

CITY COUNCIL AGENDA ITEM
CITY OF SHORELINE, WASHINGTON

<p>AGENDA TITLE: Motion Authorizing Legal Defense of Recall Petition DEPARTMENT: City Manager, City Attorney PRESENTED BY: Ian R. Sievers, City Attorney; Flannary Collins, Assistant City Attorney</p>
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PROBLEM / ISSUE STATEMENT: A petition for recall of Mayor Ransom and Deputy Mayor Fimia was filed with the King County Records and Elections Division on March 30, 2006. (Attachment A). The petition alleges violations of the Open Public Meetings Act, Chapter 42.30 RCW, for actions taken outside a public meeting using essentially the same factual basis for the claims as the violations claimed in *King v. Fimia et al.* There are ancillary claims of violation of the oath of office relating to violations of Council Rules of Procedure if, in fact, actions were taken at a meeting held in violation of the Open Meetings Act. The City Council approved defense of Mayor Ransom, Deputy Mayor Fimia, Councilmember Way and former Councilmember Chang as named defendants in the King suit on February 13, 2006 under a reservation of rights upon the City Manager's recommendation.

Unlike the *King* civil suit for civil penalties, declaratory relief and attorney's fees, the remedy in this action is solely to authorize an election for recall. There are no attorney's fees or other penalties that are awarded. In fact, the superior court hearing to certify legal sufficiency of the allegations in the petition does not determine whether the allegations are true or not. The court simply finds that the facts stated in the petition, if true, are substantial enough to constitute malfeasance or misfeasance or violation of the oath without legal justification. Details of the recall process were forwarded in an April 3, 2006 memo to the Council. (Attachment B)

Under SMC Chapter 2.40, as a condition of service or employment with the City, officials and employees are entitled to "such legal representation as may be reasonably necessary to defend a claim or lawsuit ...resulting from any conduct, act or omission of such official or employee performed or omitted on behalf of the city in their capacity as a city official or employee, which act or omission is within the scope of their service or employment with the city." This broad coverage would include recall petitions filed against an official even though no claim is made for damages or costs. Coverage under the ordinance is approved by the Council upon recommendation of the City Manager and is a determination that the coverage meets the criteria of the ordinance.

Criteria for providing defense are as follows:

1. Conduct was on behalf of the city and within the scope of services.
2. Defendant has cooperated in defense.

3. There is no primary coverage under other policies.
4. The tendered suit is not a lawsuit brought against the employee by the city.
5. Conduct was not a dishonest, fraudulent, criminal, willful, intentional or malicious act.

In addition to the City's defense ordinance, state law specifically allows defense of recall suits including appeals of the superior court decision. RCW 35.21.203 allows defense to be paid for a recall petition or appeal of a decision of the superior court on the petition upon approval of the city or town council. Attachment C.

The City Manager recommends legal defense costs be provided in this litigation. Such authorization would be consistent with the defense approved in *King v. Fimia*. However, a reservation of rights is not recommended since there will be no point in the litigation when a fact-finder will determine there was intentional misconduct that could trigger a reimbursement of defense costs or shift responsibility for a judgment to the respondents. Reimbursement of costs was imposed as a condition of defense in *King*. Second, recall petitions are easily brought with little investment or consequence to the petitioner. Lawsuits require a substantial investment of time and resources, and attorneys bringing frivolous suits can be sanctioned under rules of professional conduct. Filing a recall petition in superior court is carried out by the County Prosecutor under state law and has no consequences for the petitioner, absent actual perjury in the petition. Therefore, defense should more readily be available in recalls to avoid harassment by constituents who have little to lose but who might achieve by financial burdens on officials what they were unable to achieve at the polls. Officials with limited means might decide to let an unfounded petition go to hearing uncontested, or resign. Council positions will be less attractive to qualified citizens if there is a perception that councilmembers will be required to use their own resources to put recall petitions to a rigorous test of legal sufficiency. The electorate is served by assuring no petition is placed on the ballot without first being well tested in court with adequate legal representation.

The state statute provides each councilmember a voting right on the question of legal defense, even when they may be the subject of the recall. This issue was recently decided by the state supreme court¹ In that case, two of three port commissioners were sued for violation of the Open Public Meetings Act. A statute provides that the commissioner's may grant a request for legal defense by an officer or employee sued for acts within the scope of employment. The two affected commissioners voted for their own defense. This lead to a recall for the vote itself. The recall petitioner claimed the vote by affected commissioners was a violation of the state code of ethics for municipal officers in that the commissioners voted for a contract in which they were beneficially interested. The Supreme Court found that exercising the statutory right to vote on defense was not a beneficial contract prohibited by the ethics statute. Our local ordinance conflicts with RCW 35.21.203 by restricting the right to vote given to all councilmembers by the statute. The disqualification provisions of SMC 2.40 are preempted and inapplicable to council votes on whether to provide costs of defense in recall actions.

