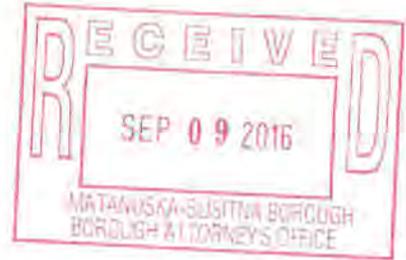


1 EMERGENCY

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8 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

9 THIRD JUDICIAL DISTRICT AT PALMER

10 Clint Tuma and Amy Tuma,)
11)
12 Plaintiff,)

13 v.)

Case No. 3PA-16-1979 C1

14 Matanuska-Susitna Borough; Barry Orzalli; Ted)
15 Franke; Christopher R. Miller; Robert Hanner;)
16 Stephen D. Guisinger; Paul Riley; Paul Steiner;)
17 Dennis Hotchkiss; Bob Lee; Philip Markwardt;)
18 Rudy Poglitsch; Timothy R. Sergie; Daniel Hamm)
19 Sally Pollen; and Larry DeVilbiss.)

20 Defendants.)
21)
22)
23)

24 Expedited Complaint for Declaratory Judgment and for Injunctive Relief

COMES NOW Clint Tuma and Amy Tuma, Plaintiffs in the above styled and numbered cause, proceeding without the assistance of counsel,¹ and brings this Expedited Complaint for Declaratory Judgment and for Injunctive Relief, to challenge an actual controversy that exists between the Plaintiffs and the Defendants. This complaint is supported by affidavits, and with a separate motion for expedited consideration, with affidavits in support.

¹ Under their constitutional and statutory right to self-representation, AS 22.20.040(a), Appearance. (a) An action or proceeding may be prosecuted or defended by a party in person or by attorney.
EXPEDITED COMPLAINT FOR DECLARATORY JUDGMENT
AND FOR MANDATORY AND INJUNCTIVE RELIEF

1 Plaintiffs seek an expedited Declaratory Judgment that the proposed zoning
2 initiative, "Proposition No. B-1 on the Ballot, Ordinance Serial No. 15-088, Matanuska-
3 Susitna Borough", scheduled to be voted on October 4, 2016, bypasses the mandatory
4 Alaska Statutes; usurping undelegated municipality powers; deprives the Matanuska-
5 Susitna Borough 'a municipality' of a power which state law specifically allows (and
6 mandates) that it perform; exceeds the Matanuska-Susitna Borough's own legislative
7 zoning powers; that it is unconstitutional, and unenforceable as a matter of law

8 The proposed zoning initiative is invalid, where it bypasses mandatory planning
9 commission review of land use ordinances, and would thwart the state legislature's
10 delegation of land use authority to the municipal assembly.²

11 The Matanuska-Susitna Borough Clerk, Lonnie R. McKechnie, was "objectively
12 unreasonable" to permit the proposed zoning initiative to be placed on the Ballot, when
13 the Supreme Court of Alaska provided written notice, in a case under her name, that
14 "zoning by initiative is invalid."³

15 The Matanuska-Susitna Borough attorney, Nicholas Spiropoulos, was objectively
16 unreasonable to recommend to the Clerk that the proposed zoning initiative could be
17 placed on the Ballot, when the Supreme Court of Alaska provided written notice that
18 "zoning by initiative is invalid,"⁴ and counsel knew, or by due diligence should have
19

20 ² See, e.g., *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244, 247 (1989)
21 (holding that "[z]oning by initiative is inconsistent with the goal of long range comprehensive planning" and was not
intended by legislature); *Carmony v. McKechnie*, 217 P.3d 818, 821 (Alaska 2009) (quoting *Griswold v. City of*
Homer, 186 P.3d 558, 563 (Alaska 2008)) (internal quotation marks omitted).

22 ³ *Carmony v. McKechnie*, 217 P.3d 818, 821 (Alaska 2009) (quoting *Griswold v. City of Homer*, 186 P.3d 558, 563
(Alaska 2008)). We recently held that because of the statutorily required role of a planning commission, "zoning by
initiative is invalid."

23 ⁴ *Carmony v. McKechnie*, 217 P.3d 818, 821 (Alaska 2009) (quoting *Griswold v. City of Homer*, 186 P.3d 558, 563
(Alaska 2008)). We recently held that because of the statutorily required role of a planning commission, "zoning by
initiative is invalid."

1 known, that recommending that the proposed zoning initiative could be placed on the
2 Ballot was contrary to the teachings of the Supreme Court of Alaska.⁵

3 A. Jurisdiction:

4 This Court has jurisdiction over this action pursuant to AS 22.10.020(g),⁶ (the
5 statute providing the Superior Court with General and Original Jurisdiction over all
6 Declaratory Judgment actions), Alaska Civil Rule 57(a),⁷ (Civil Rules for Declaratory
7 Judgment actions) and AS 44.62.010-44.62.950 (the Administrative Procedures Act).

8 B. Venue:

9 Venue is appropriate in the Third Judicial District because the actual controversy
10 between the Plaintiffs and the Defendants occurred in the Matanuska-Susitna Borough.
11 The seat of the Matanuska-Susitna Borough Government is in Palmer, Alaska, and the
12 Superior Court in Palmer is the appropriate court for the venue in this matter.

13 C. Parties: Plaintiffs: Clint Tuma and Amy Tuma, are permanent residents of the
14 State of Alaska, and are property owner in the Matanuska-Susitna Borough.

15 Defendants: The Defendant Matanuska-Susitna Borough was created by Alaska
16 Statutes and directed to create a planning commission,⁸ and to comply with other
17 statutory mandates concerning zoning.

18
19 ⁵ The legal contentions were not warranted by existing law or by a non-frivolous argument for extending, modifying,
or reversing existing law, or for establishing new law, and the factual contentions do not have evidentiary support.

20 ⁶AS 22.10.020(g). In case of an actual controversy in the state, the superior court, upon the filing of an appropriate
pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not
21 further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is
reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted,
after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

22 ⁷ Civil Rule 57(a) provides, in part: "The procedure for obtaining a declaratory judgment pursuant to statute shall be
in accordance with these rules.... The existence of another adequate remedy does not preclude a judgment for
declaratory relief in cases where it is appropriate."

23 ⁸ AS 29.40.010(a) ("areawide basis"); AS 29.40.020(a) ("borough shall establish a planning commission"); AS
29.40.020(b)(1) (requiring planning commission to prepare and submit a "proposed comprehensive plan . . . for the
24 systematic and organized development of the borough").

1 The Defendants Barry Orzalli; Ted Franke; Christopher R. Miller; Robert Hanner;
2 Stephen D. Guisinger; Paul Riley; Paul Steiner; Dennis Hotchkiss; Bob Lee; Philip
3 Markwardt; Rudy Poglitsch; Timothy R. Sergie; Daniel Hamm; Sally Pollen; and Larry
4 DeVilbiss, Initiative Sponsors, signed as residents of the Matanuska-Susitna Borough.

5 D. Legal Background of the Case of Actual Controversy:

6 Ballot Measure 2,⁹ on the November 4, 2014 ballot in Alaska, as an initiated state
7 statute, was approved by the voters, and signed into law by Lt. Governor Byron Mallot
8 on Friday January 22, 2016.

9 As a result of the successful vote on Ballot Measure 2, and the new statute that
10 authorized marijuana businesses, Plaintiffs Clint and Amy Tuma purchased property,
11 developed the property for marijuana businesses, made timely application for their own
12 license from the Alaska Marijuana Control Board, paid the required fees and provided
13 them with a complete copy of their plan.

14 Plaintiffs also posted on their property the required forms, and posted the forms
15 in a common area available to the community, to serve notice to the community their
16 intent to use their property for a marijuana business.

17 Plaintiffs also published their notice in the appropriate publication for two weeks,
18 and provided those proofs with their packet provided to the Alaska Marijuana Control
19 Board.

20 February 29, 2016, Plaintiffs attended the Matanuska-Susitna Borough Assembly
21 meeting and provided each member with a complete copy of the same packet provided
22 to the Alaska Marijuana Control Board, and made application for their land use permit.
23

24 ⁹ This bill would tax and regulate the production, sale, and use of marijuana in Alaska.
EXPEDITED COMPLAINT FOR DECLARATORY JUDGMENT
AND FOR MANDATORY AND INJUNCTIVE RELIEF

1 Plaintiffs attended a Matanuska-Susitna Borough Marijuana Advisory Committee
2 meeting and provided the Committee with a copy of the same packet provided to the
3 Alaska Marijuana Control Board, and the Matanuska-Susitna Borough Assembly.

4 Defendant Matanuska-Susitna Borough established a Marijuana Advisory Board,
5 that held public hearings and made recommendations to the Assembly. The Planning
6 Commission also made recommendations to the Assembly. Many public hearings were
7 held on developing land use permits and taxes for the marijuana business applications.

8 The Defendants Barry Orzalli; Ted Franke; Christopher R. Miller; Robert Hanner;
9 Stephen D. Guisinger; Paul Riley; Paul Steiner; Dennis Hotchkiss; Bob Lee; Philip
10 Markwardt; Rudy Poglitsch; Timothy R. Sergie; Daniel Hamm; Sally Pollen; and Larry
11 DeVilbiss all sponsored an Initiative, the proposed zoning ordinance, Ordinance Serial
12 No. 15-088, Matanuska-Susitna Borough Proposition No. B-1 on the October 4, 2016
13 Ballot.

14 Defendant Larry DeVilbiss, and other sponsors, attended some Public Hearings
15 and urged the Assembly to declare a moratorium on considering marijuana business
16 permits in Matanuska-Susitna Borough until after the vote on the Initiative, Ordinance
17 Serial No. 15-088, Matanuska-Susitna Borough Proposition No. B-1, on October 4,
18 2016 Ballot.

19 Plaintiffs were present when it was explained to the Assembly that the proposed
20 zoning initiative violated mandatory Alaska statutes, and also violated the Alaska and
21 Federal Constitution, usurped powers statutorily reserved to the Borough, and the
22 unconstitutional proposed zoning initiative and any moratorium based on the proposed
23 zoning initiative, violated mandatory Alaska statutes. That it was unconstitutional, and
24

1 could result in a "takings action", for knowingly and intentionally violating constitutional
2 and statutory rights, and they could each be found personally liable. Plaintiffs were also
3 present when each member of the Assembly was personally served with a written copy
4 of documents, to provide each of them with personal knowledge of the laws prohibiting
5 their actions.

6 Notwithstanding the written notice served on each member of the Assembly, the
7 Assembly imposed the moratorium,¹⁰ until after the vote on October 4, 2016. One of the
8 Assembly Members, Kowalke, even stated publicly at the hearing that he was doing this
9 as a present for his friend.

10 The Matanuska-Susitna Borough moratorium, based on the proposed zoning
11 initiative¹¹ caused the Alaska Marijuana Control Board to table all of the applications for
12 marijuana licenses for locations in the Matanuska-Susitna Borough, including those of
13 the Plaintiffs, until after the vote on October 4, 2016, or until the moratorium is lifted.

14 This created the case of actual controversy between Plaintiffs and Defendants,
15 and caused the Plaintiffs damage to the exercise of their personal property rights, and
16 resulted in a "takings action" in violation of the Constitution.

17 The Defendants Barry Orzalli; Ted Franke; Christopher R. Miller; Robert Hanner;
18 Stephen D. Guisinger; Paul Riley; Paul Steiner; Dennis Hotchkiss; Bob Lee; Philip
19 Markwardt; Rudy Poglitsch; Timothy R. Sergie; Daniel Hamm; Sally Pollen; and Larry
20 DeVilbiss all knew at the time they sponsored the zoning initiative, or by due diligence
21 should have known, that "zoning by initiative was invalid", for proposing zoning in the
22 Matanuska-Susitna Borough. Plaintiffs explained to Larry Devilbiss, and other sponsors,

23 _____
¹⁰ Ordinance Serial No. 16-046.

