

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF YAKIMA

| | | |
|----------------------------|---|--------------------------|
| IN RE MATTER OF RECALL OF: |) | |
| |) | |
| RICK ENSEY, |) | CAUSE NO. 09-2-03332-2 |
| YAKIMA CITY COUNCILMAN, |) | BRIEF OF CHARLOTTE JONES |
| |) | AND EUGENE RUPEL |
| |) | |
| |) | |
| |) | |

LAWSUIT

Pursuant to RCW 29A.56.110, Erica Tutt. seq, Charlotte Jones and Eugene Rupel, residents of the City of Yakima, filed written charges with the Yakima County Auditor, seeking the removal, for cause, of Rick Ensey, a Yakima City Councilmember. In turn, pursuant to RCW 29A.56.120, the Auditor served the written charges upon Rick Ensey and the Prosecuting Attorney for Yakima County. The Prosecuting Attorney, under RCW 29A.56.130, transmitted the charges to the Superior Court, for review, under RCW 29A.56.140. This Superior Court is now tasked with determining the sufficiency of the charges. In performing this task, the court is not asked to determine whether Rick Ensey should be recalled. The voters will decide that question later.

Charlotte Jones and Eugene Rupel file this brief in support of their request that the Superior Court certify the acts alleged as sufficient for recall. The facts show that Rick Ensey engaged in misfeasance and malfeasance, when he violated the Open Public Meetings Act, grounds that the legislature declares as being sufficient.

FACTS

Rick Ensey has served as a Yakima City Councilmember since January 2008.

During the months of March and April 2009, Rick Ensey met with, e-mailed, or telephoned at least three other city council members, Micah Cawley, Kathy Coffey, and Bill Lover, for the purpose of lining up their votes in favor of a Yakima City Council resolution to adopt the budgeting process employed by Yakima County, also known as the Priorities of Government Resolution. During the meetings and calls, the four discussed and agreed to vote in favor of the resolution. Four members constitutes a quorum of the Yakima City Council.

E-mail messages among Rick Ensey, Micah Cawley, Kathy Coffey, and Bruce Smith confirm Rick Ensey's procuring of votes for his resolution, in advance of the formal Yakima City Council vote. Bruce Smith is a Yakima business and confidante and coach of Rick Ensey and Kathy Coffey. The e-mail messages began, on March 26, 2009, at 7:51 a.m., when Rick Ensey wrote to Kathy Coffey and Micah Cawley:

Subject: Budget meeting

Hi
We need to meet briefly before Tuesday. Coffee today or tomorrow? This weekend?
Rick

Attachment to Written Charges and Declaration of Douglas McKinley, page A-1.

Kathy Coffey promptly responded to Rick Ensey and Micah Cawley, at 8:38 a.m., on

March 26:

Subject: Budget Meeting

I can meet today 2:15 but after that I'm pretty much unavailable until Monday. If we meet today could we meet at one of the coffee shops downtown? No one cares what we're talking about plus I told [Yakima City Manager] Dick [Zais] there was a group of us mtg on this issue. No I didn't say who but I wanted him to know we're serious plus when I speak out against him and [Yakima Mayor] Dave [Edler] I didn't want him to be blindsided. K

Attachment to Written Charges and Declaration of Douglas McKinley, page A-2.

Micah Cawley joined the discussion, at 8:40, the morning of March 26, with a message to Kathy Coffey and Rick Ensey:

Subject: Budget Meeting

Where do you want to meet? North town coffee shop?

Attachment to Written Charges and Declaration of Douglas McKinley, page A-3.

In less than one minute, Kathy Coffey wrote to her fellow council members:

Subject: Budget Meeting

Fine with me Kathy Coffey

Attachment to Written Charges and Declaration of Douglas McKinley, page A-4.

Rick Ensey replied two minutes later to Kathy Coffey and Micah Cawley:

Subject: Budget Meeting

Fine with me. North town at 2:15

Attachment to Written Charges and Declaration of Douglas McKinley, page A-5.

On March 30, 2009, Rick Ensey introduced Bruce Smith, a Yakima businessman, to the discussions among city council members of changes to the city budget process. Smith thereafter directed the group of city council members, Rick Ensey, Kathy Coffey, Micah Cawley, and Bruce

Lover. On March 30, at 8:06 p.m., Rick Ensey sent an e-mail message to Bruce Smith and Kathy Coffey:

Motion

How's this:

I move that the council direct staff to begin the 2010 budgeting process using Yakima County's budgeting process as a guide. In addition, City Council will form a special 3 council person committee - separate from the budget committee - to guide staff through this new budgeting process. Comment, questions, changes?

Rick

Attachment to Written Charges and Declaration of Douglas McKinley, page A-6.

On March 30, at 8:27 p.m., Bruce Smith replied to Rick Ensey:

Motion

I would drop "as a guide." Zais could drive a truck through that loop hole. There's also some other ambiguities.

How about:

I move that the City of Yakima switch from its current budgeting process to the Priorities of Government budgeting system used by Yakima County. This change will take place immediately and will be used to develop the city's 2010 budget. The City Council will form a three-person committee composed of myself, Kathy Coffey and Micah Cawley to oversee the transition.

The last sentence may be too strong and I would only propose it *if you have the votes lined up*. It will piss off Dave and especially [Yakima City council member] Neal [McClure] who will see that the Budget Committee is being usurped.

....

Italics added. Attachment to Written Charges and Declaration of Douglas McKinley, page A-7.

Kathy Coffey joined the discussion again with Rick Ensey's e-mail message to Bruce

Smith and her, on March 30, at 8:42 p.m:

Motion Part 2

Hi

So this is Bruce's idea:

I move that the City of Yakima switch from its current budgeting process to the Priorities of Government budgeting system used by Yakima County. This change will take place immediately and will be used to develop the city's 2010 budget. The City Council will form a three-person committee composed of myself, Kathy Coffey and Micah Cawley to oversee this transition.

I like it. What do you think, Kathy? *I think [Yakima City Councilmember] Bill [Lover] will go for it. I'll go over it with him tomorrow.*

Italics added. Attachment to Written Charges and Declaration of Douglas McKinley, page A-8.

Before bedtime on March 30, Rick Ensey contacted Bruce Smith again with this e-mail:

Motion

Will see what Kathy thinks. You said what I really wanted to say, but didn't know if it was too ballsy. Yes, I think Zais was looking to the double dip money to pay the loan. United Builders is leveraged passed their eyeballs....

Attachment to Written Charges and Declaration of Douglas McKinley, page A-9.

Bruce Smith awakened early, on March 31, to contact Rick Ensey and Kathy Coffey. At 4:58 a.m., Smith wrote, by e-mail:

Rick and Kathy:

The more I think about it, you might want to make two motions. Make the last sentence about the committee a second motion so it doesn't muddy up discussion about the new form of budgeting, which is the more important issue. You don't want to let [Mayor] Dave [Edler] and [Councilmember] Neal [McClure] focus the argument away from the main issue, which is switching to a better budgeting method. If you had to work through the Budget Committee, you could because you have two of the three votes.... In theory, Micah can be palsy shaky some days.