Each recall is considered on its own merits. The County Prosecutor is preparing separate ballot synopses for the Mayor and Deputy Mayor and allegations will be evaluated separately by the court based on the actions and responsibilities of each. Different numbers of signatures will be required on separate petitions if the court approves the ballot measure. For this reason separate votes should be taken on the question of defense.

In the interest of efficiency, the City Attorney intends to extend the contract for legal services with Steve DiJulio in the *King* defense to provide defense of the recall petitions if approved by Council. Continuing legal preparation in one case benefits the other since the parties, issues and events are the same. Work by Mr. DiJulio to date in *King* is transferable to the recall defense, a time savings that is critical given the fact that the superior court hearing is expected be held before the end of this month. Avoiding redundant effort will result in lower total defense costs.

¹ *In the Recall of Cynthia Olsen*, 154 Wn.2d 606, 116 P.3d 378 (2005).

RECOMMENDATION

1. Staff recommends that the City Council move:
That the criteria for providing a defense under SMC Chapter 2.40 are met for Mayor Ransom and the City Attorney is authorized to provide legal defense to the Mayor in his recall litigation.
2. Staff recommends that the City Council move:
That the criteria for providing a defense under SMC Chapter 2.40 are met for Deputy Mayor Fimia and the City Attorney is authorized to provide legal defense to the Deputy Mayor in her recall litigation.

Approved By: City Manager  City Attorney 

Attachments:

- A. Recall Petition
- B. Memo RE Recall Procedure
- C. RCW 35.21.203

KING COUNTY RECORDS AND ELECTIONS DIVISION

In Re the Recall of

ROBERT RANSOM, and MAGGIE
FIMIA.

Elected City Councilmembers

PETITION FOR RECALL OF ELECTED
OFFICERS

The undersigned petitioners herein, upon their oaths, declare that Robert Ransom and Maggie Fimia, all presently elected Councilmembers for the City of Shoreline, King County, Washington, have committed a series of acts constituting misfeasance, malfeasance, and violations of their oaths of office as more particularly described in this petition. Based hereupon, the petitioners request that these charges be presented to the King County prosecuting attorney and thereafter transmitted to the Superior Court for the State of Washington sitting in Seattle, King County, Washington to determine the sufficiency of these charges and the adequacy of the proposed ballot synopsis calling for the recall of said officials.

The grounds for this petition are as follows.

Beginning on or about December 5, 2005, Councilmembers Robert Ransom and Maggie Fimia, together with newly elected Councilmember Janet Way and recently defeated Councilmember John Chang, met and conducted City Council business and took official action by deciding to terminate the employment of the City of Shoreline's manager, Mr. Steve Burkett. The Councilmembers contacted Michael Bolasina to help them with accomplishing that goal and asked him not to tell the other Shoreline Councilmembers of their plans. The Councilmembers announced their decision in a letter dated December 9, 2005, addressed to the Washington Cities Insurance Authority. On December 12, 2005, Councilmember Ransom, on behalf of Councilmembers Fimia, Way and Chang, contacted the Washington Cities Insurance Authority and made arrangements to have them pay for the advice that Michael Bolasina was providing them in regard to the process of terminating City Manager Burkett. The Washington Cities Insurance Authority agreed to pay attorney Michael Bolasina to for the advice he was providing Councilmembers Fimia, Ransom, Way and Chang.

Councilmember Ransom contacted City Manager Burkett on December 12, 2005 and told him of the four Councilmembers' decision to terminate his employment. Councilmember Ransom advised manager Burkett that unless he resigned immediately the four City Councilmembers would fire him. As an incentive to resign the four Councilmembers offered manager Burkett three months severance pay beyond that to which he was otherwise legally entitled. This severance package was decided upon by Councilmembers Fimia, Ransom and Way in the presence of Scott Jepsen and Michael Bolasina outside of and during a recess in the December 12, 2005, City of Shoreline Council meeting called by Maggia Fimia.

During the same period of December 5 through December 12, 2005, Councilmembers Ransom, Fimia, Way and Chang decided to hire Mr. George Mauer as City Manager to replace manager Burkett. To that end these Councilmembers prepared an employment contract in the name of the City of Shoreline, solicited Mr. Mauer's resumé, and prepared a newspaper release announcing his hiring.

