

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

DEBORAH McISAAC,

Plaintiff,

-vs-

CITY OF BALTIC & LINDA HUNNEL, in
her official capacity as Finance Officer for
the City of Baltic,

Defendant,

and

SOUTH DAKOTANS FOR
TRANSPARENT GOVERNMENT,

Intervenor.

49CIV23-1333

**OPENING BRIEF OF
INTERVENOR ON SUFFICIENCY
OF GROUNDS FOR
PETITION FOR RECALL**

Comes now the Intervenor, South Dakotas for Transparent Government (“SDTG”), and for its brief on sufficiency of grounds for Petition for Recall, states as follows:

BACKGROUND:

On May 12, 2023, a Petition for Recall in the Municipality of Baltic (the “Petition”) was filed with the Finance Office of the City of Baltic to recall Deborah McIsaac (“McIsaac”) as Mayor of Baltic. The petitions, turned in by members of SDTG, contained one hundred thirty six (136) valid signatures and listed reasons the group requested the recall of Mayor McIsaac on the grounds of misconduct in office, gross incompetence and gross partiality. (Petition Attached as Exhibit A). On the same date, the Finance Officer for the City of Baltic, Linda Hunnel, certified that the Petition signature requirement of SDCL 9-13-30 was met and stated the election would be set by

the Baltic City Council at their next scheduled Board meeting. (Letter attached as Exhibit B).

On May 17, 2023, McIsaac filed a Complaint against the City of Baltic & Linda Hunnel, in her official capacity as Finance Officer for the City of Baltic, asking for a declaratory judgment under SDCL 15-6-57 alleging that the Petition is legally insufficient under SDCL 9-13-30. The Complaint states that the Petition failed to contain a specific statement of the grounds on which removal is sought. The relevant Petition language states:

WE, THE UNDERSIGNED qualified voters of the municipality of Baltic, State of South Dakota, petition for a candidate election to be held for the purpose of recalling Deborah McIsaac from the office of Mayor, based on the following grounds:

The citizens of Baltic, per the authority listed in SDCL 9-13-30, seek the recall of Mayor McIsaac on grounds of misconduct in office, gross incompetence, and gross partiality due to the following actions, which are sourced from sworn testimony and official documents:

1. Harassing and/or threatening city employees both before the election and after the election.
2. Improper use of City property/funds during a personal “press conference” by the utilization of City resources during a campaign event and through participation by City employees and appointed officers, upon request.
3. Failing to present public information in a true and correct manner to members of the public related to development project within the city and ongoing litigation.
4. Utilizing her office to advance her own political interests and the financial interests of others while failing to disclose a potential conflict of interest,
5. Harassing and intimidating conduct towards members of the public that would constitute gross incompetence by failing to maintain decorum.

Mayor McIsaac’s actions have demonstrated a clear pattern of misconduct in office and gross partiality, which is why her removal from office is requested.

On May 24, 2023, SDTG filed a Motion to Intervene pursuant to SDCL 15-6-24(a), or in the alternative, SDCL 15-6-24(b) in hopes of protecting the will of the residents of the City of Baltic who signed the petitions and allowing the recall election to proceed. The Court entered its Order allowing the intervention on May 30, 2023.

ISSUE

Are the grounds listed in the Petition for Recall filed on or about May 12, 2023 specific enough to satisfy the requirements contained within SDCL 9-13-30?

ANSWER

SDTG believes this Court has an obligation to protect the will of the registered voters of the City of Baltic who have signed the Petitions for Recall and that there exists sufficient detail or specificity within the stated grounds for removal in the Petitions to allow the recall election to proceed.

ARGUMENT

South Dakota Codified Law 9-13-30 sets forth the procedure for the recall process of an elected municipality official. SDCL 9-13-30 states, that the “allowable grounds for removal are misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression, or gross partiality.” It further states “[t]he petition shall contain a specific statement of the grounds on which removal is sought.” SDCL 9-13-30. There exists very little direction within South Dakota jurisprudence on this issue but the law from this jurisdiction and others show that the Court has an

obligation to ensure the will of the voters is protected and there exists enough specificity in the Petitions to put the Mayor on notice of the voters' concerns with her behavior.

