

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA**

HARRY STOLTZFUS,

Plaintiff,

v.

CASE NO.: 2010-CA-004620

**ROBERT E. "BOB" CARTER, as Chair of
the Committee to Recall Harry Stoltzfus;
ALICE BAIRD, CMC, as City Clerk of Anna
Maria, Florida; and ROBERT "BOB" SWEAT,
as Manatee County Supervisor of Elections,**

Defendants.

_____ /

AMENDED COMPLAINT

Plaintiff, HARRY STOLTZFUS ("STOLTZFUS"), by and through his undersigned counsel, sues Defendants, ROBERT E. "BOB" CARTER ("CARTER"), ALICE BAIRD ("BAIRD") AND ROBERT "BOB" SWEAT ("SWEAT"), and alleges as follows:

1. This is an action for declaratory, supplemental and injunctive relief pursuant to Fla. Stat. §§86.011, 86.021, 86.061, 86.101 and 86.111 to review the legal sufficiency and validity of a municipal recall petition under Fla. Stat. §100.361 and to enjoin the municipal recall process as to STOLTZFUS.

2. STOLTZFUS respectfully requests an accelerated hearing and immediate adjudication and, in addition or in the alternative, temporary and permanent injunctive relief, all pursuant to Fla. Stat. §86.011 and Florida law.

3. The City of Anna Maria, Florida (the "City"), is a Florida municipal corporation lying and situated entirely within the boundaries of Manatee County, Florida.

4. STOLTZFUS is a duly elected Commissioner of the City, having been elected to office in November of 2009.

5. CARTER is a resident of Manatee County, Florida, and is the designated Chair of the recall committee organized under Fla. Stat. §100.361 for the purpose of seeking the recall of STOLTZFUS from his office as Commissioner and has filed a first recall petition (“Petition”) with BAIRD for that purpose.

6. BAIRD is the City Clerk of the City of Anna Maria, Florida

7. SWEAT is the Manatee County Supervisor of Elections.

8. BAIRD, in her capacity as City Clerk, has certain ministerial and non-discretionary duties in connection with the municipal recall process and as set forth in Fla. Stat. §100.361. These include the ministerial duty to receive CARTER’S Petition and to transmit the Petition to SWEAT, as Supervisor of Elections, for verification of signatures. If a statutorily sufficient number of signatures is verified by SWEAT, BAIRD has the further ministerial duties to serve a copy of the Petition upon STOLTZFUS, to receive a defensive statement from STOLTZFUS pursuant to Fla. Stat. §100.361(3), and to prepare a second recall petition that includes STOLTZFUS’ defensive statement for circulation by CARTER’S committee.

9. SWEAT, as Manatee County Supervisor of Elections, has certain ministerial and non-discretionary duties in connection with the municipal recall process, including the duty to verify the signatures on any recall petition as provided by law.

10. Neither BAIRD nor SWEAT has the power or legal authority to adjudicate or determine the legal sufficiency of the charges set forth in the Petition.

11. SWEAT certified the requisite number of valid signatures in CARTER'S Petition on May 21, 2010. See **Exhibit A** attached hereto.

12. BAIRD served the first recall Petition upon STOLTZFUS on May 21, 2010, and STOLTZFUS is allowed and required to serve his defensive statement on or before May 28, 2010. A copy of the Petition as served on STOLTZFUS is attached hereto as **Exhibit B**.

13. STOLTZFUS has a vested and constitutionally protected property right in the office Commissioner for its remaining term, unless that term is foreshortened in accordance with the provisions of Fla. Stat. §100.361 and the constitutional requirements of due process of law.

14. STOLTZFUS has the constitutional right to fair notice of the facts alleged against him by CARTER and CARTER'S Committee, so that he might have a meaningful opportunity to defend his right to hold office.

15. STOLTZFUS has the statutory right to fair notice of the facts alleged against him by CARTER and CARTER'S Committee, so that he might have a meaningful opportunity to prepare and file his defensive statement refuting those facts and allegations as contemplated by Fla. Stat. §100.361(3).

16. Moreover, the alleged grounds for recall stated in the Petition must be limited to the statutorily authorized grounds set forth in Fla. Stat. §100.361(2)(d), *i.e.*, malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or conviction of a felony involving moral turpitude. A recall petition that contains any allegations that are not sufficient to state one of the statutory grounds for recall is an invalid petition and renders the recall illegal. *Garvin v.*

Jerome, 767 So. 2d 1190 (Fla. 2000).

17. While the truth or falsity of a charge is ultimately for the electorate to decide and is not subject to judicial inquiry, the mere recital of a statutory ground, without allegations of conduct constituting that ground, is legally insufficient. *Bent v. Ballantyne*, 368 So. 2d 351 (Fla. 1979).