Bruce

Ellipses in original. Attachment to Written Charges and Declaration of Douglas McKinley, page A-10.

Kathy Coffey wrote to Rick Ensey and Bruce Smith, on March 31, at 11:05 a.m.:

Hey guys,
Sorry I didn't get any of these but basically Rick got what needed to get done, done. I don't know if you saw any of the meeting or not Bruce but I think it went pretty well. Toward the end [Yakima City Councilmember] Bill [Lover] was saying something that Rick and I both missed[.] I was curious if you caught it or not. Let me know if you did. I think I know what [Yakima City Councilmember] Neal [McClure] is talking about with the use of the [r]eserves and I still don't agree with him about not balancing the budget with \$2 million. What's this crap about having a one budget at the beginning of the year and another at the other [sic] at the end. That's usually called a [b]udget versus actual. I think Dave's comment about some of the Council understanding the budget process and some not was directed at me. I'm insulted. I wanted to call him on it but thought better of it. He's getting more arrogant every day. I just realized that they may not televise live anymore so after you see it let me know your thought[,] Bruce. Talk to you soon, Kathy.

Kathy J. Coffey

Yakima City Council Member

Attachment to Written Charges and Declaration of Douglas McKinley, page A-11.

Bruce Smith wrote the next e-mail message, in which he gave directions to Rick Ensey and Kathy Coffey concerning the budgeting processing and, more importantly, noted that the two had lined up the necessary votes to prevail on the budget process resolution. Smith enjoins Coffey and Ensey to adopt the resolution, rather than permit study and open discussion at a city council meeting. Smith wrote at 1:38 p.m., on March 31:

Kathy and Rick:

First off, I think Leita did a fantastic job. He really laid the groundwork for you guys to significantly change the way you approach the planning and budgeting process. Now you guys need to close the deal.

Unfortunately, it's obvious [Yakima Mayor Dave] Edler and [Yakima City Councilmember Neil] McClure and [Yakima City Manager Dick] Zais will block you every step of the way. It seems Dave [Edler] does not want a transparent system. When Mike talked about giving the public what it wanted, Dave just bristled. That's when he started talking about the differences between the county and the city, apples and oranges, etc. Sincerely I believe that Dave has a vision of how he wants things done that trumps listening to the public.

Neil is an obstructionist. He will do anything he can to block any changes. And then there's Zais. I almost laughed when he said it took the county three years to adopt their budget process. That's not true. In fact, it's damned close to being a lie. They did it in one year, they just continued to improve it over three years. And you guys have something to copy, they didn't. Of course, Leita fired about 10 people (including Cochran) before people figured out he was serious ... And Zais knows that will never happen to him.

I think a lot of progress was made today. I usually measure that by how red the mayor gets ... any he was pretty crimson today.

My suggestion?

Set up a follow-up meeting fast. Within the next 2 weeks or so. If this thing gets drug out too long, it will be impossible to make any change to the 2010 process. Zais knows that, which is why I think he wants to stall things. You also may lose three councilmembers in November, which means no changes will be made for a long time after that.

*If you have the four or five votes (which you do today), force the issue. I would put out a declarative motion saying you are changing the budgeting process, something like the motion we discussed earlier. *Not thinking about it or studying it or forming a task force but changing it now! Make it effectively immediately* and make it take place for 2010. Don't be snowed or stalled. Otherwise, they will slow it down until it's too late and until after the election.*

You guys all did a great job today laying out the issues, even Micah. (Who was that mousy, whiny gal with all the eye makeup who spoke? Is she a councilmember was she there on some kind of school field trip?) They will

not beat you on the issue, but they may beat you on the process.

Have fun!

Bruce

Bruce Smith
Editor/Publisher
Yakima Valley Business Times
Central Wash. Senior Times

Ellipsis in original. Italics added. Attachment to Written Charges and Declaration of Douglas McKinley, page A-12.

On April 1, 2009, Bruce Smith sent an e-mail message to Rick Ensey on another subject, the fire department, and in which Smith orchestrated a letter for Ensey to send to City Manager Dick Zais.

On April 7, 2009, Kathy Coffey renewed the e-mail chain on the subject of the budget resolution. Coffey wrote, at 9:57 p.m., to Bruce Smith and Rick Ensey:

Bruce, I take that as a high compliment for all of us! Hope all is well with you. I just left Rick and he mentioned that I've missed some e-mails from you. Want to get together and discuss this budget issue? I'm concerned our dear friend Rick is getting cold feet. I'm open tomorrow anytime between 9:30 and 11:30 if you two are available or if just you Bruce have time for coffee. Let me know, Kathy.

Kathy J. Coffey
Yakima City Council Member

Attachment to Written Charges and Declaration of Douglas McKinley, page A-14.

Bruce Smith responded, to Coffey and Ensey, early the next morning:

Let's do it. I'm free the morning too. How does 9:30 at my office sound?

Attachment to Written Charges and Declaration of Douglas McKinley, page A-15.

Rick Ensey responded four minutes later, and at 6:40, on April 8:

[L]et me know where. I don't have a lot of time today (I'm leaving town tomorrow) but I can carve out a little time at 9:30.

Rick

Attachment to Written Charges and Declaration of Douglas McKinley, page A-16.

At 11:43, on April 8, presumably after Bruce Smith and Rick Ensey met with Coffey for coffee, Ensey sent a message to Yakima City Manager Dick Zais, with a copy to Coffey, but not other council members. Ensey asked Zais to schedule a study session to discuss the Priorities of Government budget process, without informing Zais he planned no time for studying of the process. Ensey wrote:

Subject: Priorities of Government Session

Hi Dick

I need you to schedule a Priorities of Government Study Session to begin our budgeting switch to the county's Priorities of Government model. We need this meeting set up no longer than 2 weeks from now. This will be a normal meeting with the 7 council members where motions can be made, etc.

BTW, I will be leaving town tomorrow morning but I will have my BB with me and will check it occasionally.

Thanks,

Rick Ensey

Attachment to Written Charges and Declaration of Douglas McKinley, page A-17.

Numerous e-mail messages then followed between city staff and city council members. When city staff balk at a soon meeting for the study of the budget process, Kathy Coffey and Rick Ensey direct staff to schedule the meeting less than one week ahead, during a previously scheduled study session for a curfew ordinance, and at a time that the purported study of the

budget process might not be televised.

Kathy Coffey wrote, at 11:47 a.m., on April 8, to Rick Ensey and Dick Zais, in order to clarify Ensey's request of Zais:

Re: Priorities of Government Study Session

Rick, is this a study session or simply a special mtg of ad hoc committee?
Or does the name of the mtg really make any difference? K

Attachment to Written Charges and Declaration of Douglas McKinley, page A-18.

City staffer Sonya Claar-Tee, wrote, at 1:25 p.m., April 8, 2009, to all city council members:

Subject: FW: Priorities of Government Study Session

Should this be scheduled during a regular study session time? Next Tuesday, 4/14, is a study session on curfew, the next study session time is 4/28, which is already scheduled for aquatics, which means the next study session is Tues. May 12. Would you like this scheduled for that date? Or would you like to have a study session on the same day as a council meeting? Then I could se for 4/21 or 5/5. Or, schedule at a 5 p.m. working dinner meeting before a council meeting - - the next available meeting time for that is 5/5 at 5. Direction please. Thank you.