1. The Court has an obligation to ensure the will of the voter is protected.

“Many courts have held that when the will of the voters can be ascertained, courts should uphold the will of the voters.” Sorenson v. Rickman, 486 N.W.2d 259 (S.D. 1992) (citing Neal v. Board of Supervisors, Clarke County, 243 Iowa 723, 53 N.W.2d 147, 150 (Iowa 1952); Schmitt v. McLaughlin, 275 N.W.2d 587, 592 (Minn. 1979); Town of Nasewaupee v. Sturgeon Bay, 146 Wis. 2d 492, 431 N.W.2d 699, 701 (Wis.App. 1988); [**8] Stahovic v. Rajchel, 122 Wis. 2d 370, 363 N.W.2d 243, 246 (Wis.App. 1984)). In Sorenson, the court reversed an order issuing a writ of prohibition that would have prohibited submission of an annexation question to the voters of the City of Deadwood. *Id.* The will of the voters was a critical factor in the Court’s decision. *Id.* The South Dakota Supreme Court was clear in its direction that the voters must be heard. One hundred thirty six (136) registered voters of the City of Baltic have spoken and they have requested a recall election for the position of Mayor in their City.

The South Dakota Supreme Court has also stated “[t]he basic question in an election contest is whether the election is a free and fair expression of the will of the voters despite the irregularities.” Abbott v. Hunhoff, 491 N.W.2d 450, 452 (S.D. 1992)(quoting Larson v. Locken, 262 N.W.2d 752, 753 n.1 (S.D. 1978)). Abbott was factually about election irregularities and was an election contest, not a recall election. However, the will of the voter was paramount in that decision as it should be in our case and it provides good guidance here. Further, in a dissenting opinion in the case of

Heinemeyer v. Heartland Consumers Power District, 757 N.W.2nd 772, 2008 S.D. 110, Justice Gilbertson extended that rationale more broadly when he discussed protecting the will of the voters of the State of South Dakota. Justice Gilbertson states: “Our state affords great protection to a citizen’s voting franchise.” 757 N.W.2d 772, 783, 2008 S.D. 110, ¶ 44. While our case law doesn’t particularly discuss protecting the will of the voter in recall elections, this guidance in election contests provides the pathway for deciding the issue at hand.

As stated, while South Dakota hasn’t discussed the issue, many other states have specifically discussed the principle that recall statutes are to be broadly and liberally construed as to protect the will of the voters. In the Alaska Supreme Court decision of State v. Recall of Dunleavy, the Court stated that they “liberally construe the recall statutes so that the people are permitted to vote and express their will.” 491 P.3d 343, 357, citing Meiners v. Bering Strait School District, 687 P.2d 287, 296. In Nebraska, the Courts have ruled that while they cannot ignore the express requirements, they “must be liberally construed to effectuate the purpose the statute is intended.” Quigley v. Lebsack, 362 N.W.2d 31, 33 (1985). Finally, in Wisconsin, the Courts in that State have been unwavering in the “principle that statutory provisions relating to recall are to be liberally interpreted in favor of the electorate.” In Re Carlson, 433 N.W.2d 635 (1988), citing In Re Delafield City Official, 217 N.W.2d 277, 283 (1974). The Court must bring this line of thinking to this South Dakota action and protect the rights of these who would like to see change in Baltic.

While there is little guidance on protecting the will of the voter as it relates to recall petitions in South Dakota, there is significant direction in this area in other

aspects of election laws and in other jurisdictions and it is clear the proposition that every voter's opportunity to participate in fair elections should be protected. The free and fair expression of the required number of voters in the City of Baltic is to have a recall election. The State of South Dakota provides these voters the right to have their voices heard. This Court has an obligation to protect the rights of the signers of the Petitions.

2. The grounds stated in the Petition for Recall are specific enough to satisfy the statutory obligation contained within SDCL 9-13-30.

There exists limited guidance on removing public officials from office in South Dakota and our Courts have not decided cases on the specificity of the grounds in a petition for recall. However, there is persuasive authority on the sufficiency of grounds issue in other jurisdictions.

