MUNICIPALITY OF ANCHORAGE
MAYOR DAVE BRONSON

OFFICE OF THE MAYOR

Date: July 16, 2022

To: Anchorage Assembly

From: Mayor Dave Bronson

Subject: Veto of Ordinance No. AO 2022-60(S), as amended

Pursuant to Section 2.30.100 of the Anchorage Municipal Code (AMC) and Section 5.02 of the Municipal Charter, I hereby veto AO 2022-60(S), as amended, which passed at the Assembly's regular meeting of July 12, 2022.

Since its adoption in 1975, the Anchorage Charter largely preserves to the voters the power to install and remove government officials who serve in the highest levels of Municipal government. A very narrow carve-out from that retained power is found in Charter Section 7.01, which provides that an elective office holder may be removed from office, by means other than the ballot box, if that office holder has breached the public trust.

When drafting the Charter, the Charter Commission recognized that there needs to be a procedure through which a determination can be made as to whether a "breach of the public trust" has occurred. Consequently, the Charter requires the Assembly to develop such a procedure "including provision for notice, a complete statement of the charge, a public hearing conducted by an impartial hearing officer, and judicial review". When directing that the Assembly is to establish procedural safeguards, however, the Charter does not authorize the Assembly to create additional substantive offenses for which an elected official may be removed from office. Nor does it authorize the Assembly to violate other Charter provisions or otherwise act unconstitutionally.

I am aware that Assembly members have used this Ordinance as a vehicle to try to send chills through the current administration, and that some members have publicly acknowledged that the Ordinance was introduced as a means to erect boundaries intended to circumscribe the legitimate exercise of executive power. I have heard the arguments and discussions that were presented for and against the ordinance, and well understand the disdain that was repeatedly expressed during public testimony. That I sympathize with the public's frustration, however, is not a reason for my decision to veto this legislation. Nor do I veto this Ordinance because the optics are bad or because other elected officials sometimes act in bad faith. I do not veto because the Ordinance arises from a partisan effort to attack the executive branch and certain policies with which various Assembly members disagree. To the contrary, I veto AO 2022-60(S) because it creates specific conflicts with the Municipal Charter, and is therefore unconstitutional.

Where the Ordinance goes beyond adopting a procedure to be followed in removing elected officials, and defines conduct as being an offense for which removal is warranted, the Ordinance impermissibly crosses the line from procedure to substance. In this regard, as to each of four groups of elected officials, the Ordinance states that enumerated conduct "shall"

be a breach of the public trust. The use of the word "shall" impermissibly removes discretion on the part of the decisionmakers. Thus, for example, with respect to mayors, while a "substantial" breach of a Code-imposed duty (i.e., a duly enacted ordinance) is deemed a breach of the public trust, any failure to execute a directive of a duly enacted ordinance, regardless of whether the failure is substantial or insubstantial, is also deemed a breach of the public trust. It does not matter if the "duly enacted ordinance" that the theoretical mayor failed to follow is itself unconstitutional or otherwise suffering from some infirmity that may create a duty for a mayor to refuse to adhere to its directives. Under the plain language of the proposed ordinance, the decisionmaker must find that there has been a breach of the public trust if the referenced conduct technically occurred. This is especially so with respect to mayors, assembly members, and members of supervisory boards, in that Sections 2(F), 3(G), and 4(G) of the Ordinance require the fact finder to determine "whether those actions alleged constitute a breach of the public trust ***as set forth in subsection A. of this section***", which is to say, as provided in the relevant Subsections A, that the conduct at issue "shall" be a breach.[1]

The fact that different conduct is proscribed for different officials also reveals it to be impermissibly substantive, and not merely an exemplification of breaches of the public trust. For example, it is necessarily a breach of the public trust under the Ordinance for a mayor or a member of a supervisory board to order an employee to undertake an unlawful act, but the identical conduct, if committed by an Assembly member or a member of the School Board, is not met with the same proscription.

It is also instructive that with respect to members of supervisory boards, the requirement in Section 1 of the Ordinance that they must not fail to attend three consecutive meetings without excuse, and that they must not fail to attend 2/3 of the meetings in any calendar year without excuse, is expressly stated as NOT being a breach of the public trust, but rather a Code imposed requirement that is "in addition" to the requirements of Charter Section 7.01. This is inconsistent with the assertion in Sections 4 and 5 that a failure to attend meetings is necessarily a breach of the public trust, and further reveals the Ordinance to be something other than a mere procedure for removing elected officials who have breached the public trust.