24 ¹¹ Ordinance Serial No. 15-088, Matanuska-Susitna Borough Proposition No. B-1, on October 4, 2016 Ballot.

1 during the public hearings, and after the hearings, why the zoning initiative was invalid,
2 that it violated existing mandatory Alaska statutes, and the Constitution, and amounted
3 to a takings action, in violation of Plaintiffs' constitutional rights, and statutory rights.

4 The Defendant Matanuska-Susitna Borough, through the Assembly, knew at the
5 time they declared the moratorium, based on the unconstitutional zoning initiative, or by
6 due diligence should have known, that zoning by initiative was invalid for proposing any
7 zoning in the Matanuska-Susitna Borough.

8 An actual controversy exists between the Plaintiffs and the Defendants, and the
9 Plaintiffs have an interest in protecting and exercising the rights provided to them under
10 the Alaska Constitution and Statutes. Plaintiffs have standing to bring this action, and to
11 vindicate the knowing and intentional violation of their constitutional and statutory rights.

12 E. Plaintiffs seek Declaratory Judgment and Injunctive Relief:

13 AS 22.10.020(g), encompasses considerations of standing, mootness, and
14 ripeness. Plaintiffs have standing, the issues are not moot, and they are ripe for
15 adjudication. With respect to ripeness, in *Brause*¹², the Court held ("the more practical
16 formulation is said to be: that ultimately the issue of

17 "[R]ipeness turns on 'the fitness of the issues for judicial decision' and 'the
18 hardship to the parties of withholding court consideration.' "

19 As Plaintiffs explain, there is a compelling reason for a declaratory judgment to
20 be granted in this case, and for an injunction to be granted to remove the proposed
21 zoning initiative from the Ballot before the vote.

22 Plaintiffs seek a Declaratory Judgment, declaring that the proposed measure
23 would not be enforceable as a matter of law, where the proposed zoning initiative has

24 ¹² *Brause v. State of Alaska*, 21 P.3d 357, 359 (Alaska 2001).
EXPEDITED COMPLAINT FOR DECLARATORY JUDGMENT
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1 bypassed the mandatory planning commission's review of land use ordinances and
2 would thwart the state legislature's delegation of land use authority to the municipal
3 assembly.¹³

4 Plaintiffs seek a Declaratory Judgment, declaring that the proposed measure
5 usurps undelegated powers from the Matanuska-Susitna Borough's proposed taxation,
6 where the proposed tax has already been placed on the ballot,¹⁴ and would also prohibit
7 the Matanuska-Susitna Borough from receiving the appropriation of funds already
8 dedicated to the Matanuska-Susitna Borough.¹⁵

9 Plaintiffs seek an injunction to prevent the zoning initiative¹⁶ from being placed
10 before the voters, to have the zoning initiative removed from the Ballot, and to prevent
11 any votes from being counted on the zoning initiative, until after this matter is resolved.

12 F. Pre-election Review of the Initiative

13 Generally, judicial review of the constitutionality of an initiative is unavailable until
14 after it has been enacted by the voters, "since an opinion on a law not yet enacted is
15 necessarily advisory."¹⁷ However, "there are two exceptions to this rule: first, where the
16

17 ¹³ See, e.g., *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244, 247 (1989)
18 (holding that "[z]oning by initiative is inconsistent with the goal of long range comprehensive planning" and was not
intended by legislature); *Carmony v. McKechnie*, 217 P.3d 818, 821 (Alaska 2009) (quoting *Griswold v. City of
Homer*, 186 P.3d 558, 563 (Alaska 2008)) (internal quotation marks omitted).

19 ¹⁴ Proposition No. B-5, Areawide Sales Tax of Five Percent (5%) on Marijuana and Marijuana Products With a
Limited Exemption for Sales Tax Paid to a City. Ordinance Serial No. 16-085 and IM No. 16-125 (Areawide
Proposition).

20 ¹⁵ Sec. 17.38.200. Marijuana establishment registrations.

21 (c) Upon receiving an application or renewal application for a marijuana establishment, the board shall
immediately forward a copy of each application and half of the registration application fee to the local regulatory
authority for the local government in which the applicant desires to operate the marijuana establishment, unless the
local government has not designated a local regulatory authority pursuant to AS 17.38.210(c).

22 ¹⁶ Initiative Ordinance Serial No. 15-088, the Matanuska-Susitna Borough Proposition No. B-1 "Prohibiting
Marijuana Establishments Except Those Involving Industrial Hemp in the Area Outside of the Cities".

23 ¹⁷ *Kohlhaas v. State, Office of Lieutenant Governor*, 147 P.3d 714, 717 (Alaska 2006) (Kohlhaas I). "The phrase
'unless clearly inapplicable' was included in the Alaska Constitution so that the initiative would not replace the
legislature where the legislature's power serves as a check on other branches of government, such as legislative
power to define courts' jurisdiction or override judicial rules." (internal quotation marks omitted).

1 initiative is challenged on the basis that it does not comply with the State's constitutional
2 and statutory provisions regulating initiatives, and second, where the initiative is
3 challenged as clearly unconstitutional or clearly unlawful."¹⁸

4 Plaintiffs assert that in this case both exceptions apply to the proposed zoning
5 initiative. Procedural requirements for placing the zoning initiative on the ballot were not
6 met and the subject matter is not appropriate for direct legislation under constitutional or
7 statutory limits on the initiative power.

8 The proposed zoning initiative is constitutionally and statutorily invalid. The
9 power to initiate cannot exceed the power to legislate.

10 In *Carmony v. McKechnie*,¹⁹ the Alaska Supreme Court, in holding the "Superior
11 Court Did Not Err in Holding that the Proposal Was Unenforceable as a Matter of Law,"
12 stated, as follows:

13 "In rejecting the application, the borough clerk stated that the proposal could not
14 be certified under AS 29.26.110(a)(4) because it was unenforceable as a matter
of law:

15 [T]he ordinance proposed conflicts with Borough Code, Alaska Statute, and the
16 Alaska State Constitution, as it appears to supercede and circumvent these laws
in regard to the administrative processes for the passage of ordinances;
17 referendum laws with the automatic [e]ffect of referendum elections for questions
of planning, platting, and land use regulations ...; and mandates regarding the
18 Borough's duty to provide for platting, planning, and land use regulations.... [T]his
proposed ordinance frustrates the execution of the aforementioned provisions ...
and therefore, it is preempted by the superior authority.

19
20 Judge Kristiansen agreed that the proposed measure was unenforceable as a
matter of law, holding that "initiatives cannot be used to deprive a municipality of
21 a power which state law specifically allows (and mandates) that it perform."
22

23 ¹⁸ *Carmony v. McKechnie*, 217 P.3d 818, 819-20 (Alaska 2009).

24 ¹⁹ *Carmony v. McKechnie*, 217 P.3d 818, (Alaska 2009); and See also *Griswold v. City of Homer*, 186 P.3d 558,
563 (Alaska 2008))

1 Alaska law restricts initiatives to matters that “would be enforceable as a matter
2 of law.”²⁰ We have held that “the subject of the initiative must constitute such
3 legislation as the legislative body to which it is directed has the power to enact.”²¹
4 As noted above, we ordinarily will not review a proposed initiative prior to its
approval by voters.²² However, we do so here because a question is raised
whether the initiative violates “explicit constitutional prohibitions” or whether the
proposed initiative “is in clear conflict with a state statute.”²³

5 The Court went on to say, that the court held in *Griswold v. City of Homer*²⁴ that
6 “zoning by initiative is invalid.”²⁵ This was because the “[t]he power to initiate cannot
7 exceed the power to legislate.”²⁶ That is, the people could not enact a measure by
8 initiative that was beyond the power of the borough assembly.²⁷ Under Alaska statutes,
9 boroughs (or cities exercising power delegated by their borough) must establish a
10 planning commission that prepares a comprehensive land use plan.²⁸ The planning
11 commission is required to review, recommend, and administer measures “necessary to
12 implement” that plan, and the local legislature is required to adopt land use provisions
13 “[i]n accordance with” and “to implement” the comprehensive plan.²⁹ If it bypasses
14 these procedures, zoning by initiative “exceeds the scope of the legislative power
15 granted by the [state] legislature” to the local legislature and is thus unenforceable as a
16 matter of law.³⁰

17
18
19 ²⁰ AS 29.26.110(a)(4).

20 ²¹ *Municipality of Anchorage v. Frohne*, 568 P.2d 3, 8 (Alaska 1977). See also *Griswold v. City of Homer*, 186 P.3d
558, 560 (Alaska 2008) (“The power to initiate cannot exceed the power to legislate.”).

21 ²² See *Whitson v. Anchorage*, 608 P.2d 759, 762 (Alaska 1980).

22 ²³ *Id.*

23 ²⁴ 186 P.3d 558 (Alaska 2008).

24 ²⁵ *Id.* at 563.

²⁶ *Id.* at 560.

²⁷ See *Municipality of Anchorage v. Frohne*, 568 P.2d 3, 8 (Alaska 1977) (“[T]he subject of the initiative must
constitute such legislation as the legislative body to which it is directed has the power to enact.”).

²⁸ See *Griswold*, 186 P.3d at 560–64 (discussing AS 29.40.010–.040).

²⁹ *Id.* at 561–62 (quoting AS 29.40.040).

³⁰ *Id.* at 563.

1 The court also held that, *Griswold*, decided after the present case was appealed
2 to this court, is applicable in that case. That proposed initiative would enact sweeping
3 changes to present and future land use ordinances, including zoning, by imposing
4 termination dates without any involvement by the planning commission or any
5 consideration of consistency with the comprehensive plan. It would also impose
6 termination dates on future amendments to the comprehensive plan without any
7 planning commission input. It is thus clearly barred by our holding in *Griswold*.

8 Plaintiffs believe that the teachings of the Supreme Court in *Griswold v. City of*
9 *Homer*,³¹ *Carmony v. McKechnie*,³² and *Municipality of Anchorage v. Frohne*,³³ have
10 made it abundantly clear, that zoning by initiative is invalid.

11 As the Supreme Court held, "initiatives cannot be used to deprive a municipality
12 of a power which state law specifically mandates that it perform."

13 The present case involves a general law municipality with "legislative powers
14 conferred by law."³⁴ That law specifically confers the land use regulatory power upon
15 the borough assembly.³⁵ Furthermore, it cannot be said that the state legislature
16 anticipated when it delegated such land use authority to the borough assembly that the
17 borough would submit every land use ordinance enacted by that assembly to
18 referendum by the voters. To the contrary, such an arrangement subverts state policy
19 goals. State law says that a borough assembly is required to enact a plan for the

21 _____
22 ³¹ 186 P.3d 558 (Alaska 2008).

23 ³² *Carmony v. McKechnie*, 217 P.3d 818, (Alaska 2009); and See also *Griswold v. City of Homer*, 186 P.3d 558,
24 563 (Alaska 2008))

³³ See *Municipality of Anchorage v. Frohne*, 568 P.2d 3, 8 (Alaska 1977) ("[T]he subject of the initiative must
constitute such legislation as the legislative body to which it is directed has the power to enact.").

³⁴ *Id.* at 310 (quoting AS 29.04.020).

³⁵ See AS 29.40.010-.040.

1 "systematic and organized development of the borough."³⁶ Such plans are to be "a
2 compilation of policy statements, goals, standards, and maps for guiding the physical,
3 social, and economic development, both public and private," of the borough.³⁷ It is plain
4 from this statutory language that the legislature's policy goals included marking the land
5 use planning and regulation process with certainty, continuity, consistency, and
6 comprehensiveness.

7 The state legislature did not intend such a piecemeal, uncertain process when it
8 mandated that borough assemblies enact comprehensive plans for "the systematic and
9 organized development of the borough."³⁸ The will of the people, as expressed through
10 the legislature, would be thwarted by the proposed initiative.