There are two cases that relate well to the present case. In Massachusetts, voters initiated petitions to recall two members of the Board of Selectmen "on the grounds of misfeasance and neglect of duty" in their roles as members of the board. King v. Shank, 92 Mass. App. Ct. 837, 96 N.E.3d 181 (2018). The two members sought an injunction to enjoin the recall election because the statements were not specific ¹. *Id.* The Court disagreed and stated that case law supported "a largely procedural approach to judicial

¹ c. 27 of the Acts of 1995, "An Act Providing for Recall Elections in the Town of Townsend" (act), which provides that an elected official who has been in office for at least four months, and who still has at least six months remaining in his or her term, may be subject to recall. St. 1995, c. 27, § 1. Section 2 of the act sets forth the process for recall, which includes a petitioner filing an affidavit with the town clerk, setting forth the name of the official to be recalled along with a statement of the grounds for recall. The petition must be supported by the signatures of at least ten per cent of registered voters (including 125 from each precinct) and returned to the town clerk within twenty-one days.

review of recall petitions and elections...the role of courts in policing recall elections generally is limited to ensuring the integrity of the process. *Id.*

The Court turned its attention to the specificity of grounds and stated “[o]ur decision in Mieczkowski v. Registrars of Hadley, 53 Mass. App. Ct. 62, 64-65, 756 N.E.2d 1190 (2001), typifies this procedural approach. The Hadley recall act provided that an elected official “may be recalled ... for reason of lack of fitness, incompetence, neglect of duties, corruption, malfeasance, misfeasance, or violation of oath.” The affidavit in support of recall simply restated these grounds without any specific factual allegation. The Massachusetts Court rejected the argument that the affidavit needed to be more specific.” *Id.* Their statute was similar to SDCL 9-13-30 and that Court stated that an interpretation of that statute that would allow an elected official to challenge the sufficiency of the grounds for recall would “mire the process in litigation” and undermine the statutes purpose of having prompt recall elections. *Id.*

A case in Michigan is even more on point with the present case. Molitor v. Miller, 102 Mich. App. 344, 301 N.W.2d 532 (1980). There, a recall petition was filed against a township supervisor and the supervisor pursued injunctive relief on the basis that the petition was too vague. *Id.* Specifically, the language in the petition was:

"Nonfeasance of office:

"Failure to conduct township business for the good and welfare of all residents:

"Conducting secret meetings in violation of the open meetings act:

"Failure to follow procedures set forth in the township officers manual: (appointments of committees, boards, etc.)"

Their statute ² was similar to SDCL 9-13-30 in that it required that a petition “for the recall of an officer shall...state clearly the reason or reasons” for the recall. *Id.* Referring directly to the statements of specificity, that Court said “[i]t is not insufficient because it does not allege the time, person, and occasion involved...it would impose too great a burden on recall proceedings to require meticulous and technical detailed statement of the charges.” *Id.* Lastly, that Court stated that “[i]n determining the validity of the petition, we review the statements as a whole. That is, if any one allegation contained in the petition is sufficiently clear, then the petition must be upheld.” *Id.* (quoting Amberg v. Welsh, 325 Mich. 285; 38 N.W.2d 304 (1949))

American Law Reports (ALR) has also published extensive writing on the subject. Sufficiency of Particular Charges As Affecting Enforceability of Recall Petition, 114 A.L.R.5th 1. It states that “[a]ll that is required concerning the statutory requirement of clarity regarding a recall petition is that the reason for recall be stated with sufficient clarity to enable the officer and electors to identify the transaction and know the charges made in connection therewith.” M.C.L.A. § 168.952(1)(c). (citing Donigan v. Oakland County Election Com'n, 279 Mich. App. 80, 755 N.W.2d 209 (2008)). For a recall petition to be sufficient, the charge “must be specific enough to give the elected official

² § 168.952. Recall petition under MCL 168.960; requirements; submission to board of county election commissioners; determination that reason for recall is factual and of sufficient clarity; notice; meeting; presentation of arguments; appeal; validity of petition.

Sec. 952.

(1) A petition for the recall of an officer listed in section 960 must meet all of the following requirements:

(a) Comply with section 544c(1) and (2).

(b) Be printed.

(c) *State factually and clearly each reason for the recall.* Each reason for the recall must be based upon the officer’s conduct during his or her current term of office. The reason for the recall may be typewritten.

(d) Contain a certificate of the circulator. The certificate of the circulator may be printed on the reverse side of the petition.

(e) Be in a form prescribed by the secretary of state.

meaningful notice of the particular conduct challenged and why it is grounds for recall. *Id.* (citing Matter of Recall of Boldt, 386 P.3d 1104 (Wash. 2017)). On the wording of the grounds, “[b]ecause of how the petitions were worded, the court continued, the petitioners signed the recall petitions because they agreed with all of the grounds of recall stated therein. If a potential signer disagreed with one or more of the grounds, the court concluded, then he or she would not have signed the petition. *Id.* (citing Reynolds v. Figge, 28 Kan. App. 2d 635, 19 P.3d 193, 151 Ed. Law Rep. 617 (2001)).

