CITY AND BOROUGH OF SITKA

A COAST GUARD CITY

MUNICIPAL CLERK'S OFFICE
100 Lincoln Street | Sitka, Alaska 99835
www.cityofsitka.com
clerk@cityofsitka.org
907-747-1811

December 16, 2024

VIA EMAIL AND REGULAR MAIL

Klaudia Leccese
118 Cascade Creek Road
Sitka, AK 99835
stormyseasitka@gmail.com

Lawrence Edwards
PO Box 6484
Sitka, AK 99835
larryedwards@gci.net

Re: Application for an Initiative Petition Limitation of Cruise Visitation in Sitka

Dear Ms. Leccese and Mr. Edwards:

Your initiative petition was filed in person, with the Municipal Clerk's Office, on November 29, 2024. That application seeks to call for an initiative petition limiting cruise visitation in Sitka.

Find attached the Notice of Determination for your application for an initiative petition.

Please contact me if you have questions. Thank you.

Sincerely,

Sara L. Peterson, MMC
Municipal Clerk

Cc: Michael Gatti, of Counsel JDO Law
Taylor McMahon, Attorney JDO Law
Christopher Bruno, Associate JDO Law
Rachel Jones, Municipal Attorney
John Leach, Municipal Administrator
Amy Ainslie, Planning & Community Development Director
Mayor and Assembly Members

CITY AND BOROUGH OF SITKA

A COAST GUARD CITY

NOTICE OF DETERMINATION

Application for an Initiative Petition
Limitation of Cruise Visitation in Sitka

I, the undersigned, the duly chosen, qualified Municipal Clerk of the City and Borough of Sitka, Alaska, and keeper of the records of the Assembly, **DO HEREBY CERTIFY**:

That an application for an initiative petition was filed with the Municipal Clerk on November 29, 2024;

That said application for an initiative petition seeks to limit cruise visitation in Sitka;

That said application for an initiative petition contains the signatures and residence addresses of 11 registered City and Borough of Sitka voters who will sponsor the petition;

That said application for an initiative petition contains the name and address of the prime sponsor: Klaudia Leccese, 118 Cascade Creek Road, Sitka, Alaska; and the name and address of the alternate sponsor: Lawrence Edwards, PO Box 6484, Sitka, Alaska;

That said application for an initiative petition contains the full text of the ordinance to be initiated;

That said ordinance is legally sufficient for those reasons stated in the attached memorandum from JDO Law, dated December 16, 2024, which is hereby incorporated by reference.

THEREFORE, I find that the application for an initiative petition filed on November 29, 2024 does meet the requirements for an initiative petition and an initiative petition will be prepared.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the City and Borough of Sitka this 16th day of December, 2024.

Sara L Peterson

Sara L. Peterson, MMC
Municipal Clerk

JDOLAW
JERMAIN DUNNAGAN & OWENS, P.C.
111 W. 16TH AVENUE, SUITE 203, ANCHORAGE, ALASKA 99501-6206
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MEMORANDUM

FROM: Michael Gatti
Taylor McMahon
Christopher Bruno
TO: Sara Peterson, MMC
Municipal Clerk
DATE: December 16, 2024
RE: Fourth Application for an Initiative Petition Regarding Cruise Ships

I. INTRODUCTION

We have been asked by the City and Borough of Sitka ("City" or "Sitka") to provide a legal opinion on an Application for an Initiative Petition that would limit cruise ship visitation in Sitka ("Application.") The Application was filed by Klaudia Leccese, President of Small Town SOUL, a nonprofit corporation, on November 29, 2024. It is the fourth application on this issue in the past year.[1]

The present Application seeks to enact a new title in the Sitka General Code ("SGC"): Title 25 "Tourism." This new code section would limit cruise ship visitation, starting with the 2026 cruise ship season, by placing daily and seasonal caps on the number of "passengers ashore" from "Large Cruise Ships" (those that can accommodate 250 or more overnight passengers). "Small Cruise Ships" (those that can accommodate more than 12 but less than 250 overnight passengers) are exempt from the passenger disembarkation caps, although they must obtain a Disembarkation Permit.

Under the proposal, there are daily and yearly caps on passenger disembarkation from Large Cruise Ships of 4,500 passengers daily and 300,000 passengers annually. The proposal allows the Sitka Assembly to choose one of three methods to develop an annual cruise ship schedule that complies with the passenger disembarkation caps. The petition sponsors identify two main differences between this version and prior versions:

[1] The first was filed on September 15, 2023 by Lawrence T. Edwards that proposed to create a new port district. This was found to be an impermissible appropriation and also to contain provisions that were confusing, misleading, and incomplete. The second was filed on October 25, 2023 by Lawrence T. Edwards and John C. Stein. Instead of creating a "port district," this second application proposed an ordinance that imposed daily, weekly, and annual caps on cruise visitors to Sitka without changing the zoning text or zoning map. Upon review, the Municipal Attorney concluded that, while this new approach did not create an impermissible appropriation, it contained several provisions that were confusing, misleading, and incomplete. The third was filed on June 18, 2024. It placed limits on "persons ashore" and required cruise ships and port facilities to obtain permits. Upon review, this application was not certified because it was not enforceable as a matter of law due to violations of the Tonnage Clause and provisions that were confusing, misleading, and incomplete.

1. The caps are based on "passengers ashore" instead of "persons ashore" and crewmembers who disembark are no longer counted at all.
2. Port facilities are not covered. While prior versions of the initiative required a Sitka Port Facility Permit, the current version does not. Busses leaving port facilities also are not counted.

The "passengers ashore" limitation is enforced via fines and/or revocation of that ship's disembarkation permit, deletion of its scheduled port calls for the remainder of the year, and not scheduling any port calls for that ship for a period of one year. The proposed ordinance resolves grievances through appeals to the Sitka Assembly, which would convene as a quasi-judicial body. The Assembly decision on an appeal based on the proposed ordinance would be subject to an administrative appeal to the Superior Court.

II. BACKGROUND ON THE CRUISE SHIP INDUSTRY IN SITKA

The JDO Memorandum on the Third initiative discussed the background on cruising in Southeast Alaska and is incorporated here. Since that memorandum, the City of Sitka has taken up the Tourism Task Force ("TTF") recommendations. As noted previously, the TTF was given five main objectives to explore and make recommendations on:

1. Levels of tourism in Sitka;
2. Annual review cycle of City operations and tourism funding;
3. Assisting in the development of a Tourism Management Best Practices program;
4. Land use regulations and waterfront development policies; and
5. Regional strategies to advance Sitka's interest regarding cruise tourism.

The TTF finalized its recommendations to the Sitka Assembly on April 30, 2024, and they were adopted by the Assembly on May 16, 2024 via motion and the Municipal Administrator directed to prepare an Action Plan for the recommendations. The Action Plan was issued on June 19, 2024 and presented to the Sitka Assembly at the July 9, 2024 meeting. This Action Plan translated the TTF recommendations into action items and prioritized them based on timing.

At its August 13, 2024 meeting, Ordinance 24-21, to amend Title 2, "Administrative and Personnel," of the Sitka General Code by adding Chapter 2.32 "Tourism Commission" was presented to, and passed by, the Assembly. The creation of the Tourism Commission was a TTF recommendation. The Tourism Commission is a seven member commission tasked to act as an advisory body to the Assembly for the purpose of "developing municipal and community-focused approaches that monitor and promote the social, economic, and environmental stability of, and quality of life to residents in, [Sitka]."[2]

[2] SGC 2.32.060.

At the Assembly's September 10, 2024 meeting, there was a discussion item regarding the visitor industry data. The Assembly came to the consensus that additional visitor industry data was needed, and the Municipal Administrator was directed to prepare a Request for Information for visitor industry data collection services. Thereafter, the Municipal Administrator also negotiated a non-binding Memorandum of Understanding ("MOU") with the Stika Dock Company, LLC, addressing the criteria for planning cruise calls in Sitka. This MOU was approved by the Assembly.

III. LEGAL FRAMEWORK

Article VI, Section 6.01 of Sitka's Home Rule Charter provides that "[t]he powers and rights of the initiative and referendum are reserved to the people of the municipality as prescribed by law." The Assembly, by ordinance, is tasked with the responsibility of regulating initiative procedures.[3]

Under SGC 2.80.040, a petition for an initiative or referendum shall:

1. Embrace only a single comprehensive subject; and
2. Set out fully the ordinance or resolution sought by the petition; and
3. State upon the petition, when circulated, the date of first circulation of the petition, the name of the petitioner and where he/she can be reached; and
4. Contain the statements, when circulated, that the signatures on the petition must be secured within ninety days from the date of the first circulation and that all signators are qualified voters in the municipality; and
5. Have the required number of signatures as set out in the Charter, spaces for each signature, the printed name of each signer, the date each signature is affixed, the residence and mailing addresses, and one of the following identifiers: Voter ID number, Social security number, or birth date of each signer; and
6. A statement, with space for the sponsor's sworn signature and date of signing, that the sponsor personally circulated the petition, that all signatures were affixed in the presence of the sponsor, and that the sponsor believes the signatures are those of the persons whose names they purport to be; and
7. Signers must be qualified voters in the municipality; and
8. Space for indicating the total number of signatures on the petition.

Alaska Statutes also address the initiative process at the municipal level. AS 29.26.100 reserves to residents of municipalities the right of local initiative and referendum. Under AS 29.26.110(a), an initiative or referendum is proposed by filing an application with the municipal clerk. The municipal clerk shall then certify the application if she (1) finds it is in the proper

[3] Sitka Home Rule Charter, Art. VI, Sec. 6.01.

form and (2) that the matter:

1. Is not restricted by AS 29.26.100;
2. Includes only a single subject;
3. Relates to a legislative rather than to an administrative matter; and
4. Would be enforceable as a matter of law.[4]

For purposes of this analysis, we assume that you will review the form of this Application. The following discussion relates to items 1-4 above.

IV. DISCUSSION

In Alaska, voter initiatives are broadly construed to preserve them whenever possible. Courts have a duty to give careful consideration to questions involving whether a constitutional or statutory limitation prohibits a particular initiative proposal on subject matter grounds."[5] The role of a municipal clerk in reviewing an initiative application is to determine whether any of the subject matter limitations on the use of the initiative process apply.[6]

As an initial matter, stakeholders in opposition to this initiative have again asserted that the Application is time barred under SGC 2.80.040(D)(2),[7] which states that "[i]f the petition is deemed insufficient for any reason other than lack of required number of signatures, it may not be amended or resubmitted sooner than one year."[8] However, as provided in our previous analysis, (D)(2) speaks to the sufficiency of the *petition* once the *application* has been certified, the petition prepared for circulation, and the sponsors refile the petition with the clerk with the required signatures. Subsection (A) speaks to the certification of the *application.* The code provides no time bar to resubmit an application that has not been certified. Reading this section of the code to impose a one-year time bar on resubmitting *applications* for initiative petitions,

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[4] AS 29.26.110(a).
[5] *Swetzcf v. Philemonc,f,* 203 P.3d 471 (Alaska 2009).
[6] *Alaska Action Center, Inc. v. Municipality cf Anchorage,* 84 P.3d 989, 992-93 (Alaska 2004). *Swetzcf,* 203 P.3d at 474-75; *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999). The cases discussing how initiative subject-matter restrictions should be interpreted direct that they should both be "liberally construed" and "narrowly interpreted," which appears contradictory. Ultimately, our reading of the above cases is that generally the provisions controlling the initiative process should be liberally construed in favor of a citizen's initiative, but that the restrictions on an initiative's subject matter should be narrowly interpreted, to similarly favor the initiative if possible. *See Swetzcf*, 203 P.3d at 474-75; *Brooks*, 971 P.2d at 1027; *Alaska Action Center*, 84 P.3d at 992; *Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 899-900 (Alaska 2003); *Interior Taxpayers Ass'n, Inc. v. Fairbanks N. Star Borough*, 742 P.2d 781, 782 (Alaska 1987); *Citizen's Coalition for Tort Reform v. McAlpine*, 810 P.2d 162, 168 (Alaska 1991).
[7] *See* Letter from Scott Kendall to Sara Peterson, *Re: "Limitation cf Cruise Visitation in Sitka" Initiative Petition (Our Matter No: 11105-1)*, at 5 (Dec. 9, 2024), hereinafter "CG&L Letter"; Letter from Scott E. Collins to Sara Peterson, *Re: Fourth Application for Initiative Petition for Limitation cf Cruise Visitation in Sitka*, at 3 (Dec. 11, 2024), hereinafter "Helsell Fetterman Letter."
[8] SGC 2.80.040(D)(2).

which may only need minor modifications to become sufficient, would frustrate the ability of the people to avail themselves of the initiative process.

This reading of Sitka code is also supported by AS 29.26.120 through .140, which dictate the initiative process in state law. These sections draw a clear distinction between the application, which is certified (or not) by the clerk,[9] and the actual petition itself, which is "prepared by" the clerk[10] and then later filed back with the clerk for *another* sufficiency determination.[11] In as much as the Sitka code is unclear on this point, we believe that a reviewing court would not time bar citizens for an entire year for a failed application, given the significant imposition such a bar would have on the citizens' right to engage in the initiative process. This would be especially true in cases where only a minor modification to the application would allow the clerk to certify the application. Additionally, generally speaking "the general election laws of the state of Alaska shall apply to the conduct of all municipal elections."[12] Therefore, AS 29.26.120 - .140, as generally applicable laws in Sitka, provides useful guidance to interpret SGC 2.80.040.

a. The proposed ordinance is not restricted by AS 29.26.100

The restrictions imposed by AS 29.26.100 incorporate the subject matters restrictions of Art. XI § 7 of the Alaska Constitution, which provides that:

> [t]he initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety.

Under AS 29.26.100. "An initiative proposes to make an appropriation if it 'would set aside a certain specified amount of money or property for a specific purpose or object in such a manner that it is executable, mandatory, and reasonably definite with no further legislative action.'"[13]

The Alaska Supreme Court has approved of a two-step inquiry to determine if there is an appropriation: first, the court should "determine whether the initiative deals with a public

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[9] AS 29.26.110.
[10] AS 29.26.120(a).
[11] AS 29.26.140(a).
[12] SGC 2.80.010.
[13] *Alaska Action Center, Inc. v. Municipality of Anchorage,* 84 P.3d 989, 993 (2004) (citing *City of Fairbanks v. Fairbanks Convention & Visitors Bureau,* 818 P.2d 1153, 1157 (Alaska 1991)).

asset."[14] Second, the Court should determine whether the initiative "would appropriate that asset."[15] There are two reasons for this prohibition:

> First, the provision 'prevents an electoral majority from bestowing state assets on itself.' This concern comes into play when the initiative would enact a give-away, forcing the state or a municipality to transfer assets into private hands…Second, the limitation on initiatives 'preserves to the legislature the power to make decisions concerning the allocations of state assets.' This 'ensures that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs.' This concern is implicated in cases in which the initiative 'designates the use of state assets,' even if the assets remain in state ownership.[16]

For instance, in *Alaska Action Center,* the proposed initiative at issue would have amended the municipal charter to preserve the lower end of Girdwood Valley as a park.[17] The initiative was rejected by the municipal clerk as an impermissible appropriation.[18] The Alaska Supreme Court agreed. It found that the initiative would have designated the use of a public asset, land, in a way that encroached on the legislature's control over the allocation of State assets among competing needs.[19]

In another case, *McAlpine v. University of Alaska,*[20] the initiative at issue would establish a community college system separate from the University of Alaska and require that the new system be given "such property as is necessary" for its operation and that the amount of property transferred "shall be commensurate" with property held by the former community college on a certain date.[21] The Alaska Supreme Court held that the first part of the initiative relating to "necessary" funds was not an appropriation because the discretion remained as to what was "necessary."[22] However, the third sentence of the initiative, which required a certain funding level, was an appropriation.[23] Thus, the Court directed the superior court to order the lieutenant governor to sever the third sentence of the proposed bill and place the remainder on the ballot.[24]

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[14] *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage,* 151 P.3d 418, 422 (Alaska 2006).
[15] *Id.* at 423.
[16] *Alaska Action Center*, 84 P.3d at 993-94 (internal citations omitted).
[17] *Id.* at 990.
[18] *Id.*
[19] *Id.* at 994.
[20] *McAlpine v. University of Alaska,* 762 P.2d 81 (Alaska 1988).
[21] *Id.* at 83.
[22] *Id.* at 91.
[23] *Id.* at 91.
[24] *Id.* at 95-96.

i. Similar to version 3, this initiative creates a program but does not fund itself.

Generally, this Fourth version of the initiative sets up a regulatory scheme similar to the third version. Accordingly, the general analysis provided in our previous letter also applies here.[25] Namely, that creating a new government program, even one that imposes sizable administrative, oversight, and enforcement responsibilities, is not an appropriation as long as it doesn't actually fund itself.[26]

ii. New appropriations arguments.

In response to this new version of the initiative, opponents have raised additional but distinct appropriations arguments.[27] These arguments rest on the proposition that the proposed initiative would allocate a public asset among competing needs. While it is possible that a court may ultimately side with one of these arguments, based on our current analysis, and the mandate that the clerk give liberal construction to the proposed initiative when deciding if it meets SGC 2.80.040 and AS 29.26.100, we do not believe the Clerk should reject the petition based on these arguments. That sort of determination, given the complex nature of the issues involved, is best left to a court, if a challenger wishes to oppose certification.

For example, one letter suggests that "access to the City of Sitka itself" is a public asset that this initiative appropriates and then "allocates . . . amongst competing needs."[28] Access to Sitka, however, is probably not a "public asset" for purposes of appropriations. Unlike money, land, a utility, or wild salmon, "access" is not something that Sitka or the State of Alaska can own, dispose of, sell, or give away. Therefore, its application in this context is inapposite.

To prevail on this type of appropriations argument it would need to be established that *the tourists themselves* are a "public asset" that the initiative has appropriated. Similar to "access," people, are not money, land, a utility, or a natural resource. People are not a public asset that the State "owns" and over which the legislature has the power to sell, give away, or appropriate. Within this context, regulating the number of passengers that can disembark from a cruise ship does not concern a "public asset" such that the caselaw on appropriations provides useful guidance.

A second legal opinion relies on *Mallott v. Stand for Salmon* to argue that this initiative appropriates the Alaska legislature's discretion on a resource allocation.[29] In *Mallott*, and the

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[25] Letter from Michael Gatti & Taylor McMahon to Sara Peterson, *Re: Application for an Initiative Petition Regarding Cruise Ships*, at 6-7 (Jul. 2, 2024), hereinafter "JDO Letter."
[26] *Id.*
[27] *See* CG&L Letter at 2-4; Letter from Jonathan W. Katchen to Rachel Jones, *Re: Fourth Version of Initiative Petition Limiting Cruise Visitors in Sitka*, at 6-8 (Dec. 10, 2024), hereinafter "Holland & Hart Letter."
[28] CG&L Letter at 3.
[29] Holland & Hart Letter at 6-7.

associated cases of *Pullen v. Ulmer* and *Pebble Ldt. Partnership v. Parnell*, the allocation decisions all involved initiatives that sought to limit the legislature's discretion to permit some land use, environmental, or fishing regulation due to its effect on some *other* natural resource.[30] In other words, all these cases involved allocation decisions involving a public asset that was, in fact, a tangible thing that the State owned, be it public waters, fish habitat, or the fish themselves. Similar to the above, we believe reliance on *Mallott* and its associated cases inapplicable because people are not a state asset for purposes of legislative appropriations.

The Holland Letter also argues that this initiative effectively prohibits the Department of Natural Resources "authority to allocate state submerged lands for certain cruise moorage" therefore making it an appropriation.[31] We believe this to be an overstatement of what the initiative does. Contrary to this assertion, the initiative does not prevent the State from leasing submerged tidelands to persons wishing to construct piers capable of berthing large cruise ships. At most, the initiative indirectly impacts the financial considerations of building such a facility by capping the number of persons that can *disembark* from a cruise ship. Undoubtably this impacts what cruise ships might choose to visit that facility. But it has no bearing on whether the State has the authority or discretion to permit such a use of its submerged tidelands. Just because the proposed ordinance might make a business operation less profitable doesn't mean that the State now has *no discretion whatsoever* to lease submerged tideland in Sitka to property owners wanting to build large cruise ship docks. The proposed ordinance in no way controls how many passengers can be onboard the ship, what sized ship might use such a pier, how large such a pier could be, or the State's authority to lease tidelands for berthing such ships.

Ultimately, initiatives are prohibited from making or repealing appropriations primarily to prevent a majority of the electorate from "bestowing *state assets* on itself" and to "preserve to the legislature the power to make decisions concerning the allocations of *state assets*." Putting a cap on the number of *people* disembarking a cruise ship implicates neither of these considerations, primarily because people are not "state assets." While a court may ultimately disagree, we believe the merits of these argument are best left to a court after receiving detailed legal briefing. We do not believe the above arguments provide a basis for the Clerk to reject this application at this point.

iii. The initiative is not void due to legislative action.

One opposition letter argues that this version of the initiative should be rejected because the Assembly has taken legislative action addressing the same matter.[32] This argument relies on *Warren v. Boucher* to argue that when both an initiative and a legislative action are "substantially

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[30] *See Mallott v. Stand for Salmon*, 431 P.3d 159, 167 (Alaska 2018); *Pebble Ltd. Partnership v. Parnell*, 215 P.3d 1064, 1077 (Alaska 2009); *Pullen v. Ulmer*, 923 P.2d 54, 64 (Alaska 1996).
[31] Holland & Hart Letter at 8.
[32] Helsell Fetterman Letter at 3-6.

the same" the initiative is void under Art. XI, Sec. 4, of the Alaska Constitution.[33] The *Warren* case dealt primarily with whether it was proper for the Legislature to delegate, to the Lieutenant Governor, the task of determining if a proposed initiative and an enacted *statute*, were substantially similar for purposes of voiding the initiative under Article XI of the Alaska Constitution.[34]

In our previous letter, we stated that "Because the Assembly has not enacted a measure concerning long term tourism management, but is rather considering an Action Plan, this initiative is not void under Art. IX [*sic*], Sec 4 of the Alaska Constitution."[35] This reasoning still holds true now, as the Sitka Assembly has not enacted any ordinance that is substantially similar to the proposed initiative.

The opposition letter points to various actions that the Assembly has taken since the 3rd version of the initiative was rejected.[36] This includes creating the advisory Tourism Commission, accepting the TTF's recommendations, directing the Administrator to develop an action plan, and approving a non-binding MOU.[37] To determine that there is a substantial similarity between the proposed initiative and the creation of the Tourism Commission, inquiry must be taken to whether the "legislative act accomplishes that purpose by means or systems which are fairly comparable."[38] In this case, they do not. The Tourism Commission is a non-binding, advisory body that only makes recommendations to the Assembly. Similarly, the MOU is non-binding, with the parties "acknowledge[ing] that no legally binding obligations are intended to arise between them as a result of this MOU."[39] This initiative, on the other hand, places firm daily and seasonal caps on how many passengers may disembark in Sitka. Such caps are at odds even with the recommendations of the TTF, which were to pursue mutual agreements between Sitka and the cruise ship industry on the topic of the target number of passengers ashore.