Sonya

Attachment to Written Charges and Declaration of Douglas McKinley, page A-19.

Kathy Coffey promptly replied to Sonya Claar-Tee, at 1:27 p.m., on April 8:

Subject: Re: Priorities of Government Study Session

Next Tuesday please. K.

Attachment to Written Charges and Declaration of Douglas McKinley, page A-20.

Sonya Claar-Tee wondered if Kathy Coffey read her previous e-mail message and so wrote to Coffey, at 1:33 p.m.:

Subject: Re: Priorities of Government Study Session

Hi Kathy,

Next Tuesday wasn't really an option for this one ... that slot is scheduled for a curfew study session, and I'm trying to schedule the full council for a meeting on EMS as requested at the council meeting last night. Plus, Edler leaves town next Tuesday at 11 a.m. What did you think of the other options?

Attachment to Written Charges and Declaration of Douglas McKinley, page A-21.

Kathy Coffey did not think highly of the other options, since she and her colleagues had already agreed to vote on the budget resolution and wanted an immediate vote. Coffey wrote to Claar-Tee, at 1:38 p.m., on April 8:

Sonya I don't think this warrants a full scale Study Session. This needs to be scheduled ASAP. K

Attachment to Written Charges and Declaration of Douglas McKinley, page A-22.

At 1:56 p.m., on April 8, Rick Ensey responded to Coffey's 11:47 a.m. message, with a copy to Dick Zais:

RE: Priorities of Government Study Session

Don't care what we call it as long as everyone understands why we are there, I guess.

Rick

Attachment to Written Charges and Declaration of Douglas McKinley, page A-23.

Within one minute, Kathy Coffey, out of concern that city staff may stall a meeting on the budget resolution, immediately responded to Ensey, without copying Dick Zais. Her subject heading, however, causes confusion:

Subject: Re: EMS breakfast or lunch meeting

Rick you need to get aggressive about having this ASAP. K

Attachment to Written Charges and Declaration of Douglas McKinley, page A-24.

On April 8, within an hour, Rick Ensey responded to Kathy Coffey:

Subject: Re: EMS breakfast or lunch meeting

I need to get aggressive about EMS?

Attachment to Written Charges and Declaration of Douglas McKinley, page A-25.

Coffey replied within minutes and at 2:51 p.m., on April 8:

No. I was talking about the time frames being used up on other things. K

Attachment to Written Charges and Declaration of Douglas McKinley, page A-26.

Rick Ensey sent a clarifying message to Sonya Claar-Tee, Dick Zais, and other city council members:

Subject: Re: Priorities of Government Study Session

You know, now that I look at my emails, I wasn't making sense.

I want the council to meet to discuss the Priorities of Government budget, but it isn't a full study session that will go on for more than one hour. We will probably need a half hour tops. That's why we could fit it in after the curfew study session. It's just to get the ball rolling.

Attachment to Written Charges and Declaration of Douglas McKinley, page A-27.

Six minutes later, at 2:49 p.m., on April 8, Ensey forwarded another message to Kathy Coffey and Sonya Claar-Tee:

Subject: Re: Priorities of Government Study Session

Hi

I've got two email strings going here, which is driving me crazy. How did one of my personal accounts get in here?

Anyway, I've obviously confused this. We don't need a full study session for the budget. Only a half an hour or so, tops. Since everyone is around the horseshoe anyway for the curfew discussion, we can tack this on at the end.

Rick

Attachment to Written Charges and Declaration of Douglas McKinley, page A-28.

Kathy Coffey hoped the budget resolution would pass without the light of the television camera. On April 9, at 9:41 a.m., she wrote to Sonya Claar-Tee:

Subject: Priorities of Government Study Session

Sounds fine or we could just move into the CMCR. I don't think it's mandated that EVERY meeting has to be televised. We're going to be exhausted by all the mtgs that day. For once could we skip the tv stuff and just do what's convenient? K

Attachment to Written Charges and Declaration of Douglas McKinley, page A-29.

Now that Coffey, Cawley, and Ensey obtained the April 14 date for passage of the budget resolution, they proceeded, with the help of Bruce Smith, to fortify the vote of the fourth city council member, Bill Lover. On April 10, at 4:39 p.m., Rick Ensey wrote to Kathy Coffey:

Subject: Bruce

Hi

Can you let Bruce know when our council meeting for the budget will be? He will need to get with Bill [Lover] immediately.

Rick

Attachment to Written Charges and Declaration of Douglas McKinley, page A-30.

At 6:10 p.m., on April 10, Kathy Coffey responded to Rick Ensey:

Subject: Bruce

Sure. He spoke with Bill yesterday and felt he made some good headway.

Relax and enjoy your time away. Happy Easter. K

Attachment to Written Charges and Declaration of Douglas McKinley, page A-31.

Noting that they only had two more days to insure passage of the budget resolution, on Sunday, April 12, at 3:41 p.m., Rick Ensey wrote to Bruce Smith and Kathy Coffey:

Hi

So how's "Project Lover" coming along? We are meeting Tuesday morning as a Council discussion, so we only have Monday to both iron out the Lovers and wrinkles. *I want to make sure that we go in with an agreed motion* and an agreed upon defense of the motion (I assume we will use the motion that Bruce ultimately came up with). Can we meet Monday noon or afternoon[?] I don't have much time to spare on Monday, but I'm willing to give up my lunch hour.

Rick

Italics added. Attachment to Written Charges and Declaration of Douglas McKinley, page A-32.

On Easter Sunday, April 12, at 4:39 p.m., Bruce Smith responded to Rick Ensey, with a copy to Kathy Coffey:

Bill was supposed to call me to meet this weekend, but he hasn't. I wasn't in my office much so maybe he called there. I'll give him a call and see what's up. He's waffling, but I think we have about a two-thirds chance. I told him *no one wanted to pitch the idea unless the votes were lined up*. I talked with Micah Friday (he came to see me) and he's solid.

I'll let you know.

Italics added. Attachment to Written Charges and Declaration of Douglas McKinley, page A-33.

Bruce Smith called Bill Lover and then wrote another message to Rick Ensey and Kathy Coffey, at 4:54 p.m.:

I'm meeting with Bill for breakfast tomorrow.

He likes Easter because he gets to hide his own eggs, I think.

We'll get him.

Any luck with Sonia [Rodriguez]?

Is the Tuesday AM meeting going to cover both the budget and paramedics thing? Man, that will make a bad day for [Mayor] Edler if that's true.

Bruce

Italics added. Attachment to Written Charges and Declaration of Douglas McKinley, page A-34.

Bruce Smith's e-mail message at 4:54 on April 12 is the last e-mail message, before the April 14 city council meeting, unearthed. Apparently, however, Smith, Ensey, and Coffey "got" Bill Lover.

