CITY OF WASILLA
290 E. HERNING AVE.
WASILLA, ALASKA 99654-7091
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CODE ORDINANCE

REQUESTED BY: COUNCILMAN ERICKSON
PREPARED BY: CLERK'S OFFICE

ORDINANCE SERIAL NO. 94-34

AN ORDINANCE OF THE CITY OF WASILLA, ALASKA LIMITING THE TERMS OF OFFICE OF CITY OF WASILLA COUNCIL MEMBERS AND MAYOR TO A MAXIMUM OF TWO CONSECUTIVE TERMS.

BE IT ORDAINED AND ENACTED BY THE CITY OF WASILLA, ALASKA AS FOLLOWS:

SECTION I. Classification. This ordinance is of a general and permanent nature and shall become part of the Wasilla Municipal Code.

SECTION II. Purpose. To submit to the voters of the City of Wasilla the question of whether term limits should be placed on the Mayor and Council members.

SECTION III. Enactment. The following questions shall be placed on the ballot as separate issues at the next regular election.

A. Shall the following language be added to the Wasilla Municipal Code?

"No person shall be elected to or serve on the Council for more than two consecutive, full terms without a break in service of at least one (1) full year."

B. Shall the following language be added to the Wasilla Municipal Code?

"No person shall be elected to the office of or serve as City Mayor for more than two consecutive, full terms without a break in service of at least one (1) full year."

SECTION IV. Enactment. If approved by a majority of those persons voting on the question at the next regular election, Section 2.04.030 and 2.16.030 of the Wasilla Municipal Code are amended as follows:

2.04.030 Election of Councilmen - Terms. A regular election shall be held on the first Tuesday of October each year to elect council members and to bring up for consideration other issues required for vote by the electors. Councilmen shall all run for three (3) year terms. No person shall be elected to or serve on the Council for more than two (2) consecutive, full terms without a break in service of at least one (1) full year.

2.16.030 Election and Term of Mayor. The Mayor is elected at large for a term of three years or until a successor is elected and has qualified. The Mayor's regular term begins on the first Monday following certification of the

Mayor's election. No person shall be elected to the office of or serve as City Mayor for more than two consecutive, full terms without a break in service of at least one (1) full year.

SECTION V. Enactment. This ordinance shall take effect upon voter approval. This ordinance shall take effect prospectively only. Any person serving on the Council or as Mayor on the date immediately preceding the election day on which Section III of this ordinance is approved by the voters shall not be prohibited from being elected or serving two additional consecutive full terms following the expiration of his or her current term.

SECTION VI. Effective Date. This ordinance becomes effective upon ratification by the voters.

Introduction: 08/10/94

Public Hearing: 08/22/94

ADOPTED by the Council of the City of Wasilla on this 22nd day of August, 1994.

JOHN C. STEIN, Mayor

ATTEST:

MARJORIE D. HARRIS, CMC
City Clerk

LAW OFFICE
OF
RICHARD DEUSER

MAILING ADDRESS
765 EAST PARKS HIGHWAY
SUITE 201B
WASILLA, ALASKA 99654

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KRENIK BUILDING, PARKS HIGHWAY

MEMORANDUM
TERM LIMITATIONS INITIATIVE

To : Office of the City Clerk for Wasilla
From : Richard Deuser, City Attorney
Date : June 14, 1994
Re : Advisory on Initiative Application to Limit the Terms of Mayor and Council Members;

This memorandum is offered to advise you concerning a recent Application received by the City of Wasilla Clerk's Office. The Application seeks to limit the terms of the Wasilla mayor and the Wasilla council members to two consecutive full terms. Pursuant to A.S. 29.26.110 the Municipal Clerk is required to certify the Application if the Application is in proper form and complies with several criteria outlined in the statute. The law requires that the subject matter of the proposed petition pass evaluation under the following criteria.

1) Not be restricted by Article XI, Section 7 of the State constitution;
2) Include only a single subject;
3) Relate to a legislative, not an administrative matter;
4) Be enforceable as a matter of law;

SUMMARY OF ANALYSIS

Fundamental principles of representational democracy include the right to run for and hold public office. Just as the right to vote is considered essential to the democratic principle, so too is the right to run for office. Constitutionally speaking, when fundamental rights are at issue (e.g., the right to vote), the courts apply high standards of judicial scrutiny to determine the validity of proposed legislation. Based on case law cited below, it is my considered opinion that term limits adopted legislatively (including ordinances by initiative), are constitutionally invalid unless authorized by an express constitutional provision. In Alaska there is no express constitutional power to limit the right of a citizen to run for municipal office based upon the number of terms, successive or otherwise, that have been served by that individual.

