OF WHETHER A LAW SHALL “BE REPEALED” IS MORE CONSISTENT WITH VOTER INTUITION AND THE NEAR UNIVERSAL PRACTICE OF “YES” REPRESENTING AN ENDORSEMENT OF A PROPOSED ACTION, WHILE “NO” REPRESENTS A VOTE TO MAINTAIN THE STATUS QUO.

⁸ ALASKA CONST. ART. XI, § 6. *Enactment* (emphasis added).

⁹ See Referendum 13SB21 *An Act relating to the Oil and Gas Production Tax, Interest Rates and Overdue Taxes, and Tax Credits* (Aug. 19, 2014); Referendum 00GAME *An Act Relating to Management of Game* (Nov. 7, 2000); *Referendum Relating to Voter Registration* (Chapter 211, SLA 1968) (Nov. 5, 1968).

¹⁰ Cf. Sample Ballot of Nov. 4, 2014 Statewide General Election (featuring three statewide initiatives and, in Anchorage, a referendum on AO2013-37(S-2)).

The result suggested by applicable law and conformance with state practice is also most compatible with typical voting procedures and, we believe, voter intuition. A referendum determines whether a law currently on the books should be removed. The “action” at issue is whether the law should be repealed. The “no-action alternative” is to permit the law to remain in effect.

The typical practice in voting procedures is for “yes” to be a vote in favor of a proposed action, and for “no” to be a vote *not* to take the action proposed. Indeed, in parliamentary procedure, we are not aware of an exception to this rule.¹¹

Even absent controlling law and the strong policy reasons to adopt a convention for municipal referenda consistent with state statutes, to best conform to expected practices and voter intuition, we would advise that “yes” equate to the “action alternative”—a vote in favor of repeal.

IV. THE MUNICIPALITY’S TYPICAL PRACTICE HAS BEEN TO PUT TO VOTERS THE QUESTION OF WHETHER AN ORDINANCE SHALL “BE REPEALED,” NOT WHETHER AN ORDINANCE SHALL “REMAIN LAW.”

The approach we recommend is also most consistent with the Municipality’s own prior actions.

To the best of our current knowledge, with only two exceptions, all referenda that have appeared on a municipal ballot have asked voters whether an ordinance shall “be repealed.”

1986: In a ballot proposition entitled “REPEAL OF SIGN REGULATIONS,” voters were asked:

Shall Ordinance Number AO 85-159 codified as AMC Chapters 21.45 and 23.40 as adopted on September 17, 1985 be repealed?¹²

1992: In a ballot proposition entitled “REFERENDUM ALASKA NATIVE CULTURAL CENTER,” voters were asked:

¹¹ See generally ROBERT’S RULES OF ORDER NEWLY REVISED (11th ed. 2011).

¹² The ballot proposition also featured the following explanatory language:

A YES vote would repeal the current prohibitions on the use of rooftop, portable, off-premise, and other limitations on signs. A NO vote would retain the current prohibitions on the use of rooftop, portable, off-premise, and other limitations on signs. (AO 86-204 (as amended)).

Shall AO 90-46, an ordinance authorizing the lease of lands within the Far North Bicentennial Park for the establishment of an Alaska Native cultural center be repealed?

April 1997: In a ballot proposition entitled, “REPEAL OF ORDINANCE AO 96-132,” voters were asked:

Shall Anchorage Ordinance 96-132, which rezoned the 40 acres generally located north of W. 104th Avenue and west of King Street, from I-2 (heavy industrial) to PLI-SL (public lands and institutions with special limitations) so that a correctional institution (such as a prison, jail, reformatory, or detention center) could be built on that site, be repealed?

Nov.1997: In a ballot proposition entitled, “REPEAL OF CURFEW LAW,” voters were asked:

Anchorage Municipal Code Section 8.05.440 which establishes a curfew for minors be repealed?