At its April 14, 2009, meeting the Yakima City Council adopted the budget resolution. Without any study or discussion on the resolution, Rick Ensey opened the meeting by stating: "I'm going to make this short and simple, I have a motion to immediately adopt the county's policies and procedures on their budget." See DVD of April 14 City Council meeting, Exhibit H to Declaration of Douglas McKinley; and DVD of KIMA-tv story, April 15, 2009, Exhibit I to Declaration of Douglas McKinley. As evidenced by the e-mail chain, Rick Ensey would not have introduced the motion without knowing he had three other votes to approve the resolution. In fact, the resolution passed. See April 14, 2009, Yakima City Council meeting minutes, Exhibit C to Declaration of Douglas McKinley. Yakima City Council member Neil McClure was so upset at the conduct of Rick Ensey, Kathy Coffey, Micah Cawley, and Bill Lover that McClure immediately resigned from the council.

On April 15, the e-mail changed from planning for the April 14 city council meeting to celebrating the victory and planning a media strategy. At 11:51, on April 15, Rick Ensey wrote to Kathy Coffey and Bruce Smith:

Hi ya:

I've been digesting yesterday. That may explain why I don't feel well today.

I hate to say it, but yesterday's budget success/fiasco was the easy part. Now comes the hard part. Not sure where to go from here, but perhaps hammering out a road map is an appropriate first step. I want to literally write a business plan so we know where we are at any given moment in the process and what the next steps will be. I think that if we don't have a clear road map, we (or maybe just I) will possibly get lost. Or, at least the whole process will take longer and be more painful than needed.

I have begun an editorial for the *YHR*. Bruce, I know that I have said several times that I was going to write editorials on various topics but have never followed through. Frankly, I don't like the editors of the *YHR* (surprise!) But since the *YHR* editors are offering up their Monday editorials to any schmuck with a word processor and a dictionary, I thought what the heck. I haven't gotten very far, because, as I said, I don't feel well (and writing an editorial for the *YHR* isn't helping). I think we need to dispel one myth: that we are trying to micro-manage the budget.

I don't mind being the guy behind the Priorities of Government wheel, but I do need input from Kathy, Bruce, Mike Leita, Bill, Micha and ... oh, yeah! ... the rest of the Council. But I want to make sure we head into Council discussions with a clear picture of what we want to achieve and a clear direction. If we don't, Edler will try taking this over. That's not going to happen while I'm in charge here at the White House.

Rick

Attachment to Written Charges and Declaration of Douglas McKinley, page A-35.

Bruce Smith responded, at 1:16 p.m., with a message to Ensey and Coffey:

Gen. Haig (who I shared a Jacuzzi with one time, by the way):

Good ideas, but I would wait to do anything with the *Herald* until all the details are worked out.

You and Kathy have bitten off a huge chunk [sic]. The intellectual stuff is going to have to come from the two of you.

Have fun.

Bruce

Attachment to Written Charges and Declaration of Douglas McKinley, page A-36.

Kathy Coffey joined the written conversation, at 1:49 p.m.:

I guess I have been dubbed the Mother of this little “trio” so that gives me the right to say “I told you so” or perhaps “I asked you.” A couple of weeks ago when we got the vote to put together the entire Council to investigate the Priorities of Government model I asked you[,] Rick[,] what’s your next step? You said I don’t know. I’ve been wondering how long it was going to take you to understand how huge this undertaking really is. I’ve been wondering if you truly understand the budget process. Trust me I’m not trying to be rude, but someone who cares about you better ask you that before the press or your enemies do.

While I have never wanted the limelight, I want to remind you that his has been my baby for the past year and three months. You may run the White House anyway you want but don’t muck with my budget process. OK? Or else you may get a drum but it will be over your head instead of marching behind you! Love & kisses. Mom

Attachment to Written Charges and Declaration of Douglas McKinley, page A-37.

Rick Ensey replied to Kathy Coffey, with a copy to Bruce Smith, at 2:15 p.m., on April

15:

Yes, you are the Mother of all “trios.” And I don’t consider you my mother. You are like a sister to me. A much older, very annoying sister. Did I mention the annoying thing?

Do I know what I’m getting myself into? Oh, yeah, I’m not a wide-eyed lollie-pop lickin’ 5[-]year[-]old (well, not wide-eyed anyway). *Do I understand the budget real well (or even kind of)? Not really.* Certainly not as well as you. That’s why I want on the budget committee **since I ambushed ... I mean since Neil [McClure] left.**

So next step? Get together as a council and decide our priorities? And how detailed should our priorities be? Set the department heads out to write down what they do (what do they do?) And prioritize?

Let’s get busy people!

And everyone knows that Nancy was in charge at the White House.

Italics in original. Bold print added. Attachment to Written Charges and Declaration of Douglas McKinley, page A-38.

Businessman Bruce Smith ended the e-mail chain of the Yakima power trio, at 4:45 p.m., on April 15, with a history lesson, comedy, and invitation to poker:

The [“ I am in charge here [”] thing is a reference to Gen Al Haig who was chief of staff when Ronald Reagan was shot.

Anyway, you guys figure it out and let me know. All I know is I want to be in the background... LOL

Seriously, though, you both are right. This is a complicated thing that has to be well-thought-out before anything else happens. Kathy was right, the hard work has just begun. Or was that Rick? Or Neil?

See you at poker tonight and Kathy we want to think you for Ken’s usual donation.

Bruce

Attachment to Written Charges and Declaration of Douglas McKinley, page A-39.

On April 15, 2009, Rick Ensey stated, to KIMA television news reporter, Melissa Wagner, that he contacted three other council members to obtain and confirm their vote on the budget resolution, before the official meeting on April 14. Exhibit I to Declaration of Douglas McKinley. City Council member Kathy Coffey also stated she met with other council members and attempted to meet with a fifth city council member, Sonia Rodriguez, in advance of the April 14 meeting, in order to procure her vote.

On May 1, 2009, Tim Schoenrock, a citizen of the City of Yakima, filed suit in Yakima County Superior Court, Case No. 09-2-01619-3, in which suit Schoenrock accused the Yakima City Council of violating the Open Public Meetings Act, by reason of the conduct of Rick Ensey,

Micah Cawley, Bill Lover, and Kathy Coffey. Exhibit D to Declaration of Douglas McKinley. These four city council members discussed and agreed, before a city council meeting, to vote in favor of the budget resolution. During the pendency of the lawsuit, the Yakima City Council conceded it violated the Open Public Meetings Act and rescinded the Priorities of Government Resolution. Exhibit C to Declaration of Douglas McKinley. In turn, the Yakima City Council agreed to pay Tim Schoenrock, from city funds, \$2,500 to settle the lawsuit. Exhibit E to Declaration of Douglas McKinley. This amount has been paid to the detriment of Yakima taxpayers.

The prohibitions of the Open Public Meetings Act are well known by city council members, by reason of literature provided to educate city council members. Literature mentions that discussions and the procuring of votes in advance of a city council meeting, sometimes known as a rolling quorum, violates the Open Public Meetings Act.