11 In *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*, for
12 example, the court reaffirmed that the right to legislate by municipal initiative derived
13 from AS 29.26.100, not the Alaska Constitution.³⁹ Article XI of the Alaska Constitution
14 provides a right of initiative and referendum regarding state law, whereas AS 29.26.100
15 reserves to the residents of municipalities the right of local initiative and referendum.⁴⁰

16 The proposed zoning Initiative creates a constitutional challenge to part of AS
17 17.38.210(a).⁴¹ Plaintiffs argue from the premise that the Alaska Constitution does not
18 permit constitutional amendments to be enacted by initiative. As the Alaska Supreme
19 Court recognized soon after statehood in *Starr v. Hagglund*,

21 ³⁶ AS 29.40.020(b)(1); AS 29.40.030(b).

22 ³⁷ AS 29.40.030(a).

23 ³⁸ AS 29.40.020(b)(1); AS 29.40.030(b).

24 ³⁹ 273 P.3d at 1139 (citing *Carmony v. McKechnie*, 217 P.3d 818, 823–24 (Alaska 2009); *Griswold v. City of Homer*, 186 P.3d 558, 563 (Alaska 2008)).

⁴⁰ *Carmony v. McKechnie*, 217 P.3d 818, 820 (Alaska 2009); *Griswold v. City of Homer*, 186 P.3d 558, 563 (Alaska 2008).

⁴¹ See Section H, beginning on page 15 herein.

1 [Article XIII of the Alaska Constitution] provides two methods of amending the
2 constitution: (1) by a constitutional convention, followed by ratification of the
3 proposed amendment by the people, and (2) by a proposal that has obtained a
majority vote of each house of the legislature, and is adopted by the people by
majority vote at a statewide election.⁴²

4 As the court further recognized in *Starr*, article XIII necessarily limits the scope of
5 the initiative process: "The initiative may be used only to enact laws, and not for the
6 purpose of constitutional amendment."⁴³

7 The zoning initiative,⁴⁴ on the Ballot for vote on October 4, 2016, would appear to
8 require an amendment to the Alaska Constitution, and/or a repeal of existing mandatory
9 Alaska Statutes. The proposed zoning initiative, standing in position of the Matanuska-
10 Susitna Borough, seeks to do, through a vote of the people, what the Matanuska-
11 Susitna Borough itself is statutorily prohibited from doing.

12 G. Invalid Exercise of Matanuska-Susitna Borough's Legislative Authority.

13 To decide whether Matanuska-Susitna Borough voters could invoke the initiative
14 process to amend the Matanuska-Susitna Borough's zoning code the Court must
15 determine the extent of the Borough's zoning power and the explicit and implicit
16 limitations on that power. The Matanuska-Susitna Borough's zoning power flows from
17 Alaska statutes providing for planning, platting, and land use regulation by local
18 governments.

21
22 ⁴² *Starr v. Hagglund*, 374 P.2d 316, 317 n. 2 (Alaska 1962).

23 ⁴³ *Id.*; see also *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."). Notably, article
24 XI, section 1 empowers voters to "enact laws by the initiative" (emphasis added); no similar provision extends the
initiative power to include constitutional amendments.

⁴⁴ Ordinance Serial No. 15-088, Matanuska-Susitna Borough Proposition No. B-1, for election October 4, 2016.

1 Alaska Statute 29.40.010 requires first and second class boroughs to provide for
2 "planning, platting, and land use regulation on an areawide basis."⁴⁵ If a city within a
3 borough consents by ordinance, the borough assembly may delegate any of its land use
4 regulation powers to the city.⁴⁶ Alaska Statute 29.40.020(a) provides that the borough
5 "shall establish a planning commission" and AS 29.40.020(b) provides that the planning
6 commission "shall prepare and submit a proposed comprehensive plan in accordance
7 with AS 29.40.030. . . ."⁴⁷ Section .030 describes "a comprehensive plan" as "a
8 compilation of policy statements, goals, standards, and maps for guiding the physical,
9 social, and economic development, both private and public, of the first or second class
10 borough."⁴⁸

11
12 ⁴⁵ AS 29.40.010 provides:

(a) A first or second class borough shall provide for planning, platting, and land use regulation on an areawide basis.
13 (b) If a city in a borough consents by ordinance, the assembly may by ordinance delegate any of its powers and
duties under this chapter to the city. The assembly may by ordinance, without first obtaining consent of the city,
14 revoke any power or duty delegated under this section.

⁴⁶ AS 29.40.010(b).

⁴⁷ AS 29.40.020 provides:

(a) Each first and second class borough shall establish a planning commission consisting of five residents unless a
15 greater number is required by ordinance. Commission membership shall be apportioned so that the number of
members from home rule and first class cities reflects the proportion of borough population residing in home rule
16 and first class cities located in the borough. A member shall be appointed by the borough mayor for a term of three
years subject to confirmation by the assembly, except that a member from a home rule or first class city shall be
17 selected from a list of recommendations submitted by the council. . . .

(b) In addition to the duties prescribed by ordinance, the planning commission shall

18 (1) prepare and submit to the assembly a proposed comprehensive plan in accordance with AS 29.40.030 for the
systematic and organized development of the borough;

19 (2) review, recommend, and administer measures necessary to implement the comprehensive plan, including
measures provided under AS 29.40.040.

⁴⁸ AS 29.40.030 provides:

20 (a) The comprehensive plan is a compilation of policy statements, goals, standards, and maps for guiding the
physical, social, and economic development, both private and public, of the first or second class borough, and may
include, but is not limited to, the following:

21 (1) statements of policies, goals, and standards;

22 (2) a land use plan;

(3) a community facilities plan;

(4) a transportation plan; and

(5) recommendations for implementation of the comprehensive plan.

23 (b) With the recommendations of the planning commission, the assembly shall adopt by ordinance a comprehensive
plan. The assembly shall, after receiving the recommendations of the planning commission, periodically undertake
24 an overall review of the comprehensive plan and update the plan as necessary.

1 These statutes require "areawide" planning and creation of a comprehensive
2 plan "for the systematic and organized development" of the community, and they
3 implicitly recognize the importance of the planning commission and the comprehensive
4 plan to the process of regulating land use.⁴⁹

5 A planning commission has statutory responsibilities beyond drafting the
6 comprehensive plan. Per AS 29.40.020(b)(2), the commission must also "review,
7 recommend, and administer measures necessary to implement the comprehensive
8 plan, including measures provided under AS 29.40.040."⁵⁰ Because "zoning
9 regulations" are one of the "measures provided under AS 29.40.040,"⁵¹ subsection
10 .020(b)(2) requires the planning commission to "review, recommend, and administer"
11 zoning regulations "necessary to implement the comprehensive plan." The assembly by
12 ordinance "shall adopt or amend" land use provisions "[i]n accordance with a
13 comprehensive plan" and "in order to implement the comprehensive plan."⁵² The
14 statutes therefore expressly require that the planning commission have an active role in
15 creating a comprehensive plan for "systematic and organized" local development,
16 reviewing and recommending zoning regulations, and adopting measures "necessary to

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19 ⁴⁹ AS 29.40.010(a) ("areawide basis"); AS 29.40.020(a) ("borough shall establish a planning commission"); AS
20 29.40.020(b)(1) (requiring planning commission to prepare and submit a "proposed comprehensive plan . . . for the
systematic and organized development of the borough").

⁵⁰ AS 29.40.020(b)(2).

⁵¹ AS 29.40.040(a)(1).

⁵² AS 29.40.040(a). AS 29.40.040 provides in pertinent part:

(a) In accordance with a comprehensive plan adopted under AS 29.40.030 and in order to implement the plan, the
22 assembly by ordinance shall adopt or amend provisions governing the use and occupancy of land that may include,
but are not limited to,

23 (1) zoning regulations restricting the use of land and improvements by geographic districts;

(2) land use permit requirements designed to encourage or discourage specified uses and construction of specified
structures, or to minimize unfavorable effects of uses and the construction of structures;

24 (3) measures to further the goals and objectives of the comprehensive plan.

1 implement the comprehensive plan."⁵³ The statutes implicitly recognize that the
2 planning commission plays an important part in the formation and amendment of local
3 land use regulations by providing assistance to the borough (or city) to ensure that
4 development proceeds in a "systematic and organized" manner.⁵⁴

5 The relevant state statutes are clear. A borough cannot pass or amend a zoning
6 ordinance without involving its planning commission in reviewing that ordinance.⁵⁵ This
7 review includes considering whether a proposed ordinance is consistent with the
8 comprehensive plan.⁵⁶ A borough assembly may eventually choose not to follow the
9 recommendations of the planning commission, but the statutes preclude bypassing the
10 planning commission altogether. (Emphasis added)

11 The people, standing in the place of the borough, cannot, through the initiative,
12 bypass statutory mandates imposed on the Matanuska-Susitna Borough, who was
13 obligated to establish a zoning commission, draft a comprehensive plan, and comply
14 with state law governing planning and land use regulation, "the power to establish a
15 planning commission to hear all requests for amendments to zoning codes."

16 This provision can be read as giving the planning commission the primary
17 authority for initial consideration of zoning amendments. At the very least, this provision
18 confirms the commission's role in considering proposed amendments to an existing
19 zoning code that was itself adopted "[i]n accordance with a comprehensive plan . . . and
20 in order to implement the plan. . ."⁵⁷

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⁵³ AS 29.40.020(b)(1), (2); AS 29.40.040(d)(1).

⁵⁴ AS 29.40.020(b)(1).

⁵⁵ AS 29.40.020.

⁵⁶ AS 29.40.030(b), .020(b)(2), .040(a).

⁵⁷ AS 29.40.040(a).

1 It is for this reason that the proposed "zoning by initiative is invalid", and why the
2 proposed zoning initiative must be stricken, or removed from the Ballot. The people,
3 through the initiative, or referendum process, do not have the power to pass piecemeal
4 zoning amendments without at least giving the Matanuska-Susitna Borough Planning
5 Commission opportunity to review the proposals and make recommendations.
6 Therefore, voters, who have no obligation to consider the views of the planning
7 commission or be informed by its expertise, cannot use the initiative process to
8 eliminate the planning commission's role in "areawide" land use planning and
9 regulation, and thus potentially undermine the comprehensive plan for "systematic and
10 organized" local development.⁵⁸

11 Because this initiative is local, and not statewide, the power to initiate here was
12 directly derived from AS 29.26.100,⁵⁹ not article XI, section 1 of Alaska's Constitution.⁶⁰

13 Therefore, this court must conclude that zoning by initiative exceeds the scope of
14 the legislative power granted by the legislature to the Matanuska-Susitna Borough.

15 The planning commission does more than simply give notice of hearings and
16 allow the public to be heard on the subject of zoning ordinances. If a zoning amendment
17 is proposed, the commission's role is to analyze the impact of the proposed changes in
18 light of the Matanuska-Susitna Borough's development goals as stated in the
19 comprehensive plan, and to suggest other changes that should accompany the

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22 ⁵⁸ AS 29.40.010(a) ("areawide basis"); AS 29.40.020(a) ("borough shall establish a planning commission"); AS
29.40.020(b)(1) (requiring planning commission to prepare and submit a "proposed comprehensive plan . . . for the
systematic and organized development of the borough").

23 ⁵⁹ AS 29.26.100. Reservation of Powers. The 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.

24 ⁶⁰ AS 29.26.100 provides: "The powers of initiative and referendum are reserved to the residents of municipalities,
except the powers do not extend to matters restricted by art. XI, § 7 of the state constitution."