18. The Petition circulated by CARTER and CARTER'S Committee, and now served upon STOLTZFUS, alleges the grounds for recall as follows:

Malfeasance and misfeasance. Public records evidence that Stoltzfus violated the Government-In-The-Sunshine Law by holding electronic meetings and using liaisons to discuss public business which has not been advertised to the public. Stoltzfus' email communications contained libelous and inflammatory remarks concerning city staff, citizens and professional consultants, in violation of the City's stated policy against personal attacks, which expose the City to significant legal expense. He has also made numerous statements in violation of the requirement for a fair hearing in a quasi judicial proceeding, thus abusing his authority in order to achieve a desired result. Public records reveal that Stoltzfus employed "evasive devices" in order to intentionally circumvent State Statutes. Further, Stoltzfus conspired with others to deceive citizens and bring financial harm to the City of Anna Maria by encouraging potentially harmful and expensive legal action against the City while hiding his own involvement. His conduct cannot be legally justified and conflicts with State law.

19. The charges in the Petition, collectively, are vague and ambiguous, misstate applicable law, are internally inconsistent and fail to provide STOLTZFUS fair, reasonable and adequate notice as to whether any charge is alleged to be malfeasance or misfeasance. Because malfeasance and misfeasance are mutually exclusive concepts, no single act can constitute both malfeasance and misfeasance. The grounds for recall as stated in the Petition do not distinguish between malfeasance and

malfeasance, do not indicate which act or acts are alleged as malfeasance or misfeasance, and lump together all of the alleged grounds for recall as “Malfeasance and misfeasance,” which is a legal impossibility.

20. The charges in the Petition, examined individually, are not sufficient to demonstrate either malfeasance or misfeasance and are therefore invalid grounds for recall.

21. The charge that “Public records evidence that Stoltzfus violated the Government-In-The-Sunshine Law by holding electronic meetings and using liaisons to discuss public business which has not been advertised to the public,” is vague and ambiguous and fails to provide STOLTZFUS fair, reasonable and adequate notice of the alleged grounds for recall. The charge fails to specify when and where any such “electronic meetings” were held, when the other participants were in such “electronic meetings,” or the subject matter of any such “electronic meetings.” The prefatory language stating that “Public records evidence” such conduct is misleading to the extent it states as fact something that has not been determined or adjudicated by any court of competent jurisdiction and fails to specify what “public records” allegedly evidence that stated conduct. Moreover, this charge does not actually allege that STOLTZFUS did any of these things, but only that, in the opinion of the CARTER and his Committee, that “public records reveal” that these things occurred.

22. The charge that STOLTZFUS “violated the Government-In-The-Sunshine Law by . . . using liaisons to discuss public business which has not been advertised to the public” fails to allege either malfeasance or misfeasance, because it fundamentally mis-states the requirements of the Sunshine Law, *i.e.*, Fla. Stat. §286.011. First, the

Sunshine Law does not prohibit any discussions of public business by a commissioner with any person other than another member of the same collegial body, board or commissioner. Second, it does not preclude two commissioners from discussing “public business,” as charged in the Petition. Rather, it only precludes STOLTZFUS from discussing with another commissioner some matter on which foreseeable action will be taken by the City Commission. See, e.g., *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969). Finally, the Sunshine Law does not require that the “public business” be “advertised to the public.” The Sunshine Law requires only reasonable notice (not “advertisement”) of *meetings* to which it applies and does not require that the specific business or subject matter of any such meeting be included in any notice.

23. The charge that “Stoltzfus’ email communications contained libelous and inflammatory remarks concerning city staff, citizens and professional consultants, in violation of the City’s stated policy against personal attacks, which expose the City to significant legal expense,” is vague and ambiguous and fails to provide STOLTZFUS fair, reasonable and adequate notice of the alleged grounds for his recall. The unspecified reference to STOLTZFUS’ “email communications” is hopelessly vague and uncertain, as it could refer to any one or more of potentially hundreds if not thousands of emails. The allegation that these unspecified “email communications” contained unspecified “remarks” is equally inadequate to provide STOLTZFUS with any meaningful opportunity to respond to the charges.

24. The charge that these unspecified remarks in these unidentified emails were made “in violation of the City’s stated policy against personal attacks” is

inadequate to establish malfeasance. First, the City has no such policy that would relate to email communications by a commissioner. The City does have what is at most a voluntary “pledge of conduct” for its meetings that states, in part, that “we will avoid personal attacks.” According to the rules of order adopted by the City at its organizational meeting on November 12, 2009, violation of this pledge of conduct allows an objection based upon a point of order, but there is no other specified penalty or sanction for any violation of the pledge of conduct.