While a city council member, Rick Ensey received a report prepared by the Municipal Research and Services Center entitled “Knowing the Territory: Basic Legal Guidelines for Washington City, County, and Special Purpose District Officials.” Page 32 of the report warns officials that:

An unintended meeting may occur by electronic or e-mail if a quorum of the body discusses a topic of business through an active exchange of information and opinions by e-mail.

Attachment to Written Charges and Declaration of Douglas McKinley, page B.

In 2001, the Washington Court of Appeals issued the decision, *Wood v. Battle Ground School District*, 107 Wn.App. 550 (2001), in which the court ruled e-mail communication may constitute a violation of the Open Public Meetings Act. The Washington Attorney General’s Open Records & Open Meetings Deskbook, 1.3A, warns public officials that “telephone trees,”

where members repeatedly phone each other to form a collective decision, are inappropriate under the Open Public Meetings Act. The Washington Municipal Research & Services Center's report on the application of the Open Public Meetings Act to cities, towns and counties states that discussing agency business over telephone may be a meeting and it specifically raises the issue of e-mail.

In an interview with the *Yakima Herald-Republic*, published on May 2, 2009, Rick Ensey admitted he knew meeting with council members in a group or via an exchange of phone calls or e-mail messages, known as a serial or rolling quorum, violated the Open Public Meetings Act. Exhibit F to Declaration of Douglas McKinley. A May 6, 2009, *Yakima Herald-Republic* opinion confirms violation of the Open Public Meetings Act. Exhibit G to Declaration of Douglas McKinley.

ARGUMENT

Outline of Recall Procedure

RCW 29A.56.110 to .270 sketches the course for recall, or removal from office, of a Washington public official, including a city council member, such as Rick Ensey. RCW 29A.56.110 allows a citizen to initiate the process, by preparing written charges, and lists the grounds upon which a recall effort may be based. The statute reads, in relevant part:

Whenever any legal voter of the state or of any political subdivision thereof, either individually or on behalf of an organization, desires to demand the recall and discharge of any elective public officer of the state or of such political subdivision, as the case may be, under the provisions of sections 33 and 34 of Article 1 of the Constitution, the voter shall prepare a typewritten charge, reciting that such officer, naming him or her and giving the title of the office, has committed an act or acts of malfeasance, or an act or acts of misfeasance while in office, or has violated the oath of office, or has been guilty of any two or more of the acts specified in the Constitution as grounds for recall. The charge shall state the act or acts complained of in

concise language, give a detailed description including the approximate date, location, and nature of each act complained of, be signed by the person or persons making the charge, give their respective post office addresses, and be verified under oath that the person or persons believe the charge or charges to be true and have knowledge of the alleged facts upon which the stated grounds for recall are based.

For the purposes of this chapter:

- (1) “Misfeasance” or “malfeasance” in office means any wrongful conduct that affects, interrupts, or interferes with the performance of official duty;
 - (a) Additionally, “misfeasance” in office means the performance of a duty in an improper manner; and
 - (b) Additionally, “malfeasance” in office means the commission of an unlawful act;
- (2) “Violation of the oath of office” means the neglect or knowing failure by an elective public officer to perform faithfully a duty imposed by law.

The citizen files the written charges with the county auditor, who forwards the charges to the county prosecuting attorney and the official, against whom recall is sought. RCW 29A.56.120 provides:

Any person making a charge shall file it with the elections officer whose duty it is to receive and file a declaration of candidacy for the office concerning the incumbent of which the recall is to be demanded. The officer with whom the charge is filed shall promptly (1) serve a copy of the charge upon the officer whose recall is demanded, and (2) certify and transmit the charge to the preparer of the ballot synopsis provided in RCW 29A.56.130. The manner of service shall be the same as for the commencement of a civil action in superior court.

The prosecuting attorney prepares a recall ballot synopsis and forwards the synopsis to the Superior Court for review and determination of the sufficiency of the charges. RCW 29A.56.130 declares, in part:

- (1) Within fifteen days after receiving a charge, the officer specified below shall formulate a ballot synopsis of the charge of not more than two hundred

words.

...

(b) If the recall is demanded of an elected public officer whose political jurisdiction lies wholly in one county, or if the recall is demanded of an elected public officer of a district whose jurisdiction encompasses more than one county but whose declaration of candidacy is filed with a county auditor in one of the counties, the prosecuting attorney of that county shall be the preparer, except that if the prosecuting attorney is the officer whose recall is demanded, the attorney general shall be the preparer.

(2) The synopsis shall set forth the name of the person charged, the title of the office, and a concise statement of the elements of the charge. Upon completion of the ballot synopsis, the preparer shall certify and transmit the exact language of the ballot synopsis to the persons filing the charge and the officer subject to recall. The preparer shall additionally certify and transmit the charges and the ballot synopsis to the superior court of the county in which the officer subject to recall resides and shall petition the superior court to approve the synopsis and to determine the sufficiency of the charges.

RCW 29A.56.140 lists the duties of the Superior Court:

Within fifteen days after receiving the petition, the superior court shall have conducted a hearing on and shall have determined, without cost to any party, (1) whether or not the acts stated in the charge satisfy the criteria for which a recall petition may be filed, and (2) the adequacy of the ballot synopsis. The clerk of the superior court shall notify the person subject to recall and the person demanding recall of the hearing date. Both persons may appear with counsel. The court may hear arguments as to the sufficiency of the charges and the adequacy of the ballot synopsis. The court shall not consider the truth of the charges, but only their sufficiency. An appeal of a sufficiency decision shall be filed in the supreme court as specified by RCW 29A.56.270. The superior court shall correct any ballot synopsis it deems inadequate. Any decision regarding the ballot synopsis by the superior court is final. The court shall certify and transmit the ballot synopsis to the officer subject to recall, the person demanding the recall, and either the secretary of state or the county auditor, as appropriate.

The statutory process does not ask the court to determine if the factual allegations of the written charges are true. Rather the court is only asked to determine whether, if true, the facts

are “sufficient” to trigger the remainder of the recall procedure. Nevertheless, as shown in this brief, not only are Charlotte Jones and Eugene Rupel’s allegations in their written charges sufficient for recall, but the factual allegations are in fact true.

Going further, in this procedure, the court is not called upon to recall Rick Ensey. Rather the court is merely called upon to decide if the voters should be given that opportunity, after gathering signatures. The remaining portions of the statutory scheme discuss the process, once the Superior Court approves the sufficiency of the charges. The citizens must obtain a certain percentage of signatures to send the recall petition to a vote. RCW 29A.56.150 through .180. The county auditor must then canvass and verify the signatures on the petitions. RCW 29A.56.190 and 200. If the auditor finds sufficient signatures, the auditor announces a vote. RCW 29A.56.210. The auditor then oversees the recall vote. RCW 29A.56.250 and .260.

Rick Ensey Violated the Open Public Meetings Act

Charlotte Jones and Eugene Rupel peg the recall upon Rick Ensey’s violation of the important Open Public Meetings Act, adopted in 1971, RCW 42.30. The intent of the act is that “deliberations be conducted openly.” RCW 42.30.010. To that end, all “meetings” of the governing body of a public agency must be open and public. RCW 42.30.030. “Meetings” means meetings where “action” is taken. RCW 42.30.020(4). “Action” means “the transaction of official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.” RCW 42.30.020(3). Any member of a governing body who attends a meeting where action is taken in violation of the act, “with knowledge of the fact that the meeting is in violation thereof,” is subject to a civil penalty of \$100. RCW 42.30.120(1). Also, any action taken in

violation of the act is null and void. RCW 42.30.060.