1 proposed zoning amendment.⁶¹ Even if the Matanuska-Susitna Borough chooses to
2 disregard the recommendations of the planning commission, its decision has been
3 informed by the planning commission's consideration of the potential social and
4 regulatory costs and benefits of the proposed amendment. The Matanuska-Susitna
5 Borough planning commission's role is not merely "procedural," but is substantive.
6 Matanuska-Susitna Borough voters therefore could not bypass the commission by using
7 the initiative power,⁶² because zoning by initiative eliminates the planning commission's
8 role both specified and implied in state statutes and borough ordinances.

9 Transamerica,⁶³ supports the views that the court should also express in this
10 case. In Transamerica the Arizona Supreme Court adhered to a prior holding "that
11 'zoning law is exempted from the initiative process,' in order to prevent private citizens
12 from usurping the governing body's delegated power and from circumventing the notice
13 and hearing requirements of the zoning statute."⁶⁴ The Arizona court noted that its
14 holding in the case on which it relied was "in harmony with the law in the vast majority of
15 other jurisdictions, which prohibits zoning by initiative."⁶⁵

16 In the instant case, the Initiative seems to establish that the only purpose of the
17 proposed ordinance is "to implement the will of the voters." It gives no indication that
18 the sponsors of the Initiative were giving any independent consideration to the planning
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20 ⁶¹ AS 29.40.040(a)(1); AS 29.40.020(b)(2).

21 ⁶² See, e.g., *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244, 247 (1989)
(holding that "[z]oning by initiative is inconsistent with the goal of long range comprehensive planning" and was not
22 intended by legislature); *Carmony v. McKechnie*, 217 P.3d 818, 821 (Alaska 2009) (quoting *Griswold v. City of
Homer*, 186 P.3d 558, 563 (Alaska 2008)) (internal quotation marks omitted).

23 ⁶³ *Transamerica Title Ins. Co. v. City of Tucson*, 157 Ariz. 346, 757 P.2d 1055, 1059 (1988) ("The power to zone is
part of the police power and may be delegated by the State, but the subordinate governmental unit has no greater
power than that which is delegated.").

24 ⁶⁴ *Id.* at 1058.

⁶⁵ *Id.* at 1059.

1 commission's recommendations or that it was considering the zoning amendment on its
2 own merits in light of the comprehensive plan. The proposed measure is unenforceable
3 as a matter of law, because "initiatives cannot be used to deprive a municipality of a
4 power which state law specifically allows (and mandates) that it perform."

5 Therefore, the zoning initiative,⁶⁶ is constitutionally and statutorily invalid. The
6 power to initiate cannot exceed the power to legislate.⁶⁷

7 The proposed zoning initiative is subject to pre-election judicial review because
8 the Plaintiffs have shown that the zoning initiative⁶⁸ is clearly unconstitutional and
9 clearly unlawful,⁶⁹ and does not comply with the State's constitutional and statutory
10 provisions regulating initiatives.

11 H. The Initiative creates a constitutional challenge to part of AS 17.38.210(a).

12 If the zoning initiative⁷⁰ is constitutionally and statutorily invalid,⁷¹ where this
13 zoning initiative impermissibly bypasses the Matanuska-Susitna Borough Planning
14 Commission, and therefore exceeds the Matanuska-Susitna Borough's own legislative
15 power, the portion of AS 17.38.210(a) that authorized area wide zoning by initiative is
16 also unconstitutional, either as written, or at least as applied in this case.

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20 ⁶⁶ Initiative Ordinance Serial No. 15-088, the Matanuska-Susitna Borough Proposition No. B-1 "Prohibiting
Marijuana Establishments Except Those Involving Industrial Hemp in the Area Outside of the Cities".

21 ⁶⁷ Municipality of Anchorage v. Frohne, 568 P.2d 3, 8 (Alaska 1977) (citations omitted) ("[T]he subject of the
initiative must constitute such legislation as the legislative body to which it is directed has the power to enact.");
Carmony v. McKechnie, 217 P.3d 818, 821 (Alaska 2009) (quoting Griswold v. City of Homer, 186 P.3d 558, 563
(Alaska 2008)) (internal quotation marks omitted).

22 ⁶⁸ Initiative Ordinance Serial No. 15-088, the Matanuska-Susitna Borough Proposition No. B-1 "Prohibiting
Marijuana Establishments Except Those Involving Industrial Hemp in the Area Outside of the Cities".

23 ⁶⁹ Carmony v. McKechnie, 217 P.3d 818, 819-20 (Alaska 2009).

24 ⁷⁰ Initiative Ordinance Serial No. 15-088, the Matanuska-Susitna Borough Proposition No. B-1 "Prohibiting
Marijuana Establishments Except Those Involving Industrial Hemp in the Area Outside of the Cities".

⁷¹ See Section A, page 1-6 herein. Because the power to initiate cannot exceed the power to legislate.

1 That portion of AS 17.38.210(a) is either unconstitutional, or intended to imply a
2 repeal of existing mandatory Alaska Statutes.⁷² The Alaska Supreme Court has held,
3 that while disfavored, it will consider whether newly enacted legislation should be
4 interpreted to repeal existing law.⁷³ In determining whether to permit an implied repeal,
5 courts focus on legislative intent.⁷⁴ *Generalia specialibus non derogant* ("the general
6 does not detract from the specific").⁷⁵ Courts also construe statutes in a manner that
7 avoids a finding of unconstitutionality.⁷⁶

8 If it is found unconstitutional, then those five (5) words "or by a voter initiative"
9 could be severed from the statute.⁷⁷ Or in the alternative, language could be added to
10 require an initiative comply with the same statutory mandates imposed on Boroughs.

11 As the Supreme Court pointed out in *Carmony*,⁷⁸ the omission of the statutorily-
12 mandated planning commission role is not the only reason the proposed initiative would
13 be unenforceable as a matter of law. One of the limitations on a legislature is that it
14 does not have the power "to divest itself and succeeding [legislatures] ... of powers
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17 ⁷² AS 29.40.010(a) ("areawide basis"); AS 29.40.020(a) ("borough shall establish a planning commission"); AS
18 29.40.020(b)(1) (requiring planning commission to prepare and submit a "proposed comprehensive plan . . . for the
19 systematic and organized development of the borough").

20 ⁷³ *Allen v. Alaska Oil and Gas Conservation Comm'n*, 147 P.3d 664, 668 n.17 (Alaska 2006).

21 ⁷⁴ *Id.* at 668.

22 ⁷⁵ Described in *The Vera Cruz*, (1884) 10 App. Cas. 59, as: "Now if anything be certain it is this, that where there
23 are general words in a later Act capable of reasonable and sensible application without extending them to subjects
24 specially dealt with by earlier legislation, you are not to hold that earlier legislation indirectly repealed, altered, or
derogated from merely by force of such general words, without any evidence of a particular intention to do so." This
means that if a later law and an earlier law are potentially—but not necessarily—in conflict, courts will adopt the
reading that does not result in an implied repeal of the earlier statute. Lawmaking bodies usually need to be explicit
if they intend to repeal an earlier law.

⁷⁶ *State v. American Civil Liberties Union of Alaska*, 204 P.3d 364, 373 (Alaska 2009).

⁷⁷ Sec. 01.10.030. Severability. Any law heretofore or hereafter enacted by the Alaska legislature which lacks a
severability clause shall be construed as though it contained the clause in the following language: "If any provision
of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the
application to other persons or circumstances shall not be affected thereby."

⁷⁸ *Carmony v. McKechnie*, 217 P.3d 818 (Alaska 2009) (quoting *Griswold v. City of Homer*, 186 P.3d 558, 563
(Alaska 2008)) (internal quotation marks omitted).

1 vested in it by the general law for the benefit of its constituents; for this would be to
2 repeal pro tanto the general law.”⁷⁹

3 Here, the proposed initiative would enact a comprehensive divestiture of the local
4 legislature's statutorily-mandated role in zoning and land use planning. Such a
5 divestiture would be beyond the legislature's power, so it is also beyond the power of
6 the initiative or referendum.

7 I. Title and Body of the Initiative are Deceptive and Misleading.

8 The zoning Initiative's title and body are deceptive and misleading and likely to
9 confuse voters who are both for and against the proposed Initiative, "Prohibiting
10 Marijuana Establishments Except Those Involving Industrial Hemp in the Area Outside
11 of the Cities." An initiative petition should present a straightforward, accurate, succinct
12 and nonargumentative statement of the proposition in its title and in the body of the
13 initiative. This initiative's description is anything but straightforward and accurate.

14 The title and the body of the Initiative appears to be intentionally deceptive and
15 misleading and likely to confuse the voters that "Industrial Hemp" would not be affected
16 by the initiative, if it passed, but this is not accurate under Alaska Statutes.

17 Based on the Alaska statutory definition of marijuana,⁸⁰ this Court must consider
18 an axiom, that Industrial Hemp is included in the definition of marijuana, and would also
19 be prohibited if the initiative passes, or the Initiative is not a single subject Initiative and
20 would violate the constitutional prohibitions against more than one subject.⁸¹ At the very

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22 ⁷⁹ Thompson v. Bd. of Trs. of City of Alameda, 144 Cal. 281, 77 P. 951, 952 (App.1904); see also 82
C.J.S. Statutes § 9 (2008).

23 ⁸⁰ Sec. 17.38.900. Definitions. (7) "marijuana".

24 ⁸¹ In Alaska, the single-subject requirement may be treated as a procedural rule, reviewable only in preelection
litigation. ALASKA STAT. § 15.45.040 (1982) specifies the "form" of an initiative bill: it must contain only one
subject, which must be expressed in its title, and must contain an enacting clause.

1 least this Court must determine that the ballot title is "deceptive and misleading and not
2 in a form which will produce a knowing and deliberate expression of voter choice."

3 Many voters do not read beyond the ballot measure title, and the ballot title
4 "Prohibiting Marijuana Establishments Except Those Involving Industrial Hemp in the
5 Area Outside of the Cities" is misleading, and consequently should be corrected or
6 removed from the 2016 election ballot. Specifically, the title "Prohibiting Marijuana
7 Establishments Except Those Involving Industrial Hemp in the Area Outside of the
8 Cities" might cause a voter who is either in favor or against adoption of the initiative
9 measure, to cast a ballot opposing to their desires.

10 For example, a voter who believes the initiative is misguided, bad policy, pre-
11 empted by state law, would hurt only commercial marijuana businesses and not hurt
12 Industrial Hemp farmers, or simply believes that the Initiative would permit Industrial
13 Hemp Farming, and is beneficial, could read the title . . . and erroneously cast a 'yes'
14 vote because she or he favors Industrial Hemp Farming, and thus votes 'yes.' By the
15 same token, a voter who is in favor of the initiative and reads the title . . . may
16 erroneously cast a 'no' vote."

17 This Court has the power to prevent the use of a ballot not in conformity with the
18 law and to compel officials to prepare and distribute proper ballots.

19 J. The zoning initiative violates Article X Section 2 of the Alaska Constitution.

20 The zoning initiative would usurp undelegated powers from the Matanuska-
21 Susitna Borough's proposed taxation powers, where the zoning initiative would prohibit
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1 the proposed tax that has already been placed on the ballot,⁸² and would also prohibit
2 the Matanuska-Susitna Borough from receiving the appropriation of funds already
3 dedicated to the Matanuska-Susitna Borough.⁸³

4 In the Alaska Constitution, Article X Section 2 Local Government Powers,
5 provides, "All local government powers shall be vested in boroughs and cities. The
6 State may delegate taxing powers to organized boroughs and cities only."⁸⁴ (Emphasis
7 added)

8 This section prohibits zoning initiatives that would interfere with, or usurp, the
9 Borough's powers to impose taxes, collect taxes imposed, or the Borough's powers to
10 receive appropriation of funds already dedicated to the Matanuska-Susitna Borough.