During this same period of December 5 through December 12, 2005, Councilmembers Ransom, Fimia, Way and Chang decided that Councilmember Ransom would be the next mayor of the City of Shoreline. On December 12, 2005 Councilmember Ransom was prepared to sign the Mauer employment contract in his newly appointed status as City mayor.

During the period December 12 through December 15, 2005, Councilmembers Ransom, Fimia, Way and Chang changed positions and decided to now employ Mr. Robert Olander instead of Mr. Mauer, as the new City Manager. The Councilmembers also decided to create a new position for friend, George Mauer. To this end, the Councilmembers directed deputy City Manager, Bob Olander to enter into contract negotiations with George Mauer prior to the council voting on the decision.

All of the actions described above were done in secret, without notice to the public, without notice to the other Shoreline City Councilmembers and in contravention of Washington State's Open Public Meetings Act (RCW Ch. 42:30 "OPMA"). As a consequence, Councilmembers Ransom, Fimia, Way and Chang have been named as defendants in a lawsuit filed by three citizens of the City of Shoreline, in the King County Superior Court an action entitled *Constance King, Kevin Grossman, and John D. Hollinrake, Jr. v. Maggie Fimia, Robert Ransom, John Chang and Janet Way, defendants*, being cause number 06-2-00803-1 SEA.

The above described actions by Councilmembers Ransom, Fimia, Way and Chang, in addition to violating OPMA:

1. Also violated the Councilmembers' oaths of office wherein they swore to "faithfully...discharge the duties of [their] office as prescribed law...." One such law is the OPMA which was violated by the Councilmembers conducting meetings whereat action was taken to terminate the existing City Manager's employment, to employ a new City Manager, then to employ a replacement City Manager, to elect the City's mayor and to undertake the negotiation of a City contract to increase the City Manager's severance pay. These are the transacting of official business as defined in RCW 42.30.020 (3) and (4) to which the public was entitled to notice and the opportunity to attend. See, RCW 42.30.030. By acting in such a secretive manner these Councilmembers did not faithfully discharge their official duties under the law and thus violated their oaths of office.
2. Also violated the City of Shoreline Code of Ethics No. 1 by showing substantial disregard to the principles and spirit of representative democracy and by failing to scrupulously observe the letter and spirit of law, rules and regulations.

3. Also violated the City of Shoreline Code of Ethics No. 3 by acting in a manner that adversely affected and destroyed public confidence in the City's government and governmental processes.
4. Also violated the City of Shoreline Code of Ethics No. 4 by acting in a manner inimical to the best interest of the people in pursuing a private and personal agenda.
5. Also violated the City of Shoreline Code of Ethics No. 5 by failing to keep the public informed in a timely manner of their actions and by operating secretly to avoid communications with the citizenry of the City of Shoreline.
6. Also violated the City of Shoreline Code of Ethics No. 6 by failing to keep confidential, sensitive and personal information concerning City personnel, and by revealing same to Cindy Ryu, an elected but unsworn Councilmember-to-be, rather than with the elected and sitting Councilmembers.
7. Also violated the City of Shoreline Code of Ethics No. 8 by knowingly violating the OPMA, the City of Shoreline's Code of Ethics, and the Rules of Procedure for the Shoreline City Council.
8. Also were contrary to and in violation of the Rules of Procedure for the Shoreline City Council. These rules were adopted by Resolutions 183, 196, 205 and 224 to govern the conduct of the Shoreline City Council's business. Sections 5 through 8 of the Rules contemplated and required that all actions by the counsel and its members shall adhere to the procedures there contained, including the following:
 - a. Rule 5.1 specifically requires that "all Counsel Meetings shall comply with the requirements of..." OPMA, and all meetings of the Counsel "shall be open to the public."
 - b. Rule 5.7 dictates that special meetings (as opposed to general meetings) of the counsel shall be called "subject to notice requirements provided by state law."
 - c. Rule 5.9 permits executive sessions within the counsel and outside of the public but does require advance notification to the public as to the purpose of such meetings.
 - d. Rule 7.1 requires voice votes on all counsel actions.
 - e. Rule 7.2 requires that as a condition of discussing "an action item..." there first shall be a motion made by a Councilmember that is then seconded by another.
 - f. Rule 7.15 requires that "each Councilmember shall vote on all questions put to the counsel...." (emphasis supplied)

- g. Section 8 requires that "any resolution for the removal of the City Manager shall require the affirmative vote of at least a majority of the whole membership of the counsel...."