In as much as the *Warren* case controls at all given that it addressed the State Legislature's powers, it is inapposite here because as of the date of this letter the Sitka Assembly has taken no legislative action that seeks to cap cruise ship disembarkation to the extent and in the manner that this initiative proposes. In other words, the Assembly has not taken any substantially similar action.

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[33] *Id.*
[34] *Warren v. Boucher*, 543 P.2d 731, 732-34 (Alaska 1975); AS 29.26.170(b).
[35] JDO Letter at 3 n.3.
[36] Helsell Fetterman Letter at 3-6.
[37] *Id.*
[38] *Warren* at 736.
[39] MOU, Section 10.

b. The proposed ordinance includes only a single subject.

As with the prior iterations, this proposed ordinance pertains to a single subject, the limitation of cruise visitation in Sitka. Therefore, the proposed ordinance satisfies AS 29.26.110(a)(2).

c. The proposed ordinance is legislative, not administrative.

This version of the initiative is substantially similar with respect to its purpose and matter as the Third version. Therefore, we incorporate here the analysis conducted in our prior letter.[40] Based on an overall reading of the proposed initiative, it appears to primarily be legislative in nature. Similar to version Three, this new proposed ordinance meets guideline 1 and 2 from *Swetzcf v. Philemoncjf*.[41] It declares a public purpose, creates a new law, and represents a new policy direction for Sitka. While implementation of the proposed initiative would undoubtably require administrative "ways and means," as a whole the initiative should not be rejected as being primarily administrative, given its overall legislative nature.[42]

d. The proposed ordinance would be enforceable as a matter of law.

Alaska Statute 29.26.110(a)(4) prohibits ordinances that are that are unenforceable as a matter of law.[43] While procedural and technical requirements are relaxed for citizen initiatives, "confusing or misleading petitions frustrate the ability of voters to express their will."[44] Additionally, while most constitutional challenges should not be considered until after voter enactment, proposed initiatives that are clearly unconstitutional or illegal should not be certified.[45]

i. The proposed ordinance invites a variety of possible constitutional challenges, however none of these legal challenges have clear controlling authority that justifies a rejection of the application by the Clerk at this point.

The constitutionality of an initiative is reviewed in two distinct ways. As previously discussed above, the Clerk is required to review a proposed initiative to ensure that it does not violate the constitutional and statutory provisions regulating the initiative process itself.[46] A second type of challenge involves "general contentions that the provisions of an initiative are

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[40] *See* JDO Letter at 7-8.
[41] *Swetzcf v. Philemoncjf*, 203 P.3d 471, 476-82 (Alaska 2009).
[42] *Id.*
[43] AS 29.26.110(a)(4).
[44] *Citizens for Implementing Medical Marijuana v. Municipality cf Anchorage,* 129 P.3d 898, 902 (Alaska 2006).
[45] *Carmony v. McKechnie,* 217 P.3d 818, 819-20 (Alaska 2009).
[46] *Id.*

unconstitutional."[47] In this later instance, the municipal clerk may only reject the measure "if controlling authority leaves **no room for argument** about its unconstitutionality."[48]

The difference between these two approaches is that the former considers whether the form and substance of the initiative is appropriate for the initiative process itself.[49] The latter considers whether the initiative, if passed into law, would have unconstitutional effects, provisions, or infirmities. There is a high bar at the pre-enactment stage for a clerk to reject an initiative based on constitutional infirmities in the subject matter.[50] The Alaska Supreme Court has described the level of unconstitutionality required as akin to an initiative mandating "local school segregation based on race in violation of *Brown v. Board of Education*" before the clerk may reject it on constitutional grounds."[51]

In the present case, and similar to the analysis contained in our prior letter evaluating the third initiative, many of the objections raised by the opponents of the Application fall into this second type of constitutional challenge. This includes claims that the initiative interferes with the Commerce Clause, the fundamental right to travel, the freedom of navigation, is an unlawful taking, and violates the Tonnage Clause. While all of these claims may have some merit, it is premature for the Clerk to reject the initiative at this point based on these grounds.

1. The Fourth Version of the Sitka Cruise Ship Initiative does not clearly violate the Tonnage Clause

In JDO's letter dated July 2, 2024, we recommend that the Third version of this initiative be rejected because the Cruise Ship Permit fee violated federal law.[52] This recommendation was primarily based on a mandatory permit fee that was proposed to be charged to cruise ships in order to "make one or more port calls in Sitka."[53] We advised the Clerk that this sort of mandatory fee would violate the Tonnage Clause and 33 U.S.C. §5 because it was effectively a toll, tax, or levy on a vessel's use of the navigable waters of the United States, and the fee had no relation to a service provided to the vessel.[54] In other words, the Third initiative explicitly stated that in order for a vessel to make a port call in Sitka, it needed to pay a fee. This clearly violates the Tonnage Clause and associated federal law.

The Fourth version of the initiative no longer has a mandatory permit fee. Instead, this version now has an optional permit fee that either may, or may not, be required by the Sitka Assembly.[55] This means that the initiative may be enacted and enforced with no fee being charged to vessels. If cruise ships are not charged a fee, the Tonnage Clause and 33 U.S.C. §5

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[47] *Id.*
[48] *Id.* (emphasis added).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] JDO Letter at 10.
[53] *Id.*
[54] *Id.*
[55] *See* 25.02.020D5; 25.03.010C2.

are not implicated, at least with respect to a permit fee. In addition, there is an argument that the permit fee provides a service to the vessel: namely a scheduling and vessel/passenger deconfliction service to avoid overcrowding in the harbor. Whether this is ultimately a viable argument is best left to a court. Nevertheless, it provides sufficient "room for argument" on the constitutionality of this permit fee.

Given the high bar of unconstitutionality that must be demonstrated at the pre-enactment stage, the permit fee provision in this latest version of the initiative is not clearly unconstitutional, given that ultimately there may be no fee. If the Assembly later decides to charge a permit fee, the constitutionality of such a fee can be challenged at that time, *if* that happens.

In other words, under the Fourth initiative, there is "room for argument" regarding the constitutionality of the permit fee scheme. It is far from clear that a provision presenting a possibly unconstitutional non-mandatory option invalidates the entire proposed initiative. Therefore, the initiative should not be rejected on this basis alone.[56]

There is a related argument that requiring a permit, even without a fee, violates 33 U.S.C. § 5(b) because the very process of requiring a permit is effectively a tax, toll, operating charge, fee, or "other imposition"[57] on a vessel for operating on the navigable waters. While this might be a potentially viable claim, the permit itself does not directly concern a vessel's use or enjoyment of navigable waters. Instead, the permit is styled as a "disembarkation permit" that regulates the total number of passengers that can leave the ship in a day.[58] This creates sufficient "room for argument" that makes it improper for the clerk to deny this initiative on these grounds at this point. [59]

Similarly, there are various sections of this initiative that could be read as an absolute prohibition on a ship visiting Sitka. For example, section 25.02.010A.4 says that "Cruise ship port calls shall not be scheduled outside of the cruise season."[60] However, as is more fully discussed below, not being on the official schedule may, or may not, interfere with the vessel's use and enjoyment of the navigable waters. However, without clearly controlling authority on point, this determination is most appropriate for a court.

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[56] Relatedly, even if this fee provision is unconstitutional, it can be struck from the proposed ordinance similar to how the unconstitutional provision in *McAlpine* was "severed" from the proposed initiative and the rest was placed on the ballot. *McAlpine v. University of Alaska*, 762 P.2d 81, 95-96 (Alaska 1988).
[57] 33 U.S.C. §5(b).
[58] *See* 25.02.020B.
[59] In the case of *Polar Tankers, Inc. v. City of Valdez*, the U.S. Supreme Court invalidated a Valdez property tax because it effectively created a charge "for the privilege of entering, trading in, or lying in a port" on all oil tankers operating in Valdez. *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 2277, 2283 (2009). This case provides useful analysis of the Tonnage Clause, but does not provide "clearly controlling authority" to conclude that putting a cap on the number of passengers disembarking a cruise ship is equivalent to a tax, fee, duty or charge on the ship.
[60] 25.02.010A4; *see also* 25.01.060A.

2. The fines and enforcement provisions do not clearly violate the Tonnage Clause or 33 U.S.C. §5.

The Fourth initiative seeks, via its Violations and Enforcement section, to impose a variety of fines on cruise ships that violate the permit and disembarkation caps.[61] Opponents to this initiative have raised issues with these fines, primarily that they run counter to the Tonnage Clause and 33 U.S.C. §5(b) because they are a toll, fee, or imposition on a vessel for its use or enjoyment of the navigable waters.[62]

It is not clear that a fine for disembarking too many passengers amounts to an imposition on the vessel's use of the navigable waters. Disembarking passengers at a certain port is not necessarily an intrinsic and necessary activity in order for a vessel and its passengers to use and enjoy the navigable *waters* of the United States. The proposed initiative does not seek to prevent cruise ships from using Sitka's Harbor or the surrounding waters. Instead, it only seeks to fine cruise ships for *disembarking* passengers onto land in excess of certain caps.

The Violations and Enforcement Section also seeks to prevent habitual violators from scheduling a Sitka port call for one year after more egregious violations.[63] Similar to the above, there is a viable argument that such a prohibition would violate 33 U.S.C. §5. And questions remain whether not being on the official Sitka cruise ship schedule (in order to disembark passengers without incurring a fine) actually or legally prevents a cruise ship from using or enjoying the navigable waters. The ordinance does not seek to prevent any cruise ship from sailing past Sitka, from using pier facilitates, or even otherwise legally anchoring in Sitka's Harbor or surrounding waters. A cruise ship is free to use the navigable waters unimpeded. This ordinance only implicates a cruise ship that both uses the waters and actually disembarks passengers into Sitka. As mentioned above, whether disembarking passengers at a certain place on a certain day is a fundamental a part of a vessel's "use and enjoyment of the navigable waters" is not clearly established in controlling authority. As such, the enforcement provisions and fines do not rise to the level of constitutional infirmity justifying rejection of the initiative at the pre-enactment stage.[64] These challenges are best left to a court.

ii. The proposed ordinance is not so confusing, misleading, or incomplete as to justify a rejection.

The legal sufficiency of a proposed initiative includes a consideration of whether the ordinance and its associated materials have confusing, misleading, or incomplete language.[65] The touchstone for this analysis is whether or not the initiative and its associated materials would confuse or mislead *a voter* or signatory to the petition.[66] This is because confusing, misleading,

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[61] 25.01.060A.
[62] CG&L Letter at 4-5; Holland & Hart Letter at 4-6; Helsell Fetterman Letter at 8-9.
[63] 25.01.060A(1)-(3).
[64] *Alaska Action Center,* 84 P.3d at 992.
[65] *Citizens for Implementing Medical Marijuana v. Municipality of Anchorage,* 129 P.3d 898, 902 (Alaska 2006).
[66] *Id.*

or incomplete language "frustrate[s] the ability of voters to express their will."[67] The "main concern" is that all matters put up for a vote should be "presented clearly and honestly to the people of Alaska."[68] "A description which is untruthful, misleading, or which is not complete enough to convey **basic** information as to what the ordinance does, cannot be regarded as a legally adequate or sufficient description within the meaning of the ordinance."[69] These cases support that the legal review of this issue is limited and should be confined to "basic" information and "minimum standards" of accuracy and fairness.[70] Therefore, the fact that an ordinance may be difficult to implement, or require complex or burdensome administrative procedures, is not controlling so long as the ordinance can be understood.

As an initial matter, this version of the initiative addresses most, if not all, of the items pointed out in our July letter.[71] Most of these items have been made moot due to changes in the Fourth version.

Otherwise, and as a general proposition, this initiative is not confusing or misleading in its ultimate objective. Were it to be put to a vote, there is little question that voters would understand that the initiative seeks to limit the total number of passengers that can disembark cruise ships, limit the number of days cruise ships can visit Sitka, and otherwise puts into place a scheduling process that fairly allocates days and disembarking passengers between cruise ship applicants. Those caps are clearly stated in 25.02.010, and a three scheduling options are presented in 25.02.020 that, on their face, appear to provide viable processes.

Opponents to this initiative have raised various examples of how it is confusing or misleading. This includes concerns over:

- How to determine if counting and reporting systems proposed by each ship are sufficient;[72]

- Objections that the proposed scheduling process is unworkable in reality;[73]

- Objections to including an "FAQ" document with the initiative;[74]

- Problems harmonizing section 25.01.040 stating that individual passengers shall not be interfered with, with the overall goal of the initiative to cap disembarkations, which ostensibly may require a cruise ship preventing a person from disembarking;[75]

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[67] *Id.*
[68] *Id.* at 901.
[69] *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1219 (Alaska 1993) (emphasis added); *Sitkans for Responsible Gov't v. City & Borough of Sitka*, 274 P.3d 486, 494 (Alaska 2012) (reiterating and relying on *Faipeas* holding).
[70] *Sitkans*, 274 P.3d at 494.
[71] *See* JDO Letter at 11-13.
[72] Holland & Hart Letter at 2-3.
[73] *Id.* at 3-4; Helsell Fetterman Letter at 7
[74] Helsell Fetterman Letter at 7.

- And allegedly misleading treatment of small cruise ships as compared to large cruise ships.[76]

In addition to the above, we have also identified certain parts of the Fourth initiative that present difficulties to its administration and implementation. This includes:

- The definition of "Cruise Ship Operator" makes it difficult to determine who would be liable for enforcement fines. "Cruise Ship Operator" includes owners, masters, and other "persons" in charge of the ship, as well as "persons . . . being responsible for passengers ashore."[77] The enforcement section allows for fines to be imposed on any of these distinct persons or entities.[78] This creates ambiguity on who Sitka should impose the penalty against, and may produce unanticipated consequences. For example, if the fine is imposed on the captain of the ship, and that captain immediately leaves employment with that Cruise Ship company, is the ship itself and/or the owners then fined? Or does the initial fine follow the captain? What happens if the same Captain is then hired by a rival operator on the Sitka schedule? Will the next ship that Captain is in charge of be prevented from being on the Sitka schedule if the fine remains outstanding?

- Under 25.02.020B no "person . . . may allow or facilitate the disembarkation of passengers . . . without the large cruise ship first having obtained a Disembarkation Permit." What will happen if a deck hand does the facilitating? Will the deck hand be fined $15,000 under 25.01.060? If the cruise ship operator fires the deckhand and disclaims any responsibility for exceeding the cap, is that ship still prevented from scheduling a port call for an entire year under 25.01.060?

- There are various ambiguities about how the appeal and stay of enforcement provisions contained in 25.01.070 would operate in reality. This includes the mechanisms and timelines by which stay requests appear in front of the Assembly, who has standing to intervene in appeals and/or be a party, and the process by which the Assembly elects to review a decision on the record vs. hear the appeal *de novo*.

- If a cruise ship is prevented from being on the schedule under 25.01.060, can a different ship owned by the same company be on the schedule? If so, is there anything that would prevent a company that owns multiple ships from rotating a new ship into the Alaska season when its other ships are prohibited? Does the ordinance allow Sitka to address such a situation?

- There are concerns that the default "queuing" schedule process contained in 25.02.030C is completely unworkable, will take an unreasonable amount of time if instituted, would

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[75] *Id.*
[76] *Id.* at 7-8.
[77] 25.01.020E.
[78] 25.01.060A.

require significant time and money on the part of the municipality, and would be untenable for the industry based on the real world constraints of how ship scheduling works. This includes related concerns about how the optimization process in 25.02.030C3 would work (or not) in real life.

- There is ambiguity about who the "Alaska cruise ship industry" is for purposes of turning over scheduling in the "free market scheduling" option contained in 25.02.032. If this option is selected, who or what gets to decide the schedule process? How does the municipality decide that a proposed schedule has come from the "Alaska cruise ship industry?" What does the municipality do if two proposed scheduled are offered, each from a group claiming to be "the Alaska cruise ship industry?"

- The allocation of decision-making authority in 25.02.032 is confusing. Selecting the free market schedule is left to either the Assembly "by resolution," or to the administrator. Why must the Assembly pass a resolution, which requires a public process, while the administrator can unilaterally decide to implement this section?

- The level of discretion afforded to the municipality under the "alternate" scheduling process in 25.02.034 is confusing and incomplete. What level of municipal oversight is required? Does this option allow the municipality to contract out to a private business to do the scheduling?

A significant distinction between the Third and the Fourth initiative was that the Third Initiative proposed a scheduling system that was unworkable in practice, yet the average voter likely would not realize that the draft-style scheduling process would not function. In the present initiative, the Assembly has been given three scheduling options. While unwieldly, a workable method could be determined under the proposed ordinance now that there is flexibility.

Cases such as *Faipeas,*[79] *Sitkans for Responsible Government,*[80] and *Citizens for Implementing Medical Marijuana,*[81] establish that the analysis concerns whether the language is partisan, whether it is truthful, whether it conveys the basic information, and whether it is unclear. That is, does the petition "frustrate the ability of voters to express their will."[82]

Notwithstanding the administrative difficulties noted above, the ordinance as written is not so confusing, misleading, or incomplete as to justify the Clerk's rejection. Practical difficulties aside, there is nothing inherently confusing or misleading about the proposed scheduling process. And ultimately, voters will be deciding whether to cap the number of people allowed to disembark from cruise ships.

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[79] 860 P.2d 1214 (Alaska 1993).
[80] 274 P.3d 486 (Alaska 2012).
[81] 129 P.3d 898 (Alaska 2006).
[82] *Id.* at 902.

V. CONCLUSION

We recommend that the Fourth Application should be certified, as discussed above. At this point, any legal challenges to the proposed initiative are best addressed by a court.

Attachments:

- Letter from Michael Gatti & Taylor McMahon, Jermain Dunnagan & Owens, P.C., to Sara Peterson, Sitka Municipal Clerk, *Re: Application for an Initiative Petition Regarding Cruise Ships*, (Jul. 2, 2024).

- Letter from Scott Kendall, Cashion Gilmore & Lindemuth, to Sara Peterson, Sitka Municipal Clerk, *Re: "Limitation of Cruise Visitation in Sitka" Initiative Petition (Our Matter No: 11105-1)*, (Dec. 9, 2024).

- Letter from Jonathan W. Katchen, Holland & Hart, to Rachel Jones, Sitka Borough Attorney, *Re: Fourth Version of Initiative Petition Limiting Cruise Visitors in Sitka*, (Dec. 10, 2024).

- Letter from Scott E. Collins, Helsell Fetterman, to Sara Peterson, Sitka Municipal Clerk, *Re: Fourth Application for Initiative Petition for Limitation of Cruise Visitation in Sitka*, (Dec. 11, 2024).

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MEMORANDUM

FROM: Michael Gatti
Taylor McMahon
TO: Sara Peterson, MMC
Municipal Clerk
DATE: July 2, 2024
RE: Application for an Initiative Petition Regarding Cruise Ships

I. INTRODUCTION

We have been asked by the City and Borough of Sitka ("City" or "Sitka") to provide a legal opinion on an Application for an Initiative Petition that would limit cruise ship visitation in Sitka ("Application.") The Application was filed by Klaudia Leccese on June 18, 2024. It is the third application on this issue in the past year.[1]

The present Application seeks to enact a new title in the Sitka General Code ("SGC"): Title 25 "Tourism." This new code section would limit cruise ship visitation by placing daily and seasonal caps on the number of "persons ashore." Under the proposal, cruise ship companies would participate in a draft-style pre-season scheduling conference to obtain port call authorizations. Cruise ships would have to obtain a Sitka Cruise Ship Permit while those owning, managing, or operating a port facility would have to obtain a Sitka Port Facility Permit.

The "persons ashore" limitation is enforced via fines and, potentially, barring the ship's passengers from disembarking. The system will be administered by a department designated by the municipal administrator. Aggrieved parties may appeal to this department.

II. BACKGROUND ON THE CRUISE SHIP INDUSTRY IN SITKA

Cruising in Alaska's southeast is a regional industry and scheduling is currently handled at the regional level by Cruise Line Agencies of Alaska ("CLAA"). CLAA performs a variety of services. Notably, it creates all Alaska cruise ship schedules and has a sizable staff to manage this complex scheduling process. Ship schedules are set out multiple years in advance and

[1] The first was filed on September 15, 2023 by Lawrence T. Edwards that proposed to create a new port district. This was found to be an impermissible appropriation and also to contain provisions that were confusing, misleading, and incomplete. The second was filed on October 25, 2023 by Lawrence T. Edwards and John C. Stein. Instead of creating a "port district," this second application proposed an ordinance that imposed daily, weekly, and annual caps on cruise visitors to Sitka without changing the zoning text or zoning map. Upon review, the Municipal Attorney concluded that, while this new approach did not create an impermissible appropriation, it contained several provisions that were confusing, misleading, and incomplete.

scheduling takes place over a period of months.

Prior to 2022, Sitka did not have large cruise ship berthing facilities. Cruise ships would anchor offshore and lighter passengers to smaller docks. From there, these visitors would come into town on foot, disperse on pre-booked tours, or by other modes of transportation from the docks.

This all changed with the development of the Sitka Sound Cruise Terminal ("SSCT"), which is privately owned. This terminal was developed to berth much larger, neopanamax ships (those with 4,000+ guest capacity plus crew). In the spring of 2021, SSCT provided the City notice that 400,000 cruise passengers were expected in 2022: a significant jump from the approximately 200,000 cruise visitors that Sitka historically saw. 2023 was another record-breaking year for cruise tourism in Sitka. The City understands that SSCT currently has long term berthing contracts with multiple cruise lines. Passengers arriving at SSCT are shuttled into town via bus.

The rapid rise in cruise visitors has caused discord among Sitka's residents. While there are economic benefits to hosting cruise ship visitors, there are also downsides related to congestion and overcrowding. Following this increase in cruise ship tourism, the City created a Tourism Task Force ("Task Force") to facilitate the transition to long-term tourism management.[2] The Task Force had five main directives to explore and make recommendations on:

1. Levels of tourism in Sitka;
2. Annual review cycle of City operations and tourism funding;
3. Assisting in the development of a Tourism Management Best Practices program;
4. Land use regulations and waterfront development policies; and
5. Regional strategies to advance Sitka's interest regarding cruise tourism.