The statements on the grounds for recall are sufficiently specific. SDCL 9-13-30 requires only a “specific statement of the grounds on which removal is sought” and those specific statements were included in the Petition. The statements were sufficient to give any Baltic voter a reasonable idea as to what the grounds for the Petition were. For example, the first statement is “Harassing and/or threatening city employees both before the election and after the election.” Short of giving detailed accounts of actual instances, that is sufficient to allow a Baltic voter to decide if they agree or disagree with the statement. This is supported by the ALR, which states that “petitioners signed the recall petitions because they agreed with all of the grounds of recall stated therein. If a potential signer disagreed with one or more of the grounds...then he or she would not have signed the petition.” The required number of signatures on the Petition is proof of the signers’ agreement with the charges in the Petition.

The Molitor court decided that statements more general than these, like “[F]ailure to conduct township business for the good and welfare of all residents” were sufficiently specific. And like Molitor the statement of the grounds here “it is not insufficient because it does not allege the time, person, and occasion involved”. The

King court agreed with this position when they said a recall affidavit simply restating the grounds contained in the statute without specific factual allegations was sufficiently specific. This Petition “enabled the officer and electors to identify the transaction and know the charges made in connection therewith” with sufficient clarity as described in the ALR.

Even if the statute was to require more specificity than the King and Molitor courts, the present Petition meets that requirement. The second statement of the grounds for recall states “[I]mproper use of City property/funds during a personal ‘press conference’ by the utilization of City resources during a campaign event and through participation by City employees and appointed officers, upon request.” Under SDCL 12-27-20, “[t]he state, an agency of the state, and the governing body of any county, municipality, or other political subdivision of the state may not expend or permit the expenditure of public funds for the purpose of influencing the nomination or election of any, or for the petitioning of a ballot question on the ballot or the adoption or defeat of any ballot question...” This statement of grounds meets all possible criteria for specificity at even the most stringent levels. Minus the date, it specifies the entire act of misconduct by Mayor. It specifies the people involved and the occasion of the alleged misconduct. Like Molitor, the statements, reviewed, as a whole, meet any specificity requirement because #2, at least, meets that requirement. That court said it best when it stated “if any one allegation contained in the petition is sufficiently clear, then the petition must be upheld.” Any more stringent requirements on the sufficiency of the grounds will “mire the process in litigation,” the likes of which the King court sought to guard against.

CONCLUSION

The Petition is proof of the will of the voters in Baltic. In Sorenson, the court stated that “when the will of the voter can be ascertained, courts should uphold the will of the voter.” Here, the voters will has been ascertained. The voters of Baltic wish to have a recall election. The voters who signed the Petition agreed that the statements were specific enough that they believe a recall election is proper. This is not like in Abbott, where there were questions as to what the voter wanted. There, the court was unable to find out which way the voter voted. Here, there are no questions as to the wishes of the voters that signed the petition. Their wishes are ascertained by their signatures on the Petition. They want a recall.

One of the fundamental principles of our government is respecting the will of the voter. The voters of Baltic have spoken, and they are in favor of a recall election. Like Abbott, the Petition, taken as a whole, is a “free and fair expression of the will of the voters.” Ignoring the will of the voter can lead to disillusionment, apathy, and frustration between the citizens and their government. That is why courts like King take a largely procedural approach when policing recall elections. The roles of those courts “generally is limited to ensuring the integrity of the process.” Here, all steps of the process were followed according to SDCL 9-13-30, and the citizens of Baltic spoke and said that they wish to have a recall election. To not allow the election to proceed would go against the will of the voters of Baltic. Therefore, the recall election should be allowed to proceed.

DATED this 2nd day of June, 2023.



Drew Duncan
THE DUNCAN LAW FIRM, LLP
515 W. Landscape Place, Suite 101
Sioux Falls, SD 57108
(605) 361-9840
dcduncan@ddlawsd.com
Attorney for Intervenor

CERTIFICATE OF SERVICE

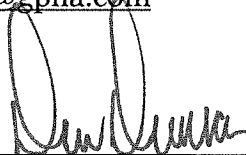
The undersigned hereby certifies that the Intervenor's Opening Brief on Sufficiency of Grounds for Petition for Recall was electronically filed and served through the Odyssey File and Serve System upon counsel for the Plaintiff, to-wit:

Lisa K. Marso lkmарso@boycelaw.com

and upon counsel for the Defendants, to-wit:

Sara Frankenstein sfrankenstein@gpna.com
Aidan Goetzinger agoetzinger@gpna.com

on this 2nd day of June, 2023.