All of the foregoing rules of procedure were violated, broken or ignored by Councilmembers Ransom, Fimia, Way and Chang in their actions taken during the period December 5 through December 15, 2005.

CONCLUSION

The above described acts by Councilmembers Robert Ransom, Maggie Fimia, Janet Way and former Councilmember John Chang constitute misfeasance in that they performed their counsel duties in an improper manner.

The above described acts by these Councilmembers constitute malfeasance in that committed unlawful acts in the course of acting as Councilmembers for the City of Shoreline.

For the above stated reasons the petitioners request that this petition be submitted to the King County prosecuting attorney for processing in accordance with the law and in order that the citizenry of the City of Shoreline shall be given the opportunity to recall the elected officers Robert Ransom, and Maggie Fimia from their present positions as Councilmembers.

SO PETITIONED this 21st day of March, 2006.

VERIFICATION

The undersigned each verify upon their respective oaths, subject to the Washington State laws and penalties of perjury, that: (1) They are each registered voters residing within the boundaries of the City of Shoreline, King County, Washington; and (2) the above stated charges are true and correct to the best of their knowledge and information; and (3) they have knowledge of the facts underlined in the above-stated charges.

Printed Name	Signature	Address
Frank H. Moll		15560 11 th Ave NE Shoreline 98155
MARY F. FOX		511 NW 102nd St, SL, 98177
Ron Greeley		20233 - 23 Ave NW, Shoreline, 98177
Mary Jo Heller		14804 N. Park Ave N Shoreline 98133
Dennis Heller		14804 N. Park Ave N. Shoreline 98133
S. Cheryl Lee (Sungyong)		16043 Wallingford N Shoreline 98133

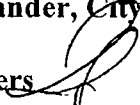


Memorandum

• COUNCILMEMBER	_____
•	_____
•	_____
• FULL COUNCIL	<u>X</u>
• CITY MANAGER	<u>X</u>
• STAFF	<u>SIEVERS</u>
•	_____
•	_____
• FILE	<u>X</u>

DATE: April 3, 2006

TO: Councilmembers
Robert Olander, City Manager

FROM: Ian R. Sievers 

RE: Recall Petition

Attached is a copy of a recall petition filed with King County Records and Elections Division on March 30, 2006.

The recall procedure is set out in state statutes, 29A.56.110-.270. The significant steps are as follows:

- The Petition is served by King County Elections on Mayor Ransom and Deputy Mayor Fimia, the councilmembers whose recall is demanded .
- The King County Prosecuting Attorney must prepare the ballot synopsis (200 words) within 15 days.
- The Prosecutor certifies the language to the filers and the councilmembers and petitions the superior court to approve the synopsis and determine the sufficiency of the charges.
- Within 15 days of receipt of the petition the superior court conducts a hearing to determine the legal and factual sufficiency of the petition. Filers and Councilmembers will receive notice of the hearing from the court and may appear by counsel. The judge will determine whether the petition contains facts sufficient to establish an act the law considers misfeasance or malfeasance, if true. There is no inquiry into the actual truth or falsity of the allegations.
- The superior court will send the petition to the auditor for a special election if found factually and legally sufficient following the hearing.
- The superior court's ruling is subject to direct, expedited review by the Washington supreme court.

- If not appealed the petitioners have 180 days from the superior courts decision to gather signatures of 35% of total votes cast for all candidates for the councilmember's office at the preceding election. This signature period runs from the final decision of the supreme court if appealed.
- A recall election shall be set not less than 45 nor more than 60 days from certification.

I spoke with the prosecuting attorney reviewing this petition. She expects service within the next day or two and anticipates that the synopsis will be filed with the superior court next week.

Attached is a copy of RCW 35.21.203, the statute permitting defense costs to be paid by the City for the superior court hearing on sufficiency and any appeal.

RCW 35.21.203

Recall sufficiency hearing -- Payment of defense expenses.

The necessary expenses of defending an elective city or town official in a judicial hearing to determine the sufficiency of a recall charge as provided in *RCW 29.82.023 shall be paid by the city or town if the official requests such defense and approval is granted by the city or town council. The expenses paid by the city or town may include costs associated with an appeal of the decision rendered by the superior court concerning the sufficiency of the recall charge.

1989 c 250 § 2.]

NOTES:

*Reviser's note: RCW 29.82.023 was recodified as RCW 29A.56.140 pursuant to 2003 c 111 § 2401, effective July 1, 2004.