The purpose of the OPMA is to permit the public to observe the steps employed to reach a governmental decision. **Cathcart v. Andersen**, 85 Wn.2d 102, 107, 530 P.2d 313 (1975); **Eugster v. City of Spokane**, 128 Wn.App. 1, 7, 114 P.3d 1200 (2005). For this reason, public bodies must make decisions openly. **Miller v. City of Tacoma**, 138 Wn.2d 318, 324, 979 P.2d 429 (1999). RCW 42.30.010 asserts:

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

The Open Public Meetings Act demands a liberal construction. **Miller v. City of Tacoma**, 138 Wn.2d 318, 324, 979 P.2d 429 (1999). OPMA charges must be reviewed in light of the admonition that the act is to be construed liberally "to guarantee public access to and participation in the activities of their representative agencies." **Mead School District No. 354 v. Mead Educational Association**, 85 Wn.2d 140, 145, 530 P.2d 302 (1985). Thus, courts should bar public officials from employing clever means to avoid the restrictions of the Act, when those means violate the public policy of open government.

Four members of the Yakima City Council, Bill Lover, Micah Cawley, Rick Ensey, and Kathy Coffey, met or communicated at various places, in small groups and through an intermediary, and agreed to approve the Priorities of Government budget process. At the formal

meeting, the four shunned any public discussion and immediately proceeded to a vote. This conduct violated both the spirit and form of the Open Public Meetings Act.

The Washington Supreme Court notes that discussions among a majority of the members of a public body constitute “meetings” subject to the Open Public Meetings Act of 1971. **Matter of Recall of Beasley**, 128 Wn.2d 419, 426, 908 P.2d 878 (1996). Going further, under some circumstances, electronic mail communications can constitute a meeting. **Wood v. Battle Ground School District**, 107 Wn.App. 550, 556, 564, 27 P.3d 1208 (2001). If face-to-face contact of the members of a legislative body was necessary for a “meeting,” the objective of the open meeting requirement of the Brown Act could all too easily be evaded.” **Wood v. Battle Ground School District**, 107 Wn.App. 550, 562, 27 P.3d 1208 (2001). A definition of “meeting” that would require the physical presence of members in the same location would contravene the OPMA’s clear purpose. **Wood v. Battle Ground School District**, 107 Wn.App. 550, 562, 27 P.3d 1208 (2001). Consequently, courts have adopted a broad definition of “meeting” to effectuate open meetings laws that state legislatures enacted for the public benefit. **Wood v. Battle Ground School District**, 107 Wn.App. 550, 562, 3, 27 P.3d 1208 (2001). For example, the Washington Attorney General’s *Open Records & Open Meetings Deskbook*, 1.3A notes that “telephone trees,” where members repeatedly phone each other to form a collective decision, are inappropriate under the OPMA. See [http:// www.wa.gov/ago/ records/chapter1.html](http://www.wa.gov/ago/records/chapter1.html) (last visited July 12, 2001), quoted in **Wood v. Battle Ground School District**, 107 Wn.App. 550, 563, 27 P.3d 1208 (2001). Thus, Washington broadly defines “meeting” as “meetings at which action is taken,” regardless of the particular means used to conduct it. **Wood v. Battle Ground School District**, 107 Wn.App. 550, 563, 27 P.3d 1208 (2001).

During past years tendencies toward secrecy in public affairs have been the subject of extensive criticism. Terms such as managed news, secret meetings, closed records, executive sessions, and study sessions have become synonymous with “hanky panky” in the minds of public-spirited citizens. One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies. Regardless of their good intentions, these specified boards and commissions, through devious ways, should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made.

Wood v. Battle Ground School District, 107 Wn.App. 550, 562, 27 P.3d 1208 (2001), quoting **Board of Public Instruction v. Doran**, 224 So.2d 693, 699 (Fla.1969).

In **Wood v. Battle Ground School District**, 107 Wn.App. 550 (2001), the court held that Wood established a prima facie case of “meeting” by e-mails. The discussions related to board business, including the possibility of instituting a declaratory judgment. The active exchange of information and opinions in the e-mail, as opposed to the mere passive receipt of information, suggested a collective intent to deliberate or discuss board business.

The four city council members knew they could adopt the Priorities of Government resolution, because of an agreement beforehand by the four to vote favorably. The vote, at the April 14 council meeting, was a mere formality. Formal action by the public body should not be summary approval of decisions made in secret meetings. **Miller v. City of Tacoma**, 138 Wn.2d 318, 329, 979 P.2d 429 (1999), quoting **Tolar v. School Board of Liberty County**, 398 So.2d 427, 8 (Fla.1981). Decisions made in secret meetings may constitute “final action” even though there is subsequent formal approval of the decision in a public meeting. **Miller v. City of Tacoma**, 138 Wn.2d 318, 329, 979 P.2d 429 (1999); **Organization to Preserve Agricultural Lands v. Adams County**, 128 Wn.2d 869, 884, 913 P.3d 793 (1996).

OPMA was modeled on California’s and Florida’s open meetings law. **Wood v. Battle**

Ground School District, 107 Wn.App. 550, 560, 27 P.3d 1208 (2001). Thus, decisions from those jurisdictions provide guidance in interpreting Washington law. **Wood v. Battle Ground School District**, 107 Wn.App. 550, 560, 27 P.3d 1208 (2001). Both states present decisions confirming Rick Ensey’s violation of the OPMA.

In **Stockton Newspapers, Inc. v. Members of the Redevelopment Agency of the City of Stockton**, 171 Cal.App.3d 95, 214 Cal.Rptr. 561 (1985), a newspaper sought a declaration that the redevelopment agency and its members violated the open meetings requirement of the California Act. Gerald Sperry, attorney for the redevelopment agency, conducted a telephone poll, by calling each board member for the purpose of obtaining a collective commitment or promise by members to approve the transfer of ownership of real property forming part of a planned waterfront development. The telephonic poll was not conducted at either a regular or special meeting of the legislative body of the agency, nor was the public given notice of it. The trial court ruled that a series of one-to-one telephone calls conducted for the purpose of deciding or deliberating upon matters of public business was not a violation of the open meeting requirements. Challengers to the action appealed.

The court, in **Stockton Newspapers, Inc. v. Members of the Redevelopment Agency of the City of Stockton**, framed the issue as whether a series of nonpublic telephone conversations, each between a member of the governing body of a local agency and its attorney, for the commonly agreed purpose of obtaining a collective commitment or promise by a majority of that body concerning public business, constitutes a “meeting” within the purview of the act. The court answered in the affirmative and reversed the trial court. The court wrote:

The foregoing authorities make clear that the concept of “meeting” under the Brown Act comprehends informal sessions at which a legislative body

commits itself collectively to a particular future decision concerning the public business. Considering the ease by which personal contact is established by use of the telephone and the common resort to that form of communication in the conduct of public business, no reason appears why the contemporaneous physical presence at a common site of the members of a legislative body is a requisite of such an informal meeting. Indeed if face-to-face contact of the members of a legislative body were necessary for a “meeting,” the objective of the open meeting requirement of the Brown Act could all too easily be evaded.