25. Even if the City had such a policy that applied to email communications by a commissioner, a violation of such a policy does not amount to malfeasance unless the conduct alleged is a violation of state law or the City Charter or ordinance. *Bent v. Ballantyne*, 368 So. 2d 351 (Fla. 1979). No provisions of state law, the City Charter or any ordinance of the City prohibits the conduct alleged in this charge, and it is therefore not malfeasance as a matter of law.

26. This charge also does not allege facts demonstrating misfeasance on the part of STOLTZFUS. STOLTZFUS has the express right under the City Charter to “closely scrutiniz[e] by questions and personal observations all aspects of City government operations so as to gain independent information to assist the members in the formulation of sound policies to be considered by the Commission.” City Charter §3.06(a). The charges do not reflect any conduct beyond that which is expressly permitted by the City Charter. Moreover, STOLTZFUS’ First Amendment rights to speak on matters of public concern cannot be limited and are not forfeited by virtue of his status as a Commissioner.

27. The charges also do not demonstrate that any allegedly “libelous and inflammatory” remarks contained in any unidentified emails were made by STOLTZFUS in connection with his official duties as Commissioner, as opposed to in his personal capacity as a citizen and resident of the City. Conduct unrelated to STOLTZFUS’ official duties cannot form a valid basis for recall.

28. The charge that “He has also made numerous statements in violation of the requirement for a fair hearing in a quasi-judicial proceeding, thus abusing his authority in order to achieve a desired result” is vague and ambiguous and fails to provide STOLTZFUS fair, reasonable and adequate notice of the alleged grounds for recall. In fact, this charge is a hybrid of two charges that were found to be too vague to constitute valid grounds for recall in *Garvin v. Jerome*, 721 So. 2d 1224, 1226 (Fla. 5 DCA 1998), *rev’d on other grounds*, 767 So. 2d 1190 (Fla. 2000).

29. This charge also does not otherwise demonstrate acts of malfeasance or misfeasance and is therefore inadequate grounds to support a recall.

30. The charge that “Public records reveal that Stoltzfus employed ‘evasive devices’ in order to intentionally circumvent State Statutes,” is vague and ambiguous and fails to provide STOLTZFUS fair, reasonable and adequate notice of the alleged grounds for recall. This charge fails to specify which “public records” allegedly “reveal” the charged conduct, or what “evasive devices” were allegedly utilized, or which “State Statutes” were supposedly “circumvented” and in what manner. The prefatory language stating that “public records reveal” such conduct is misleading to the extent it states as fact something that has not been determined or adjudicated by any court of competent jurisdiction and fails to specify what “public records” allegedly evidence the stated

conduct. Moreover, this charge does not actually allege that STOLTZFUS did any of these things, but only that, in the view of CARTER and his Committee, that “public records reveal” that these things occurred.

31. The charge that “Further, STOLTZFUS conspired with others to deceive citizens and bring financial harm to the City of Anna Maria by encouraging potentially harmful and expensive legal action against the City while hiding his own involvement,” is vague and ambiguous and fails to provide STOLTZFUS fair, reasonable and adequate notice of the alleged grounds for recall. The charge fails to allege how STOLTZFUS supposedly “conspired” and with whom, how citizens were allegedly deceived and about what, how the undescribed “legal action” would result in “financial harm” to the City, how or why the unspecified “legal action” would be “harmful” to the City or how “expensive” such undescribed legal action might be. Moreover, the charge that STOLTZFUS encouraged “potentially harmful and expensive” legal action against the City is a statement of opinion and not an allegation of fact with respect to the unspecified legal action.

32. The charge also fails to allege that the unspecified “legal action against the City” is, was or would be unwarranted, unjustified, or without a legal basis.

33. Even if the charge adequately described the alleged conduct, it does not demonstrate that STOLTZFUS took any such action in his capacity as Commissioner or as part of the performance of his official duties. STOLTZFUS does not forfeit his rights as a private citizen by virtue of his station as a Commissioner. If STOLTZFUS tripped over a damaged City-owned sidewalk and injured himself or was struck by a City-owned vehicle and hurt, he would have every right to sue the City for the resulting damages –

even if that suit constituted “potentially harmful and expensive legal action against the City.” There is simply no legal prohibition under state law or the City Charter that would preclude STOLTZFUS from discussing potential legal action against the City with other persons, or even “encouraging” such legal action, nor is there any legal prohibition on STOLTZFUS seeking to keep his involvement in such matters confidential and private.

34. This charge fails to allege any conduct by STOLTZFUS amounting to malfeasance or misfeasance and insufficient grounds to support a recall.