Although case law exists to support the procedural approach of permitting a petition on term limits to move forward and, if approved, then judicially determine constitutionality, it is my considered opinion that contrary Alaska case law calls for a decision at this point in time before the matter is submitted for petition signatures.

It is my advice and recommendation that the Application not be certified as the initiative proposing term limits would not be enforceable as a matter of law.

PROCEDURAL CASE LAW AS TO WHETHER TO DECIDE NOW OR AWAIT THE OUTCOME OF AN ELECTION BALLOT

There is no single Alaska precedent available to conclude that term limits are unconstitutional in the absence of an amendment to the state constitution. In fact, A.S. 29.20.140(d) - for council members - and A.S. 29.20.230(c) - for the office of Mayor - both contemplate that term limits are valid if ratified by the voters. These statutes assume the constitutional validity of term limits without an inquiry into the premise - are term limits constitutional?

In the legal climate of no controlling case law directly on point and arguable authority in support of the legal availability of term limits (note statutes referred to above) there is case law authority for the procedural alternative of allowing the Application to move forward and only if and when approved by the voters should the question be judicially determined.

In Whitson v. Anchorage, 608 P. 2d 759, 762 (Ak. 1980), the Supreme Court offered the following guidance when dealing with a matter that is not clearly defined by the law :

> As a matter of judicial prudence, courts will refrain from passing on the constitutionality of proposed legislation. In keeping with this tradition, we have recognized that general contentions that the provisions of an initiative are unconstitutional are justiciable only after the initiative has been approved by the voters. [Citations Omitted].

Further support for procedurally allowing the Application to be certified and only

dealing with constitutionality if the ballot is approved is found in pronouncements that encourage liberal interpretation of the power of initiative :

> [i]n reviewing an initiative prior to submission to the people, the requirements of the constitutional and statutory provisions pertaining to the use of initiatives should be liberally construed so that 'the people [are] permitted to vote and express their will on the proposed legislation... Boucher v. Engstrom 528 P.2d 456 at 462, (Alaska 1974);

Against the above authorities are the words and actions of the Supreme Court in several cases. Notable for the purpose of resolving the procedural question is the case of Whitson, *supra*, at page 762 :

> There are, however, recognized exceptions to this general principle of non-intervention in the case of voter initiatives. *Municipality of Anchorage v. Frohne,* 568 P. 2d 3 (Alaska 1977)*; Boucher v. Engstrom*, 528 P. 2d 456 (Alaska 1974); *Walters v. Cease,* 394 P. 2d 670 (Alaska 1964); *Starr v. Hagglund.* 374 P. 2d 316 (Alaska 1962); In the case of explicit constitutional prohibitions against proposed initiatives, we have noted that "[u]nless the courts had power to enforce those exclusions, they would be futile..." *Boucher,* 528 p. 2d at 460, quoting *Bowe v. Secretary of the Commonwealth,* 69 N.E. 2d at 128. Similarly, where, as here, a municipal charter amendment proposed by initiative is in clear conflict with state statute, it would be useless "to allow the voters to give their time, thought and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots, and thereafter, if their vote be in the affirmative, confront them with a judicial decree that their action was in vain because of the reasons herein set forth." [Citations Omitted].

In conformance with the above authority, the Supreme Court again acted prior to an election in the more recent case of Faipeas v. Municipality of Anchorage, 860 P. 2d 1214, (Alaska 1993);

The advisability of whether to allow the Application to move forward despite

arguable constitutional problems is ultimately controlled by the strength or weakness of the arguable constitutional infirmity.

The issue focuses then on the substantive question of whether an Alaska court would uphold the validity of term limits without express constitutional authority for such legislation (whether by ratified ordinance or by initiative).

It is my researched view that authority is strong enough to conclude that an Alaskan Court, if presented the question, would rule term limits to be unconstitutional. It is my considered opinion that authority is strong enough to call for a decision by the Clerk, at this stage, declaring the Application not to be certified as it would not be enforceable as a matter of law.