171 Cal.App.3d 95 at 102.

In **Stockton Newspapers v. Members of the Redevelopment Agency**, the redevelopment agency argued that, since the telephone conversations were conducted serially as opposed to simultaneously, as in the case of a “speaker phone” conference call among a majority of the members, the case falls within the statutory exception to the open meeting requirement where less-than-a-quorum of the governing body is at any one time involved. The court disagreed, noting the body should not be free to decide public business through such a subterfuge.

The other Sunshine State addressed a purported Open Public Meetings Act violation, in **Blackford v. School Board of Orange County**, 375 So.2d 578 (Fla.App.1979). The Orange County school board’s staff was faced with a major redistricting problem involving the transfer of some 6000 students to other schools. The school district superintendent wished to avoid the uproar which would attend public airing of each possible alternative, until his staff had crystallized a plan for approval. The superintendent, being aware of the Sunshine Law, devised a plan to avert its application. He engaged each board member in individual conversations, so that the board would not conduct a “meeting” under case law. Board members proceeded in convoy, but out of sight of each other, to the superintendent’s office. One member, who might have

opposed a plan, was not invited to the office. Based upon conversations with board members, the superintendent prepared a redistricting plan acceptable to a majority of the board. At a later formal meeting, the board approved the plan.

The Florida court, in **Blackford v. School Board of Orange County**, declared that the conduct of the school board violated the Sunshine State's Sunshine Act, despite the superintendent protesting he did not act as a go-between during the discussions and denying he told any one board member the opinions of any of the others. The superintendent also denied board members indicated which way they would vote. The Florida court ruled that the repetitive secret discussions with individual board members was tantamount to a meeting, during which official action took place.

We may never know the details of the meetings among Rick Ensey, Bruce Smith, Bill Lover, Kathy Coffey, Micah Cawley, and others, since they hid their conniving. Nevertheless, some facts become clear with the e-mail messages.

We know that four city council members agreed, in private and amongst themselves, to vote in favor of the resolution, based upon both overwhelming circumstantial and direct evidence. Rick Ensey, Micah Cawley, and Kathy Coffey met at the coffee shop on March 26, after which Ensey knew he held Cawley's vote. Based upon Cawley's promise to vote favorably, Rick Ensey and Bruce Smith began to draft the budget resolution on March 30. On March 30, Ensey also told Smith and Coffey that he would review the resolution with Bill Lover.

In a March 31 e-mail, Bruce Smith noted Ensey and Coffey had lined up the necessary votes to prevail on the budget process resolution. Smith declared: "If you have the four or five votes (which you do today), force the issue." Smith enjoined Coffey and Ensey to adopt the

resolution, rather than permit study and open discussion at a city council meeting, as demanded by law. While professing a desire for transparent government, Smith conspired with city council members to hide deliberations of public officials. Rick Ensey participated in this conspiracy in violation of Washington's Open Public Meetings Act.

On April 12, with only two days left, Rick Ensey, Bruce Smith, and Kathy Coffey sought to gird the vote of Bill Lover. The group would not forward the budget resolution, unless assured of four votes. Rick Ensey wrote: "I want to make sure that we go in with an agreed motion." Smith responded: "He's [Bill Lover's] waffling, but I think we have about a two-thirds chance. I told him no one wanted to pitch the idea unless the votes were lined up. I talked with Micah [Cawley] Friday (he came to see me) and he's solid. I'll let you know." Later on April 12, Bruce Smith mailed: "We'll get him," referring to Bill Lover.

The group would not have introduced the resolution without an advance agreement between a majority of city council members. Not surprisingly, Rick Ensey immediately forwarded a motion at the April 14 meeting, despite the minority members expecting only a study session. Ensey uttered: "I'm going to make this short and simple, I have a motion to immediately adopt the county's policies and procedures on their budget." The motion passed. The following day, Rick Ensey admitted in an e-mail that he "ambushed" council member Neil McClure. As a result of the unlawful conduct of Rick Ensey, the City of Yakima was successfully sued for violating the OPMA.

Rick Ensey used the strawman, Bruce Smith, to meet with Bill Lover and to engage the vote of Lover. This court should not countenance the use of an intermediary to thwart the Open Public Meetings Act. One may not perform an act indirectly, which he may not perform directly.

In **Stockton Newspapers v. Members of the Redevelopment Agency**, 171 Cal.App.3d 95, 214 Cal.Rptr. 561 (1985), the California court also noted that board members had no contact, but came to an agreement through an intermediary, the agency's attorney. The court impliedly ruled that the board may not conduct business, in violation of the law, through an intermediary.

In **Blackford v. School Board of Orange County**, 375 So.2d 578 (Fla.App.1979), the court ruled discrete meetings, by board members, with the school superintendent violated the Sunshine Act. The court held that board members could not use intermediaries in order to circumvent public meeting requirements.

Sufficient Grounds Exist to Recall Rick Ensey

In Washington, an elected official may only be recalled for cause. **Chandler v. Otto**, 103 Wn.2d 268, 274, 693 P.2d 71 (1984). To satisfy this requirement, a petition must be both factually and legally sufficient. **Matter of Recall of Beasley**, 128 Wn.2d 419, 424, 908 P.2d 878 (1996); **Chandler v. Otto**, 103 Wn.2d 268, 274, 693 P.2d 71 (1984).

Factual sufficiency means the facts must establish a prima facie case of misfeasance, malfeasance, or violation of the oath of office. **Recall of Wasson**, 149 Wn.2d 787, 791, 72 P.3d 170 (2003). To be factually sufficient, the charges must state the act or acts complained of in concise language, give a detailed description including the approximate date, location, and nature of each act complained of, and be verified under oath that the person or persons believe the charge or charges to be true and have knowledge of the alleged facts upon which the stated grounds for recall are based. RCW 29A.56.110.

A reviewing court does not have the authority to look at the truthfulness of a charge or to question the underlying motivation. **Recall of Wasson**, 149 Wn.2d 787, 792, 72 P.3d 170

(2003). Instead, a reviewing court must consider whether, accepting the allegations as true, the charges on their face support the conclusion that the officer abused his or her position. **Recall of Wasson**, 149 Wn.2d 787, 792, 72 P.3d 170 (2003).

The purpose of the factual sufficiency requirement is to ensure that charges, although adequate on their face, do not constitute grounds for recall unless supported by identifiable facts. **Matter of Recall of Beasley**, 128 Wn.2d 419, 424, 5, 908 P.2d 878 (1996). Nevertheless, the recall statutes do not require firsthand knowledge of the facts underlying the charges, as long as the petitioners have some form of knowledge of the facts upon which the charges are based rather than simply a belief that the charges are true. **In re Zufelt**, 112 Wn.2d 906, 912, 774 P.2d 1223 (1989).