The Task Force finalized its recommendations to the Sitka Assembly on April 30, 2024, and they were adopted by the Assembly on May 16, 2024. The Task Force recommendations were broad ranging, including the level of cruise visitation in Sitka, on-going public processes for managing tourism, regulations, permitting, zoning, development policies and regional engagement strategies. The proposed ordinance, in contrast, is more narrowly focused on the level of cruise visitation in Sitka. The following highlights some of the differences:

Provision/Issue	TTF Recommendations	Ballot Prop
Means of Control	Pursue a mutual agreement	Regulatory approach to

[2] The City currently has a Short-Term Tourism Plan.

	between CBS and the industry to achieve target numbers	achieving target numbers
Seasonal Cap	No specified seasonal cap/limit	300,000 seasonal cap
Daily Cap	Target daily maximum in range of 5,000 – 7,000	4,500
Quiet Day(s)	Designate one to two days per week (the same day(s) every week) with 1,000 or fewer cruise passengers in town	One day each week (no specificity that it would be the same day of the week on a consistent basis) with no ships larger than 250 passenger capacity in town
Length of Season	Mid-May – Mid-September	May 1 – September 30
Managing Docks	In addition to the mutual agreement, create a policy for use of city-owned lightering docks to control/curtail peak visitor days	No differentiation of how different docks should be managed/booked to achieve target numbers

The Task Force recommendations have been converted to an Action Plan, which is pending Assembly review, discussion, and direction. Some of the actions are already ongoing.[3]

III. LEGAL FRAMEWORK

Article VI, Section 6.01 of Sitka's Home Rule Charter provides that "[t]he powers and rights of the initiative and referendum are reserved to the people of the municipality as prescribed by law." The Assembly, by ordinance, is tasked with the responsibility of regulating initiative procedures.[4]

Under SGC 2.80.040, a petition for an initiative or referendum shall:

1. Embrace only a single comprehensive subject; and
2. Set out fully the ordinance or resolution sought by the petition; and
3. State upon the petition, when circulated, the date of first circulation of the petition, the name of the petitioner and where he/she can be reached; and
4. Contain the statements, when circulated, that the signatures on the petition must be secured within ninety days from the date of the first circulation and that all signators are qualified voters in the municipality; and
5. Have the required number of signatures as set out in the Charter, spaces for each signature, the printed name of each signer, the date each signature is affixed, the residence and mailing addresses, and one of the following

[3] Because the Assembly has not enacted a measure concerning long term tourism management, but is rather considering an Action Plan, this initiative is not void under Art. IX, Sec 4 of the Alaska Constitution.
[4] Sitka Home Rule Charter, Article VI, Section 6.01.

identifiers: Voter ID number, Social security number, or birth date of each signer; and

6. A statement, with space for the sponsor's sworn signature and date of signing, that the sponsor personally circulated the petition, that all signatures were affixed in the presence of the sponsor, and that the sponsor believes the signatures are those of the persons whose names they purport to be; and
7. Signers must be qualified voters in the municipality; and
8. Space for indicating the total number of signatures on the petition.

Alaska Statutes also address the initiative process at the municipal level. AS 29.26.100 reserves to residents of municipalities the right of local initiative and referendum. Under AS 29.26.110(a), an initiative or referendum is proposed by filing an application with the municipal clerk. The municipal clerk shall then certify the application if she (1) finds it is in the proper form and (2) that the matter:

1. Is not restricted by AS 29.26.100;
2. Includes only a single subject;
3. Relates to a legislative rather than to an administrative matter; and
4. Would be enforceable as a matter of law.[5]

For purposes of this analysis, we assume that you will review the form of this Application. The following discussion relates to items 1-4 above.

IV. DISCUSSION

In Alaska, voter initiatives are broadly construed to preserve them whenever possible. Courts have a duty to give careful consideration to questions involving whether a constitutional or statutory limitation prohibits a particular initiative proposal on subject matter grounds."[6] The role of a municipal clerk in reviewing an initiative application is to determine whether any of the subject matter limitations on the use of the initiative process apply.[7] In this case, the Application should not be certified because it is unenforceable as a matter of law due to (1) misleading, confusing, and incomplete terms and (2) that the requirement of the Sitka Cruise Ship Permit violates the Tonnage Clause.

As an initial matter, stakeholders in opposition to this initiative asserted that the Application is time barred under SGC 2.80.040(D)(2), which states that "[i]f the petition is deemed insufficient for any reason other than lack of required number of signatures, it may not be amended or resubmitted sooner than one year." However, (D)(2) speaks to the sufficiency of

[5] AS 29.26.110(a).
[6] *Swetzcf v. Philemoncf,* 203 P.3d 471 (Alaska 2009).
[7] *Alaska Action Center, Inc. v. Municipality cf Anchorage,* 84 P.3d 989, 992-93 (Alaska 2004).

the *petition,* while subsection (A) speaks to the certification of the *application.* There is no such time bar for resubmitting an application.[8]

a. The proposed ordinance is not restricted by AS 29.26.100

The restriction imposed by AS 29.26.100 incorporates the subject matters restrictions of Art. XI § 7 of the Alaska Constitution, which provides that:

> [t]he initiative shall not be used to dedicate revenues, make or repeal appropriations, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation. The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety.

Under AS 29.26.100. "An initiative proposes to make an appropriation if it 'would set aside a certain specified amount of money or property for a specific purpose or object in such a manner that it is executable, mandatory, and reasonably definite with no further legislative action.'"[9]

The Alaska Supreme Court has approved of a two-step inquiry to determine if there is an appropriation: first, the court should "determine whether the initiative deals with a public asset."[10] Second, the Court should determine whether the initiative "would appropriate that asset."[11] There are two reasons for this prohibition:

> First, the provision 'prevents an electoral majority from bestowing state assets on itself.' This concern comes into play when the initiative would enact a give-away, forcing the state or a municipality to transfer assets into private hands…Second, the limitation on initiatives 'preserves to the legislature the power to make decisions concerning the allocations of state assets.' This 'ensures that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs.' This concern is implicated in cases in which the initiative 'designates the use of state assets,' even if the assets remain in state ownership.[12]

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[8] Reading this section of the SGC to impose a one year time bar on resubmitting applications for initiative petitions, which may only need minor modifications to become sufficient, would frustrate the ability of the people to avail themselves of the initiative process.

[9] *Alaska Action Center, Inc. v. Municipality of Anchorage,* 84 P.3d 989, 993 (2004) (citing *City of Fairbanks v. Fairbanks Convention & Visitors Bureau,* 818 P.2d 1153, 1157 (Alaska 1991)).

[10] *Anchorage Citizens for Taxi Reform v. Municipality of Anchorage,* 151 P.3d 418, 422 (Alaska 2006).

[11] *Id.* at 423).

[12] *Id.* at 993-94 (internal citations omitted).

For instance, in *Alaska Action Center,* the proposed initiative at issue would have amended the municipal charter to preserve the lower end of Girdwood Valley as a park.[13] The initiative was rejected by the municipal clerk as an impermissible appropriation.[14] The Alaska Supreme Court agreed. It found that the initiative would have designated the use of a public asset, land, in a way that encroached on the legislature's control over the allocation of State assets among competing needs.[15]

In another case, *McAlpine v. University of Alaska,*[16] the initiative at issue would establish a community college system separate from the University of Alaska and require that the new system be given "such property as is necessary" for its operation and that the amount of property transferred "shall be commensurate" with property held by the former community college on a certain date.[17] The Alaska Supreme Court held that the first part of the initiative relating to "necessary" funds was not an appropriation because the discretion remained as to what was "necessary."[18] However, the third sentence of the initiative, which required a certain funding level, was an appropriation.[19] Thus, the Court directed the superior court to order the lieutenant governor to sever the third sentence of the proposed bill and place the remainder on the ballot.[20]

Under 25.01.040(A) of the proposed ordinance, "the municipal administrator shall designate a department or departments(s) to develop and maintain the Sitka Cruise Visitation Schedule…The schedule shall list each ship authorized for each day and the number of 'persons ashore' authorized for each ship." This department shall craft "Sitka Cruise Ship Permits" and "Sitka Port Facilities Permits" and bear responsibility for enforcing them.[21]

While the Application tasks the designated department with scheduling, oversight, and enforcement responsibilities to effectuate the "persons ashore" limitation, it does not fund these activities nor does it designate a specific department to oversee tourism. There are certainly practical issues associated with this new scheme. To schedule and maintain the proposed Sitka Cruise Visitation Schedule, which would have Sitka take over this work from CLAA, would likely require additional staff and specialized software. The process is likely to be unwieldy as cruise ship scheduling is a more complex proposition than contemplated by this proposed ordinance.

Nonetheless, simply creating a new government program or liability is not an appropriation.[22] For instance, in *McAlpine,* the ballot initiative was allowed to create a new

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[13] *Id.* at 990.
[14] *Id.*
[15] *Id.* at 994.
[16] *McAlpine v. University of Alaska,* 762 P.2d 81 (Alaska 1988).
[17] *Id.* at 83.
[18] *Id.* at 91.
[19] *Id.* at 91.
[20] *Id.* at 95-96.
[21] 25.01.080
[22] *McAlpine* at 91.

government program, the community college, but not to appropriate its funding: which discretion remained with the legislature. Similarly, the D.C. Court of appeals held that an initiative establishing an overnight shelter program was not an impermissible appropriation when the initiative committed no assets to the program.[23]

Similarly, the proposed ordinance at issue here tasks an unnamed department with effectuating and enforcing the Sitka Cruise Visitation Schedule, but does not fund it. While funds and personnel will be required to implement the system of permits, scheduling, and enforcement the proposed ordinance does not appropriate funds for this purpose, as it cannot. Because the Application only creates a new program related to tourism, but does not attempt to fund it, it is not an impermissible appropriation. Therefore, the proposed ordinance is not restricted by AS 29.26.100.

b. The proposed ordinance includes only a single subject.

As with the prior iterations, this proposed ordinance pertains to a single subject, the limitation of cruise visitation in Sitka. Therefore, the proposed ordinance satisfies AS 29.26.110(a)(2).

c. The proposed ordinance is legislative, not administrative.

Under AS 29.26.110(a)(3), an initiative must relate to a legislative, not an administrative matter. In 2009, the Alaska Supreme Court was presented with its first opportunity to interpret this subsection.[24] At issue in *Swetzcf* was an initiative proposing that the City of Saint Paul "shall not engage in the sale or delivery of electric power to retail customers": which would have the effect of taking Saint Paul out of the utility business.[25] The City contended, in part, that the initiative related to an administrative, not a legislative matter.[26] The Alaska Supreme Court disagreed. It began by noting that the legislative/administrative distinction is based on government efficiency. Upon review of how other courts had addressed the legislative/administrative distinction, it approvingly used three of the four guidelines set forth by the Supreme Court of Kansas in *City cf Wichita v. Kansas Taxpayers Network, Inc.*:[27]

1. An ordinance that makes new law is legislative; while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance.
2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts

[23] *District cf Columbia Board cf Elections and Ethics v. District cf Columbia,* 520 A.2d 671, 675 (D.C. App. 1986).
[24] *Id.* at 476.
[25] *Id.* at 473.
[26] *Id.* at 474.
[27] 874 P.2d 667 (1994).

that deal with a small segment of an overall policy question generally are administrative.

3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy.[28]

The Court found that the Saint Paul initiative was legislative because removing the city from the utility business would be a new policy directive under the first guideline and was general. Additionally, the initiative declared a public purpose to discontinue electric power sales, satisfying the second guideline.[29] While guideline three may not have been satisfied for the initiative, the Court indicated that this was a balancing exercise, noting that the third guideline should not supersede the first two.[30]

In the present case, the Application meets guideline 1 and 2. It makes new law limiting cruise ship visitation to Sitka. Similarly, it declares a public purpose of limiting cruise ship visitation to Sitka and provides a means of doing so through the daily and seasonal caps on "persons ashore." This represents a new policy direction for Sitka. Guideline 3 may not be satisfied, however, as in *Swetzcf,* this is a balancing test. Because the Application establishes a new policy with respect to cruise visitation in Sitka, it is legislative, not administrative.

d. The proposed ordinance would not be enforceable as a matter of law.

AS 29.26.110(a)(4) prohibits ordinances that are unenforceable as a matter of law. While procedural and technical requirements are relaxed for citizen initiatives, "confusing or misleading petitions frustrate the ability of voters to express their will."[31] Additionally, while most constitutional challenges are not ripe until after voter enactment, proposed initiatives that are clearly unconstitutional or illegal should not be certified.[32]

i. Constitutional Challenges

Opponents of the proposed ordinance have raised certain constitutional challenges: citing the Commerce Clause, the Constitutional Right to travel, the Takings Clause, and the Admiralty Clause. However, it is premature to address these arguments at this stage.

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[28] The fourth guideline is that "no one act of a governing body is likely to be solely administrative or legislative, and the operation of the initiative and referendum statute is restricted to measures which are quite clearly and fully legislative and not principally executive or administrative. 2003 P.3d at 477. The Court elected not to follow this guideline, noting that it ran counter to the rule of construction that proposed initiatives should be construed liberally whenever possible. *Id.* at 479.

[29] *Id.* at 479.

[30] *Id.*

[31] *Citizens for Implementing Medical Marijuana v. Municipality of Anchorage,* 129 P.3d 898, 902 (Alaska 2006).

The constitutionality of an initiative may be reviewed either before it goes to the voters or after it is enacted. There are two types of constitutional challenges.[33] The first type "invoke the particular constitutional and statutory provisions regulating initiatives."[34] For these challenges, the municipal clerk "has the discretion to reject the measure if she determines it violates any of the liberally construed restrictions on initiatives."[35]

The second type of challenge involves "general contentions that the provisions of an initiative are unconstitutional."[36] In this later instance, the municipal clerk may only reject the measure "if controlling authority leaves no room for argument about its unconstitutionality."[37] The difference between these two approaches is whether the initiative process is appropriate for the subject matter of the initiative, not whether the substance of the initiative is unconstitutional.[38] In the present case, the objections raised by the opponents of the Application fall into this second type of constitutional challenge and a court may likely find they should not be addressed at this stage. Instead, stakeholders may need to seek judicial resolution of prematurely raised legal arguments.

As previously noted in the review of the October 25, 2023 application, there is a factually similar case, *Association to Preserve and Protect Local Livelihoods v. Town of Bar Harbor,* presenting a challenge to a land use ordinance that established a daily cap on cruise ship disembarkation. A decision was issued by the U.S. District Court for the District of Maine on March 1, 2024 that largely upheld the ordinance: concluding that an initiative can be used to restrict cruise ship visitation in the manner proposed here, despite numerous federal challenges.[39] Appeal was recently taken. At its present juncture this case, while similar, does not yet present controlling authority applicable to this Application. A future appellate court decision may amend that position by providing legal guidance on cruise ship initiatives.

ii. The Sitka Cruise Ship Permit fee violates the Tonnage Clause

While it is premature to address the generalized constitutional challenges alleged by stakeholders, that portion of the proposed ordinance that requires ships to pay a fee to obtain the Sitka Cruise Ship Permit violates the Tonnage Clause of the U.S. Constitution and the Rivers and Harbors Appropriations Act ("RHAA," 33 USC §5). The Tonnage Clause prohibits charging a vessel for using navigable waterways. The simplest formulation of the relevant rule of law is that

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[32] *Carmony v. McKechnie,* 217 P.3d 818, 819-20 (Alaska 2009).
[33] *Alaska Action Center, Inc. v. Municipality of Anchorage,* 84 P.3d 989, 992 (Alaska 2004).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] 2024 WL 952418 (D. Maine March 1, 2024).

states and municipalities may charge vessels reasonable fees for rendering or making available services *to the vessel* that further the marine enterprise or that enhance the safety and efficiency of interstate commerce.[40]

The proposed ordinance requires "[a] cruise line company whose ship(s) will make one or more port calls in Sitka during a year [to] apply for and receive a current, valid, "Sitka Cruise Ship Permit' individually for each ship that is not exempt under 25.01.030(A)(7).[41] Applications will be reviewed upon payment of a fee in an amount set by the Assembly.[42] The purpose of obtaining the Sitka Cruise Ship Permit is to: "(i) ensure awareness by the cruise industry of its responsibilities under this chapter; (ii) ensure adherence to the daily and annual caps in section 25.01.030, (as expressed in section 25.01.040); (iii) ensure accurate and complete data collection; and (iv) aid enforcement of this chapter."[43]

This Sitka Cruise Ship Permit requirement violates the Tonnage clause. This is primarily because none of the stated reasons for requiring cruise ships to obtain these permits clearly articulate any sort of *service* to the vessel. Instead, the stated purposes of the permit (and associated fee) are mostly in service of the proposed ordinance and Sitka. While one might argue that "ensuring awareness" of the passenger caps is a service to the vessel, that is a stretch. Without some better or different justifications for the permit fee, this part of the proposed ordinance fails under a 33 USC §5 analysis.

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[40] *Cruise Lines Int'l Assoc. Alaska v. City & Borough of Juneau*, 356 F.Supp.3d 831, 843-44 (D. Alaska 2018), *overruled on other ground by Lil' Man in the Boat, Inc. v. City of San Francisco*, 5 F.4th 952 (9th Cir. 2021).
[41] 25.01.050(A)(1).
[42] 25.01.050(B).
[43] 25.01.050(A).

iii. The proposed ordinance contains confusing, misleading, and incomplete provisions.

The proposed ordinance must be reviewed to consider its legal sufficiency, and it must be worded carefully enough to be enforced. Initiatives must be drafted clearly enough so that the voters know what they are voting on and so future disputes over the initiative's meaning are avoided. In this case, certain provisions of the proposed ordinance are confusing, misleading, and incomplete as follows:

(1) Under 25.01.050(E)(1), each permittee, meaning the cruise ships and the port facilities, "shall accurately count 'persons ashore' for its ship or onto its port facility." While the permittees "shall assist the department in resolving any data inconsistencies,"[44] it is unclear how the City would proceed with enforcement if there was conflicting information between the ship and the port regarding persons ashore. There is no mechanism for what happens if there is an impasse or the City cannot solve the irregularity or inconsistency and how penalties should be applied in that situation. That is, if the persons ashore count cannot be reconciled, whose data should CBS rely on? The ship's or the port's?

(2) Under 25.01.040, to be eligible to apply for a preseason port call authorization for a ship, the ship must have a valid permit for that cruise season issued under 25.01.050. 21.01.050(3) provides that a permit is valid for the current year. This is confusing and incomplete as it reads as though ship scheduling can only occur in the current year, yet cruise ship tickets are sold father in advance due to the level of advanced planning needed.

(3) 25.01.070 states that if cruise ships are barred under 25.01.080(B) due to excessive violations, the ship and port facility shall not allow passengers to disembark (except in the case of an emergency). This is the only reference to what "barring" entails and who is responsible for it. There are no provisions in the Sitka Cruise Ship Permit or Sitka Port Facility Permit sections that inform permittees on how "barring" should work, nor any information asked of permittess regarding their procedures for "barring."

(4) Under 25.01.030(A)(8), no person shall be impeded from disembarking, even if a port call causes exceedance of a cap or a ship's person's ashore. However, 25.01.070, in conjunction with 25.01.080(B) does provide that passengers shall not be allowed to disembark in cases of excessive violations of a ships "persons ashore." This is inconsistent and confusing.

As with the prior version of this proposed initiative, on the one hand as an enforcement mechanism, cruise ships are barred from making port calls

[44] 25.01.050(E)(1)(e).

(25.01.080(B) provides that port call authorizations shall be cancelled). On the other hand, the proposed code says there will be no interference with seafarers and passengers from coming ashore (25.01.070). As with the prior version, voters will not know what they are voting on and future disputes concerning these provisions are likely.

(5) 25.01.080(A) provides the penalty for a ship or port who fails to obtain/possess a valid permit prior to ship arrival, which includes the ship or port facility begin barred until the permit is obtained. However, the provisions for "barring" under 25.01.070 make no reference to violations under this section and it is unclear how "barring" would work in this no valid permit scenario.

(6) 25.01.080, governing enforcement, is poorly drafted. It appears that subsection (A) applies when a cruise line or port facility does not have a valid permit, subsection (B) applies to ships that exceed their authorized "persons ashore," and subsection (C) applies to failures to collect and/or report data and other violations of the permittee's permit. However, the application of these subsections to certain scenarios could be clearer. Additionally, there is tension between subsections (A) and (B):

- (A) has the penalties for a ship or port failing to obtain a permit prior to ship arrival which include a $5,000 fine and the unpermitted ship or unpermitted port being barred until a permit is obtain. (B) states that unscheduled, non-emergency port calls carry a $15,000 fine and port calls by that ship would be barred for one year.
- Ships and ports must have a permit to be on the schedule. Therefore, any port call by a ship without a permit (or to a port without a permit) would, by definition, be unscheduled.
- It is unclear which set of penalties would apply. Applying both is problematic, as (A) only requires the ship or port be barred until a permit is obtained and (B) requires the ship to be barred for a year. It is also unclear which fine, or both, should be levied.
- Under (A), it is also unclear whether in the case of an unpermitted ship making a port call, if only the ship gets the $5,000 fine or if the port does as well.
- 25.01.040(B) states, "If a cruise ship makes a port call that is not in the schedule, the ship and the port facility it utilizes are in violation of this chapter." This means that if an unpermitted ship makes a port call, it is unscheduled and perhaps the $15,000 fine in (B) should also be levied against the port.

(7) The appeal process under 25.01.080(G) does not specify what happens to the permittee during the appeal process (i.e. whether the enforcement action is stayed until the appeal is finalized). Given that entire cruise lines could be barred for a year and all scheduled port calls canceled, the lack of clarity in this section has high financial stakes for the permittee.

(8) Under 25.01.020(D), the definition of a cruise ship includes providing commercial passengers with a "tourist experience." This is vague. Could a group call themselves naturalists, cultural observers, etc. to exempt themselves from these provisions?

(9) The proposed ordinance does not have a prescriptive way of determining the "persons ashore" expected from any ship in the scheduling process. 25.01.040(1) requires each ship application for port calls include the maximum number of "persons ashore," but doesn't define the basis for that maximum number (e.g. lower berth capacity, etc.). This creates inconsistency across lines/ships, which could advantage some during the scheduling process.

(10) The proposed ordinance is misleading because, with a randomized draw for scheduling, it is highly probably that the resulting schedule will not be optimized for use under the caps. As a result, the actual number of cruise passengers in Sitka may be well below the target numbers voters thought they were approving via the ballot initiative.

For instance, if a ship is unable to get the day it wants in Sitka, a series of "if-thens" have to be gone through to figure out where else that ship could berth, which has flow down effects on the entire itinerary of not just that ship, but other ships and ports. Cruise lines would be unlikely to make these kinds of "real time" decisions during the scheduling conference. Therefore, the scheduling conference will likely reach an impasse.

(11) Under the proposed ordinance, the City would be responsible for scheduling privately owned facilities (primarily SSCT) as well as municipal facilities. Under 25.01.040(1), port call authorization applications include an identification of the port facility the applicant will use for each port call. However, there is no provision for what happens if the ship's preferred port facility is not available, but there is still space for the ship under the caps. The proposed ordinance makes no consideration for when private facilitates would or would not be willing to accommodate a booking, and which ships have contracts to berth at the facility.

V. CONCLUSION

We recommend that the Application is denied certification for the reasons presented above.

Attachments:

- June 25, 2024 letter from Holland & Hart re Third Version of Initiative Petition Limited Cruise Visitors in Sitka
- June 27, 2024 letter from Helsell Fetterman re Third Application for Initiative Petition for Limitation of Cruise Visitation in Sitka
- June 28, 2024 letter from Cashion Gilmore & Lindemuth re "Cruise Limitations" Initiative Petition

CG&L
CASHION GILMORE & LINDEMUTH

VIA EMAIL and U.S. MAIL

June 28, 2024

Sara Peterson, Municipal Clerk
Office of the Sitka Municipal Clerk
100 Lincoln Street, Suite 306
Sitka, Alaska 99835
sara.peterson@cityofsitka.org

cc: Brian E. Hanson, Municipal Attorney
brian.hanson@cityofsitka.org

RE: "Cruise Limitations" Initiative Petition
(Our Matter No: 11105-1)

Dear Sara:

On behalf of Royal Caribbean Cruises, Ltd.,[1] I write to you regarding the June 18 filing of a ballot proposition intended to appear on the October 2024 ballot—the so-called "Limitation of Cruise Visitation in Sitka" Ordinance (the "Ordinance"). The Ordinance seeks to place hard caps on the number of cruise passengers from any large ships allowed ashore per day and per season, and also limits such passengers to accessing Sitka only six days per week.[2]

The Ordinance is an unlawful use of the initiative power for several reasons. First, it is a clear example of an "appropriation" of public assets prohibited by Article XI, Section 7 of the Alaska Constitution. Second, it also violates the fundamental right to travel guaranteed by the Alaska Constitution. The Ordinance conflicts with multiple aspects of federal law, including federal statutes, the United States Constitution, and international law principles incorporated by federal law. And finally, the proponent of the Ordinance is prohibited from bringing it because a substantially similar measure was rejected less than one year ago.