11 The zoning initiative, standing in the shoes of the Matanuska-Susitna Borough,
12 seeks to do, through a vote of the people, what the Constitution of the State of Alaska
13 and Alaska Statutes prohibit the Initiative and referendum from being used for:

14 "The initiative shall not be used to dedicate revenues, make or repeal
15 appropriations, create courts, define the jurisdiction of courts or prescribe their
16 rules, or enact local or special legislation. The referendum shall not be applied to
17 dedications of revenue, to appropriations, to local or special legislation, or to laws
18 necessary for the immediate preservation of the public peace, health, or safety."⁸⁵

18 ⁸² Proposition No. B-5, Areawide Sales Tax of Five Percent (5%) on Marijuana and Marijuana Products With a
19 Limited Exemption for Sales Tax Paid to a City. Ordinance Serial No. 16-085 and IM No. 16-125 (Areawide
20 Proposition).

20 ⁸³ Sec. 17.38.200. Marijuana establishment registrations.

21 (c) Upon receiving an application or renewal application for a marijuana establishment, the board shall
22 immediately forward a copy of each application and half of the registration application fee to the local regulatory
23 authority for the local government in which the applicant desires to operate the marijuana establishment, unless the
24 local government has not designated a local regulatory authority pursuant to AS 17.38.210(c).

22 ⁸⁴ See, *State v. Alex*, 646 P.2d 203 (Alaska, 1982) where the Supreme Court held, "In conclusion, then, we hold that
23 the statute impermissibly delegates the taxing power to the regional associations, violating article X, section 2 of
24 Alaska's constitution."

23 ⁸⁵ Alaska Constitution, Article XI, Section 7; Alaska Statute Sec. 15.45.010. Provision and scope for use of the
24 initiative. The law-making powers assigned to the legislature may be exercised by the people through the initiative.
However, an initiative may not be proposed to dedicate revenue, to make or repeal appropriations, to create courts,
to define the jurisdiction of courts or prescribe their rules, or to enact local or special legislation.

1 Article X of the Alaska Constitution establishes the framework for local
2 government in Alaska. Section 1 of the local government article states the following with
3 respect to the purpose and construction of the constitutional provisions regarding local
4 government: The purpose of this article is to provide for maximum local self-government
5 with a minimum of local government units, and to prevent duplication of tax-levying
6 jurisdictions. A liberal construction shall be given to the powers of local government
7 units. (Emphasis added).

8 The Supreme Court has held that when the Initiative violates the constitutional
9 restrictions on the initiative process it should have been rejected.⁸⁶ The unconstitutional
10 zoning Initiative should not have been placed before the voters. An injunction should be
11 granted directing that the proposed unconstitutional zoning ordinance be removed from
12 the ballot.⁸⁷

13 K. Unconstitutional takings and damage to the property rights of the Plaintiffs.

14 The sponsors of the unconstitutional zoning initiative, standing in the place of the
15 Matanuska-Susitna Borough, caused a government takings and damage to the property
16 rights of the Plaintiffs, in violation of the Alaska Constitution,⁸⁸ and in violation of the
17 Constitution of the United States.⁸⁹

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19 ⁸⁶ *Alaskans for Efficient Government, Inc. v. State*, 153 P.3d 296 (Alaska 2007); and *See, State v. Alex*, 646 P.2d
20 203 (Alaska, 1982) where the Supreme Court held, "In conclusion, then, we hold that the statute impermissibly
delegates the taxing power to the regional associations, violating article X, section 2 of Alaska's constitution." *See*
also *Whitson v. Anchorage*, 608 P.2d 759 (Alaska 1980).

21 ⁸⁷ *Whitson v. Anchorage*, 608 P.2d 759 (Alaska 1980).

22 ⁸⁸ Article I, § 18 of the Alaska Constitution states, "Private property shall not be taken or damaged for public
use without just compensation" (emphasis added).

23 ⁸⁹ Fifth Amendment, made applicable to the States through the Fourteenth Amendment. *See, Chicago Burlington &*
Quincy Railroad Co. v. Chicago, 166 U.S. 226 (1897), where the justices unanimously held that the due process
24 clause required state and local governments to give "just compensation" for taking private property for public
purposes. Still, this decision did not connect the due process clause of the 14th Amendment to the Bill of Rights.
According to the Supreme Court, "just compensation" was a right within the meaning of the due process clause
itself.

1 The Defendant sponsors of the zoning initiative all knew that they were standing
2 in place of the Matanuska-Susitna Borough, exercising the government powers of the
3 Matanuska-Susitna Borough, in an attempt to create an area-wide zoning ordinance
4 through the initiative process. The sponsors knew the purpose of the zoning initiative
5 was to take away the personal property rights of every person in the Matanuska-Susitna
6 Borough, including the Plaintiffs, to exercise their rights under the Alaska Constitution
7 and Alaska Statutes to develop and use their own property for a commercial marijuana
8 business in the Matanuska-Susitna Borough. The Defendant sponsors of the zoning
9 initiative caused, or contributed to, the unconstitutional takings and damage to the
10 personal property rights of the Plaintiffs.

11 The Defendant Matanuska-Susitna Borough knew that zoning by initiative was
12 invalid for proposing zoning in the Matanuska-Susitna Borough, that it violated existing
13 mandatory Alaska statutes, and the Constitution,⁹⁰ and amounted to a takings action, in
14 violation of Plaintiffs' constitutional rights, and damage to the personal property rights of
15 the Plaintiffs by the Defendants.

16 The Defendant Matanuska-Susitna Borough, through the Assembly, knew at the
17 time they declared the moratorium, based on the unconstitutional zoning initiative, or by
18 due diligence should have known, that zoning by initiative was invalid for proposing any
19 zoning in the Matanuska-Susitna Borough,⁹¹ and the moratorium caused or contributed
20 to a takings and damage to the personal property rights of the Plaintiffs, because of the
21 intentional unconstitutional delay of many months, preventing Plaintiffs from exercising

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⁹⁰ See, Section G. Invalid Exercise of Matanuska-Susitna Borough's Legislative Authority, page 8-13 herein.

23 ⁹¹ See, e.g., *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244, 247 (1989)
24 (holding that "[z]oning by initiative is inconsistent with the goal of long range comprehensive planning" and was not
intended by legislature); *Carmony v. McKechnie*, 217 P.3d 818, 821 (Alaska 2009) (quoting *Griswold v. City of
Homer*, 186 P.3d 558, 563 (Alaska 2008)) (internal quotation marks omitted).

1 their own personal property rights to develop and use their own property for any type of
2 commercial marijuana business in the Matanuska-Susitna Borough.

3 The Supreme Court of the United States has developed two "per se" rules for
4 takings. First, when the government physically takes an interest in property,
5 compensation is mandated whether taking all or just a part of an owner's interest.⁹²
6 Second, when a government action deprives the landowner of all economically viable
7 use of the land, a taking has occurred.⁹³ However, when a regulation prevents an
8 owner from conducting certain activities without removing all viable use, a court must
9 assess the purpose and the effect of the regulation. Using the "Penn Central Analysis,"
10 named for the case that established it, the court weighs the regulation's economic effect
11 on the landowner, the extent to which the regulation interferes with reasonable
12 investment-backed expectations, and the character of the government action.⁹⁴

13 The Alaska Supreme Court explained in a case decided recently, in 2002,⁹⁵ in a
14 pre-condemnation governmental activity,

15 "We have never applied the case-specific analysis to a case involving pre-
16 condemnation governmental activity.⁹⁶ We have applied it to date only to cases
17 in which the government has, in its governmental capacity, allegedly restricted
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19 ⁹² Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465, 1478-1479 (2002).

20 ⁹³ Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

21 ⁹⁴ Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465, at 1475, citing Penn
22 Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

23 ⁹⁵ Joseph M. Jackovich Revocable Trust v. State, Dept. of Transp., 54 P.3d 294, 2002 WL 31002501, Alaska,
24 September 06, 2002 (NO. S-9686).

⁹⁶ The case-specific takings clause analysis originates in the Supreme Court's decisions. See, e.g., PruneYard
Shopping Ctr. v. Robins, 447 U.S. 74, 83, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980) (identifying several factors to
determine whether governmental action has gone beyond mere regulation, including "the character of the
governmental action, its economic impact, and its interference with reasonable investment-backed expectations")
(citation omitted); see also Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104,124, 98 S.Ct. 2646, 57
L.Ed.2d 631 (1978) (explaining that courts must "engag[e] in ... essentially ad hoc, factual inquiries" to determine
when "justice and fairness" require public as whole rather than small number of disproportionately burdened
landowners bear costs of regulation).

1 landowners from using their property or deprived them of the exclusive use of
2 their property.”⁹⁷

3 The court went on to say, “moreover, it is not clear how the case-specific factors
4 we have identified might apply in such a case.”⁹⁸ The fourth factor-the legitimacy
5 of the interest advanced by “the regulation or land-use decision”-implicitly
6 recognizes that an ad hoc takings claim turns on an action having the purpose of
7 affecting the landowner's property rights.” (But there was no indication the
8 actions in that case, attributed to the state, had any purpose of affecting or
9 limiting the owners' rights or use of the affected properties. The complained-of
10 actions were taken to give the owners and the community notice of the project's
11 potential scope and progress.) (Emphasis added)

12 Plaintiffs have shown that the actions of the Defendants caused, or contributed
13 to, unconstitutional takings and damage to the personal property rights of the Plaintiffs
14 without just compensation.

15 As the Supreme Court stated in the 2002 case,⁹⁹

16 The fourth factor-the legitimacy of the interest advanced by “the regulation or
17 land-use decision”- implicitly recognizes that an ad hoc takings claim turns on an
18 action having the purpose of affecting the landowner's property rights. (Emphasis
19 added)

20 But, unlike the 2002 case,¹⁰⁰ where in that case there was no indication that the
21 actions attributed to the state had any purpose of affecting or limiting the owners' rights
22 or use of the affected properties, in this case, the Plaintiffs have shown that was exactly
23 the purpose of the Defendant sponsors of the zoning initiative, and exactly the purpose
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⁹⁷ E.g., *R & Y, Inc.*, 34 P.3d 289 (Alaska 2001) (where municipality imposed improvement setback restriction in wetland area); *Balough v. Fairbanks N. Star Borough*, 995 P.2d 245 (Alaska 2000) (where junkyard was no longer permissible use following rezoning); *Cannone v. Noey*, 867 P.2d 797 (Alaska 1994) (where state imposed restrictions on subdivision); *Anchorage v. Sandberg*, 861 P.2d 554 (Alaska 1993) (where municipality's decisions in opposing improvement district prevented landowner from creating improvement district); *State, Dep't of Natural Res. v. Arctic Slope Reg'l Corp.*, 834 P.2d 134 (Alaska 1992) (where state law required well operators to disclose their drilling results to state, thus denying them exclusive use of their data).

⁹⁸ The factors are: “(1) the character of the governmental action; (2) its economic impact; (3) its interference with reasonable investment-backed expectations; and (4) the legitimacy of the interest advanced by the regulation or land-use decision.” *R & Y*, 34 P.3d at 293.

⁹⁹ *Joseph M. Jackovich Revocable Trust v. State, Dept. of Transp.*, 54 P.3d 294, 2002 WL 31002501, Alaska, September 06, 2002 (NO. S-9686).

¹⁰⁰ *Joseph M. Jackovich Revocable Trust v. State, Dept. of Transp.*, 54 P.3d 294, 2002 WL 31002501, Alaska, September 06, 2002 (NO. S-9686).

1 of the Defendant Matanuska-Susitna Borough, through the Assembly's moratorium, of
2 affecting or limiting the owners' rights or use of their own affected properties.

3 Plaintiffs have shown the illegitimacy of the zoning initiative, where it violated
4 mandatory Alaska Statutes, and the Alaska Constitution, bypassing the mandatory
5 planning commission review of land use ordinances and would thwart the state
6 legislature's delegation of land use authority to the municipal assembly,¹⁰¹ and would
7 not be enforceable as a matter of law, and the Defendant sponsor of that zoning
8 initiative, standing in place of the Matanuska-Susitna Borough, caused a government
9 takings and damage to the personal property rights of the Plaintiffs, for the public use,
10 without just compensation.