DISCUSSION

ARGUMENT FOR CONSTITUTIONAL VALIDITY. In the interest of presenting a balanced view of an unsettled area of the law, consider the following argument favoring the constitutionality of voter-approved municipal term limits.

As noted above, state law from Title 29 contemplates term limits for both council members and the mayor if approved by the voters. In turn, the validity of those statutes is arguably a function of the State Constitution, Article X, Section 7, which simply and pervasively provides "...municipalities shall have the powers and functions conferred by law...". Since municipal government is a creation of the state legislature and the structure embodied in Title 29, it could be said that the statutory authority to institute term limits is simply another aspect of the power of the state legislature to establish the reasonable powers, functions and administration of local governments.

Support for this rationale is to be found in the decision of another state. City Council of City of Bethlehem v. Marcincin, 515 A.2d 1320, (Pa. 1986) confronted the constitutional issue of whether a local term limits ordinance was valid under Pennsylvania law. The ordinance was challenged by an incumbent mayor running for office again. The lower court found the term limits to be unconstitutional. The Pennsylvania Supreme Court, despite a dissent adopting the lower court rationale, found the law to pass constitutional muster. The Pa. Court found the ordinance valid

after applying a relatively low standard of review - the reasonable basis test.

ARGUMENT FOR UNCONSTITUTIONALITY OF TERM LIMITS. Several Alaska Attorney General opinions have been authored that touch on the central issue - the constitutionality of term limits. See Opinions of the Attorney General No. 6, April 4, l963; Opinion File No. 663-91-0527, Nov. 7, 1991; Opinion File No. 663-90-0910, February 5, 1990; The last of these opinions is the most direct discussion of the subject although the actual basis of the opinion does not conclusively deal with the question relative to **municipal** offices. In the context of the constitutionality of a proposed initiative that would have prohibited a person from serving in the state legislature beyond eight consecutive legislative sessions the following was stated :

> Any change that may be accomplished only by an amendment to the Alaska Constitution may not be accomplished through the initiative process. Amendments to the Alaska Constitution may only be proposed by two-thirds vote of the each house of the legislature or by a constitutional convention, with proposed amendments subject to adoption or ratification by vote of the people. Alaska Constitution Art. XIII, Section 1. The constitution may not be amended by enactment of a law by either the legislature or by the people through the initiative process. Starr v. Hagglund, 374 P. 2d 316, 317, n. 2 (Alaska 1962); cf. State v. Lewis, 559 P. 2d 630, 639 (Alaska 1977) ("The Alaska Constitution may not be amended by popular vote alone, without prior action by either the legislature or a constitutional convention").

The Alaska Constitution has specific provisions regarding the terms of state senators and state representatives. Article II, Section 3. The constitution has no limitations on the number of terms a legislator may serve. The absence of such constitutional authorization for term limits is particularly significant when noting the express limitation on the number of terms for the office of governor.[1] Similarly, there are

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[1]Article III, Section 5 limits the governor to two consecutive terms and one full term must then intervene before the same individual can again hold that office.

limitations set forth in the Constitution on the Judiciary.[2]

The opinion of the Attorney General notes that express constitutional authority for term limits as to some specific offices implies awareness by the constitutional convention of other instances where no constitutional limits are authorized. In Latin legal terminology, "exspressio unius, exclusio alterius," meaning inclusion of one implies exclusion of others.

The opinion concludes on this topic by stating that the Constitution would have to be amended to permit term limits in the context of state legislative office :

> Such limitations cannot abe imposed by law enacted by the legislature or by the people through the initiative process. See generally 63A AmJur 2d, Public Officers and Employees, Section 156.

The reasoning of the above quoted opinion has obvious relevance when applied to the arena of municipal offices. The only apparent basis for arguably distinguishing municipal offices from state offices is the pervasive authorization for state laws regulating municipalities - Article X, Section 7, quoted above. Perhaps there could also be theoretical argument based on the power granted constitutionally to home rule charter municipalities. Whatever merit such arguments may have, Wasilla is a general law municipality, not home rule charter.