35. The charge that “His conduct cannot be legally justified and conflicts with State law” is vague and ambiguous and fails to provide STOLTZFUS fair, reasonable and adequate notice of the alleged grounds for recall. The charge fails to describe the “conduct” referred to and fails to allege how any such conduct “conflicts with State law.” It is also impossible to determine whether this charge is intended to merely summarize the prior allegations or whether the “conduct” referred to is some other, undescribed conduct. Standing alone, this charge fails to allege any conduct amounting to malfeasance or misfeasance and is therefore inadequate to support a recall.

36. This Court has the authority and duty to review the jurisdictional facts alleged in the Petition to determine whether they demonstrate conduct amounting to malfeasance or misfeasance as charged, and to determine whether the charges in the Petition comport with STOLTZFUS’ due process and statutory rights.

37. The appropriate time to seek judicial review of the legal sufficiency of the Petition to provide adequate notice of the charges and a meaningful opportunity for defense is after the first recall Petition has been served upon STOLTZFUS and before the time which STOLTZFUS must, by statute, deliver his defensive statement, which is

on or before May 28, 2010.

38. Contemporaneously with the filing of this Complaint, STOLTZFUS filed a Motion for Accelerated Hearing pursuant to Fla. Stat. §86.111.

39. By Order dated May 26, 2010, the Court denied STOLTZFUS' request for an accelerated hearing. A true and correct copy of the Order is attached hereto as **Exhibit C**.

40. Thereafter, STOLTZFUS submitted a general defensive statement within the time permitted by law.

41. Pursuant to Fla. Stat. §100.361(3)(b), BAIRD then prepared the Recall Petition and Defense (the "Petition and Defense") and provided copies of same to CARTER for circulation.

42. Thereafter, CARTER and his Committee circulated the Petition and Defense in an effort to collect a sufficient number of valid elector signatures.

43. CARTER and his Committee obtained some or all of the elector signatures during the second round of signature gathering in violation of federal law and regulations that prohibit political activities on governmental property.

44. Any elector signatures obtained illegally should be disallowed and the adequacy of the number of valid elector signatures to require a recall election should be recalculated after elimination of any elector signatures so obtained in violation of law.

45. On July 2, 2010, CARTER delivered the signed Petition and Defense to BAIRD, who submitted them to SWEAT for verification of the elector signatures as required by Fla. Sta. §100.361(3)(d) and (e).

46. On July 9, 2010, SWEAT certified that the Petition and Defense was

signed by 256 qualified electors of Anna Maria. A copy of SWEAT's certification is attached hereto as **Exhibit D**. That number is at least fifteen percent (15%) of the number of qualified electors in the City.

47. On July 9, 2010, BAIRD notified STOLTZFUS via email of the determination made by SWEAT. A copy of BAIRD's email is attached hereto as **Exhibit E**.

48. STOLTZFUS does not intend to resign from his office as a duly elected commissioner within the five-day period provided in Fla. Stat. §100.361(4) or, in the alternative, such period has elapsed and STOLTZFUS has not resigned.

49. Accordingly, the Chief Judge of the Twelfth Judicial Circuit is required to fix a date for the holding of a recall election as to STOLTZFUS.

50. Pursuant to Fla. Stat. §100.361(4), the date of the recall election must be between August 13 and September 12, 2010.

51. There is an actual, present and bona fide case or controversy between STOLTZFUS and the Defendants that requires a speedy hearing and immediate adjudication pursuant to Ch. 86, Fla. Stat., and in equity.

52. STOLTZFUS has no adequate remedy at law.

53. STOLTZFUS is entitled to recover the costs of this action pursuant to Fla. Stat. §86.081.

WHEREFORE, Plaintiff, HARRY STOLTZFUS, prays that the Court will take jurisdiction of this cause and the parties hereto and enter an order:

1. Authorizing and requiring accelerated responsive pleadings;
2. Setting this cause for an immediate and accelerated hearing on the merits;

3. Granting such temporary relief as may be necessary to preserve the status quo;
4. Declaring that one or more of the grounds for recall set forth in the recall Petition and the Petition and Defense are legally insufficient and that the recall Petition and the Petition and Defense are invalid;
5. Enjoining the Defendants from taking any further action in furtherance of the recall;
6. Enjoining the conduct of any recall election;
7. Granting such further legal, equitable or supplemental relief as the Court deems appropriate; and
8. Awarding STOLTZFUS the costs of this action.

Dated this 12th day of July, 2010.

/s/ Richard A. Harrison

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished via U.S. Mail with an additional courtesy copy via email as indicated, on this 12th day of July, 2010, to:

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