Drew Duncan



PETITION FOR RECALL IN THE MUNICIPALITY OF BALTIC

MAY 12 2023
BY: _____

WE, THE UNDERSIGNED qualified voters of the municipality of Baltic, state of South Dakota, petition for a candidate election to be held for the purpose of recalling Deborah McIsaac from the office of Mayor, based on the following grounds.

The citizens of Baltic, per the authority listed in SDCL 9-13-30, seek the recall of Mayor McIsaac on grounds of misconduct in office, gross incompetence, and gross partiality due to the following actions, which are sourced from sworn testimony and official documents:

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1. Harassing and/or threatening city employees both before the election and after the election,
2. Improper use of City property/funds during a personal "press conference" by the utilization of City resources during a campaign event and through participation by City employees and appointed officers, upon request,
3. Failing to present public information in a true and correct manner to members of the public related to development projects within the city and ongoing litigation,
4. Utilizing her office to advance her own political interests and the financial interests of others while failing to disclose a potential conflict of interest,
5. Harassing and intimidating conduct towards members of the public that would constitute gross incompetence by failing to maintain decorum.

Mayor McIsaac's actions have demonstrated a clear pattern of misconduct in office and gross partiality, which is why her removal from office is requested.

INSTRUCTIONS TO SIGNERS:

1. Signers of this petition must individually sign their names in the form in which they are registered to vote or as they usually sign their names.
2. Before the petition is filed, each signer or the circulator must add the residence address of the signer and the date of signing. If the signer is a resident of a second or third class municipality, a post office box may be used for the residence address.
3. Before the petition is filed, each signer or the circulator must print the name of the signer in the space provided and add the county of voter registration.
4. Abbreviations of common usage may be used. Ditto marks may not be used.
5. Failure to provide all information requested may invalidate the signature.

	NAME	RESIDENCE	DATE/COUNTY
✓	<i>[Signature]</i> SIGN PRINT Jamie Ingemansen	503 Adam Ave Baltic SD 57003	4/11/23 Minnehaha
✓	<i>[Signature]</i> SIGN PRINT Adam Petersen	610 Meadow St Baltic SD 57003	4/11/23 Minnehaha
✓	<i>[Signature]</i> SIGN PRINT Doug Buens	131 Marefield Bvess Baltic S.D. 57003	4/11/23 Minnehaha
✓	<i>[Signature]</i> SIGN PRINT Tiffany Keller	610 Meadow St Baltic SD 57003	4/11/23 Minnehaha
✓	<i>[Signature]</i> SIGN PRINT Tiffany Keller	1006 Elizabeth Ave Baltic SD 57003	4-11-23 minnehaha
✓	<i>[Signature]</i> SIGN PRINT Dana Keller	606 Elizabeth Avenue Baltic, SD 57003	4-11-23 Minnehaha
✓	<i>[Signature]</i> SIGN PRINT Sill Anters	507 Adam Ave Baltic, SD 57003	4-11-23 Minnehaha
	NAME	RESIDENCE	DATE/COUNTY