Sitka Ballot Measure Provisions

Under 2.80.040 the SCG only provides generalized format and content requirements that are not substantive in nature. However, the SCG is supplemented by Alaska Statutes and the Alaska Constitution regarding the proper subjects and contents of ballot measures.[3]

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[1] Although I write today on behalf of my client, the reasoning in this letter applies with equal force to the interests of all similarly situated cruiselines.
[2] *See* Ordinance at 25.01.030.
[3] *See* September 29, 2023 Application Review by Brian E. Henson, sent to Sara Peterson at page 2.

State Law and Constitution Prohibits Ballot Measures Making an Appropriation

Under AS 29.26.100 "[t]he powers of initiative and referendum are reserved to the residents of municipalities, except the powers do not extend to matters restricted by Art. XI, Sec. 7 of the state constitution." In addition, AS 29.10.030(c) states that: "[a municipal] charter may not permit the initiative and referendum to be used for a purpose prohibited by Art. XI, Sec. 7 of the state constitution."

Article XI, Section 7 of the Alaska Constitution makes clear that an initiative cannot be used to "dedicate revenues, **make or repeal appropriations**, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation."[4] Any such attempted misuse of the initiative process should result in a measure being rejected.

The Alaska Supreme Court has implemented a two-part test for determining whether the provisions of an initiative constitute a prohibited appropriation:

> First, we determine whether the initiative deals with a public asset. In a series of cases, we have determined that public revenue, **land**, a municipally-owned utility, and wild salmon are all public assets that cannot be appropriated by initiative. Second, we determine whether the initiative would appropriate that asset. In deciding where the initiative would have that effect, we have looked at the "two core objectives" of the limitation on the use of the initiative power to make appropriations. One objective is preventing "give-away" programs that appeal to the self-interest of voters and endanger the state treasury. … **The other objective is preserving legislative discretion by "ensur[ing] that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs**."[5]

The Ordinance purports to place a hard cap on passengers from large vessels disembarking in Sitka (both per day and cumulatively by season) and to limit their ability to do so to six days per week. The Ordinance essentially prohibits such ships' crews and passengers over the cap (and one day a week) from accessing the entirety of Sitka.

Accordingly, the Ordinance takes control of public assets—access to the City of Sitka itself—and allocates them amongst competing needs. On one day a week, large vessel passengers cannot access Sitka at all, while everyone else can. Additionally, it places a hard cap on those passengers allowing certain passengers free access, but then allocating access away from any (per day or per season) surplus passengers. This usurps the authority and control provided to the Sitka Assembly by law.

The Alaska Supreme Court has specifically found a prohibited appropriation where, as is the case here, a ballot measure allocates a public resource amongst competing user groups. In that case, it was a ban on fishing for salmon via set net in a particular region. Specifically, the Court said that

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[4] (Emphasis added).
[5] *Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422-23 (Alaska 2006) (citations omitted and emphasis added).

the ballot measure at issue was an unconstitutional appropriation because the proposed measure "would completely appropriate salmon away from set netters and prohibit the legislature from allocating any salmon to that user group."[6] The Ordinance is materially identical to the invalid set netting initiative because it would completely appropriate access to Sitka away from surplus cruise ship passengers and crew towards other user groups (e.g., smaller passenger vessels, charters, sightseeing tours, fly-in visitors, etc), and the Assembly would have no discretion to otherwise allow access to these passengers.

The Ordinance therefore violates the Alaska Constitution because it has the purpose and effect of making an appropriation of public assets and because it interferes with the Assembly's exclusive ability to control these assets and allocate them amongst competing needs. As a result, the Ordinance also fails to satisfy AS 29.26.110(a)(1).

Accordingly, you should reject the Ordinance as an unconstitutional appropriation.

The Ordinance would be Unenforceable as a Matter of Federal Law

An initiative must be enforceable as a matter of law to be placed on a ballot under AS 29.26.110(a)(4). However, the Ordinance would likely be enjoined because it conflicts with several aspects of federal law including, but not limited to, the following:

- The fundamental right to travel in the U.S. Constitution, contained in the Fourteenth Amendment's Privileges and Immunities Clause, as well as other constitutional provisions.[7] By arbitrarily blocking citizens from Sitka on certain days and if they are surplus passengers, the Ordinance clearly violates the right to travel.

- The Commerce Clause in the U.S. Constitution at Article I, Sec. 8 providing that: the U.S. Congress has the exclusive power "to regulate commerce with foreign nations, among states, and with the Indian tribes." Cruise ship travel, particularly through the inside passage, necessarily implicates interstate and foreign commerce. Both areas are exclusively regulated by federal law, meaning the Ordinance clearly violates the Commerce Clause.

- The Ordinance conflicts with established principles of international and federal maritime law guaranteeing freedom of navigation, passage, and entry to ports, as well as federal statutes governing those subjects.

- The Takings Clause in both the U.S. Constitution at the Fifth Amendment and the Alaska Constitution at Article I, Sec. 18 prohibit the taking of private property without just compensation. The Ordinance directly impacts private dock owners by dramatically limiting the docks' use without compensation. It also will have a massive indirect impact

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[6] *Lieutenant Governor v. Alaska Fisheries Conservation Alliance, Inc.*, 363 P.3d 105, 106 (Alaska 2015).

[7] *See also* discussion of a right to travel in the Alaska Constitution based in its equal protection clause, *Thomas v. Bailey*, 595 P.2d 1, 9-16 (Alaska 1979).

on business owners throughout Sitka. Accordingly, the Ordinance violates the Takings Clauses of both the U.S. and Alaska Constitutions.

Sitka Code Prohibits Re-filing an Amended Petition Less than One Year after Rejection

The supporters of the Ordinance appear to be serially filing measures related to "Limitation of Cruise Visitation in Sitka." Two such measures appear to have been filed in 2023, one on or about September 15 and the other on or about October 25. This current measure was filed on June 18, 2024. However, such "rapid fire" filing of related measures is not permitted by Sitka Code.

Specifically, SGC 2.80.040(D)(2) provides that, "[i]f the petition is deemed insufficient for any reason other than lack of required number of signatures, **it may not be amended or resubmitted sooner than one year.**"[8] Here, the proponents of this latest measure have recently had prior petitions rejected for reasons of facially unconstitutionality—i.e. a "reason other than lack of required signatures." They have therefore filed this amended version of their petition regarding "Limitation of Cruise Visitation in Sitka" many months too early. Accordingly, the Ordinance can and should be rejected for that reason as well.

Conclusion

The Ordinance is unenforceable as a matter of state and federal law. The Ordinance also was filed months too early and cannot even be considered until much later in the year. The correct decision is to reject the Ordinance for these reasons.

Thank you for your attention to this matter. Please reach out if you have any questions regarding this letter.

Sincerely,

s/Scott Kendall/

Scott Kendall
Attorney
scott@cashiongilmore.com
(907) 339-4967 (direct)

[8] (Emphasis added).

Holland & Hart

Jonathan W. Katchen
Partner
Phone 907.865.2606
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June 25, 2024

Borough Attorney
Legal Department
City and Borough of Sitka
100 Lincoln Street
Sitka, AK 99835
legal@cityofsitka.org

Re: Third Version of Initiative Petition Limiting Cruise Visitors in Sitka

Dear Borough Attorney:

On behalf of my client, Sitka Dock Co., LLC ("Sitka Dock Co."), I write regarding the application for an initiative petition seeking to limit cruise visitors in Sitka, filed with the City Borough on June 18, 2024. As you are aware, both previous versions of this petition were rejected by the Municipal Clerk, in consultation with you, because the ordinances proposed by the applications were confusing, misleading, and incomplete, and, in the case of the first version, because you found the proposed initiative would have appropriated public resources in violation of AS 29.26.110(a)(1) and the Alaska Constitution.

This version is procedurally deficient and barred by the City Code, and should be rejected on this ground, because petitioners must wait one year before amending and resubmitting their petition. In addition, this third version should also be rejected on substantive grounds: the initiative is unenforceable because it remains confusing, misleading, and incomplete, it constitutes an appropriation under Article XII, Section 7 of the Alaska Constitution, the initiative is pre-empted by federal law, and violates the Alaska Constitution's right to travel.

I. The Proposed Ordinance

The proposed ordinance would put in place a complex scheme of permits, schedules, and fines designed to limit cruise visitation to Sitka. The mechanism used to achieve this purpose is a cap system which (1) restricts the cruise season to May 1 through September 30, (2) restricts the use of cruise vessels to only 6 days per week, (3) restricts daily persons ashore to 4,500, and (4) restricts persons ashore during the entire cruise season to 300,000.

First, all individual cruise ships and all port facilities must obtain a permit after paying an unspecified fee to be set by the Assembly. The permit application requires the ship or port facility to specify what data collection procedures it intends to use to count "persons ashore," giving the department discretion to determine whether those procedures are "sufficient" for "complete and accurate data." No specific system for data collection is established.

Prior to the cruise season, the proposed initiative would require all ships to apply for port call authorizations. Then, representatives from every cruise line would come together at a conference to create a cruise schedule which complies with the cap system. Names of applicants would be randomly drawn and once drawn, the representative would select one slot in the schedule per month. This process is repeated until the schedule has hit the relevant caps or no more applicants request space in the schedule. Applicants can later apply for unfilled space or apply to swap spaces with ties for simultaneously filed applications broken by coin toss.

Enforcement of the schedule would occur via fines for every violation of the caps and, despite several provisions suggesting the contrary, bans cruise ship passengers disembarking in certain situations. For a cruise line with multiple ships, offenses apply collectively. On the third violation, a ship, or an entire cruise line, would be prohibited from landing passengers in Sitka for one year. Fines are also assessed for the failure of a ship or port facility to acquire a permit, and disembarking passengers are barred until a permit is obtained.

Finally, the proposed ordinance grants appeal rights and grants the Ports and Harbors Department the ability to seek administrative search warrants to investigate actual or suspected violations of the quotas.

II. Petitioners Must Wait One Year Before Submitting an Amended Petition.

Chapter 2.40.040 of the Sitka General Code governs initiatives and referendums. Subsection A provides that a "petition for initiative" shall be certified by the municipal clerk within 10 days, or, if the clerk declines to certify the petition, shall notify the sponsors of the ground for denial. Subsection D(2) provides that if a petition "is deemed insufficient for any reason other than lack of required number of signatures, it may not be amended or resubmitted sooner than one year."

Petitioners submitted the first version on September 15, 2023, which the Municipal Clerk rejected on September 29, 2023. Petitioners then submitted a modified version of the first petition on October 25, 2023, which the Clerk rejected on November 9, 2023. Neither petition was rejected for lack of the required signatures, but rather for the substantive reasons noted above.

The third petition is an amendment and resubmission of the first and second petitions, and for that reason should be rejected. Petitioners should not get a third bite at the apple when Borough Code prohibits a second (without waiting for one year).

The second version constituted an amendment to the first. In the context of ballot initiatives, the Alaska Supreme Court has explained that "the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed."[1] This is precisely what the initiative

[1] *Bess v. Ulmer*, 985 P.2d 979, 985 (Alaska 1999) (discussing the difference between "amending" the Constitution by ballot initiative and "revising" the Constitution through a constitutional convention).

sponsors intended when they submitted their second version – a change to the original instrument effecting an improvement, so as not to run afoul of the constitutional prohibition on initiatives that appropriate the Assembly's zoning power.

Similarly, the third version of the initiative amends the second version. The third version contains the same permit and scheduling system within the second version and the same methodology of daily and yearly caps. It also contains essentially the same enforcement mechanism of escalating fines culminating in the barring of a cruise line landing passengers upon a third violation. Indeed, the third version is simply an attempt to remedy the many deficiencies of the second version, and thus constitutes an amendment or resubmission of the previous versions.

III. Substantive Analysis

Like the first two applications, certain provisions of the third version are confusing, misleading, and incomplete, as discussed below. In addition, the third version amounts to an appropriation of state resources in violation of AS 29.26.110(a) and Article XI, Section 7 of the Alaska Constitution because the proposed initiative would narrow the legislature's range of discretion to make decisions regarding how to allocate public resources – state-owned lands and public waters. Additionally, the initiative is preempted by federal law, specifically 33 U.S.C. 5(b), and violates the Alaska Constitution's right to travel.

a. The Proposed Ordinance is Confusing, Misleading, and Incomplete

The proposed ordinance is contradictory on a fundamental issue: What happens to cruise passengers when a ship or cruise line violates the ordinance? Proposed 25.01.030(8) states:

> **No person shall be impeded from disembarking or embarking a ship**, even if a port call causes exceedance of a cap or of a ship's scheduled "persons ashore."[2]

And yet, the operative provisions of the proposed ordinance *do* impede passengers from disembarking. For example, 25.01.070 states:

> If a ship is currently barred under 25.01.080(B) because of excessive violations as described there, **the ship and any port facility shall not allow passengers to disembark** except if the ship is in Sitka because of a maritime or medical emergency, or otherwise to allow individual passengers to seek emergency medical treatment the ship cannot provide.[3]

This confusing contradiction cuts to a core issue. Voters must decide how this initiative would be enforced. On the one hand, the initiative states that "[e]nforcement of this chapter is only against ships, cruise lines and port facilities—not passengers or crew." At the same time, the actual

[2] Proposed 25.01.030(8) (emphasis added).

[3] Proposed 25.01.070 (emphasis added).

enforcement mechanisms clearly require "passengers" to be "barred from landing"[4] and states that "passengers" shall not be allowed to "disembark."[5] As drafted, the proposed ordinance says one thing about enforcement and then does another.

Indeed, your November 9, 2023 Memorandum previously found that the second version of the petition suffered from this same defect, which has not been remedied in the third version.[6] The proposed ordinance is "confusing, misleading, and incomplete"[7] in this regard and fails to comply with AS 29.26.110(a)(4).

Additionally, the proposed ordinance is incomplete in that it would levy thousands of dollars in fines for failure to submit "accurate" data, without defining how "accuracy" will be determined. This lack of detail is particularly relevant to port facilities, as they are expected to "distinguish between passengers and crew, and between those continuing, starting or ending an itinerary in Sitka,"[8] but given no indication what methods are acceptable for accomplishing this difficult task or what margin of error will be permitted. Port facilities cannot rely on cruise ships' counts, as they are expected to make independent counts.[9]

There is no indication in the ordinance which of these two counts should prevail, or how the Ports and Harbors Department will ultimately decide which of the counts is determinative. This determination is hugely consequential, as three violations of the port call limitation by a cruise line will lead to the catastrophic consequence of a year-long ban. Once again, your previous Memorandum reviewing the second version already identified this defect,[10] but the initiative sponsors have not remedied this issue.

b. <u>The Proposed Ordinance Infringes on Legislative Discretion Over Public Resources and Improperly Appropriates a Public Asset</u>

Article XI, Section 7 of the Alaska Constitution prohibits ballot initiatives from addressing certain subjects, including making appropriations. The Alaska Supreme Court has held that these restrictions "were devised to prevent certain questions from going to the electorate at all,"[11] and

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[4] Proposed 25.01.080(B).

[5] Proposed 25.01.070(B).

[6] Memorandum Re: Application for Initiative Petition, Brian E. Hanson at 6 (Nov. 9, 2023).

[7] *Id.* at 1.

[8] Proposed 25.01.050(E)(1)(a).

[9] Proposed 25.01.050(E)(1)(b).

[10] Memorandum Re: Application for Initiative Petition, Brian E. Hanson at 6 (Nov. 9, 2023).

[11] *Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989, 992 (Alaska 2004).

the executive "must play the gatekeeper role in the first instance."[12] Initiatives that "touch[] upon the allocation of public . . . assets require careful consideration because the constitutional right of direct legislation is limited by the Alaska Constitution."[13] As you noted in your memorandums recommending against certification of the first and second initiative, "[a]lthough appropriation is often understood to refer to money, an initiative setting land aside, or any other type of government property, may also be an appropriation."[14]

Indeed, the Alaska Supreme Court has recently held that initiatives may not "narrow the legislature's range of discretion to make decisions regarding how to allocate Alaska's lakes, streams, and rivers among competing needs"[15] because the Constitution's prohibition against initiative appropriations "'*was designed to preserve to the legislature the power to make decisions concerning the allocation of state assets.*'"[16] This "ensures that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs."[17]

In *Mallott v. Stand for Salmon*, sponsors submitted a ballot initiative to the State that would have regulated mine permitting through the Department of Fish and Game. The initiative would have "'effectively preclude[d] some uses [of anadromous fish habitat] altogether,' therefore 'leaving insufficient discretion to the legislature to determine how to allocate these state assets.'"[18] The Court found the initiative to be an unconstitutional appropriation, since it narrowed the discretion granted to the legislature under the Alaska Constitution.

State submerged lands and public waters are undoubtedly public resources on par with the lakes, streams, and rivers at issue in *Stand for Salmon*. Article VIII, Section 2 of the Alaska Constitution provides that:

> The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

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[12] *Id.*

[13] *Pullen v. Ulmer*, 923 P.2d 54, 57 (Alaska 1996).

[14] September 29, 2023 Memorandum at 3; November 9, 2023 Memorandum at 3. *See also Alaska Conservative Political Action Committee v. Municipality of Anchorage*, 745 P.2d 936, 938 (Alaska 1987) ("The prohibition against appropriation by initiative applies to all state and municipal assets").

[15] *Mallott v. Stand for Salmon*, 431 P.3d 159, 166 (Alaska 2018).

[16] *Id.* at 165 (quoting *Pullen* 923 P.2d at 63 (emphasis in original)).

[17] *McAlpine v. University of Alaska*, 762 P.2d 81, 88 (Alaska 1988) (emphasis in original).

[18] *Id.* at 163 (quoting review by the Department of Law).

Moreover, the Alaska Supreme Court has held that the legislature has "plenary authority" to provide for the utilization of state lands – including tide and submerged lands – through leasing.[19] The legislature has exercised this authority by passing the Alaska Land Act, including AS 38.05.070, which governs leasing of non-mineral state lands and vests in the Commissioner of the Department of Natural Resources ("DNR") the authority to manage tide and submerged lands.

In the case of Sitka Dock Co., DNR has exercised its authority under the Alaska Land Act, issuing a lease for the use of state submerged lands for a dock facility pursuant to AS 38.05.070. In 2012, DNR issued a 25-year lease[20] to Halibut Point Marine Service, LLC, an affiliate of Sitka Dock Co., for a cruise ship dock. DNR subsequently expanded the lease area to accommodate larger vessels.[21] In doing so, DNR has found on multiple occasions that the lease to Sitka Dock Co. is in the best interests of the state, most recently in 2020:

> **It is in the state's interest to approve this [lease amendment] for the purpose of allowing larger cruise ship vessels to enter Alaska's growing cruise industry and market.** Cruise ship passengers generate significant economic returns to local economies and governments through tourism in Southeast Alaska. **By giving larger ships the ability to dock, they have the capacity to bring more tourism visitors to the area**, which have implicit benefits to the local and state economies through expanded economic opportunity in the form of larger tourism markets.[22]

The third version of the initiative will prevent cruise ships from docking at a facility on state submerged lands leased by the DNR Commissioner to Sitka Dock Co.,[23] completely frustrating the purpose of the lease, the intent of the legislature, and DNR's management decisions for the use of state lands. Indeed, because of the daily caps on cruise visitors under the third version, it is unlikely that *any* cruise ships would be allowed to land at Sitka Dock Co.'s facility if the third version's permitting system were implemented. Because the initiative proposes a daily cap of 4,500 persons ashore, it is a de facto ban on the "larger ships" which carry more than 4,500 passengers. This is contrary to the DNR's express finding that it was in the state's interest under the Alaska Land Act for these ships to dock.

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[19] *State v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1212 (Alaska 2010).

[20] DNR leasing decision for ADL 107980.

[21] DNR leasing decision for ADL 108776.

[22] Lease Amendment Preliminary Decision for ADL 108776, July 6, 2020 (emphasis added).

[23] For example, Section 25.01.030 of the third version provides that "[t]he sum of scheduled 'persons ashore' for any day of the cruise season shall not exceed 4,500" and that "[p]ort calls shall not be allowed on more than six days per week, unless excepted in (A)(6) or (7)".

Just like the initiative at issue in *Stand for Salmon*, which "'effectively preclude[d] some uses'"[24] of state waterways and thereby unconstitutionally limited the discretion over these public resources granted to the Department of Fish and Game by the legislature, the proposed initiative here would effectively preclude DNR from exercising its legislatively-granted discretion over state land by eliminating DNR's authority to allocate state submerged lands for certain cruise moorage. Specifically, the initiative restricts DNR's authority and precludes certain uses of state tidelands by (1) creating a de facto limit on the number of cruise ships that can moor, (2) a de facto limit on the size of those vessels, and (3) a de jure limit on the number of days per week all cruise ships with over 250 passengers can moor.

In Southeast Alaska, state-owned tide and submerged lands and public waters – especially those proximate to cities like Sitka – are among the most valuable assets owned by the State. Implementation of the initiative proposed by the third version would limit the range of discretion granted to DNR by the legislature because DNR would not be able to lease state-owned tide and submerged lands for certain cruise vessels. An initiative that narrows the range of discretion available to the legislature over state assets is unconstitutional because it constitutes an appropriation under Article XI, Section 7 of the Alaska Constitution, and the Borough should not certify the third version for this reason.

c. The Proposed Ordinance violates 33 U.S.C. 5(b) and is Therefore Preempted by Federal Law

The system of fines levied on cruise vessels by the proposed initiative would violate federal law under 33 U.S.C. 5(b), which prohibits non-federal entities from levying "taxes, tolls, operating charges, fees, *or any other impositions whatsoever*" on vessels operating in navigable waters.

The Alaska Supreme Court in *Riverways* found that a lease provision functioning as a head tax on vessel passengers violated this code section. The breadth of 33 U.S.C. 5(b)'s preemption is highlighted by the Court's quotation of the United State Supreme Court's Tonnage Clause precedent: "a state may not impose 'taxes and duties regardless of their name or form . . . which operate to impose a charge' on the use of navigable waters."[25]

The charges here, even though they take the "name or form" of fines, impose a charge on the use of navigable waters in violation of 33 U.S.C. 5(b). The proposed ordinance would establish $5,000 fines for failing to acquire a permit or failing to collect data, and escalating $5,000, $10,000, and $15,000 fines for violations of the caps on persons ashore. These fines "operate to impose a charge" on the use of navigable waters by levying an imposition on vessels operating in navigable waters and are thus preempted by 33 U.S.C. 5(b).