11 Plaintiffs have shown the illegitimacy of the zoning initiative, that the Defendant
12 Matanuska-Susitna Borough, through the Assembly, relied on to impose a moratorium
13 intentionally affecting or limiting the Plaintiffs, the owners' rights or use of the affected
14 properties, causing a government takings and damage to the personal property rights of
15 the Plaintiffs without just compensation.

16 The zoning initiative clearly indicates the Defendant sponsors of the initiative,
17 were exercising the Matanuska-Susitna Borough's legislative zoning powers, in the
18 place of the Matanuska-Susitna Borough government. Therefore, the intentional takings
19 and damage of the personal property rights of the Plaintiffs was by the government, and
20 since it was taken by, and for, the people, it was taken for public use, to prevent the
21 Plaintiffs from using and developing their property for use of a marijuana business.

22
23 ¹⁰¹ See, e.g., *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244, 247 (1989)
24 (holding that "[z]oning by initiative is inconsistent with the goal of long range comprehensive planning" and was not
intended by legislature); *Carmony v. McKechnie*, 217 P.3d 818, 821 (Alaska 2009) (quoting *Griswold v. City of
Homer*, 186 P.3d 558, 563 (Alaska 2008)) (internal quotation marks omitted).

1 L. No ordinances or regulations prohibiting Marijuana Businesses at the time:

2 There were no ordinances or regulations prohibiting Marijuana Businesses, in the
3 Matanuska-Susitna Borough, made pursuant to AS 17.38.210(b), at the time Plaintiffs
4 invested in their properties and developed their properties for marijuana businesses,
5 and when they presented their application and completed plan to the Alaska Marijuana
6 Control Board, or when they presented a copy of their plan and made application to the
7 Matanuska-Susitna Borough for any land use permit that might be necessary.

8 Sec. 17.38.210. Local control.

9 (h) A local regulatory authority issuing a registration to an applicant shall do so
10 within 90 days of receipt of the submitted or resubmitted application unless
11 the local regulatory authority finds and notifies the applicant that the applicant is
12 not in compliance with ordinances and regulations made pursuant to (b) of this
13 section in effect at the time the application is submitted to the local
14 regulatory authority. The local government shall notify the board if an annual
15 registration has been issued to the applicant. (Emphasis added)

13 (b) A local government may enact ordinances or regulations not in conflict with
14 this chapter or with regulations enacted pursuant to this chapter, governing the
15 time, place, manner, and number of marijuana establishment operations. A local
16 government may establish civil penalties for violation of an ordinance or
17 regulation governing the time, place, and manner of a marijuana establishment
18 that may operate in such local government.

16 The majority of legislatures require an express statement of retroactivity before
17 an interpreter can construe a statute to apply to past conditions.¹⁰²

18 Plaintiffs were present when it was explained to the Matanuska-Susitna Borough
19 Assembly during a public meeting, that new ordinances or regulations prohibiting
20 Marijuana Businesses made pursuant to AS 17.38.210(b) could only be prospective,
21
22
23

24 ¹⁰² The codified canons require a statute's retroactive effect to be express, obvious, plain, manifest, or clear., No statute is retrospective unless expressly declared therein.
EXPEDITED COMPLAINT FOR DECLARATORY JUDGMENT
AND FOR MANDATORY AND INJUNCTIVE RELIEF

1 and could not have a retroactive effect.¹⁰³ This was in response to the Borough
2 attorney's statement, during the public meeting, that they would establish an ordinance
3 or regulation, make it a crime, make it retroactive, and put people in jail, to prevent them
4 from exercising any "grandfathered in" rights. But it would not circumvent the "in effect
5 at the time the of the application" mandate, or the "shall do so within 90 days of receipt
6 of the submitted application..". (Emphasis added)

7 Plaintiffs seek a Declaratory Judgment that the Alaska statute clearly requires the
8 Matanuska-Susitna Borough to issue the land use permit to the Plaintiffs within 90 days
9 of the Plaintiffs' submitted application, when there were no ordinances and regulations
10 made pursuant to (b) of this section¹⁰⁴ in effect at the time the application is
11 submitted to the local regulatory authority. (Emphasis added).

12 M. Alaska Statute did not authorize Local Government prohibition, by enactment of
13 an Ordinance or by voter initiative, until after it took effect on February 23, 2016.

14 A review of the books, of voters' signatures, indicates that they were all signed in
15 2015, submitted in 2015, and then resubmitted again in 2016. It appears the proposed
16 zoning initiative was prepared by the sponsors, submitted to the Clerk for approval, and
17 the signatures were all gathered before the Alaska Statute was signed into law and took
18 effect, that provided the authority for the Local Government prohibition, (commonly
19 referred to as the opt out provision), by "enactment of an ordinance or by initiative."

20 It also appears that the sponsors signature sheet presented to the Clerk does not
21 appear to comply with the Alaska Statute AS 15.45.330. It does not appear to contain
22 the required information, and may statutorily invalidate the original sponsors signatures.

23 ¹⁰³ AS § 01.10.090 (2008).

24 ¹⁰⁴ AS 17.38.210. Local control.

1 The Alaska statute,¹⁰⁵ that first authorized the proposed zoning initiative, was not
2 signed into law by Byron Mallot until January 24, 2016. The law did not take effect until
3 30 days later on February 23, 2016.¹⁰⁶

4 But the day, and the dates, they were signed indicates the voters' signatures may
5 have been induced by political propaganda to influence legislation, with 755 signatures
6 gathered on Sundays, indicating the voters' signatures may have been the result of the
7 influence of political propaganda to influence legislation.

8 Federal statutes prohibit churches from "carrying on political propaganda, or by
9 otherwise attempting to influence legislation."¹⁰⁷ The subject of the proposed initiative,
10 "Prohibiting Marijuana Establishments Except Those Involving Industrial Hemp in the
11 Area Outside of the Cities," is believed to have become part of the political propaganda
12 to influence legislation, directed by a tax exempt church, and may have even occurred
13 on church property, on Sundays.

14 According to the wording in the Federal statutes, if political propaganda was used
15 to influence legislation, it appears those churches could be subjected to a loss of their
16 501(c)(3) tax exempt status, and even punishments of possible fines, and forfeitures,
17 that has sometimes even led to tax seizures and forfeitures of church properties.

18 The proposed zoning initiative was submitted to the Clerk on May 7, 2015. On
19 May 15, 2015, the Clerk submitted her review of the application rejecting the application
20

21 ¹⁰⁵ AS 17.38.210 (a), "A local government may prohibit the operation of marijuana cultivation facilities, marijuana
22 product manufacturing facilities, marijuana testing facilities, or retail marijuana stores through the enactment of an
23 ordinance or by a voter initiative." (Emphasis added)

24 ¹⁰⁶ AS 44.62.180. Local Option was still pending before the House, prior to being signed into law. See HB 75: "An
Act relating to the regulation of marijuana by municipalities; and providing for an effective date." "AS 17.38.110(a)
is amended to read . . ."

¹⁰⁷ Title 26 U.S.C. § 501(c)(3). Disqualified organizations, for purposes of tax exempt status set out in paragraph
(3), an organization is a disqualified organization if it is - (A) described in section 170(b)(1)(A)(i) (relating to
churches), (B) an integrated auxiliary of a church or of a convention or association of churches.

1 for initiative because the title did not accurately reflect the contents of the initiative. A
2 copy of the memorandum opinion of the Borough attorney was included.

3 On Page 2 of the May 15, 2015 letter it states, "The signatures of at least 10
4 registered voters (sponsors) is affixed, and they are registered voters from outside the
5 cities of Houston, Palmer, and Wasilla." The sponsors names and addresses contains
6 fourteen signatures. However, it is stamped at the top as being received by the Clerk's
7 Office on May 22, 2015. This would appear to be seven (7) days after the May 15, 2015
8 letter was written. A review of the sponsors' information indicates 1) address that does
9 not exist, 2) a vacant lot, and 3) a number that appear may be within the cities.¹⁰⁸

10 N. Prejudice to the Plaintiffs caused by the Defendants Takings:

11 Plaintiffs' investment, expenses, and loss of income, from the invalid proposed
12 initiative, that violates mandatory Alaska Statutes, and is unconstitutional, caused or
13 contributed to the unconstitutional takings, or damage, to the Plaintiffs' constitutional
14 and statutory personal property rights, to exercise their right to engage in their lawful
15 marijuana business in the Matanuska-Susitna Borough, due to the proposed zoning
16 initiative, and because of the moratorium.

17 Plaintiffs' investment, maintenance and other expenses are far in excess of
18 \$60,000 so far. Their actual loss of projected income, due to the unconstitutional
19 takings and damage to the personal property rights of the Plaintiffs, and due to the
20 illegal and unconstitutional delay intentionally caused by the Defendants, would be
21 \$1,440,000 a year - \$60,000 in expenses. (See, Plaintiffs' affidavits In support)

22 ¹⁰⁸ AS 15.45.330.

23 Each petition shall include a statement of warning that a person who signs a name other than the person's own to the
24 petition, or who knowingly signs more than once for the same proposition at one election, or who signs the petition
when knowingly not a qualified voter is guilty of a class B misdemeanor.

1 O. No sovereign immunity for takings actions:

2 First English Evangelical Lutheran Church¹⁰⁹ holds that the Constitution requires
3 a state to waive its sovereign immunity to the extent necessary to allow claims to be
4 filed against it for takings of private property for public use.¹¹⁰ It is also true that when
5 the government takes property for a public use it must pay interest,¹¹¹ which is (among
6 other things) compensation for delay in getting money that is owed one.¹¹² The other
7 side of this coin, however, is that if a person whose property is taken is entitled to
8 interest at a properly compensatory rate from the date of the taking.¹¹³

9 PLAINTIFFS' CLAIMS FOR RELIEF

10 Plaintiffs incorporate by reference each of the allegations in pages 1-32 above,
11 and request the following relief:

12 A. For a declaratory judgment, declaring as follows:

- 13 1. That the proposed zoning initiative is in clear conflict "with one or more state
14 statutes";
- 15 2. That the proposed zoning initiative violates "explicit constitutional prohibitions";
- 16 3. That the proposed zoning initiative "cannot be used to deprive a municipality of
17 a power which state law specifically allows (and mandates) that it perform";
- 18 4. That "[t]he powers to initiate cannot exceed the power to legislate", and the
19 proposed zoning initiative exceeds Matanuska-Susitna Borough's legislative powers;
- 20

21 ¹⁰⁹ First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315-16 (1987).

22 ¹¹⁰ Cf. McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 36-41 (1990); Ward v. Board
of County Commissioners, 253 U.S. 17, 24 (1920).

23 ¹¹¹ Library of Congress v. Shaw, 478 U.S. 310, 317 n. 5 (1986); cf. Kirby Forest Industries, Inc. v. United States,
467 U.S. 1, 18 (1984); Jacobs v. United States, 290 U.S. 13, 17 (1933); Evans v. City of Chicago, 10 F.3d 474, 481
(7th Cir. 1993) (en banc); Simon v. Cebrick, 53 F.3d 17, 24 (3d Cir. 1995),

24 ¹¹² Library of Congress v. Shaw, supra, 478 U.S. at 321 -22.