2007: In a ballot proposition entitled, “REFERENDUM TO REPEAL AO 2006-86(S) SECOND HAND SMOKE ORDINANCE,” voters were asked:

Shall Anchorage Ordinance 2006-86(S), relating to a prohibition of smoking in public places, to extend second hand smoke control, be repealed?

As noted above, we are aware of only two exceptions to this rule, neither of which provides a good or defensible model for future referenda, for reasons already stated and added to below.

1993: In a ballot proposition entitled, “REFERENDUM ON ADDITION TO PROTECTED CLASSES,” voters were asked,

Should AO 92-116(S), which adds sexual orientation to the list of protected classes for the purpose of public employment or municipal contractors, remain law?

The Alaska Supreme Court held that this referendum had proceeded to the ballot unlawfully, and noted deficiencies with its language.¹³ As a result of the Court's decision, the April 1993 Municipal Ballot was presented to voters with a coversheet that read:

Pursuant to Alaska Supreme Court Order No. S-5605, the election on Proposition One (Anchorage Municipal Ordinance 96-116(S)) has been stayed. Therefore, IF YOU VOTE ON PROPOSITION ONE YOUR VOTE WILL NOT BE COUNTED.

This is a result that we seek to avoid.

2013: In a ballot proposition entitled, simply, "Municipality of Anchorage Proposition No. 1," voters were asked:

Shall AO No. 2013-37(S-2)(as amended), an ordinance amending Anchorage Municipal Code chapter 3.70, Employee Relations, remain law?

To the best of our understanding, as a result of the unusual set of circumstances that led to the AO37 referendum going to voters, *the AO37 ballot-proposition language did not receive a legal review.*

Sponsors of the AO37 referendum submitted two referendum applications. In the first application, the sponsors proposed the following petition language:

PETITION TITLE: REFERENDUM PETITION TO
 REPEAL AO 37

PROPOSED PETITION: In accordance with Section 3.02 of the Home Rule Charter for the Municipality of Anchorage and Section 2.50 of the Anchorage Municipal Code, we the undersigned qualified voters of the Municipality of Anchorage submit this Referendum Petition calling for the repeal of Anchorage Ordinance 37 ("AO 37") enacted on March 26, 2013, amending Section 3.70, Employee Relations, of the Anchorage Municipal Code.

¹³ See *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1218 n.3 (Alaska 1993).

AO 37 makes numerous changes to the Anchorage Municipal Code that affect municipal employees. Among the changes, AO 37 limits collective bargaining for municipal employees; introduces a managed competition program for potential outsourcing of certain city services; removes certain public employees from collective bargaining; gives the Municipality additional control over staffing, scheduling, equipment, benefits, overtime, and leave; eliminates binding arbitration for contractual impasse resolution; prohibits strikes; and limits annual pay and benefit increases.

Therefore, we the undersigned registered voters of the Municipality of Anchorage request the following question be placed before the voters of the Municipality of Anchorage as a referendum question:

Shall AO 37, an ordinance amending
Anchorage Municipal Code chapter 3.70,
Employee Relations, remain law?

Yes No

The Municipal Attorney's office advised the Municipal Clerk to reject this application on technical grounds; the application cited the wrong version of AO37 and did not include a full text copy of ordinance. The Department of Law also suggested that the sponsor's summary of AO37 was inconsistent with the Alaska Supreme Court's decisions in the *Faipeas* and *Citizens for Implementing Medical Marijuana* cases.

In response to the Municipal Clerk's resulting refusal to certify the application, the sponsors tried again. The sponsors submitted a second application that corrected the technical deficiencies and omitted any summary of AO37, so as to "eliminate any concern regarding whether the summary is misleading or confusing."