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[24] *Stand for Salmon*, 431 P.3d at 163 (quoting review by the Department of Law).

[25] *Riverways*, 232 P.3d at 1222 (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 9 (2009) (The Alaska Supreme Court further noted that "33 U.S.C. § 5(b) codified the common law" concerning these constitutional provisions).

d. The Proposed Ordinance Infringes on the Right to Travel Under the Alaska Constitution

In addition to violating the right to travel under the Federal Constitution, the proposed initiative would be contrary to Alaska Supreme Court decisions establishing a right to travel under the Alaska Constitution, which is protected to an even greater degree than under the Federal Constitution.

In *Thomas v. Bailey*, Justice Rabinowitz agreed with invalidating a proposed initiative as an unconstitutional appropriation, but wrote separately to explain how preferential treatment of Alaska citizens based on duration of residency violates the right to travel under Alaska's equal protection clause.[26] His concurrence explains the fundamental nature of the right to travel in Alaska, including that:

> [T]he right of interstate travel is itself a fundamental right under the state constitution and that any classification which serves to penalize the exercise of that right must be subjected to strict scrutiny.[27]

And that:

> The uniquely important status of right-to-travel protection in the Alaska Constitution reflects, in part, an awareness of the distinctive character of this state in attracting many new residents to participate in Alaska's growth and expansion.[28]

The proposed initiative would unconstitutionally infringe on the right to travel of those passengers who happen to travel on a cruise ship of 250 passengers or larger, including those passengers who would disembark at Sitka Dock Co.'s facility. Such a classification cannot survive strict scrutiny, as the classification is arbitrary and there are undoubtedly less restrictive alternatives.

Very truly yours,

Jonathan W. Katchen
Partner
of Holland & Hart LLP

cc. Municipal Clerk
clerk@cityofsitka.org

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[26] 595 P.2d 1, 9 (Alaska 1979).

[27] *Id.* at 11.

[28] *Id.* at 16.

HELSELL
FETTERMAN

June 27, 2024

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Ms. Sara Peterson, MMC
Municipal Clerk
City and Borough of Sitka
100 Lincoln Street
Sitka, Alaska 99835

RE: Third Application for Initiative Petition for Limitation of Cruise Visitation in Sitka

Dear Ms. Peterson:

We represent Allen Marine Tours, Inc. and its affiliated companies (collectively, "Allen Marine") in voicing its opposition to the June 18, 2024 filing of an application for a proposed ordinance for "Limitation of Cruise Visitation in Sitka." We request that you deny the application and not issue a petition on the proposed ordinance.

I. Introduction.

As you well know, the June 18 filing is the third application (the "Third Application") over the past nine months for a proposed ordinance entitled "An Ordinance of the City and Borough of Sitka, Limitation of Cruise Visitation in Sitka." Lawrence Edwards filed the first two applications, proposing an ordinance identically entitled "An Ordinance of the City and Borough of Sitka, Limitation of Cruise Visitation in Sitka," on September 15, 2023 and October 25, 2023, respectively. The second application, submitted under the same name as the first, was an amendment of the first application made to obtain your approval. The Third Application pending before you, submitted under the same name, is yet another amendment of the first and second applications made to obtain your approval. While purportedly filed by an entity formed earlier this year, "Small Town SOUL," there is no doubt that Mr. Edwards, an incorporator, director, and officer of the new entity, is behind the Third Application.

In response to each of the first and second applications, Allen Marine submitted a letter to you, signed by its CEO, Jamey Cagle, and CFO, Jeremy Plank, in opposition to the applications. In this letter, we try not to rehash the analysis presented to you in those letters, although much of what is written in those two letters applies again on this Third Application. To spare you having to read a repeat of what is said in those two prior letters, we ask that you please review them in making your decision on the Third Application. To that end, we hereby incorporate the two letters from Allen Marine into this letter by this reference, as if such letters were fully stated herein, for the sake of focusing on additional reasons why the Third Application must be rejected.

On September 29, 2023, on the advice of Sitka's Municipal Attorney, Brian E. Hanson, you rejected Mr. Edwards' first application because "said ordinance is an impermissible appropriation of a public asset under Art. XI, Sec. 7 of the Alaska Constitution, and is legally insufficient under AS 29.26.110(a)(4), because it would be unenforceable as a matter of law." Mr. Hanson advised that that proposed ordinance would (1) constitute an impermissible appropriation of public assets by creating a port district across the streets and lands owned by Sitka; and (2) violate AS 29.26.110(a)(4) by being confusing, misleading, and incomplete due to undetermined terms of enforcement.

On November 3, 2023, on Mr. Hanson's advice, you rejected Mr. Edwards' second application because "said ordinance is legally insufficient under AS 29.26.110(a)(4), because it would be unenforceable as a matter of law." Mr. Hanson advised that that proposed ordinance would violate AS 29.26.110(a)(4) by being confusing, misleading, and incomplete, and, consequently, unenforceable as a matter of law.

The Third Application must be rejected for the same reasons that you rejected the first two applications. There are additional reasons for rejecting the Third Application. Since any one of these many reasons defeat the attempt to put the proposed ordinance on the ballot, we ask that you reject the Third Application as you did the first two applications.

II. Analysis

Any one of the following ten reasons requires rejecting the Third Application:

- The Third Application is barred by SGC 2.80.040.D.2.
- The Sitka Assembly has legislatively addressed cruise visitation in a substantially similar manner as that proposed in the Third Application.
- The Third Application would impermissibly appropriate public resources.
- The Third Application is confusing, misleading, and incomplete and, thus, legally insufficient under AS 29.26.110(a)(4).
- The Third Application would irreparably harm the Sitka economy, its tax base, and its many businesses and residents who serve cruise ships and their passengers.
- Federal maritime law, namely 33 U.S.C. § 5, clearly prohibits and preempts the fees and fines against cruise ships called for in the Third Application.
- The Third Application violates the "Takings Clauses" in the U.S. and Alaska Constitutions.

- The Third Application violates the fundamental right that every Alaskan and other American has to travel freely within the United States.
- The Third Application violates the "Commerce Clause" in the U.S. Constitution.
- The U.S. Constitution's "Admiralty Clause" preempts application of the ordinance proposed in the Third Application.

We present each of these reasons in order for your further understanding.

A. The Third Application is Barred by SGC 2.80.040.D.2.

Neither the first application for an ordinance on "Limitation of Cruise Visitation in Sitka," filed on September 15, 2023, nor the second application under the same name, filed on October 25, 2023, was rejected for lack of required signatures. To the contrary, as summarized in the Introduction above, each was rejected for substantive reasons. As a result, the Third Application, filed on June 18, 2024, is barred by the first sentence of SGC 2.80.040.D.2, which states:

> If the petition is deemed insufficient for any reason other than lack of required number of signatures, it may not be amended or resubmitted sooner than one year.

The second application and Third Application are merely amendments to the first application – all of which attach a proposed ordinance with the same title, "An Ordinance of the City and Borough of Sitka, Limitation of Cruise Visitation in Sitka." Under SGC 2.80.040.D.2, the Third Application is premature, as it may not be submitted until one year after the second application, or on or after October 25, 2024.

The fact that the first two applications were filed by Mr. Edwards and the Third Application is filed by Small Town SOUL is immaterial. SGC 2.80.040.D.2 addresses "the petition" not the sponsor(s) or the person(s) who filed the petition. In other words, a petition that has been deemed insufficient for a reason other than lack of signatures may not be amended or resubmitted within a year, regardless of who files or sponsors the petition. This rule makes sense; otherwise, the same rejected petition could be filed over and over again within a year by different people, which is in part what the rule seeks to eliminate.

Even so, the reality is that Mr. Edwards is behind all three applications. Although he filed the first two applications, and Small Town SOUL filed the Third Application, there can be no doubt that Mr. Edwards is behind the Third Application too. He is an incorporator, director, and officer of Small Town SOUL[1] and is clearly promoting the Third Application.

[1] *See* Small Town SOUL (AK Entity #10257501) Articles of Incorporation, filed with the Alaska Secretary of State on January 22, 2024. These Articles of Incorporation further show that Mr. Edwards is the person who completed the

B. The Sitka Assembly Has Legislatively Addressed Cruise Visitation in a Substantially Similar Manner as That Proposed in the Third Application, Which Prevents the Third Application.

The Third Application cannot be considered in a vacuum. Since the Sitka Assembly is currently acting to address limitation of cruise visitation in Sitka, the Alaska Supreme Court's holding in *Warren v. Boucher*, 543 P.2d 731 (Alaska 1975) operates to prevent the Third Application. In *Warren*, the Court addressed "the process and conditions by which enactments of the legislature can operate to prevent an initiative from appearing on the ballot."[2] Where legislative action treats the same problem as that sought to be reached by a proposed initiative and where both attempted to reach the same results, there is substantial similarity between the legislative action and the proposed initiative such that the proposed initiative must be rejected.[3] To prevent an initiative, a legislative act "need not conform to the initiative in all respects" because legislative bodies are entitled to "have some discretion in deciding how far a legislative act should differ from the provisions of an initiative."[4] In turn, the legislative body's discretion is "reasonably broad" and "[i]f in the main the legislative act achieves the same general purpose as the initiative" and "accomplishes that purpose by means or systems which are fairly comparable," the legislative act and initiative are considered substantially similar such that the initiative may no longer proceed.[5]

As you well know, on March 14, 2023, the Sitka Assembly created the Tourism Task Force (the "Task Force") by passage of Resolution 2023-11, with the intent to facilitate Sitka's transition from short-term management of cruise tourism into a long-term perspective.[6] It is notable that the language of Resolution 2023-11 and other pronouncements from the Assembly that the Assembly charged the Task Force to focus on cruise ship visitation rather than on the broader visitor industry.[7] All members of the Task Force were appointed by the Assembly, and the Task Force comprised of a cross-section of the Sitka community – a member recommended by the Sheet'ka Kwáan Sitka Tribe of Alaska, a member recommended by the Ports and Harbors Commission, a member recommended by the Sustainability Commission, a member representing the downtown business corridor, a member representing tours and attractions, a member representing business in

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online application to incorporate Small Town SOUL. *See also* the website of Small Town SOUL, identifying Mr. Edwards as a director and officer, https://smalltownsoul.org/about.

[2] *Warren v. Boucher*, 543 P.2d 731, 732 (Alaska 1975)

[3] *Id.* at 734-35.

[4] *Id.* at 736.

[5] *Id.*

[6] *Tourism Task Force Recommendations,* Sitka Assembly File No. 24-072, discussed and approved at the Sitka Assembly meeting on May 16, 2024 (the "Task Force Recommendations"), at p. 3. Information about the Task Force, its charge from the Sitka Assembly, and documents from and concerning the Task Force, including the Task Force Recommendations, are posted on your website under the menu item "Tourism Task Force." *See* https://www.cityofsitka.com/departments/MunicipalClerk-1/TourismTaskForce.

[7] Task Force Recommendations at p. 3.

general, a member representing the Sitka Sound Cruise Terminal, and two members representing the community at-large.[8] Our client's CFO, Jeremy Plank, served on the Task Force as the member representing tours and attractions.[9] Resolution 2023-11 charged the Task Force with five directives, the first of which is "Levels of Tourism in Sitka" and required the Task Force to deliver its final recommendations to the Assembly no later than April 30, 2024.[10]

From April 27, 2023 through April 30, 2024, the Task Force met seventeen times, and each meeting was open to the public.[11] In addition, the Task Force convened public engagement events, including two surveys, three "town hall meetings," and an attractions focus group.[12] Throughout the process, the public regularly contacted Task Force members and the feedback and input provided by the public was regularly shared within the Task Force during meetings.[13]

The Task Force viewed the first directive – "Levels of Tourism in Sitka" – as "of utmost interest and importance to the public" and deserving of a high level of attention.[14] After careful and extensive analysis, considering and weighing all the competing interests, the Task Force returned seven, comprehensive recommendations on this first directive of "Levels of Tourism:"[15]

- "Pursue mutual agreements with the industry" – Sitka should pursue mutual agreements to advocate for community goals related to cruise visitation.[16]

- "Flatten the curve" – Sitka should ensure that, at a minimum, it does not experience continued exponential growth such as that seen in 2022 and 2023, which would ease the anxiety of many residents regarding future growth.[17]

- "Take out the peak" – The public's top priority for visitor number management was the daily number of visitors, and most impacts cited were in relation to large visitor days (congestion, safety concerns, telecommunications challenges). In response, Sitka should advocate to reduce "peak" days in the cruise ship schedule. This should include limiting "large ships" – the neopanamax ships with 4,000+ passenger capacity – to one

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[8] *Id.*

[9] *Id.* at cover sheet.

[10] *Id.* at p.3.

[11] *Id.* at p. 4.

[12] *Id.*

[13] *Id.*

[14] *Id.* at p. 5.

[15] *Id.* at pp. 10-12.

[16] *Id.* at p. 11.

[17] *Id.*

per day. Also, consider their visitation on a weekly basis, with a potential range of two to four days per week. Based on the results of community survey, it appears that a daily limit between 5,000 and 7,000 cruise passengers is most agreeable. Another element of "taking out the peak" includes operational considerations – the disbursement of visitors throughout town and staggering ship arrivals can also reduce congestion on peak days. The Task Force further recommends the development and implementation of a lightering policy that would limit the size of ships (particularly those with lower berth capacities over 900 passengers) utilizing Sitka lightering facilities on days when 5,000 or more visitors are expected at the Sitka Sound Cruise Terminal and other docks.[18]

- "Designated quiet days" – Sitka should advocate to designate one or two quiet days per week, with preferences from the community for Fridays, Saturdays, and/or Sundays.[19]

- "Shorten the length of the season" – Sitka should advocate to limit sailings in April to early May as well as late September to October. Maintaining the historic, standard season of mid-May through mid-September would reduce the strain and burnout experienced by local businesses and the public generally, as well as protect the visitor experience cruise passengers have in Sitka that may encourage them to return as independent travelers.[20]

- "Continue collecting data" – Sitka should prioritize continuous data collection from the community, industry trends, evaluation methodologies for sustainable tourism, and economic data to inform future agreements with cruise ship operators.[21]

- "Prioritize initiatives that enhance and protect Sitka's character and quality of life" – Many of the recommendations speak to potential priority actions and projects that would enhance and protect Sitka's character and quality of life. In addition, the following should be considered: (a) continue to invest tax revenues gained through cruise tourism in services and infrastructure that promote quality of life; (b) promote and foster other industries, particularly those that operate year-round or in the winter months to keep Sitka a vibrant, year-round community with diverse economic pillars; (c) protect local enjoyment of holidays such as July 4, and protect use of public facilities for important events such a voting by reducing conflict with cruise visitation; and (d) protect and maintain Sitka's federally designated Rural Status.[22]

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[18] *Id.*

[19] *Id.*

[20] *Id.* at p. 12.

[21] *Id.*

[22] *Id.*

At its May 16, 2024 meeting, the Sitka Assembly discussed the Task Force Recommendations and received public comments, including those offered verbally during the meeting by Mr. Edwards. On motion, the Assembly accepted the Task Force recommendations by unanimous vote of all Assembly members present, and directed the Municipal Administrator to develop an action plan to be brought back to the Assembly no later than the second meeting in June.[23]

On June 19, 2024, Sitka Planning & Community Development Director Amy Ainslie, through Sitka Municipal Administrator John Leach, submitted to Mayor Eisenbeisz and Assembly Members a Memorandum with the subject "Action Plan for Tourism Task Force Recommendations," attaching the "Action Plan for Tourism Task Force" (the "Action Plan").[24] For each of the seven Task Force recommendations on "Levels of Tourism in Sitka," the action plan describes the action on the recommendation, the priority for that action, and the timeline by which action will be taken. For the first five of such recommendations, the Action Plan describes the following action to be taken:

> Direct the Municipal Adminstrator [*sic*] to negotiate preliminary terms for an agreement that achieves the goals for levels of tourism as identified in the Task Force recommendations under Directive #1. Final approval of the agreement and terms by the Assembly[25]

The Action Plan assigns the foregoing action a "High" priority, with action to be taken within one to three months, to be led by the Assembly and the Municipal Administrator.[26]

For the sixth such recommendation – "Continue collecting data" – the Action Plan describes the following action to be taken:

> Assembly to determine any additional studies or surveys to be commissioned - direction for Adminstrator [*sic*] to proceed [as] needed. Ordinance for supplemental appropriation may be needed (Visitor Enhancement potential source of funds)[27]

The Action Plan assigns the foregoing action a "Medium" priority, with action to be taken within four to six months, to be led by the Assembly and the Municipal Administrator.[28]

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[23] Motion 24-073, approved May 16, 2024.

[24] *Action Plan for Tourism Task Force*, Sitka Assembly File No. 24-094 (the "Action Plan").

[25] Action Plan at p. 2.

[26] *Id.*

[27] *Id.*

[28] *Id.*

For the last such recommendation – "Prioritize quality of life" – the Action Plan describes the following action to be taken: "Ongoing, long-term effort. No specific action needed."[29] The Action Plan assigns the foregoing action an "Ongoing" priority to be led by the Assembly.[30]

The Action Plan was on the agenda for the Sitka Assembly's June 25, 2024 meeting, but on the advice of Mr. Hanson, the Sitka Assembly voted to postpone discussion and decision on the Action Plan until he has a full opportunity to review and consider the Action Plan in light of the newly filed Third Application and make a recommendation to the Assembly.

The Assembly's unanimous acceptance of the Task Force Recommendations and the direction to the Municipal Administrator to develop an action plan implementing the Task Force Recommendations shows that the Sitka legislative process is addressing the same matters and issues, in much the same way, as the Third Application proposes. Given the substantial similarity between the Assembly's action and what the proposed Third Application seeks to achieve, the Third Application is prevented by the principles laid out by the Alaska Supreme Court in *Warren*.

C. The Third Application.

The Third Application now proposes a citizen's initiative that is clearly, and unlawfully, designed and timed to undermine the Sitka Assembly's legislative authority and process. The proposed ordinance presented in the Third Application (the "Proposed Ordinance") would address the same matters now being addressed by the Assembly through its legislative authority and process – "reducing cruise-related overcrowding of people and vehicles," "protect Sitka's rural subsistence status, small town character and way of life," and "regain Sitka's integrity as a high-quality destination for international, national and Alaskan visitors of all kinds."[31] Under *Warren*, the Assembly's legislative act and Mr. Edwards' proposed initiative are "substantially similar" such that the initiative may not proceed to certification or to the ballot.

A review of the details of the Third Application's Proposed Ordinance further shows that, like the first application, the Third Application would be "an impermissible appropriation of a public asset under Art. XI, Sec. 7 of the Alaska Constitution;" and, like the first and second applications, the Third Application "is legally insufficient under AS 29.26.110(a)(4), because it would be unenforceable as a matter of law."

1. The Third Application Would Impermissibly Appropriate Public Resources.

Under Article XI, Section 7 of the Alaska Constitution, which applies to municipal citizen initiatives by virtue of AS 29.10.030(c), an initiative may not be used to make appropriations. In

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[29] *Id.*

[30] *Id.*

[31] Proposed Ordinance § 25.01.010 (Purpose and Intent), 1st paragraph, p. 1.

turn, a Municipal Clerk has the authority to reject an application for initiative petition if she determines it "violates . . . [this] liberally construed restriction[] on initiatives."[32] Appropriation is not limited to money; an initiative setting aside land or any other type of government or other public property or resource may also be an appropriation.[33] An initiative proposes to make an appropriation if it "would set aside a certain specified amount of money or property for a specific purpose or object in such a manner that it is executable, mandatory, and reasonably definite with no further legislative action."[34] The Third Application does just that.

Mr. Edwards' first application ran afoul of the appropriation prohibition by expressly attempting to establish a port district in the zoning maps of Sitka that would appropriate streets and land owned by Sitka within the new port district. While the Third Application does not expressly propose a port district, it does clearly appropriate public property by commandeering public assets in a way the effectively creates an implied new port district. In fact, such public assets would be so affected in character and use that Sitka itself would be deprived of the uses and operations of its valuable assets, namely cruise ship docks. The Proposed Ordinance would also significantly alter the public use of streets, sidewalks, and parks in such a way as to rise to an appropriation of those public resources.

Sitka's two public docks for cruise ships would be transformed from their current possession and use into highly regulated clearinghouses for processing passengers and crew embarking and disembarking cruise ships that call on Sitka. Under Section 25.01.050(2) of the Proposed Ordinance, a public dock that serves cruise ships or their crews and passengers would need to apply for, and pay for, a "Sitka Port Facility Permit" to be issued by some as-yet identified "department" of Sitka. A failure to hold a permit may expose the public dock to substantial fines and ineligibility to obtain a future permit and, thus, operate for cruise ship purposes.[35]

The Proposed Ordinance further appropriates public resources by requiring the public docks serving cruise ships and their passengers and crews to implement and apply rigorous data collection and reporting requirements. Such requirements are not just a matter of counting people passing through turnstiles. Section 25.01.050(E)(1) would require the public dock to "distinguish between passengers and crew, and between those continuing, starting or ending an itinerary in Sitka." In other words, valuable public resources would need to be deployed in stopping and questioning each person who crosses the dock, whether embarking or disembarking. That would require not just turnstiles, but booths and personnel akin to the operations of the Customs and

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[32] *Alaska Action Center, Inc. v. Municipality of Anchorage*, 84 P.3d 989, 992 (Alaska 2004), *citing Kodiak Island Borough v. Mahoney*, 71 P.3d 896, 900 (Alaska 2003) and *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999).

[33] *See Thomas v. Bailey*, 595 P.2d 1, 9 (1979) (land); *Pullen v. Ulmer*, 923 P.2d 54, 61 (Alaska 1996) (salmon – public resource)

[34] *Alaska Action*, 84 P.3d at 993, *citing City of Fairbanks v. Fairbanks Convention and Visitors Bureau*, 818 P.2d 1153, 1157 (Alaska 1991).

[35] *See* Proposed Ordinance § 25.01.080(A).

Immigration Services at ports of entry. As if that were not enough, Section 25.01.050(G)(2)(c) would have those public docks "make daily counts of all buses, vans and taxis leaving the facility, for each of those categories." On top of such data collection responsibilities, the public docks would then have strict data reporting requirements, again subject to fines for failures to comply and inaccuracies in reporting. While Mr. Edwards is astute enough not to expressly call for establishing a "port district," the Third Application in effect creates the same structure.

More importantly, the Third Application is completely silent as to how Sitka is to pay for creating and operating the cruise passenger clearinghouses called for in the Proposed Ordinance. While the Proposed Ordinance does call for application fees and fines, no connection whatsoever is made between such proposed revenue and the high expense of operating a cruise ship terminal under the Proposed Ordinance. Thus, we are left with the conclusion that the Third Application would have Sitka tap the municipality's general funds to cover the high expenses of operating its clearinghouse cruise ship terminals and of implementing, administering, and enforcing the many, complex rules and requirements put forth in the Proposed Ordinance. That is an appropriation of general funds to serve the specific purpose of the initiative, which is impermissible.