When the plain language of the Ordinance provides that the decisionmaker will not be permitted to decide in each instance whether the conduct charged against an elected official is in fact a breach when considered in its rightful context, I have no choice but to veto the Ordinance. As well, I must recognize that the ordinance is arbitrary and capricious when it defines specific conduct as a breach of the public trust only when committed by specified elected officials but not others. I cannot ignore the constitutional requirements of equal protection as it applies here, and so must veto this Ordinance.

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1 Curiously, although Section 5(A) provides that specified conduct on the part of School board Members "shall" be a breach, Section 5(G) requires the fact finder to determine only "whether those actions alleged constitute a breach of the public trust" without a duplicate reference to the mandate that such conduct "shall" be found to be a breach.

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A separate constitutional issue is presented by the Ordinance in that Charter Section 5.04 expressly provides that the municipal attorney "shall advise and assist the municipal government on legal matters". Section 3 of the ordinance purports to give the Assembly the power to appoint "an impartial third-party attorney" as a special counsel to substitute for the municipal attorney to "review the accusation document for legal sufficiency". This provision is in conflict with Charter Section 5.04 and the separation of powers doctrine.

I have no doubt that the Assembly may hire its own counsel to provide it with advice when it is carrying out its own duties. What it may not permissibly do, however, is require that the Municipal Attorney stand aside while some outside counsel is arbitrarily substituted for the Municipal Attorney for the purpose of reviewing an accusation prepared by either the Board of Ethics or the Assembly.

It might subsequently be argued as an afterthought that some procedure is needed to address situations in which a Municipal Attorney has a conflict of interest that precludes him or her from reviewing an accusation. However, the Ordinance does not deal with instances in which there is a conflict of interest, but rather merely assigns to the Assembly the power to arbitrarily hire an attorney of its choosing to substitute for the Municipal Attorney.[2] That delegation of power is in conflict with Charter Section 5.04. The Ordinance must be vetoed accordingly.

I want to point out a technical error in the proposed Ordinance that has unknown effects. Who is allowed to submit an accusation document? And to whom does it go? Per Sections 2(B), 3(B), 4(B), and 5(B), proceedings for removal from office "may only be initiated by delivery of an accusation document to the municipal clerk." But the same sentence later states that the accusation document must specify if delivery is "to the assembly or the board of ethics." So, who delivers the accusation, and to whom is it delivered? Given the context and the pre-amendment Code sections applicable to Assembly Members and School Board Members, I think the Assembly intended that accusation documents could only originate *from* itself or the board of ethics, and further intended that the accusation document would then go *to* the municipal clerk. (This intention could be effected by changing the preposition "to" to "from" at, e.g., line 22, page 5, AO 2022-60(S)). But, by forcing through this ordinance on an expedited basis and circumventing a full debate among members, the Assembly's intent is unclear, and I must veto for vagueness.

After the floor amendments offered on Tuesday, I see that the Assembly recognizes that there are heightened due process concerns regarding the removal of elected officials. That is how I understand the higher evidentiary standard of "clear and convincing evidence" effected by Zaletel Amendment No. 4, and the unnumbered Dunbar Amendment removing "official oppression" as a category of breach of the public trust. But these heightened due process considerations are inconsistent with the Assembly amending current Code to reduce the vote to submit an accusation from two-thirds to a simple majority.

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[2] It must be noted that in situations where the Assembly is the accuser, there is also a blatant conflict of interest in having the Assembly determine who should review the Assembly's accusation for legal sufficiency.

The Assembly has ignored its obligation under Charter Section 7.01 for 47 years. Clearly, where the Assembly leadership continually reports to the press that they have no intention to actually use this Ordinance any time soon, there is no basis upon which the Assembly can assert that there is a pressing need to get this legislation into Code, or to continue to be divisive in the process. The Assembly needs to step back and critically examine their effort, taking whatever additional time may be necessary to develop an ordinance that fully complies with the Charter. After 47 years, that amount of time will be negligible by comparison.

Accordingly, I am compelled to veto AO 2022 – 60(S), as amended.

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