The court may consider documents for the purpose of determining whether there is any factual basis for the charges. **Matter of Recall of Beasley**, 128 Wn.2d 419, 427, 908 P.2d 878 (1996). The court may also consider affidavits of witnesses. **Matter of Recall of Beasley**, 128 Wn.2d 419, 427, 908 P.2d 878 (1996). The court may go outside the petition to determine whether there is a factual basis for the charge. **Recall of Anderson**, 131 Wn.2d 92, 95, 929 P.2d 410 (1997).

Percipient knowledge of the charges by the petitioners is not required for sound policy reasons, otherwise a public official engaged in misconduct could avoid recall, if he hides his conduct or engages in secretive misconduct. For example, an office holder could murder an opponent outside the public view. If no one saw the murder, the official could not be recalled based upon circumstantial evidence. Spokane's Mayor Jim West could not have been recalled, based upon his e-mail solicitation of companionship for a possible government job, if the

recipient refused to sign the recall charges. In our case, the recipients of the e-mail, and the conspirators in the vote, refuse to sign the charges against Rick Ensey, but instead vote to tax the citizens of Yakima to pay for Rick Ensey's attorney, with the hope that the attorney will belittle Charlotte Jones and Gene Rupel and steer the focus of the recall away from the misconduct of Ensey.

In the pending recall proceeding, the personal knowledge of petitioners Charlotte Jones and Eugene Rupel is irrelevant anyway to determining the factual sufficiency of the charges, because the charges are supported in their entirety upon public records, produced by the City of Yakima, in response to a public disclosure request, and upon statements to the media by Rick Ensey. The public records and media statements are attached to the written charges. Rick Ensey must concede the veracity of the facts, since the facts come from his mouth and his computer.

Since Jones and Rupel meet the "factual sufficiency" prong of the recall process, the court must next address the "legal sufficiency" of the charges. "Legal sufficiency" means the charge presents specific and substantial conduct clearly amounting to misfeasance, malfeasance or violation of the oath of office. **Recall of Wasson**, 149 Wn.2d 787, 791, 72 P.3d 170 (2003). In the context of recall petitions, "misfeasance" and "malfeasance" both mean "any wrongful conduct that affects, interrupts, or interferes with the performance of official duty." **Recall of Anderson**, 131 Wn.2d 92, 95, 929 P.2d 410 (1997). "Misfeasance" also means "the performance of a duty in an improper manner," and "malfeasance" includes "the commission of an unlawful act." **Recall of Anderson**, 131 Wn.2d 92, 95, 929 P.2d 410 (1997). Rick Ensey's violation of the Open Public Meetings Act constitutes misfeasance, malfeasance, wrongful conduct, the performance of a duty in an improper manner, and the commission of an unlawful act.

Rick Ensey Intended to Violate the Open Public Meetings Act

Supreme Court decisions support the argument that, for a public official to be recalled for a violation of the Open Public Meetings Act, the violation must be intentional. **Recall of Wasson**, 149 Wn.2d 787, 791, 72 P.3d 170 (2003).¹ Charlotte Jones and Eugene Rupel disagree with this proposition. The recall statute, RCW 29A.56.110, nowhere requires proof of intent to violate the law. Nor can the statute be read to imply any “intent” element. Instead, the petitioners need only prove wrongful conduct that affects, interrupts, or interferes with the performance of official duty; the performance of a duty in an improper manner; or the commission of an unlawful act.

The judicially crafted requirement of “intentional misconduct” violates the clear terms of the recall statute and enables an incompetent city council member to avoid recall. A city council member can simply refuse to read relevant texts and then claim that, since he was ignorant of the law, he intended no violation.

Also, the court need not independently determine if Rick Ensey intended to violate the Open Public Meetings Act, since Charlotte Jones and Eugene Rupel allege in their charges that Ensey intentionally violated the act. The recall statute does not allow the court to weigh the veracity of the allegations. The voters can later determine, during the recall process, whether Ensey intentionally violated the act.

Even if this court concludes a recall effort requires a showing of an intentional violation of the law and it must weigh the evidence, under any definition of the word “intentional,” Rick Ensey intentionally violated the Open Public Meetings Act. “Intentional” conduct not only

¹Jones and Rupel do not ask the Superior Court to ignore Supreme Court precedence, particularly since the court should rule that Rick Ensey intentionally violated the OPMA. Nevertheless, the two wish to preserve this argument for any appeal.

includes a specific intent to violate the law, but wanton or reckless misconduct. **Jones v. United States of America**, 693 F.2d 1299 (9th Cir.1982); applying Washington’s Recreational Land Use Immunity Act. Along these lines, in **Yousoufian v. Office of Ron Sims**, 137 Wn.App. 69, 151 P.3d 243 (2007), involving a claim under the Public Disclosure Act, the court defined “intent,” using pattern jury instructions. One such instruction defines “wanton misconduct” as

the intentional doing of an act which one has a duty to refrain from doing or the intentional failure to do an act which one has a duty to do, in reckless disregard for the consequences and under such surrounding circumstances and conditions that a reasonable person would know, or should know, that such conduct would, in a high degree of probability, result in substantial harm to another.

Yousoufian v. Office of Ron Sims, 137 Wn.App. at 79. As such, intentional action includes any “willful” conduct. **In re Disciplinary Proceeding Against Vanderveen**, 166 Wn.2d 594, 612, 211 P.3d 1008 (2009).

The City of Yakima provided Rick Ensey literature about the Open Public Meetings Act, that warned him that lassoing votes, outside the open air of a city council meeting and in advance of a formal vote, violates the law. In a media interview, Rick Ensey conceded he knew the requirements of the OPMA, including that a rolling quorum was illegal. Of course, in this recall proceeding, Ensey will protest that he lacked any intent to violate the law. But the circumstantial evidence shows he either engaged in an intentional or reckless and wanton violation. Rick Ensey admitted the violation, when the city council, on May 5, unanimously voted to rescind the budget resolution and when the city agreed to pay the challenger, to the vote, \$2,500 to dismiss the OPMA suit.

Other misconduct is wrapped in Rick Ensey’s violation of the Open Public Meetings Act. Ensey allowed businessman Bruce Smith, the William Marcy Tweed of Yakima, to direct his

conduct as a Yakima City council member. Rick Ensey approved of Bruce Smith meeting with Yakima City city council members to solidify their votes. A cynical person might conclude Ensey pandered for the favor of Bruce Smith.

Rick Ensey also misled city officials when he asked for a study session for the budget process, when he knew he wished no study but to immediately proceed to a vote. In his covert e-mail, he referred to political opponents derisively.

Yakima deserves a city council member who is transparent, who discusses issues openly with other council members. At least, with the facts that have been unearthed, the citizens of Yakima should be given a choice to recall a city council member, who flaunts the Open Public Meetings Act.

CONCLUSION

Charlotte Jones and Eugene Rupel respectfully request that the Superior Court approve the sufficiency of the written charges against Yakima City Council Member Rick Ensey and allow the residents of Yakima to decide whether Ensey should be recalled for his misconduct.

DATED this ___ day of September, 2009.

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