Additionally, the caps on cruise ship passengers, when met, would empty public streets, sidewalks, and parks of such passengers. When viewed in light of the Constitutional right of those passengers to travel those streets and sidewalks freely (see below), the Third Application's taking those streets away from passengers is another form of appropriation. Such prohibition appropriates the streets and sidewalks from Sitka by limiting how Sitka may use and make available its streets and sidewalks to members of the public. And that appropriation would benefit the sponsors of the proposed initiative to the detriment of other members of the public, including cruise visitors.

There are "two core-objectives" underlying the prohibition against appropriations by initiative. The first is "to prevent the electoral majority from bestowing state assets on itself." The second is to "preserve to the legislature the power to make decisions concerning the allocation of state assets."[36] On the first objective, the Third Application would have public docks, streets, sidewalks, and parks appropriated away from public access to serve special-interest goals of the sponsors of capping cruise ship visitors. In doing so, they would effectively bestow those public assets on themselves in terms of possession, control, operation, and even availability.

On the second objective, the Third Application would, and is obviously intended to, take away from the Sitka Assembly the power and right to make decisions concerning the allocation of using Sitka's public docks, as well as its streets, sidewalks, and parks. The Proposed Ordinance would take control of such public assets and their allocation among competing needs from the Sitka Assembly. That is highly evident in the timing of this Third Application – it comes at the same time as the Assembly is implementing the Task Force Recommendations accepted by the Assembly at its May 16, 2024 meeting. Now, apparently unhappy with the Assembly, the sponsors

[36] *Mallot v. Stand for Salmon*, 431 P.3d 159, 165 (Alaska 2018).

of the Third Application seek to make an end-around the Assembly with their proposed citizen's initiative. Again, that is exactly what *Warren* prohibits.

2. The Third Application is Confusing, Misleading, and Incomplete and Legally Insufficient Under AS 29.26.110(a)(4).

As Mr. Hanson wrote in providing you advice on the first two applications:

> The proposed ordinance must be reviewed to consider its legal sufficiency, and it must be worded carefully enough to be enforced. Initiatives must be drafted clearly enough so that the voters know what they are voting on and so future disputes over the initiative's meaning are avoided.[37]

Once again, the Third Application fails to meet that standard because it is misleading, confusing, and incomplete, among other deficiencies, in several important ways.

First, even the stated purpose of the Proposed Ordinance is confusing, conflicting, and misleading. Section 3 states that the purpose is to "limit[] the amount of cruise visitation ('persons ashore')." Section 25.01.010 of the Proposed Ordinance would echo that statement: "This chapter manages cruise visitation through limitations on the number of 'persons ashore' . . ." However, Paragraph 8 of Section 25.01.030 boldly contradicts those statements of purpose, when it would enact the following rule: "No person shall be impeded from disembarking or embarking a ship, even if a port call causes exceedance of a cap . . ." To add to the contradiction, there is an entire section in the Proposed Ordinance, Section 25.01.070, that addresses "Non-interference with seafarers or passengers." Paragraph B of that proposed section goes so far as to say, "Cruise ship passengers are welcome ashore in Sitka even if their port call exceeds the number of 'persons ashore' authorized . . ."

The Proposed Ordinance talks out of both sides of its mouth. Are cruise ship passengers welcome in Sitka or not? The Proposed Ordinance would confuse the voter as to its purpose and, frankly, the sponsors saying that all cruise passengers are "welcome ashore in Sitka" is not just misleading, it is false. Just witness the "welcome" received by some of the first cruise ship passengers that arrived in Sitka earlier this year.

Second, similarly, the substance of rules within the Proposed Ordinance are conflicting, and thus confusing, in application. Whereas the first paragraph of Section 25.01.070(B) says that "Cruise ship passengers are welcome ashore in Sitka even if their port call exceeds the number of

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[37] Memorandum dated September 29, 2023 to Sara Peterson, Municipal Clerk, from Brian E. Hanson, Municipal Attorney, regarding Application for Initiative Petition entitled "Limitation of Cruise Visitation in Sitka" submitted September 15, 2023, at p. 7; and Memorandum dated November 9, 2023 to Sara Peterson, Municipal Clerk, from Brian E. Hanson, Municipal Attorney regarding Application for Initiative Petition (the "Second Application") entitled "Limitation of Cruise Visitation in Sitka," submitted October 25, 2023, at p. 5.

'persons ashore' authorized . . ."; the very next paragraph in that same subsection says, "If a ship is currently barred . . ., the ship and any port facility shall not allow passengers to disembark . . ." (emphasis added). Not only does this second paragraph put an onus on the dock operator to determine cruise ship disqualification and to deter passenger disembarkation from such cruise ships, it also puts that dock operator in the dilemma as to which directly conflicting rule to apply – does the dock facility allow the passenger to pass as required under the first paragraph of Section 25.01.070(B), or block the passenger's disembarkation as required under the second paragraph? Either way it chooses, it would violate Section 25.01.070(B).

Third, the proposed language in Section 25.01.040 of the Proposed Ordinance attempting to set forth how cruise ship visitation would be scheduled will make your head spin. The language, let alone the process attempted to be established, is nonsensical, impossible to understand, and not feasible in application.

Take a simple question to start: To whom is a Sitka Cruise Ship Permit issued – the cruise line company or each cruise ship? On the one hand, Section 25.01.040(E)(1) says that "the ship" must have a valid permit to be eligible to apply for a preseason port call authorization. But under Section 25.01.050(1) – which is the requirement to possess a Sitka Cruise Ship Permit – it is the "cruise line company" that must apply for and receive the permit.

Similarly, must the permit be issued before the company or the ship (which one?) may apply for and participate in the preseason scheduling process? On the one hand, Section 25.01.040(E)(1) would answer the question in the affirmative, but that is not how Section 25.01.050(1) reads. Section 25.01.050(1) – which addresses the requirement for a "Sitka Cruise Ship Permit" – says that only those ships that will call on Sitka will need a permit, presupposing that they have already scheduled port calls before the season and having a permit: "A cruise line company whose ship(s) will make one or more port calls in Sitka during the year must first apply for and receive a current, valid 'Sitka Cruise Ship Permit' individually for each ship that is not exempt under 25.01.030(A)(7)." We read Section 25.01.050(1) to say that a cruise line company only needs to apply for a permit after it has scheduled port calls in Sitka; otherwise, why would it need a permit? That clearly contradicts the language of Section 25.01.040(E)(1) which requires a permit in order to participate in the preseason scheduling process.

Subparts (a) through (e) of Section 25.01.040(E)(1) attempt to set forth a selection process, akin to a draft, for scheduling cruise ship port calls. To say that the explanation of the selection process is "as clear as mud" would be an understatement. Under subpart (a), a yet-to-be-identified "responsible department" of the Sitka municipal government apparently will have the responsibility for running a port call selection process. Subpart (b) seems to give first dibs in the selection process to "itineraries" that begin or end in Sitka, but this language is vague. What does it mean to begin or end an "itinerary" in Sitka, since the term "itinerary" is not included in the definitions in Section 25.01.020? As you can appreciate, the term "itinerary" can have multiple meanings in the context of travel and cruise visitations, and it would seem that use of the term here

requires a definitive meaning spelled out in the definitions section. Otherwise, to gain priority, cruise line companies may have multiple ways by which they begin or end "itineraries" in Sitka.

Subpart (c) goes on to provide that "the [unidentified] department" shall randomly draw names of applicants to determine the "initial order" for port call requests. But the selection by an "applicant" is limited to "one of its applied-for port call schedule authorizations" (whatever that means!). If we try to understand what an "applied-for port call schedule authorization" is, it would appear that before the conference where the selection process is conducted, a cruise line seeking port calls at Sitka must identify on its preseason application the dates it will pursue at the conference. That makes no sense, particularly since such dates will receive no "schedule authorization" prior to the selection conference. It makes even less sense in practice, when weeks or months after such applications are submitted the port call dates are selected, the cruise line will only have available to it for selection the dates stated on its application. For that process would assume that dates stated on the application are available when the cruise line's turn to select comes up and the cap(s) are not met by or for such date. Subpart (d) is even more confusing. If a requested port call cannot be authorized due to application of a cap, then the applicant "may instantly" request an alternative date? How will that "alternative date" work with the limitation set forth in Subpart (c) that would restrict the cruise line to the dates set forth in its application?

The main takeaway from Subparts (a) through (e) is that the process by which cruise ship port calls are determined is complicated, ambiguous, susceptible to conflict, and likely to be gamed by savvy participants. Perhaps more importantly for your consideration of the Third Application, the language and attempted process spelled out in Subparts (a) through (e) raise more questions than they answer, which is exactly what you do not want in a citizen initiative going to the ballot.

Fourth, while the Proposed Ordinance imposes burdensome and expensive processing, conferencing, permitting, monitoring, enforcement, data collection, and reporting responsibilities on Sitka, some yet-to-be-named-or-created "department," and its cruise ship terminal operations, there is nothing in the Proposed Ordinance that provides funding to support such activities. That silence speaks volumes – the sponsors of the Third Application do not want the voter to know that the high expense imposed on the Municipal Government by the Proposed Ordinance will have to come out of the municipality's general fund. The omission of this critical fact renders the Proposed Ordinance incomplete, if not also misleading, and thus insufficient.

Fifth, there are other significant typographical errors within the Proposed Ordinance. For example, the definition of "Cruise ship" in Section 25.010.20(D) refers (parenthetically without a closing parenthesis) to Section "25.01.030(A)(4) and (A)(5)" when the reference should be to Section "25.01.030(A)(6) and (A)(7)."

3. The Third Application Would Irreparably Harm the Sitka Economy, Its Tax Base, and Businesses and Residents that Serve Cruise Ships and Their Visitors.

There can be no doubt that cruise ships and their passengers infuse the Sitka economy which derives a higher tax base for Sitka's public services, higher revenues for local businesses, and more jobs for residents. The Task Force Recommendations report touches on the financial benefits the cruise industry provides to the Sitka economy and tax base: "Two-thirds of respondents at the November 13th [2023] town hall meeting cited economic benefit from the cruise industry in the form of direct benefits through jobs/businesses in the industry for themselves or family members, increased revenue, and benefits to the general economy."[38] As a result, "[n]ew and improved municipal services have been made available, and substantial contributions to public infrastructure have been made as a result."[39] While economic benefits should not be the sole, or even most important, factor for determining the right level of cruise visitation in Sitka,[40] it should certainly carry weight as competing interests and allocations are considered and balanced through the current legislative process of the Sitka Assembly.

The Third Application seeks to eliminate, rather than balance, the economic benefits derived by Sitka and its residents from cruise visitation. The concerns that the sponsors of the Third Application seek to address is what they perceive as "overcrowding of people and vehicles on Sitka's highways, streets, sidewalks, trails, waterways and public places."[41] But that is not what the Third Application would accomplish – as it would go much deeper than just reducing overcrowding; the Proposed Ordinance would leave Sitka empty many days during the peak cruise season.

While the daily visitor cap of merely 4,500 "persons ashore"[42] that the Proposed Ordinance seeks to impose may bear some rational relationship to serving the goal of reducing overcrowding, the seasonal cap of 300,000 "persons ashore" does not. That proposed seasonal cap is either arbitrary and capricious with no rational relationship to addressing alleged overcrowding, or it is intentionally designed to economically injure Sitka and its tax base and the many businesses and residents who rely on the cruise industry for their livelihoods. Even if just a conservative daily average of 3,000 "persons ashore" arrive in Sitka from cruise ships, the seasonal cap will be exhausted in just 100 days. But under the Proposed Ordinance, the "cruise season" would last from May 1 through September 30,[43] for a total of 153 days. Thus, under a conservative average of 3,000 "persons ashore," a number that Sitka can well handle, there would be another 53 days –

[38] Task Force Recommendations Report at p. 6.

[39] *Id.* at p. 7.

[40] *Id.*

[41] Proposed Ordinance § 25.01.010.

[42] *See* Proposed Ordinance § 25.01.020.G. Note that "persons ashore" includes not just passengers, but also crewmembers.

[43] Proposed Ordinance § 25.01.020(C).

nearly two months during the peak cruise season – when no "persons ashore" could visit Sitka. On those 53 days, shops, restaurants, tours, and attractions would, for the most part, be idle. The impacts of that number of idle days on Sitka, its tax base, and the businesses and residents who rely on the cruise ships and their passengers for their livelihoods would be disastrous.[44]

Because the seasonal cap is not rationally tied to the stated purpose of the Proposed Ordinance, it will only serve to create further confusion and conflict as to the meaning and implementation of the Proposed Ordinance. Moreover, the utter lack of discussion in the Third Application as to the adverse economic impact the Proposed Ordinance would have is not just misleading, incomplete, and confusing, it is irresponsible.

D. The Third Application Would Impose Fees and Fines Prohibited by Federal Maritime Law.

Since "Cruise ship passengers are welcome ashore in Sitka even if their port call exceeds the number of 'persons ashore' authorized,"[45] then the Third Application is not really about reducing cruise visitation in Sitka. It is about punishing cruise ships and the docks that serve them, and making them pay application fees and fines, which is ironic given that two of the cruise ship docks susceptible to such payments are Sitka public docks. This ill intent behind the Third Application is another reason the stated purpose of the Proposed Ordinance is misleading and false.

Viewed as a means for collecting fees and fines from the cruise lines, the Third Application clearly runs afoul of well-established federal maritime law, namely the statutory prohibition of 33 U.S.C. § 5. That statute plainly prohibits Sitka from imposing any "taxes, tolls, operating charges, fees, or any other impositions whatever" – which would include application fees and fines – on cruise ships that call on Sitka (or its passengers or crew):

> (b) No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom of navigation on those waters, except for--
>
> (1) fees charged under section 2236 of this title [port or harbor dues];
>
> (2) reasonable fees charged on a fair and equitable basis that--
>
> (A) are used solely to pay the cost of a service to the vessel or water craft;
>
> (B) enhance the safety and efficiency of interstate and foreign commerce; and

[44] If the proposed cap of 4,500 persons ashore were reached on a daily basis, the seasonal cap would be exhausted in just 67 days, leaving Sitka idle of cruise visitations for 86 days, more than half of the entire peak cruise season.

[45] Proposed Ordinance § 25.01.070(B).

> (C) do not impose more than a small burden on interstate or foreign commerce; or
>
> (3) property taxes on vessels or watercraft, other than vessels or watercraft that are primarily engaged in foreign commerce if those taxes are permissible under the United States Constitution.[46]

The Proposed Ordinance's application fees and fines for cruise ships are not permitted under the statute, as they do not fit into any one of the limited exceptions. The statute is clearly controlling authority, and by virtue of its direct and express preemption of local attempts to charge fees and other impositions on vessels upon navigable waters, any attempt by Sitka to impose fees and fines on cruise ships would be clearly prohibited under controlling authority. In turn, the Proposed Ordinance is unenforceable as a matter of law under AS 29.26.110(a)(4).

E. The Third Application Clearly Violates the "Takings Clauses" in the U.S. and Alaska Constitutions.

Both the U.S. Constitution and the Alaska Constitution prohibit the taking of private property for a public use without just compensation. The Fifth Amendment of the U.S. Constitution states, "nor shall private property be taken for public use, without just compensation;" and this clause is made applicable to the states through the Fourteenth Amendment.[47] Section 18 of the Alaska Constitution similarly states, "Private property shall not be taken or damaged for public use without just compensation."

The Proposed Ordinance converts private docks that serve cruise ships into passenger disembarkation and embarkation clearinghouses and compliance (and rejection) points, where burdensome and expensive screening, monitoring, data collection, and enforcement efforts are imposed. Effectively, those docks become akin to Customs and Immigrations entry ports, where the docks and those operating them become quasi-governmental property and operations. As such, the Proposed Ordinance "takes" private property for those governmental functions, which is clearly a regulatory taking subject to the Takings Clauses. The Constitutional guarantee that private property shall not be taken for a public use without just compensation was designed to bar a government authority from forcing some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[48] A "regulatory taking" occurs when governmental regulations limit the use of private property to such a degree that the landowner is effectively deprived of all economically reasonable use or value of their property.[49]

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[46] 33 U.S.C. § 5(b) (emphasis added).

[47] *See Chicago, B & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897).

[48] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[49] *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017).

Monitoring and stopping passenger disembarkation and collecting data – only by virtue of the privilege of an annual permit that may be revoked, penalized, or not renewed, thereby depriving decades long use and operation of the private facility – is a clear equivalent of forcing a few people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. The onerous requirements called for in the Proposed Ordinance would turn relatively passive income-producing docks into burdensome operations requiring intensive and active monitoring and policing of disembarkations and collecting and reporting data of disembarkations (and installing facilities and hiring personnel to meet such obligations). This is a classic case of "regulatory taking."[50]

The Third Application calls for neither the execise of the eminent domain process, nor the payment of just compensation, for such taking, which makes it an unconstitutional exercise of governmental power.[51] For "controlling authority" confirming the Proposed Ordinance would constitute a regulatory taking (and thus be unconstitutional by not calling for an eminent domain process or just compensation), we refer you to the following case authority: *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (factors considered in determining whether a regulation constitutes a taking are: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (law aiming to protect erosion and destruction of barrier islands that barred Lucas from erecting permanent habitable structures on his land deemed a regulatory taking); *Horne v. Dep't of Agric.*, 569 U.S. 513 (2013) (in action seeking judicial review of agency enforcement action imposing fines and penalties, court held that petitioner's claim that such fines and penalties were a taking of private property could be raised as an affirmative defense to the enforcement action).

F. Other Reasons Make the Third Application Clearly Unenforceable.

In response to the first and second applications, Allen Marine presented further reasons for why the proposed cruise ship visitation limitations set forth in the Proposed Ordinance are clearly unenforceable. Rather than repeat all of those reasons at length here, we simply incorporate them by reference herein. Those reasons include the following:

1. The Proposed Ordinance would violate the Commerce Clause in the U.S. Constitution and is, thus, unconstitutional and unenforceable.[52]

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[50] *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539-40 (2005) (on identifying "regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property…").

[51] *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 178-180 (1979) (imposition of a navigational servitude upon a private marina constitutes a taking).

[52] *See* Allen Marine Tours & Affiliates' letter to you, dated November 6, 2023 at pp.10-11.

2. The Admiralty Clause in the U.S. Constitution preempts application of the Proposed Ordinance.[53]

3. The Proposed Ordinance would violate the fundamental right to travel that every American has under the U.S. Constitution.[54]

Allen Marine reserves all rights with respect to the Proposed Ordinance and does not waive any claims, defenses, arguments, and the like which are not raised in this letter.

III. Conclusion.

There are multiple reasons why you should reject the Third Application, not the least of which is that the Sitka Assembly has cruise visitation on the forefront of its agenda. The legislative process, where balancing of multiple, conflicting interests and allocating finite public resources can be best achieved, ought to be permitted to run its course before any interest group seeking to serve narrowly defined special interests is permitted to undermine the legislative process.

If we can answer any questions or provide any further information, please feel free to contact me. Thank you.

Very truly yours,

HELSELL FETTERMAN LLP

Scott E. Collins

SEC: jlb

cc (by email):
Mr. John Leach, Municipal Administrator (administrator@cityofsitka.org)
Mr. Brian E. Hanson, Municipal Attorney (brian.hanson@cityofsitka.org)
Allen Marine Tours, Inc.

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[53] *Id.* at pp. 11-12.

[54] *Id.* at p. 12.

CG&L

CASHION GILMORE & LINDEMUTH

VIA EMAIL and U.S. MAIL

December 9, 2024

Sara Peterson, Municipal Clerk
Office of the Sitka Municipal Clerk
100 Lincoln Street, Suite 306
Sitka, Alaska 99835
sara.peterson@cityofsitka.org

cc: Brian E. Hanson, Municipal Attorney
brian.hanson@cityofsitka.org

RE: "Limitation of Cruise Visitation in Sitka" Initiative Petition
(Our Matter No: 11105-1)

Dear Sara:

On behalf of Royal Caribbean Cruises, Ltd. ("RCC"),[1] I write to you regarding the November 29, 2024, filing of a ballot proposition—the so-called "Limitation of Cruise Visitation in Sitka" Ordinance (the "Ordinance"). The filing of the Ordinance follows closely on the heels of the proponents filing a nearly identical ballot proposition in June of this year. The June ordinance was rejected by you as legally defective. The current Ordinance is likewise defective and must also be rejected.

Both proposed ordinances were squarely aimed at the same goal: to strictly limit the number of cruise passengers who can visit Sitka, placing hard caps on the number of cruise passengers from any large ships allowed ashore per day and per season, and also to completely bar cruise passengers from setting foot in Sitka *at least* one day per week, but up to two.[2] Separately, the Ordinance establishes a permit and scheduling regime,[3] as well as fines and enforcement provisions.[4] Finally,

[1] Although I write today on behalf of my client, the reasoning in this letter applies with equal force to the interests of all similarly situated cruise lines.

[2] *See* Ordinance at 25.02.010. The ordinance provides that cruise passengers can only be allowed in Sitka six days a week, but also grants the Assembly the power to expand that prohibition to bar them two days per week.

[3] *See* Ordinance at 25.02.020.

[4] *Id.* at 25.01.060.

the Ordinance treats larger cruise ships disparately by largely exempting "small" cruise ships, with a capacity of less than 250 passengers, from these restrictions.[5]

The Ordinance is an unlawful use of the initiative power for several reasons.

First, it is a clear example of an "appropriation" of public assets prohibited by Article XI, Section 7 of the Alaska Constitution. Second, it also violates the fundamental right to travel guaranteed by the Alaska Constitution. The Ordinance also conflicts with multiple aspects of federal law, including federal statutes, the United States Constitution, and international law principles incorporated by federal law. Additionally, the significant fine element, essentially "charging" cruise ships for what the proponents deem "excess" passenger disembarkations violations the Tonnage Clause of the U.S. Constitution as well as the Rivers and Harbors Appropriations Act. And finally, the proponent of the Ordinance is prohibited from bringing it because a substantially similar measure was rejected less than one year ago.

Sitka Ballot Measure Provisions

Under 2.80.040 the SCG only provides generalized format and content requirements that are not substantive in nature. However, the SCG is supplemented by Alaska Statutes and the Alaska Constitution regarding the proper subjects and contents of ballot measures.

State Law and Constitution Prohibits Ballot Measures Making an Appropriation

Under AS 29.26.100 "[t]he powers of initiative and referendum are reserved to the residents of municipalities, except the powers do not extend to matters restricted by Art. XI, Sec. 7 of the state constitution." In addition, AS 29.10.030(c) specifies that: "[a municipal] charter may not permit the initiative and referendum to be used for a purpose prohibited by Art. XI, Sec. 7 of the state constitution."

Article XI, Section 7 of the Alaska Constitution makes clear that an initiative cannot be used to "dedicate revenues, **make or repeal appropriations**, create courts, define the jurisdiction of courts or prescribe their rules, or enact local or special legislation."[6] Any such attempted misuse of the initiative process should result in a measure being rejected.

The Alaska Supreme Court has implemented a two-part test for determining whether the provisions of an initiative constitute a prohibited appropriation:

> First, we determine whether the initiative deals with a public asset. In a series of cases, we have determined that public revenue, **land**, a municipally-owned utility, and wild salmon are all public assets that cannot be appropriated by initiative. Second, we determine whether the initiative would appropriate that asset. In

[5] *Id*. at 25.03.010A.