ISSUE

In light of the above contradictory authority, the determinative issue is to ask how the Alaska Supreme Court views the importance of the right to run for office. If that right is considered a normal aspect of the powers and administration of local government, an approved initiative or ratified ordinance limiting consecutive terms would be upheld. Alternatively, if the Court in Alaska were to view the right to run for office as fundamental, the Court is likely to insist upon express constitutional authority to validate preclusion from holding office.

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[2]Article IV, Section 2(b) prohibits justices of the Supreme Court from serving two consecutive terms as Chief Justice.

PELOZA V. FREAS

There is no Alaska Supreme Court case directly on point - are municipal term limits constitutional? However, a **very** recent Alaska Supreme Court decision offers compelling guidance.

Peloza v. Freas, 871 P. 2d 687, (Ak. 1994) considered a Kenai charter - imposed three year residency requirement for city council candidates. The Alaska Court first noted that Federal Constitutional considerations, standing alone, would likely only result in "rational-basis" scrutiny, the relatively low level of constitutional review employed by the Pennsylvania Court in City of Bethlehem v. Marcincin, *supra*. However, the Alaska Court went on to note that Alaska's Constitution, "...in contrast, requires much greater scrutiny. See Alaska Pac. Assurance Co. v. Brown, 687 P. 2d 264, (Alaska 1984)." The Alaska Supreme Court employs a sliding scale of review. If the subject involves fundamental rights or suspect classifications, heightened scrutiny will apply :

> As the level of scrutiny selected is higher on the [sliding] scale, we require that the asserted governmental interests be relatively more compelling and that the legislation's means-to-end fit be correspondingly closer. On the other hand, if relaxed scrutiny i s indicated, less important governmental objectives will suffice and a greater degree of over/or underinclusiveness in the means-to-end fit will be tolerated. Peloza, *supra*, Citing State v. Ostrosky, 667 P. 2d 1184, 1193 (Alaska 1983).

Peloza, *supra*, went on to apply strict judicial scrutiny citing Castner v. City of Homer, 598 P. 2d 953 (Alaska 1979) for the proposition "that the right to seek elective public office should be treated as fundamental and subject to strict scrutiny." Peloza, *supra*, extends the concept of strict scrutiny, known to apply to the right to run for State legislative office, to municipal offices.

There is an obvious reason to believe term limits would not survive strict scrutiny. If repeat office holders are not a good idea, the far less restrictive alternative of not voting for a repeat office holder is always available to the electorate.

There is also good reason to believe that City of Bethlehem v. Marcincin, *supra*, would no longer be viewed as good law even in lower 48 jurisdictions that apply a more relaxed level of review to matters involving eligibility for public office. Thorsted v. Gregoire, 1994 WL 37883 (WD Wash) is a February 10, 1994 decision of the Federal District Court. The case consolidated a number of lawsuits arising from a Washington law limiting the number of terms that could be held by a U.S. Senator or Representative from the State of Washington. What distinguishes this case is the number of parties, the quality of the legal representation of those parties, and the care that the Washington Court devoted to analyzing the issue. Based on the Federal 14th Amendment (equal protection) and the Federal First Amendment (free speech), the Washington Court concluded term limits were unconstitutional in the absence of express constitutional authority.

The basis of the Washington decision, free speech and equal protection, is likely to be given strong support by the Alaska Supreme Court as indicated by Vogler v. Miller, 651 P.2d 1, (Alaska 1982) which involved the number of signatures that an independent candidate needed to obtain in order to be placed on a gubernatorial ballot. The rationale of the opinion makes clear that the Alaska Court views as fundamental the right to associate freely in pursuit of political belief. It is noteworthy that Vogler, *supra*, was expressly based on both free speech and equal protection considerations, the two grounds employed by the Washington Court in Thorsted, *supra*.

These authorities establish that Alaska would follow Thorsted, *supra*, holding that term limits are unconstitutional in the absence of express constitutional authority.

CONCLUSION

In view of Peloza, *supra*, and Vogler, *supra*, clear authority exists that the Supreme Court of Alaska views the right to run for municipal office as fundamental. Given the level of review applicable to matters that are deemed fundamental, I consider it clear that Alaska Courts would rule term limits invalid unless premised on express constitutional authorization.

Consequently, I view the proposed term limits initiative as unenforceable. I recommend that the term limits initiative not be certified for preparation of a petition.

Sincerely,

Richard Deuser

cc : Mayor John Stein