¹¹³ Evans v. City of Chicago, supra, 10 F.3d at 481-82.
EXPEDITED COMPLAINT FOR DECLARATORY JUDGMENT
AND FOR MANDATORY AND INJUNCTIVE RELIEF

1 5. That a portion of AS 17.38.210(a), that authorized area wide zoning by
2 initiative is unconstitutional, either as written, or at least as applied in this case. The
3 statute that authorized area wide zoning by initiative "is in clear conflict with one or more
4 state statutes" and is unconstitutional;

5 6. That the Defendant Sponsors of the proposed zoning initiative were standing
6 in place of the Matanuska-Susitna Borough, exercising the government powers through
7 the initiative, the legislative powers of the Matanuska-Susitna Borough;

8 7. That the wording in the proposed zoning initiative seems to establish that the
9 only purpose of the proposed ordinance is "to implement the will of the voters";

10 8. That the wording in the proposed zoning initiative seems to establish that it is
11 intended to take away the personal property rights of everyone in the Matanuska-
12 Susitna Borough, outside of the cities of Houston, Palmer, and Wasilla, to exercise their
13 constitutional and statutory right to engage in marijuana businesses in the Matanuska-
14 Susitna Borough, if it passes;

15 9. That Matanuska-Susitna Borough's moratorium, based on an invalid proposed
16 zoning initiative, caused, or contributed to, a delay in the consideration of the Plaintiffs'
17 exercise of their constitutional and statutory rights to engage in marijuana businesses in
18 the Matanuska-Susitna Borough;

19 10. That Matanuska-Susitna Borough clerk, and the Borough Attorney, knew, or
20 by due diligence should have known, that the teachings of the Supreme Court in
21 *Griswold v. City of Homer*,¹¹⁴ *Carmony v. McKechnie*,¹¹⁵ and *Municipality of Anchorage*

22
23

¹¹⁴ 186 P.3d 558 (Alaska 2008).

¹¹⁵ *Carmony v. McKechnie*, 217 P.3d 818, (Alaska 2009); and See also *Griswold v. City of Homer*, 186 P.3d 558,
563 (Alaska 2008))

1 v. Frohne,¹¹⁶ have made it clear that zoning by initiative is invalid, and that the Clerk
2 exceeded her jurisdiction in accepting an application for a proposed zoning initiative
3 which did not comply with the statutory requisites.

4 11. That that the Alaska statute clearly required Matanuska-Susitna Borough to
5 issue a land use permit to Plaintiffs within 90 days of Plaintiffs' submitted application,
6 when there were no ordinances and regulations made pursuant to (b) of this section¹¹⁷
7 in effect at the time the application was submitted to the local regulatory authority.
8 (Emphasis added).

9 12. That Defendants appear may have caused or contributed to unconstitutional
10 takings, or damage, to the personal property rights of the Plaintiffs, and it appears may
11 have caused, or contributed to, the prejudice caused to the Plaintiffs.

12 B. For a preliminary and permanent injunction directing as follows:

- 13 1. To prevent the zoning initiative¹¹⁸ from being placed before the voters;
- 14 2. To have the zoning initiative removed from the Ballot; and
- 15 3. To prevent any votes from being counted on the zoning initiative, in the event
16 that it is voted on, until after this matter is resolved.
- 17 4. That the Matanuska-Susitna Borough issue the Plaintiffs any land use permit
deem necessary pursuant to the mandatory requirement of AS 17.38.210(h).

18 C. Grant the Plaintiffs attorney fees, research expenses, and costs for having to
19 bring this action to vindicate violation of Plaintiffs constitutional and statutory rights.¹¹⁹

20 D. Grant such other and further relief as the Court deems appropriate.

21
22 ¹¹⁶ See *Municipality of Anchorage v. Frohne*, 568 P.2d 3, 8 (Alaska 1977) (“[T]he subject of the initiative must
constitute such legislation as the legislative body to which it is directed has the power to enact.”).

¹¹⁷ AS 17.38.210. Local control.

23 ¹¹⁸ Initiative Ordinance Serial No. 15-088, the Matanuska-Susitna Borough Proposition No. B-1 “Prohibiting
Marijuana Establishments Except Those Involving Industrial Hemp in the Area Outside of the Cities”.

24 ¹¹⁹ by an invalid unconstitutional proposed zoning initiative that violates mandatory Alaska statutes and usurps
planning and zoning powers mandated for the Borough to exercise.

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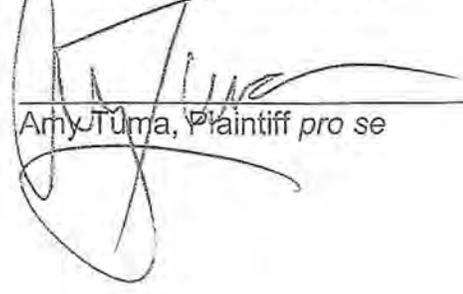
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests this Court enter the Declaratory Judgments, and grant the injunctions, prayed for herein.

Respectfully submitted this 8 day of September 2016.



Clint Tuma, Plaintiff *pro se*



Amy Tuma, Plaintiff *pro se*

1 CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that on the 8 day of September, 2016, a true
3 and complete copy of the above and foregoing document was served on the appropriate
4 parties by process server, or by hand, fax, or by placing it in the United States Mail with
first class postage prepaid and addressed as follows: All by process server

5 Matanuska-Susitna Borough
6 350 E. Dahlia Ave
Palmer, AK 99645
Phone: (907) 861-7801

Larry DeVilbiss.
2300 N. Aurora Lane
Palmer, AK 99645

7 Daniel Hamm
8 8661 East Regents Road
Palmer, Alaska 99645

Sally Pollen
2000 Pennington Lane
Palmer, Alaska 99645

9 Barry Orzalli
10 1561 South Bever Lake Road
Wasilla, Alaska 99623

Ted Franke
5381 East Pine Street
Wasilla, Alaska 99654

11 Dennis Hotchkiss;
12 3040 N. Belos Street
Wasilla, Alaska 99654

Christopher R. Miller
4028 N. Snowgoose Road
Palmer, Alaska 99645

13 Robert Hanner
14 525 Scheelite Drive
Wasilla, Alaska 99654

Timothy R. Sergie
8736 N. SunValley Drive
Palmer, Alaska 99645

15 Stephen D. Guisinger
16 2850 Snowshoe Lane
Wasilla, Alaska 99654

Rudy Poglitsch
7180 E. Twin Lakes Drive
Wasilla, Alaska 99654

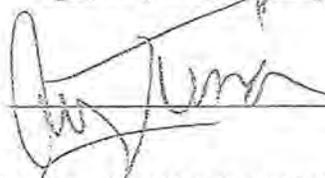
17 Paul Riley
18 7851 E. SouthShore Drive
Wasilla, Alaska 99687

Philip Markwardt
3641 Puffin Circle
Palmer, Alaska 99645

19 Paul Steiner
20 10739 E. Center Street
Palmer, Alaska 99645

Bob Lee
1500 E. Robin Lane
Palmer, Alaska 99645

21 Dated this 8 Day of September, 2016,

22
23 Signed, 



1 Clint Tuma & Amy Tuma
2 PO BOX 1073
3 10948 N Pilot Dr
4 Willow AK 99688
5 (907) 376-2232 – Message Phone
6 (907) 376-0530 - Fax

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT PALMER

7 Clint Tuma and Amy Tuma,)
8)
9 Plaintiff,)
10)
11 v.)
12)
13 Matanuska-Susitna Borough; Barry Orzalli; Ted)
14 Franke; Christopher R. Miller; Robert Hanner;)
15 Stephen D. Guisinger; Paul Riley; Paul Steiner;)
16 Dennis Hotchkiss; Bob Lee; Philip Markwardt;)
17 Rudy Poglitsch; Timothy R. Sergie; Daniel Hamm)
18 Sally Pollen; and Larry DeVilbiss.)
19 Defendants.)

Case No. 3PA-16-1979C1

AFFIDAVIT OF CLINT TUMA - IN SUPPORT OF THE
EMERGENCY MOTION FOR DECLARATORY JUDGMENT
AND FOR MANDATORY AND INJUNCTIVE RELIEF

17 STATE OF ALASKA)
18) ss.
19 THIRD JUDICIAL DISTRICT)

20 I, Clint Tuma, being first duly sworn, deposes and states:

21 1. That I am an adult resident of the State of Alaska, and that I am the named
22 Plaintiff in the above styled and numbered cause.

23 2. That I have personal knowledge of the facts in the Emergency-Expedited
24 Complaint for Declaratory Judgment and for Mandatory and Injunctive Relief and that I

1 reviewed my Emergency-Expedited Complaint for Declaratory Judgment and for
2 Mandatory and Injunctive Relief, finding any factual assertions made therein to be true
3 to the best of my knowledge and belief.

4 3. That I have submitted herewith, attached hereto, a list of the investment, and
5 expenses incurred, and a projected estimated loss of income and projected expenses,
6 as referred to in the section in my Emergency-Expedited Complaint for Declaratory
7 Judgment and for Mandatory and Injunctive Relief. (See Exhibit A attached hereto)

8 4. Affiant sayeth further naught.

9 RESPECTFULLY submitted on this the 8 day of September 2016.

10

11

BY 
Clint Tuma, Plaintiff, pro se

12

13

SUBSCRIBED AND SWORN to before me this 8th day of September 2016.

14

15

By Ronda Marcy
Notary Public for Alaska
My Commission expires: 12-25-16

16

17

18

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23

24

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8 day of September, 2016, a true and complete copy of the above and foregoing document was served on the appropriate parties by process server, or by hand, fax, or by placing it in the United States Mail with first class postage prepaid and addressed as follows: All by process server

Matanuska-Susitna Borough
350 E. Dahlia Ave
Palmer, AK 99645
Phone: (907) 861-7801

Larry DeVilbiss.
2300 N. Aurora Lane
Palmer, AK 99645

Daniel Hamm
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Palmer, Alaska 99645

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2000 Pennington Lane
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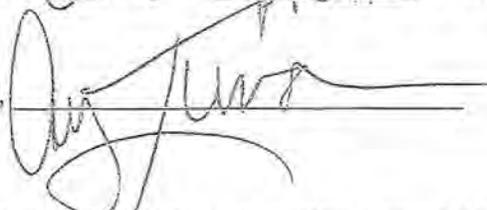
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Palmer, Alaska 99645

Paul Steiner
10739 E. Center Street
Palmer, Alaska 99645

Bob Lee
1500 E. Robin Lane
Palmer, Alaska 99645

Dated this 8 Day of September, 2016,

Signed, 



Clint Tuma and Amy Tuma filed notices as Evergreen Marijuana Producers and served the Mat-Su Borough a complete copy of their application on Feb 29, 2016.

A. A list of the investment, and expenses incurred:

MEA Bills	November 2015 to August 2016	5233.13
Borough Business License	3/1/16 – 12/31/17	100.00
Newman's Hilltop Service – plowing	2/12/16	150.00
State Farm Insurance	10/15	297.68
Newman's Fuel receipt	2/26/16	46.55
Newman's Fuel receipt	2/21/16	31.50
MTA	04/04/16	128.41
UPS Store – fingerprints	02/17/16	35.00
MEA	October 2015	376.26
MEA	October 2015	122.00
Far North Garden Supply	02/27/16	267.00
Far North Garden Supply	02/27/16	94.83
Alaska Jack's	03/05/16	292.50
Alaska Jack's	02/19/16	79.80
Alaska Jack's	02/22/16	143.10
AIH	02/12/16	418.19
AIH	02/13/16	532.67
Honeybee Lake Aero Park Homeowner's Assoc. Asses	1/1/2016	300.00
Wick Communication	02/29/16	234.00
AIH	08/29/15	854.99
Far North Garden Supply	08/15/16	637.99
Newman's propane	06/07/16	15.75
Lowe's	06/07/16	62.84
Lowe's	08/15/16	53.86
Lowe's	06/13/16	400.88

Lowe's	06/05/16	731.71
Lowe's	02/24/16	184.24
Lowe's	02/19/16	963.89
Lowe's	02/20/16	(48.38)
Lowe's	03/04/16	224.92
Lowe's	02/27/16	272.18
Lowe's	03/05/16	18.95
Lowe's	02/20/16	195.54
Lowe's	02/22/16	915.25
Lowe's	02/19/16	659.69
Lowe's	08/15/16	232.63
Mat-Su Title	10/19/15	32198.85
Mat-Su Borough Property Tax	03/15/16	1103.84
FNBA	02/02/16	1974.28
FNBA	03/04/16	2000.00
FNBA	03/21/16	2000.00
FNBA	04/04/16	2000.00
FNBA	06/03/16	2200.00
FNBA	07/06/16	2000.00
TOTAL:		60785.20

(The actual receipts are available for viewing and copying upon request.)