[6] (Emphasis added).

> deciding where the initiative would have that effect, we have looked at the "two core objectives" of the limitation on the use of the initiative power to make appropriations. One objective is preventing "give-away" programs that appeal to the self-interest of voters and endanger the state treasury. … **The other objective is preserving legislative discretion by "ensur[ing] that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs**."[7]

Nearly identically to the June ordinance, this Ordinance purports to place a hard cap on passengers from large vessels disembarking in Sitka (both per day and cumulatively by season) and to limit their ability to disembark at all to either six (or five) days per week. In effect, the Ordinance essentially prohibits such ships' passengers over the cap (and one to two days per week) from accessing the entirety of Sitka.

Accordingly, the Ordinance takes control of public assets—any access to the City of Sitka itself—and allocates them amongst competing needs. On one or two days per week, large vessel passengers cannot access Sitka at all, while everyone else can. Additionally, it places a hard cap on those passengers allowing certain passengers free access, but then allocating access away from any (per day or per season) surplus passengers, but *not* passengers on smaller vessels. This usurps the authority and control provided to the Sitka Assembly by law.

The Alaska Supreme Court has specifically found a prohibited appropriation where, as is the case here, a ballot measure allocates a public resource amongst competing user groups. In that case, it was a ban on fishing for salmon via set net in a particular region. Specifically, the Court said that the ballot measure at issue was an unconstitutional appropriation because the proposed measure "would completely appropriate salmon away from set netters and prohibit the legislature from allocating any salmon to that user group."[8] The Ordinance is materially identical to the invalid set netting initiative because it would completely appropriate access to Sitka away from surplus passengers on large cruise ships towards other user groups (e.g., passengers on small cruise ships, charters, sightseeing tours, fly-in visitors, etc.), and the Assembly would have no discretion to otherwise allow access to these passengers.[9]

The Ordinance therefore violates the Alaska Constitution because it has the purpose and effect of making an appropriation of public assets and because it interferes with the Assembly's exclusive ability to control these assets and allocate them amongst competing needs. As a result, the Ordinance also fails to satisfy AS 29.26.110(a)(1).

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[7] *Citizens for Taxi Reform v. Municipality of Anchorage*, 151 P.3d 418, 422-23 (Alaska 2006) (citations omitted and emphasis added).

[8] *Lieutenant Governor v. Alaska Fisheries Conservation Alliance, Inc.*, 363 P.3d 105, 106 (Alaska 2015).

[9] The *only* discretion that appears to have been given to the Assembly is whether to further penalize passengers on large vessels by completely excluding them on two days per week, rather than the default of one day.

It is evident that the Ordinance must be rejected as an unconstitutional appropriation.

The Ordinance would be Unenforceable as a Matter of Federal Law

An initiative must be enforceable as a matter of law to be placed on a ballot under AS 29.26.110(a)(4). However, the Ordinance will be immediately enjoined because it conflicts with several aspects of federal law including, but not limited to, the following:

- The fundamental right to travel in the U.S. Constitution, contained in the Fourteenth Amendment's Privileges and Immunities Clause, as well as other constitutional provisions.[10] By arbitrarily blocking citizens from Sitka on certain days and if they are surplus passengers, the Ordinance clearly violates the right to travel.

- The Commerce Clause in the U.S. Constitution at Article I, Sec. 8 providing that: the U.S. Congress has the exclusive power "to regulate commerce with foreign nations, among states, and with the Indian tribes." Cruise ship travel, particularly through the inside passage, necessarily implicates interstate and foreign commerce. Both areas are exclusively regulated by federal law, meaning the Ordinance clearly violates the Commerce Clause.

- The Ordinance conflicts with established principles of international and federal maritime law guaranteeing freedom of navigation, passage, and entry to ports, as well as federal statutes governing those subjects.

- The Takings Clause in both the U.S. Constitution at the Fifth Amendment, and the Alaska Constitution at Article I, Sec. 18, prohibit the taking of private property without just compensation. The Ordinance directly impacts private dock owners by dramatically limiting the docks' use without compensation. It also will have a massive indirect impact on business owners throughout Sitka. Accordingly, the Ordinance violates the Takings Clauses of both the U.S. and Alaska Constitutions.

- The Tonnage Clause of the U.S. Constitution and the Rivers and Harbors Appropriations Act ("RHAA")[11] generally prohibits imposing fees on a vessel using navigable waterways. A local or state government may *only* charge vessels reasonable fees for rending services *to the vessel* that further the marine enterprise or enhance the safety or efficiency of interstate commerce.[12] By imposing significant fines on cruise ships for nothing more than

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[10] *See also* discussion of a right to travel in the Alaska Constitution based in its equal protection clause, Article I, Section 1, *Thomas v. Bailey*, 595 P.2d 1, 9-16 (Alaska 1979).

[11] 33 USC Sec. 5.

[12] *Cruise Lines Int'l Assoc. Alaska v. City & Borough of Juneau*, 356 F.Supp.3d 831, 843-44 (D. Alaska 2018); *overruled on unrelated grounds by Lil' Man in the Boat, Inc. v. City of San Francisco*, 5 F.4th 952 (9th Cir. 2021).

disembarking one too many passengers, or disembarking *any* passengers on one (or two) "prohibited" days per week, the Ordinance impermissibly charges these ships a fee for using navigable waterways without providing any service or safety improvement to interstate commerce. The ordinance is unlawful under both the Tonnage Clause and the RHAA.

- The Contracts Clause of the U.S. Constitution prohibits laws the impair contracts between private parties without a legitimate public purpose, or when there are less intrusive means available. RCC has an ownership interest in Sitka Dock Co. Through that ownership and a contractual berthing agreement, RCC has obtained preferential berthing access seven days a week, year-round, through 2044, with an option for a five-year extension. The Ordinance significantly impairs that right without any just compensation. It is evident that the Ordinance is not narrowly tailored, and that there are less intrusive alternatives available because the City of Sitka has already put an agreement in place with Sitka Dock Co. to manage cruise arrivals—accordingly, it violates the Contracts Clause. For the same reason, the Ordinance also again violates the Takings Clauses of both the U.S. and Alaska Constitutions.[13]

Sitka Code Prohibits Re-filing an Amended Petition Less than One Year after Rejection

The supporters of the Ordinance have a practice of serially filing measures related to "Limitation of Cruise Visitation in Sitka" hoping to find one that sticks. Three such measures were filed in 2023 and 2024 prior to this Ordinance. One version on or about September 15, 2023, another on or about October 25, 2023, and a third version on June 18, 2024. However, such "rapid fire" filing of related measures is not permitted by Sitka Code.[14]

Specifically, SGC 2.80.040(D)(2) provides that, "[i]f the petition is deemed insufficient for any reason other than lack of required number of signatures, **it may not be amended or resubmitted sooner than one year.**"[15] Here, the proponents of this latest measure have had their most recent prior petition (in June 2024) rejected for reasons of facial unconstitutionality and legal defects—i.e. a "reason other than lack of required signatures." They have therefore filed this amended version of their petition regarding "Limitation of Cruise Visitation in Sitka" many months too early. Accordingly, the Ordinance can, and should, be rejected for that reason as well.

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[13] *See* Article I, Section 1 and Article I, Section 18 of the Alaska Constitution.

[14] We understand that the City of Sitka's counsel previously concluded that this prohibition applies to failed petitions, and not failed applications. We disagree. The purpose of this section of code is to prevent waste of City resources and the proponents' continual filing of proposed ordinances makes evident that our stricter interpretation of this section is appropriate.

[15] (Emphasis added).

Conclusion

The Ordinance violates constitutional prohibitions on the subject matter of ballot measures. The Ordinance is unenforceable as a matter of state and federal law. The Ordinance also was filed months too early and cannot even be considered until late June of next year. The correct decision is to reject the Ordinance for these reasons.

Even the proponents themselves admit that the Ordinance is nearly identical to the prior, rejected measure, stating that this new version is only different from the rejected measure in format, "but in principal [*sic*] the regulations are otherwise much the same."[16]

Thank you for your attention to this matter. Please reach out if you have any questions regarding this letter.

Sincerely,

s/Scott Kendall/

Scott Kendall
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[16] *See* Proponents' "FAQs on the Cruise Visitation Limits Initiative" at 4.

Holland & Hart

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December 10, 2024

Rachel Jones
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City and Borough of Sitka
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Sitka, AK 99835
legal@cityofsitka.org

Re: Fourth Version of Initiative Petition Limiting Cruise Visitors in Sitka

Dear Ms. Jones:

I write on behalf of Sitka Dock Co., LLC ("Sitka Dock Co.") regarding the fourth and latest version of a proposed initiative petition seeking to limit cruise visitors in Sitka. The petition suffers from similar infirmities as the previous versions that have uniformly been rejected by the Borough because they were confusing, misleading, and incomplete, violated the Tonnage Clause of the United States Constitution, and/or constituted an impermissible appropriation of public recourses. For the reasons explained below, this fourth version should be rejected on the same grounds.

I. The Proposed Ordinance

As with previous versions, the proposed ordinance would put in place a complex scheme of permits, schedules, and fines designed to limit cruise visitation to Sitka. To do this, the proposed ordinance would (1) restrict the cruise season to May 1 through September 30, (2) restrict cruise vessel landings to either five or six days per week, (3) restrict daily "passengers ashore" to 4,500, and (4) restrict passengers ashore during the entire May through September cruise season to 300,000.

All individual cruise ships would have to obtain a permit, after paying an unspecified application fee to be determined by the Assembly that can fluctuate annually. The permit application requires each ship to submit "detailed descriptions" of how it will count passengers ashore from each vessel, how it will verify and report this data, and how it will ensure that these counting and reporting procedures "are executed for each port call." A ship's permit application is evaluated for "completeness" by the Borough, and "shall" be rejected if deemed incomplete. However, no standards are enumerated for determining whether an application is complete or whether the passenger counting system proposed by a ship is adequate.

Prior to the cruise season, every large cruise ship[1] operator who submitted a "complete" permit application would be required to participate in a conference to create a schedule that complies with the daily and annual limits on passengers ashore from large ships. Names of applicants would be randomly drawn to establish a selection order, and applicants could request one port call per turn. The scheduling conference can be continued, at the city administrator's discretion, in order to "optimize" the schedule.

The proposed ordinance provides for "optimization requests," which "may shift a cruise ship's port call to a different date and may include scheduling a different cruise ship of that cruise line or another line for the abandoned date. . ." The only criterion for what constitutes "optimization" is "maximiz[ing] the daily passenger ashore capacity" while still complying with the overall limitations on large cruise vessels, including the daily and annual passengers ashore limits and the cruise season restrictions.

Small cruise ships – those with overnight accommodations for less than 250 people[2] – would be subject to a similar permit application process as large vessels, and required to report passengers ashore for every port call as well. However, because the proposed ordinance places no restriction on the number of passengers ashore from small cruise ships, these vessels are exempt from the competitive scheduling process required of large cruise ships.

II. The Proposed Ordinance is Confusing, Misleading, and Incomplete

As noted in the memorandum rejecting the third version of the proposed ordinance, an initiative must propose an enforceable law that voters can understand and the municipality can administer:

> The proposed ordinance must be reviewed to consider its legal sufficiency, and it must be worded carefully enough to be enforced. Initiatives must be drafted clearly enough so that the voters know what they are voting on and so future disputes over the initiative's meaning are avoided.[3]

In this case, the proposed ordinance is confusing, misleading, and incomplete in the following ways:

1. The proposed ordinance requires that cruise ship operators develop a system of counting and reporting "passengers ashore" – the number of passengers disembarking from each ship – in order to apply for a permit allowing ships to make port calls in

[1] Large cruise ships are defined as those with overnight accommodations for 250 passengers or more. SCG 25.01.020(F).

[2] SCG 25.01.020(L).

[3] July 2, 2024 memorandum from Jermaine Dunnigan & Owens rejecting the third version of the initiative petition ("JDO memorandum"), at 11.

Sitka.[4] But the ordinance provides no criteria for determining whether the system described in the application submitted by the ship operator is acceptable. Cruise operators are left to guess as to what kinds of counting and reporting systems may be deemed acceptable and allow the operator to participate in scheduling port calls.

Similarly, for the city administrator evaluating applications for completeness, the proposed ordinance provides no guidance. Is it enough for a complete application that *any* system of counting and reporting is described? If the administrator does not believe that a cruise operator's proposed system of counting and reporting will be accurate, is the administrator required to accept the application as "complete" and allow the cruise ship operator to bid on port calls at the scheduling conference?

This is not only a problem for applications and scheduling, but also enforcement. Enforcement of the ordinance is done based on self-reports of passengers ashore by cruise operators, who may have completely different counting and reporting systems. One operator could overcount its passengers and report a number in excess of its permit, even though the passengers disembarking from its ship was within the permitted number. Another could undercount and report a number within the permitted amount, despite the actual number of disembarking passengers being more than allowed. Given the limitations on cruise ship port calls imposed by the proposed ordinance and the financial stakes for cruise operators, the lack of criteria for evaluating, counting, and reporting will inevitably lead to disputes concerning enforcement and lack of enforcement.

2. The default scheduling procedure outlined in SCG 25.03.010 does not provide the Borough or applicants with adequate guidelines, and this lack of completeness will certainly lead to additional dispute and confusion. The scheduling procedure provides that applicants are given a random order to make port call requests, and that the city administrator "shall" award a port call request if "there is sufficient available capacity for it under the limits imposed by SCG 25.02.010."[5]

   But how does the administrator decide whether there is sufficient available capacity? Does the administrator reject a request if the maximum passenger capacity exceeds the remaining number of passengers ashore allowable for the requested day? What if the cruise operator asserts that the ship in question will not transport the maximum number of passengers, or that the number of passengers actually coming ashore will not exceed the remaining number of passengers ashore allowable for that day? Cruise operators may not know 18 months before the cruise season how many passengers will actually board their ship, much less how many will decide to come ashore in Sitka. Without any criteria for deciding whether there is "sufficient available capacity," the proposed

[4] SCG 25.02.020(C)(1)(c).

[5] SCG 25.02.020(I)(1).

ordinance is confusing, incomplete, and will cause disputes that cannot be resolved based on the language of the initiative.

3. The optimization procedures are confusing, incomplete, and impossible to administer. Pursuant to SCG 25.02.030(c)(3), cruise ship operators participating in the scheduling conference may make "optimization requests" in an attempt to displace port call allocations of other vessels. If, for instance, a daily port call was initially awarded to a ship with a maximum berthing capacity of 3,500, and no other ships were awarded berthing for that day, another operator could request that the day be awarded to its ship with a berthing capacity of 4,000. Since 4,000 is closer to the daily maximum number of "passengers ashore" of 4,500, presumably the ship with the larger berthing capacity could awarded the port call for that day and the ship with the 3,500-passenger capacity would be stripped of its authorization for that day. But what if the larger ship actually came to port with 3,000 passengers? Are the maximum berthing capacities presumed to be the deciding factor? Actual tickets sold for the vessel at the time of scheduling? The number of tickets expected to be sold before the voyage commences? The number of passengers likely to actually come ashore? Without knowing how many passengers will actually come ashore from the vessel(s) scheduled for a particular day, it is impossible to "optimize" the schedule. And without criteria governing how to decide optimization requests, the scheduling procedure of the proposed ordinance is confusing, incomplete, and impossible for the Borough to administer.

4. As with the prior version, the proposed ordinance is misleading because it is highly probable that the system for scheduling port calls will not be optimized, particularly considering that the proposed ordinance does not define "sufficient available capacity." Under this confusing scheme, the actual number of cruise passengers visiting Sitka may be *much less* than the number of cruise passengers voters think they are approving. This is a critical issue that must be adequately addressed.

III. The Proposed Ordinance Violates the Tonnage Clause

a) The Proposed Ordinance's Application Fee Violates the Tonnage Clause

In rejecting the third version of the initiative petition, the Borough Attorney found that it violated the Tonnage Clause of the United States Constitution and 33 U.S.C. § 5, which prohibit non-federal entities from levying "taxes, tolls, operating charges, fees, or any other impositions whatsoever" on vessels operating in navigable waters:

> The Tonnage Clause prohibits charging a vessel for using navigable waterways. The simplest formulation of the relevant rule of law is that states and municipalities may charge vessels reasonable fees for rendering or making available services *to*

> *the vessel* that further the marine enterprise or that enhance the safety and efficiency of interstate commerce.[6]

The JDO memorandum found that the permit application fee violated the Tonnage clause because the petition did not "articulate any sort of *service* to the vessel"[7] provided by requiring cruise vessels to obtain permits.

Similarly, the fourth version of the petition articulates absolutely no service *to the vessels* provided by requiring permits. The only difference between the third and fourth versions is that the third version mandated an application fee, while the fourth version allows the Assembly to decide whether to impose an application fee. This is not a material difference, however, since the proposed ordinance provides that the Assembly may alter the amount of the application fee annually.[8] So even if the Assembly decides not to impose an application fee during a particular year, it can always change course and impose a fee in subsequent years.

In short, the fourth version of the initiative petition violates the Tonnage Clause and 33 U.S.C. § 5 in precisely the same way as the third version, and should be rejected on the same basis.

b) The Proposed Ordinance's Fines Violate the Tonnage Clause

In addition to the application fee, the proposed ordinance imposes fines that also violate the Tonnage Clause. The proposed ordinance would impose fines of $15,000 for a large cruise ship docking without a permit,[9] and fines between $5,000 and $15,000 for exceeding the permitted passengers ashore and other permit violations.[10] The proposed ordinance provides that no port calls may be scheduled for a ship for a period of one year if it docks without a permit[11] or commits three permit violations in a one-year period.[12]

However, nothing prevents a ship from docking at a private facility, and the proposed ordinance provides that the Borough may not interfere with passengers disembarking from a ship.[13] Without preventing large cruise vessels from actually docking or passengers from disembarking, the fines operate effectively as a tax on cruise operators willing to pay the fine. Wealthier operators could simply absorb the fine as a cost of doing business, transforming the fine into a tax on vessels

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[6] JDO memorandum at 10 (emphasis in original).

[7] *Id.* (emphasis in original).

[8] SCG 25.02.020(D)(5); 25.03.010(C)(2).

[9] SCG 25.01.060(A)(1).

[10] SCG 25.01.060(A)(2).

[11] SCG 25.01.060(A)(1).

[12] SCG 25.01.060(A)(2) and (3).

[13] SCG 25.01.040.

without any corresponding service to the vessels. Because the Tonnage Clause prohibits this kind of levy without the consent of Congress, the fines imposed by the proposed ordinance violate the Tonnage Clause.

IV. The Proposed Ordinance Infringes on Legislative Discretion Over Public Resources and Improperly Appropriates a Public Asset

As explained in our letter concerning the third version,[14] the proposed initiative amounts to an unconstitutional appropriation and should be rejected on this basis. It is not premature to address this argument, because unlike other constitutional challenges that are only ripe for review if an initiative is approved by voters, proposed initiatives that enact an appropriation may not go to the voters at all.[15]

As the Borough has noted in rejecting a previous version of the proposed initiative, "[a]lthough appropriation is often understood to refer to money, an initiative setting land aside, or any other type of government property, may also be an appropriation."[16] The Alaska Supreme Court has held that initiatives may not "narrow the legislature's range of discretion to make decisions regarding how to allocate Alaska's lakes, streams, and rivers among competing needs"[17] because the Constitution's prohibition against initiative appropriations "'*was designed to preserve to the legislature the power to make decisions concerning the allocation of state assets.*'"[18] This "ensures that the legislature, and *only* the legislature, retains control over the allocation of state assets among competing needs."[19]

In *Mallott v. Stand for Salmon*, sponsors submitted a ballot initiative to the State that would have regulated mine permitting through the Department of Fish and Game. The initiative would have "'effectively preclude[d] some uses [of anadromous fish habitat] altogether,' therefore 'leaving insufficient discretion to the legislature to determine how to allocate these state assets.'"[20] The Court found the initiative to be an unconstitutional appropriation, since it narrowed the discretion granted to the legislature under the Alaska Constitution.

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[14] June 25, 2024 letter on behalf of Sitka Dock Co. to Borough Attorney.

[15] *See Alaska Action Ctr., Inc. v. Municipality of Anchorage*, 84 P.3d 989, 992 (Alaska 2004)(constitutional and statutory restrictions on initiatives, including the prohibition against appropriations, "were devised to prevent certain questions from going before the electorate at all").

[16] September 29, 2023 Memorandum at 3; November 9, 2023 Memorandum at 3. *See also Alaska Conservative Political Action Committee v. Municipality of Anchorage*, 745 P.2d 936, 938 (Alaska 1987) ("The prohibition against appropriation by initiative applies to all state and municipal assets").

[17] *Mallott v. Stand for Salmon*, 431 P.3d 159, 166 (Alaska 2018).

[18] *Id.* at 165 (quoting *Pullen* 923 P.2d at 63 (emphasis in original)).

[19] *McAlpine v. University of Alaska*, 762 P.2d 81, 88 (Alaska 1988) (emphasis in original).

[20] *Id.* at 163 (quoting review by the Department of Law).

State submerged lands and public waters are undoubtedly state assets on par with the lakes, streams, and rivers at issue in *Stand for Salmon*. Article VIII, Section 2 of the Alaska Constitution provides that:

> The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

In the case of Sitka Dock Co., DNR has exercised its authority over state submerged lands by issuing a lease for the use of state submerged lands for a dock facility pursuant to AS 38.05.070. In 2012, DNR issued a 25-year lease[21] to Halibut Point Marine Service, LLC, an affiliate of Sitka Dock Co., for a cruise ship dock. DNR subsequently expanded the lease area to accommodate larger vessels.[22] In doing so, DNR has found that the lease to Sitka Dock Co. is in the best interests of the state, most recently in 2020:

> **It is in the state's interest to approve this [lease amendment] for the purpose of allowing larger cruise ship vessels to enter Alaska's growing cruise industry and market.** Cruise ship passengers generate significant economic returns to local economies and governments through tourism in Southeast Alaska. **By giving larger ships the ability to dock, they have the capacity to bring more tourism visitors to the area**, which have implicit benefits to the local and state economies through expanded economic opportunity in the form of larger tourism markets.[23]

The fourth version of the initiative would ban cruise ships from docking at a facility on state submerged lands leased by the DNR Commissioner to Sitka Dock Co., completely frustrating the purpose of the lease, the intent of the legislature, and DNR's management decisions for the use of state lands. Indeed, because of the daily caps on cruise visitors under the fourth version, it is unlikely that *any* cruise ships would be allowed to land at Sitka Dock Co.'s facility if the fourth version's permitting system were implemented. Because the initiative proposes a daily cap of 4,500 persons ashore, it is a de facto ban on the larger ships which carry more than 4,500 passengers. This is contrary to the DNR's express finding that it was in the state's best interest under the Alaska Land Act for these ships to dock.

Just like the initiative at issue in *Stand for Salmon*, which "'effectively preclude[d] some uses'"[24] of state waterways and thereby unconstitutionally limited the discretion over these public resources granted to the Department of Fish and Game by the legislature, the proposed initiative here would effectively preclude DNR from exercising its legislatively-granted discretion over state land by

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[21] DNR leasing decision for ADL 107980.