SIGN	STREET AND NUMBER OR RURAL ROUTE AND BOX NUMBER	DATE OF SIGNING
1 SIGN Tricia Dahsner PRINT Tricia Dahsner	500 S. 6th St. CITY OR TOWN Baltic SD 57003	4-11-23 COUNTY OF REGISTRATION minnehaha
2 SIGN Megan Hardy PRINT Megan Hardy	510 S 6th St CITY OR TOWN Baltic SD 57003	4/11/23 COUNTY OF REGISTRATION minnehaha
3 SIGN Tom Baatz PRINT Tom Baatz	615 Meadow St CITY OR TOWN Baltic SD	4-11-23 COUNTY OF REGISTRATION Minn.
4 SIGN Jessica Fredrickson PRINT Jessica Fredrickson	605 Meadow St CITY OR TOWN Baltic SD 57003	4-11-2023 COUNTY OF REGISTRATION minnehaha
5 SIGN Lenny Fredrickson PRINT LENNY FREDRICKSON	605 MEADOW ST. CITY OR TOWN BALTIC SD 57003	4-11-2023 COUNTY OF REGISTRATION MINNEHAHA
6 SIGN Clay Ochener PRINT Clay Ochener	500 S 6th St CITY OR TOWN Baltic SD 57003	4-11-2023 COUNTY OF REGISTRATION minnehaha
7 SIGN Dawn Wendland PRINT Dawn Wendland	411 Kringen Ave CITY OR TOWN Baltic SD 57003	4-11-2023 COUNTY OF REGISTRATION minnehaha
8 SIGN Jacie Wendland PRINT Jacie Wendland	411 Kringen Ave CITY OR TOWN Baltic SD 57003	4-11-2023 COUNTY OF REGISTRATION minnehaha
9 SIGN Myles Peterson PRINT Myles Peterson	514 Anna Ave CITY OR TOWN Baltic, SD, 57003	4-11-23 COUNTY OF REGISTRATION minnehaha
10 SIGN Daniel Hotzler PRINT Daniel Hotzler	525 MEADOW ST CITY OR TOWN BALTIC, SD, 57003	04/11-23 COUNTY OF REGISTRATION minnehaha
11 SIGN Shelby Tidemann PRINT Shelby Tidemann	22C 6th St CITY OR TOWN Baltic, SD 57003	04.14.23 COUNTY OF REGISTRATION minnehaha
12 SIGN Nicholas Langford PRINT Nicholas Langford	626 S 6th St. CITY OR TOWN Baltic, SD	4-19-23 COUNTY OF REGISTRATION minnehaha
13 SIGN Christy Canaland PRINT Christy Canaland	620 S. 6th St CITY OR TOWN Baltic, SD	4-19-23 COUNTY OF REGISTRATION Minnehaha

VERIFICATION BY PERSON CIRCULATING PETITION

INSTRUCTIONS TO CIRCULATOR: This section must be completed following circulation and before filing.

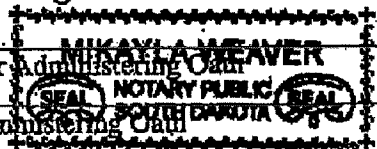
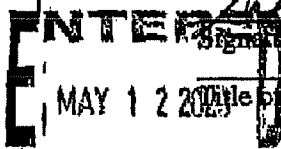
12
Jamie Ingemansen **503 Adam Ave** **Baltic SD**
 Print name of the circulator Residence Address City State

I, under oath, state that I circulated the above petition for recall, that each signer personally signed this petition in my presence, that either the signer or I added the printed name, the residence address of the signer, the date of signing, and the county of voter registration, that I attest the legality of the signatures and that each person signing this petition is a qualified voter of the municipality of Baltic.

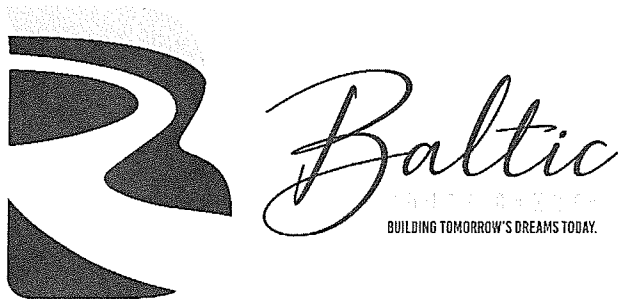
Jamie Ingemansen
 Signature of Circulator

Sworn to before me this 9th day of MAY, 2023.
 (Seal)

My Commission Expires June 2, 2027
 Form Revised 2001 - 5:02:08:17



BY: _____



May 12, 2023

Drew Duncan
515 Landscape Place Ste 101
Sioux Falls, SD 57108

Dear Mr. Duncan,

As Finance Officer of the City of Baltic, I am sending this letter to inform you that I have accepted and filed the Recall Petition of Deborah McIsaac that Noah Greble and Margaret Samp presented to me on May 11, 2023. I have determined that the number of petition signatures satisfies the requirement of SDCL 9-13-30.

The Recall Petition of Deborah McIsaac will be presented to the Baltic City Council on May 16, 2023, at their regular monthly meeting, held at 7:00 PM in the Baltic City Hall.

Thank you for your cooperation in this matter.

Sincerely,

Linda D. Hunnel
Finance Officer
City of Baltic