The Municipal Attorney's office never drafted a summary. The Department of Law instead advised, incorrectly, that the sponsors' second application should not be certified on grounds that it addressed improper subject matter. The question was litigated, and the Municipality lost.¹⁴ After the Alaska Supreme Court ruled that the AO37 referendum did not address improper subject matter, the proposition requested by

¹⁴ See *Municipality of Anchorage v. Holleman*, 321 P.3d 378 (Alaska 2014).

the sponsors was placed on the ballot, unaccompanied by any summary of AO37, and apparently without any additional legal scrutiny.¹⁵

We would not advise the Clerk's office to certify an application modeled on the unusual language that appeared in the enjoined AO 92-116(S) referendum, or the litigated and then under-scrutinized AO37 referendum.

V. UNLIKE "SHALL [A LAW] REMAIN LAW," SHALL A LAW "BE REPEALED" DOES NOT HAVE A DOCUMENTED RECORD OF BEING CONFUSING.

Finally, it is well-known within the Municipality that voters were *actually confused* by the AO37 referendum. Some of this confusion was documented in news reports:

Even some union members were confused. Outside of the Anchorage Bible Fellowship, Clarence Olhausen, a carpenter with Carpenters Local 1281, said that when he got to the voting booth, he wasn't exactly sure whether he needed to choose "yes" or "no" to vote to repeal the measure. He ended up guessing correctly, casting a "no" vote.¹⁶

This fact, too, informs our opinion.

CONCLUSION:

To better ensure that the results of a referendum vote will stand, we advise that the question to be put to voters in a referendum election should be whether the subject law should "be repealed."

¹⁵ Cf. *id.* (not discussing the language of the proposed ballot proposition); Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Cross Motion for Summary Judgment, *Holleman v. Municipality of Anchorage*, Case No. 3AN-13-06812CI (Alaska Sup. Ct. Aug. 21, 2013) (not discussing the language of the proposed ballot proposition).

As noted above, the proposition that appeared on the ballot in the Nov. 4, 2014 election was entitled, "Municipality of Anchorage Proposition No. 1." It did not expressly inform voters that they were being asked to participate in a referendum election.

¹⁶ See, e.g., Devin Kelly, *Anchorage Voters Favor Unions in Repealing Mayor Sullivan's Labor Law Rewrite*, ALASKA DISPATCH NEWS (Nov. 4, 2014), available at: <http://www.adn.com/article/20141104/anchorage-voters-favor-unions-repealing-mayor-sullivans-labor-law-rewrite>

Putting to voters the question of whether AO2015-96(S-2)(as amended) shall “be repealed”: (1) better accords with the Anchorage Municipal Charter and Code; (2) avoids inconsistency with state practice; (3) is more intuitive, in that it follows the usual practice of a “yes” vote representing the “action alternative,” while a “no” vote represents the “no action” alternative; (4) is more consistent with prior municipal practice; and (5) permits the Municipality to avoid using language known to have caused voter confusion in the past.

That said, our office takes the sponsors’ point that, at 75-words, the revised petition language we previously suggested may be too dense for the public to easily digest.¹⁷ We therefore suggest the following revision, which better tracks the instruction contained in Anchorage Municipal Code section 28.40.010D.1.b. that a ballot proposition should be composed of a “summary description” and a “question.”

Voters are asked whether to repeal an ordinance, AO 2015-96(S-1)(as amended), which amended the Equal Rights Title of the Anchorage Municipal Code (Title 5). The ordinance prohibits discrimination within the municipality on the bases of sexual orientation or gender identity in several covered areas: in the sale, rental or use of real property; in financing practices; in employment practices; in public accommodations; in educational institutions; and in practices of the municipality. The ordinance codified certain religious and other exemptions. The ordinance also expanded the lawyer’s role in fact-finding conferences before the Anchorage Equal Rights Commission.

A “yes” vote is a vote to repeal the ordinance. A “no” vote is a vote to keep the ordinance in place.

Shall AO 2015-96(S-1)(as amended) be repealed?

¹⁷ We note also that certain press reports quoted our suggested language in an abbreviated and ungrammatical manner, suggesting that, as a single sentence, it may have been difficult to parse.