[22] DNR leasing decision for ADL 108776.

[23] Lease Amendment Preliminary Decision for ADL 108776, July 6, 2020 (emphasis added).

[24] *Stand for Salmon*, 431 P.3d at 163 (quoting review by the Department of Law).

eliminating DNR's authority to allocate state submerged lands for certain cruise moorage. Specifically, the initiative restricts DNR's authority and precludes certain uses of state tidelands by (1) creating a de facto limit on the number of cruise ships that can moor, (2) a de facto limit on the size of those vessels, and (3) a de jure limit on the number of days per week all cruise ships can moor.

In Southeast Alaska, state-owned tide and submerged lands and public waters – especially those proximate to cities like Sitka – are among the most valuable assets owned by the State. Implementation of the initiative proposed by the fourth version would limit the range of discretion granted to DNR by the legislature because DNR would not be able to lease state-owned tide and submerged lands for certain cruise vessels. An initiative that narrows the range of discretion available to the legislature over state assets is unconstitutional because it constitutes an appropriation under Article XI, Section 7 of the Alaska Constitution, and the Borough should not certify the fourth version for this reason.

Sincerely,

Jonathan W. Katchen
Partner
of Holland & Hart LLP

HELSELL
FETTERMAN

December 11, 2024

Scott E. Collins
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Ms. Sara Peterson, MMC
Municipal Clerk
City and Borough of Sitka
100 Lincoln Street
Sitka, Alaska 99835

RE: Fourth Application for Initiative Petition for Limitation of Cruise Visitation in Sitka

Dear Ms. Peterson:

We represent Allen Marine Tours, Inc. and its affiliated companies (collectively, "Allen Marine") in voicing opposition to the November 29, 2024 filing of an application for a proposed ordinance for "Limitation on Cruise Visitation in Sitka." We request that you deny the application and not issue a petition on the proposed ordinance.

I. Introduction.

The November 29 filing is the fourth application (the "Fourth Application") in less than two years for a proposed ordinance named "An Ordinance of the City and Borough of Sitka, Limitation on Cruise Visitation in Sitka." Lawrence Edwards filed the first two applications, proposing an ordinance with the same name on September 15, 2023 and October 25, 2023, respectively. The second application was an amendment of the first application made to obtain your approval. The third application, filed under the same name, was another amendment, and it was filed by a newly formed entity that we previously demonstrated was an arm of Mr. Edwards. Now, Mr. Edwards is back again with yet another amendment.

In response to the first two applications, Allen Marine submitted a letter to you, signed by its CEO, Jamey Cagle, and CFO, Jeremy Plank, in opposition to the applications. On the third application, we submitted Allen Marine's opposition, as we now do on the Fourth Application. To avoid repeating all that was said in the prior three letters submitted by or on behalf of Allen Marine, we ask that you please review those letters in making your decision on the Fourth Application. To that end, we hereby incorporate the three prior letters into this letter by this reference, as if such letters were fully stated herein, for the sake of focusing on additional reasons why the Fourth Application must be rejected.

On September 29, 2023, on the advice of Sitka's then Municipal Attorney, Brian E. Hanson, you rejected Mr. Edwards' first application because "said ordinance is an impermissible appropriation of a public asset under Art. XI, Sec. 7 of the Alaska Constitution, and is legally

insufficient under AS 29.26.110(a)(4), because it would be unenforceable as a matter of law." Mr. Hanson advised that the first proposed ordinance would (1) constitute an impermissible appropriation of public assets by creating a port district across the streets and lands owned by Sitka; and (2) violate AS 29.26.110(a)(4) by being confusing, misleading, and incomplete due to undetermined terms of enforcement.

On November 3, 2023, on Mr. Hanson's advice, you rejected Mr. Edwards' second application because "said ordinance is legally insufficient under AS 29.26.110(a)(4), because it would be unenforceable as a matter of law." Mr. Hanson advised that that proposed ordinance would violate AS 29.26.110(a)(4) by being confusing, misleading, and incomplete, and, consequently, unenforceable as a matter of law.

On July 2, 2024, on the advice of attorneys Michael Gatti and Taylor McMahon, you rejected Mr. Edwards' third application because once again "said ordinance is legally insufficient for those reasons stated in the attached memorandum from [attorneys Gatti and McMahon]." Those attorneys advised you that the application "should not be certified because it is unenforceable as a matter of law due to (1) misleading, confusing, and incomplete terms and (2) that the requirement for a Sitka Cruise Ship Permit violates the Tonnage Clause."

The Fourth Application must be rejected for the same reasons that you rejected the first three applications. There are additional reasons for rejecting the Fourth Application. Since any one of these many reasons defeats the attempt to put the proposed ordinance on the ballot, we ask that you reject the Fourth Application as you did the first three applications.

II. Analysis

Any one of the following four reasons requires rejecting the Fourth Application:

- The Fourth Application is barred by SGC 2.80.040.D.2.
- The Sitka Assembly has legislatively addressed cruise visitation in a substantially similar manner as that proposed in the Fourth Application.
- The Fourth Application is confusing, misleading, and incomplete and, thus, legally insufficient under AS 29.26.110(a)(4).
- Federal maritime law, namely 33 U.S.C. § 5, clearly prohibits and preempts the fees and fines against cruise ships called for in the Fourth Application.

We present each of these reasons in order for your further understanding.

A. The Fourth Application is Barred by SGC 2.80.040.D.2.

None of the three prior applications, including the third, which was filed on June 18, 2024, was rejected for lack of required signatures. As summarized in the Introduction above, each was rejected for substantive reasons. As a result, the Fourth Application, filed on November 29, 2024, is barred by the first sentence of SGC 2.80.040.D.2, which states:

> If the petition is deemed insufficient for any reason other than lack of required number of signatures, it may not be amended or resubmitted sooner than one year.

This Fourth application is merely an amendment to the first, second, and third applications – all of which attached a proposed ordinance that would limit cruise visitation in Sitka. Under SGC 2.80.040.D.2, the Fourth Application is premature, as it may not be submitted until one year after the third application, or on or after June 18, 2025.

On the third application, attorneys Gatti and McMahan expressed the view that subsection D.2 of SGC 2.80.040 applies to "petitions," whereas what you now face is an "application." Since that is a distinction without a difference, we respectfully disagree with that position. Section 2.80.040 plainly uses the words "application" and "petition" interchangeably without any difference in meaning. Subsection A of SGC 2.80.040 illustrates this point. The first sentence of that subsection uses the term "petition" in describing a document that a sponsor initially files with you, while the second sentence refers to that same filing as an "application."

The proponents of the ballot measure also call their filing a "petition" – "Thank you for your consideration of the initiative petition submitted by Larry Edwards and myself." (emphasis added) Even the July 2, 2024 memorandum of attorneys Gatti and McMahon interchangeably used the terms "application" and "petition" to refer to the same document.

We submit to you that SGC 2.80.040.D.2 does apply to the Fourth Application, and that provision operates to bar the filing of yet another petition so soon after the last one.

B. The Sitka Assembly Has Legislatively Addressed Cruise Visitation in a Substantially Similar Manner as That Proposed in the Fourth Application.

Our response to the third application presented the court decisions, work of the Tourism Task Force (TTF), and the Sitka Assembly's adoption of the TTF's Recommendations, supporting the position that the third application was prevented by the legislative actions of the Sitka Assembly. In their memorandum to you, attorneys Gatti and McMahon expressed reservations with this position because the "Action Plan" proposed by the Municipal Administrator had not yet been considered and approved by the Assembly at that point. That approval did occur, and the Municipal Administrator is moving forward to implement the TTF's Recommendations and the Action Plan legislatively adopted by the Assembly. As a result, under the case law presented, the Fourth Application is prevented by legislative action addressing the same matter.

In brief summary, the Alaska Supreme Court in *Warren v. Boucher*, 543 P.2d 731 (Alaska 1975) held that where legislative action treats the same problem as that sought to be reached by a proposed initiative and where both attempted to reach the same results, there is substantial similarity between the legislative action and the proposed initiative such that the proposed initiative must be rejected.[1] To prevent an initiative, a legislative act "need not conform to the initiative in all respects" because legislative bodies are entitled to "have some discretion in deciding how far a legislative act should differ from the provisions of an initiative."[2] In turn, the legislative body's discretion is "reasonably broad" and "[i]f in the main the legislative act achieves the same general purpose as the initiative" and "accomplishes that purpose by means or systems which are fairly comparable," the legislative act and initiative are considered substantially similar such that the initiative may no longer proceed.[3]

After a year of meetings, public engagement events (surveys, town hall meetings, etc.), and focus groups, the TTF, after careful and extensive analysis considering and weighing all the competing interests, delivered seven, comprehensive Recommendations on "Levels of Tourism,"[4] under the following labels:

- "Pursue mutual agreements with the industry"[5]
- "Flatten the curve"[6]
- "Take out the peak"[7]
- "Designated quiet days"[8]
- "Shorten the length of the season"[9]
- "Continue collecting data"[10]
- "Prioritize initiatives that enhance and protect Sitka's character and quality of life"[11]

At its May 16, 2024 meeting, the Sitka Assembly discussed the TTF's Recommendations and received public comments, including those offered verbally during the meeting by Mr. Edwards. On motion, the Assembly accepted the TTF's Recommendations by unanimous vote of

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[1] *Id.* at 734-35.
[2] *Id.* at 736.
[3] *Id.*
[4] *Tourism Task Force Recommendations,* Sitka Assembly File No. 24-072, discussed and approved at the Sitka Assembly meeting on May 16, 2024 (the "Task Force Recommendations"), at p. 3. Information about the Task Force, its charge from the Sitka Assembly, and documents from and concerning the Task Force, including the Task Force Recommendations, are posted on your website under the menu item "Tourism Task Force." *See* https://www.cityofsitka.com/departments/MunicipalClerk-1/TourismTaskForce.
[5] *Id.* at p. 11.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at p. 12.
[10] *Id.*
[11] *Id.*

all Assembly members present, and directed the Municipal Administrator to develop an action plan for the Assembly to consider and approve.[12]

On June 19, 2024, Sitka Planning & Community Development Director Amy Ainslie, through Sitka Municipal Administrator John Leach, submitted to Mayor Eisenbeisz and Assembly Members a Memorandum with the subject "Action Plan for Tourism Task Force Recommendations," attaching the "Action Plan for Tourism Task Force" (the "Action Plan").[13] For each of the foregoing seven TTF Recommendations on "Levels of Tourism in Sitka," the action plan describes the action on the recommendation, the priority for that action, and the timeline by which action will be taken. For the first five Recommendations, the Action Plan describes the following action to be taken:

> Direct the Municipal Adminstrator [*sic*] to negotiate preliminary terms for an agreement that achieves the goals for levels of tourism as identified in the Task Force recommendations under Directive #1. Final approval of the agreement and terms by the Assembly[14]

The Action Plan assigns the foregoing action a "High" priority, with action to be taken within one to three months, to be led by the Assembly and the Municipal Administrator.[15] For the sixth Recommendation – "Continue collecting data" – the Action Plan describes the following action to be taken:

> Assembly to determine any additional studies or surveys to be commissioned - direction for Adminstrator [*sic*] to proceed [as] needed. Ordinance for supplemental appropriation may be needed (Visitor Enhancement potential source of funds)[16]

The Action Plan assigns the foregoing action a "Medium" priority, with action to be taken within four to six months, to be led by the Assembly and the Municipal Administrator.[17] For the last Recommendation – "Prioritize quality of life" – the Action Plan describes the following action to be taken: "Ongoing, long-term effort. No specific action needed."[18] The Action Plan assigns the foregoing action an "Ongoing" priority to be led by the Assembly.[19]

At the Assembly's July 9, 2024 meeting, the Assembly adopted the Action Pan as presented. Since then, the Assembly and the Municipal Administrator have moved forward in earnest to implement the Action Plan and the TTF Recommendations in order to address the same

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[12] Motion 24-073, approved May 16, 2024.
[13] *Action Plan for Tourism Task Force*, Sitka Assembly File No. 24-094 (the "Action Plan").
[14] Action Plan at p. 2.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*

cruise ship visitation concerns behind the Fourth Application. At its August 13, 2024 meeting, the Assembly created a Tourism Commission for the purpose of developing municipal and community-focused approaches that monitor and promote the social, economic, and environmental stability of, and quality of life to residents in, Sitka[20] and adopted a new chapter in the Sitka General Code (SGC ch. 2.32) governing the new Tourism Commission. In addressing the sixth TTF Recommendation, the Assembly, at its September 10, 2024 meeting, addressed the need for "Visitor Industry Data Collection," concluding with a consensus instruction to the Municipal Administrator to put out an RFP for visitor industry data collection services.[21]

In addition, the Municipal Administrator negotiated a significant Memorandum of Understanding (MOU) between Sitka and the Sitka Sound Cruise Terminal that addresses and implements the first five TTF Recommendations on "Levels of Tourism."[22] The Sitka Assembly considered the MOU during its November 12, 2024 meeting and approved the MOU with authorization for the Municipal Administrator to sign the document and proceed forward with its terms. Our understanding is that the MOU was signed after Assembly approval.

Under the MOU, a framework for the cruise ship visitation is established in detail. There are guidelines on port calls and berthing designed to implement the TTF Recommendations. The MOU caps cruise visitation at 7,000 passengers on any given day, maintains a "quiet day" for Sitka residents, and addresses concerns with the "shoulder season," among other things. In the MOU, the parties commit to share quarterly schedules, establish berthing schedules 18 months in advance of each cruise season, and otherwise work together and coordinate cruise ship calls to meet the goals of the TTF Recommendations. Unlike the Fourth Application, which would not take effect until the 2026 season, the MOU would be effective for the 2025 season. There is much more in the MOU and we encourage you to read it fully if you have any remaining doubt that addresses the same concerns presented with the Fourth Application.

The foregoing brief summary shows that the Sitka legislative and administrative processes are promptly and earnestly addressing the same matters and issues, in much the same way, as the Fourth Application proposes. Given the substantial similarity between the Assembly's actions, and the Administrator's implementation, and what the proposed Fourth Application seeks to achieve, the Fourth Application is prevented by the principles of the Alaska Supreme Court in *Warren*.

C. The Fourth Application is Confusing, Misleading, and Incomplete and Legally Insufficient Under AS 29.26.110(a)(4).

As addressed by Mr. Hanson providing you advice on the first two applications:

> The proposed ordinance must be reviewed to consider its legal sufficiency, and it must be worded carefully enough to be enforced. Initiatives must be drafted

[20] *See* SGC 2.32.060.
[21] *See* File No. 24-137.
[22] *See* File No. 24-168.

> clearly enough so that the voters know what they are voting on and so future disputes over the initiative's meaning are avoided.[23]

Once again, the Fourth Application fails to meet that standard because it is misleading, confusing, and incomplete, among other deficiencies, in several important ways.

First, the Fourth Application would have you attach a set of "frequently asked questions" to the proposed ordinance. That would be entirely inappropriate, especially since these FAQs present the biased views of Mr. Edwards and lack all objectivity. There is no reason for this FAQ to be a part of any petition and, when read objectively, is very misleading and would create much confusion among voters if it appeared to have your endorsement, as it would if attached to any petition. It would not be part of any ordinance, and thus should not be part of any petition.

Second, the Fourth Amendment introduces an important concept of "optimization,"[24] but is wholly deficient in explaining what that is and how it would work in practice. After multiple readings, we have no idea what "optimization" is, what it is supposed to do, and how it will be applied.

Third, along the same lines, the Fourth Application leaves the entire "cruise ship scheduling" process to the imagination.[25] Just the fact that there are three alternative ways to schedule calls by large cruise ships,[26] none of which come with any detail on how it would work in practice or guidance as to which alternative will be applied, creates much confusion and would have the voters considering incomplete provisions on what may be the most important aspect of the Fourth Application. By contrast, please see the detail on cruise ship scheduling and berthing in the MOU.

Fourth, like the prior applications, although this Fourth Application is supposed to be about "limitation of cruise ship visitation," it once again states that no passenger will be prevented from disembarking.[27] For all the reasons such gratuitous statements in the prior applications were false, misleading, and confusing, they are here as well.

Fifth, the Fourth Application's treatment of "small cruise ships" is confusing and misleading. Are they or are they not governed by the proposed ordinance? The impression created is that small cruise ships are not subject to the requirements of the proposed ordinance, but that is not true. On the one hand, small cruise ships are "exempt" from visitation limits, but, on the other

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[23] Memorandum dated September 29, 2023 to Sara Peterson, Municipal Clerk, from Brian E. Hanson, Municipal Attorney, regarding Application for Initiative Petition entitled "Limitation of Cruise Visitation in Sitka" submitted September 15, 2023, at p. 7; and Memorandum dated November 9, 2023 to Sara Peterson, Municipal Clerk, from Brian E. Hanson, Municipal Attorney regarding Application for Initiative Petition (the "Second Application") entitled "Limitation of Cruise Visitation in Sitka," submitted October 25, 2023, at p. 5.

[24] *See* Proposed Section 25.02.030.C.3.

[25] *See* Proposed Section 25.02.030.

[26] Proposed Sections 25.02.030 – 050.

[27] *See, e.g.*, Proposed Section 25.01.040.A.

hand, they would still need to obtain a permit (which could be denied) and collect and report passenger data (subject to penalties for violations of such requirements).[28] As illustrated by the accompanying FAQs, the Fourth Application would have voters believe that small cruise ships have minimal requirements, but that is not the case when Chapter III of the proposed ordinance is read. We also refer you to the first line of proposed Section 25.01.010, the purpose statement of the proposed ordinance – it misleadingly reads, "This title limits large cruise ship visitation . . ." Moreover, if the Fourth Application is not intended to address small cruise ship visitation, then why does it put them to the burden and expense of applying for and receiving a permit and collecting and reporting disembarkation data?

Sixth, if the Fourth Application is really about limiting cruise ship visitation, why doesn't it cap passenger landings by small cruise ships. It is not the first passengers that the Fourth Application targets; it is those at the margin and above certain numbers. If a large cruise ship disembarks 4,000 passengers, there is no issue of overcrowding (according to the Fourth Application). If a small cruise ship calls an hour later and 249 passengers disembark, then, according to the Fourth Application, it is those 249 passengers – not the large cruise ship's 4,000 passengers – that cause overcrowding on Sitka's streets. That leads to more confusion, but once again shows the intent of the sponsors of the Fourth Application – to single out and punish the large cruise ships.

Seventh, while the proposed ordinance would have cruise ships collect and report data, nothing is said as to how that should be done. One of the things to be reported is "any irregularities observed in the disembarkation counting processes,"[29] but there is no indication or guidance as to what such an "irregularity" is or could be. Yet, cruise ships and their operators are subject to fines, permit revocation, and other penalties for failing to report such "irregularities."

There are similar and other ways throughout the proposed ordinance that make the Fourth Application misleading, confusing, and/or incomplete. We are confident you will see those deficiencies in reading it.

D. Federal maritime law, namely 33 U.S.C. § 5, Clearly Prohibits and Preempts the Fees and Fines the Fourth Application Would Impose on Cruise Ships.

A simple, and broadly applied, federal statute, 33 U.S.C. § 5, plainly prohibits Sitka from imposing any "taxes, tolls, operating charges, fees, or any other impositions whatever" – which would include application fees and fines – on cruise ships that call on Sitka (or its passengers or crew). Subsection (b) of the statutes states: "No taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft, or from its passengers or crew, by any non-Federal interest, if the vessel or water craft is operating on any navigable waters subject to the authority of the United States, or under the right to freedom

[28] *See* Proposed Chapter III.
[29] Proposed Sections 25.02.020.H.4 and 25.03.010G.4.

of navigation on those waters . . ." There are certain limited exceptions to this broad rule that are spelled out in the statute – such as impositions "solely to pay the cost of a service to the vessel" or "enhance the safety and efficiency of interstate and foreign commerce" – but none of those exceptions have application here.

Concluding that the third application would violate the statute was one of the two grounds on which attorneys Gatti and McMahon advised you to reject that application.[30] For the same reasons they gave you that advice, the Fourth Application violates the statute. The proposed ordinance's application fees[31] and fines[32] are clearly impermissible under the statute. The statute is clearly controlling authority, and by virtue of its direct and express preemption of local attempts to charge fees and other impositions on vessels upon navigable waters, any attempt by Sitka to impose fees and fines on cruise ships would be clearly prohibited under controlling authority. In turn, the proposed ordinance is unenforceable as a matter of law under AS 29.26.110(a)(4).

E. Other Reasons Make the Fourth Application Clearly Unenforceable.

In response to the first, second, and third applications, Allen Marine and we presented further reasons for why the proposed cruise ship visitation limitations now proposed are clearly unenforceable. Rather than repeat all of those reasons at length here, we simply reference them and incorporate them herein. Those reasons include the following:

1. The Fourth Application would impermissibly appropriate public resources for all the reasons previously stated.[33]

2. The Fourth Application is misleading, confusing, and incomplete because it omits explanation as to the extent to which it would harm the Sitka economy, tax base, businesses, and workforce that serve cruise ships and their passengers. In particular, the proposed annual 300,000 passenger cap will mean that many days during the cruise ship season will go without any cruise visitations (beyond "quiet days").[34]

4. The Fourth Application violates the "Takings Clauses" in the U.S. and Alaska Constitutions.[35]

5. The proposed ordinance would violate the Commerce Clause in the U.S. Constitution and is, thus, unconstitutional and unenforceable.[36]

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[30]Memorandum dated July 2, 2024 to Sara Peterson, Municipal Clerk, from Michael Gatti and Taylor McMahon of Jermain, Dunnagan & Owens, P.C., regarding Application for Initiative Petition Regarding Cruise Ships, at pp. 4 and 10.
[31] Proposed Sections 25.02.020.D.5 and 25.03.010C.2.
[32] Proposed Section 25.01.060.
[33] *See* Helsell Fetterman LLP letter to you, dated June 27, 2024, at pp. 8-11.
[34] *Id.* at pp. 14-15.
[35] *Id.* at pp. 16-17.
[36] *See* Allen Marine Tours & Affiliates' letter to you, dated November 6, 2023 at pp.10-11.

6. The Admiralty Clause in the U.S. Constitution preempts application of the proposed ordinance.[37]

7. The proposed ordinance would violate the fundamental right to travel that every American has under the U.S. Constitution.[38]

Allen Marine reserves all rights with respect to the proposed ordinance and does not waive any claims, defenses, arguments, and the like which are not raised in this letter.

III. Conclusion.

There are multiple reasons why you should reject the Fourth Application, not the least of which is that the Sitka Assembly has legislatively adopted measures to address the same cruise visitation concerns as those to be addressed by the Fourth Application. The legislative process, as implemented by the Municipal Administrator, where balancing of multiple, conflicting interests, and allocating finite public resources can be best achieved, should not be usurped by a poorly written proposed ordinance that is misleading, confusing, and incomplete.

If we can answer any questions or provide any further information, please feel free to contact me. Thank you.

Very truly yours,

HELSELL FETTERMAN LLP

Scott E. Collins

SEC: jlb

cc (by email):
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[37] *Id.* at pp. 11-12.
[38] *Id.* at p. 12.