B. Projected Income and Expenses:

The building diagram for the submitted license illustrates 40 ft by 50 ft, three stories with production rate of 480 plants producing 1/4lb per plant in a 16 week cycle.

The projected cost is believed to be at the market rate of an average \$3000 per lb. 120lbs at \$360,000 every 16weeks would be a projected \$1,440,000 a year annual income.

Operating expenses are projected to be at \$60,000 annually.



1 Clint Tuma & Amy Tuma
2 PO BOX 1073
3 10948 N Pilot Dr
4 Willow AK 99688
5 (907) 376-2232 – Message Phone
6 (907) 376-0530 - Fax

7 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
8
9 THIRD JUDICIAL DISTRICT AT PALMER

7 Clint Tuma and Amy Tuma,)
8)
9 Plaintiff,)
10)
11 v.)
12 Matanuska-Susitna Borough; Barry Orzalli; Ted)
13 Franke; Christopher R. Miller; Robert Hanner;)
14 Stephen D. Guisinger; Paul Riley; Paul Steiner;)
15 Dennis Hotchkiss; Bob Lee; Philip Markwardt;)
16 Rudy Poglitsch; Timothy R. Sergie; Daniel Hamm)
17 Sally Pollen; and Larry DeVilbiss.)
18 Defendants.)

Case No. 3PA-16-1979 e1

15 AFFIDAVIT OF AMY TUMA IN SUPPORT OF THE
16 EMERGENCY MOTION FOR DECLARATORY JUDGMENT
17 AND FOR MANDATORY AND INJUNCTIVE RELIEF

18 STATE OF ALASKA)
19) ss.)
20 THIRD JUDICIAL DISTRICT)

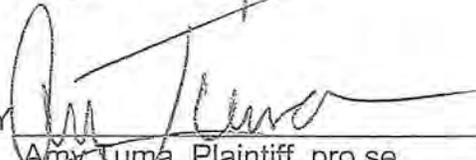
21 I, Am Tuma, being first duly sworn, deposes and states:

- 22 1. That I am an adult resident of the State of Alaska, and that I am one of the
23 named Plaintiffs in the above styled and numbered cause.
24 2. That I have personal knowledge of the facts in the Emergency-Expedited
Complaint for Declaratory Judgment and for Injunctive Relief, and that I reviewed my

1 Emergency-Expedited Complaint for Declaratory Judgment and for Injunctive Relief,
2 finding any factual assertions made therein to be true to the best of my knowledge and
3 belief.

4 3. Affiant sayeth further naught.

5 RESPECTFULLY submitted on this the 9 day of September, 2016.

6
7 BY 
8 Amy Tuma, Plaintiff, pro se

9
10 SUBSCRIBED AND SWORN to before me this 9th day of September, 2016.

11 By 
12 Notary Public for Alaska
13 My Commission expires: 12-25-16



1 CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that on the 9 day of September, 2016, a true
3 and complete copy of the above and foregoing document was served on the appropriate
4 parties by placing it in the United States Mail with first class postage prepaid and
addressed as follows: All served by Process Service.

5 Matanuska-Susitna Borough
6 350 E. Dahlia Ave
Palmer, AK 99645
7 Phone: (907) 861-7801

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9 Barry Orzalli
10 1561 South Bever Lake Road
Wasilla, Alaska 99623

Ted Franke
5381 East Pine Street
Wasilla, Alaska 99654

11 Dennis Hotchkiss;
12 3040 N. Belos Street
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13 Robert Hanner
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Rudy Poglitsch
7180 E. Twin Lakes Drive
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17 Paul Riley
18 7851 E. SouthShore Drive
Wasilla, Alaska 99687

Philip Markwardt
3641 Puffin Circle
Palmer, Alaska 99645

19 Paul Steiner
20 10739 E. Center Street
Palmer, Alaska 99645

Bob Lee
1500 E. Robin Lane
Palmer, Alaska 99645

21 Dated this 9 Day of September, 2016,

22
23 Signed, 
24



1 Clint Tuma & Amy Tuma
2 PO BOX 1073
3 10948 N Pilot Dr
4 Willow AK 99688
5 (907) 376-2232 – Message Phone
6 (907) 376-0530 - Fax

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT PALMER

7 Clint Tuma and Amy Tuma,)
8)
9 Plaintiff,)
10)
11 v.)
12)
13 Matanuska-Susitna Borough; Barry Orzalli; Ted)
14 Franke; Christopher R. Miller; Robert Hanner;)
15 Stephen D. Guisinger; Paul Riley; Paul Steiner;)
16 Dennis Hotchkiss; Bob Lee; Philip Markwardt;)
17 Rudy Poglitsch; Timothy R. Sergie; Daniel Hamm)
18 Sally Pollen; and Larry DeVilbiss.)
19)
20 Defendants.)
21)
22)
23)
24)

Case No. 3PA-16-1979CI

ORDER

This matter came before the court on Plaintiffs' Emergency Expedited Complaint for Declaratory Judgment and for Injunctive Relief, supported by affidavit of Plaintiffs.

Based on the un-contradicted facts, contained in Plaintiffs' Complaint, it appears the Plaintiffs have established a case of actual controversy between the parties.

Therefore, this Court may declare the rights and legal relations of the Plaintiffs, (the interested parties seeking the declaration), whether or not further relief is or could be sought.

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JURISDICTION

This Court has jurisdiction over this action pursuant to AS 22.10.020(g),¹ Alaska Civil Rule 57(a),² and AS 44.62.010-44.62.950.

COURT'S DECISION

After a review of the complaint, any opposition thereto, and any reply that may have been filed, it appears the Plaintiffs have established that they are entitled to the relief that they request.

It is Hereby ORDERED, that the Plaintiffs' Emergency-Expedited Complaint for Declaratory Judgment and for Injunctive Relief, is Hereby GRANTED.

Therefore, it is Hereby ORDERED, the Court issues a Declaratory Judgment to the Plaintiffs, declaring the following:

1. That the proposed zoning initiative is in clear conflict "with one or more Alaska statutes";
2. That the proposed zoning initiative violates "explicit constitutional prohibitions";
3. That the proposed zoning initiative "cannot be used to deprive a municipality of a power which state law specifically allows (and mandates) that it perform";
4. That "[t]he power to initiate cannot exceed the power to legislate", and the proposed zoning initiative exceeds Matanuska-Susitna Borough's legislative powers;
5. That a portion of AS 17.38.210(a), that authorized area wide zoning by initiative is unconstitutional, either as written, or at least as applied in this case. The

¹AS 22.10.020(g). In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

² Civil Rule 57(a) provides, in part: "The procedure for obtaining a declaratory judgment pursuant to statute shall be in accordance with these rules.... The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

1 statute that authorized area wide zoning by initiative "is in clear conflict with one or more
2 state statutes" and is unconstitutional;

3 6. That the Defendant Sponsors of the proposed zoning initiative were standing
4 in place of the Matanuska-Susitna Borough, exercising the government powers through
5 the initiative, the legislative powers of the Matanuska-Susitna Borough;

6 7. That the wording in the proposed zoning initiative seems to establish that the
7 only purpose of the proposed ordinance is "to implement the will of the voters";

8 8. That the wording in the proposed zoning initiative seems to establish that it is
9 intended to take away personal property rights of everyone in the Matanuska-Susitna
10 Borough, outside of the cities of Houston, Palmer, and Wasilla, to exercise their
11 constitutional and statutory right to engage in marijuana businesses in the Matanuska-
12 Susitna Borough;

13 9. That Matanuska-Susitna Borough's moratorium, based on an invalid proposed
14 zoning initiative, caused, or contributed to, a delay in the consideration of the Plaintiffs'
15 exercise of their constitutional and statutory rights to engage in marijuana businesses in
16 the Matanuska-Susitna Borough;

17 10. That Matanuska-Susitna Borough clerk, and the Borough Attorney, knew, or
18 by due diligence should have known, that the teachings of the Supreme Court in
19 *Griswold v. City of Homer*,³ *Carmony v. McKechnie*,⁴ and *Municipality of Anchorage v.*
20 *Frohne*,⁵ have made it clear that zoning by initiative is invalid, and that the Clerk
21 exceeded her jurisdiction in accepting an application for a proposed zoning initiative
22 which did not comply with the statutory requisites.

23 ³ 186 P.3d 558 (Alaska 2008).

24 ⁴ *Carmony v. McKechnie*, 217 P.3d 818, (Alaska 2009); and See also *Griswold v. City of Homer*, 186 P.3d 558, 563 (Alaska 2008)

⁵ See *Municipality of Anchorage v. Frohne*, 568 P.2d 3, 8 (Alaska 1977) ("[T]he subject of the initiative must constitute such legislation as the legislative body to which it is directed has the power to enact.").

1 The Court further ORDERS as follows:

2 A Preliminary and Permanent Injunction is GRANTED to the Plaintiffs.

3 The Injunction Hereby ORDERS the Clerk of the Matanuska-Susitna Borough is
4 Hereby Directed as follows:

5 1. To prevent the zoning initiative⁶ from being placed before the voters;

6 2. To have the zoning initiative removed from the Ballot; and

7 3. To prevent any votes from being counted on the zoning initiative, in the that it
8 is voted on, until after this matter is resolved.

9 The Court Further ORDERS as follows:

10 Plaintiffs are Hereby GRANTED

11 Plaintiffs' attorney fees, research expenses, and costs for having to bring this
12 action to vindicate violation of the Plaintiffs constitutional and statutory rights.⁷

13 DATED this _____ day of _____, 2016.

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Hon. _____,
Superior Court Judge

⁶ Initiative Ordinance Serial No. 15-088, the Matanuska-Susitna Borough Proposition No. B-1 "Prohibiting Marijuana Establishments Except Those Involving Industrial Hemp in the Area Outside of the Cities".

⁷ by an invalid unconstitutional proposed zoning initiative that violates mandatory Alaska statutes and usurps planning and zoning powers mandated for the Borough to exercise.

1 CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that on the 8 day of September, 2016, a true
3 and complete copy of the above and foregoing document was served on the appropriate
4 parties by placing it in the United States Mail with first class postage prepaid and
addressed as follows: All process server

5 Matanuska-Susitna Borough
6 350 E. Dahlia Ave
Palmer, AK 99645
Phone: (907) 861-7801

Larry DeVilbiss.
2300 N. Aurora Lane
Palmer, AK 99645

7 Daniel Hamm
8 8661 East Regents Road
Palmer, Alaska 99645

Sally Pollen
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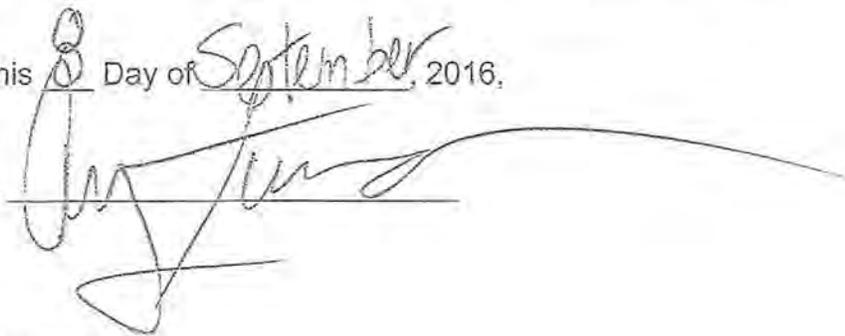
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22
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24