Administrative Hearing Arapahoe County, Colorado Designated Election Official, A.J. BECKMAN Public Alliance 405 Urban St. Suite 310 Lakewood, Colorado 80228 720-213-6621 IN RE: SUFFICIENCY DECISION PERTAINING TO RECALL PETITIONS OF DANIEL TAYLOR, RITA EFFLER, ROBIN O'MEARA, AND CRAIG BALDWIN AS DIRECTORS OF THE HEATHER GARDENS METROPOLITAN DISTRICT	

Order of Designated Election Official on
Protests to Sufficiency Determination of Recall Petitions
for Directors of the Heather Gardens Metropolitan District
(Corrected)

The Designated Election Official for the Heather Gardens Metropolitan District, having received protests to his Sufficiency Decision as to recall petitions filed regarding Directors Daniel Taylor, Robin O'Meara, Rita Effler, and Craig Baldwin and, pursuant to evidentiary hearings held on March 13 and 15, 2024, hereby orders the following:

FACTUAL BACKGROUND

1. The Heather Gardens Metropolitan District ("District") is a special district formed under state law and governed by a board of directors as provided by law.

2. Allen Lindeman, Bonnie Fleming, and John Harvey ("Recall Committee") are eligible electors of the District and seek to recall four of the District's directors: Daniel Taylor, Rita Effler, Robin O'Meara, and Craig Baldwin ("Recall Directors").

3. Directors of a district are subject to the right of recall. C.R.S. § 32-1-906(1).

4. By court order dated November 21, 2023, the undersigned was appointed as the Designated Election Official ("DEO") to conduct the recall proceedings and election, pursuant to C.R.S. § 32-1-914. *See* Order re Unopposed Motion for Request for Appointment of Replacement Designated Election Official, Case No. 1983CV105 (Arapahoe County District Court).

5. The DEO approved recall petitions pertaining to the Recall of Directors Daniel Taylor, Craig Baldwin and Rita Effler on December 15th, 2023. The DEO approved recall petitions pertaining to the Recall of Director Robin O'Meara on December 20th, 2023.

6. The Recall Committee completed and filed recall petitions ("Petitions") for each of the Recall Directors on February 6, 2024. This submission was within the sixty (60) days authorized by state law for petition circulation, once the DEO approved the petition form.

7. "The designated election official shall deem the petition sufficient if he or she determines that it was timely filed, has the required attached circulator affidavits, and was signed by the requisite number of eligible electors of the special district within sixty days following the date upon which the designated election official approved the form of the petition." C.R.S. § 32-1-910(3)(c).

8. After reviewing the Petitions, in compliance with the statutory deadline of determining petition sufficiency five (5) business days after petition filing, the DEO made the following factual findings:

   (a) Of the 417 signatures submitted on recall petitions relating to Director Daniel Taylor, the DEO rejected 16 signatures and accepted 401 signatures.

   (b) Of the 417 signatures submitted on recall petitions relating to Director Rita Effler, the DEO rejected 17 signatures and accepted 400 signatures.

   (c) Of the 414 signatures submitted on recall petitions relating to Director Robin O'Meara, the DEO rejected 17 signatures and accepted 397 signatures.

   (d) Of the 404 signatures submitted on recall petitions relating to Director Craig Baldwin, the DEO rejected 19 signatures and accepted 385 signatures.

9. Because each recall petition was required to contain the signatures and voter information of three hundred (300) eligible electors, *see* C.R.S. § 32-1-910(3)(c), the DEO announced on February 13, 2024 that all four recall petitions were sufficient, having been signed by the required number of eligible electors of the District ("Sufficiency Decision").

10. Within the time period permitted by statute, Daniel Taylor, John Rasmussen, Deborah Parker, Robin O'Meara, Gwendolyn Alexander, John Guise, and Forrest McClure ("Protestors") filed protests to the Sufficiency Decision. On motion by Protestors and without objection by the Recall Committee, all protests were consolidated in a single hearing.

11. The grounds for the protest included:

    (a) Directors were not permitted to object to revised petition forms before they were approved by the DEO (alleged in Taylor protest);

(b) Grounds for recall in the Petitions contained false, misleading, unfounded, or hearsay statements (alleged in Taylor, Rasmussen, Alexander, Guise, and McClure protests);

(c) Persons who sought to provide information, opposing the recall, to eligible electors of the District were intimidated by persons supporting the recall (alleged in Taylor and Alexander protests);

(d) Petitions were signed by persons when no circulator was present for purposes of circulating that petition (alleged in Taylor, O'Meara, and Parker protests);

(e) Signers did not read the petitions before signing (alleged in O'Meara and Alexander protests); and

(f) Recall proponents held informational sessions at which food and drink were offered to the persons in attendance (alleged in O'Meara protest).

12. Beginning on February 29, 2024, status conferences were held to begin the hearing process, consistent with C.R.S. § 32-1-910(3)(d)(II). At those status conferences, procedural guidelines were provided to and discussed with Protestors.

13. Protestors sought, and the DEO issued, subpoenas to compel the production of documents and the attendance of witness for hearings that were held on March 13 and 15, 2024 ("Protest Hearing").

14. Certain elements of the subpoenas were subject to motions to quash filed by the Recall Committee and the Heather Gardens Association. The DEO granted in part and denied in part those motions by order, dated March 8, 2024.

15. Notice of the scheduled hearing dates was provided to the parties and the public.

16. Both parties at the Protest Hearing were represented by counsel.

17. The Protest Hearing was conducted before the DEO, the Deputy DEOs, and the DEO's legal counsel and was open to the public in person and on Zoom.[1] Testimony was taken from witnesses, and exhibits were entered into evidence, including exhibits that were made part of the record by the DEO. (See attached *Addendum 1* for a list of all exhibits entered into evidence.)

18. With the exception of one witness who was unable to attend in person due to mobility issues, all witnesses appeared in person before the parties and the DEO and were subject to direct and cross examination. Without objection, the one witness who could not attend in person testified on Zoom.

[1] The hearings were recorded by the Heather Gardens Metropolitan District (https://www.hgmetrodist.org/protest-recall-election-hearings) and by the Heather Gardens Association (https://www.heathergardens.org/News/13855~798371).

19. In the Protestors' closing argument, they raised three (3) new allegations as grounds to protest the Sufficiency Determination for the first time:

    (a) There was no cost estimate of the election on the face of the recall petitions.

    (b) For certain petitions, the dates that the circulator signed his or her petition did not match with the date that the notary public used in the notarization block.

    (c) For certain petitions, the person who notarized the circulator affidavits was named in the petition and therefore had a disqualifying interest in acting as notary public for these documents.

20. The hearing was concluded on March 15, 2024, within forty (40) days after filing of the petitions as required by statute. *See* C.R.S. § 32-1-910(3)(d)(IV).

21. This order is being issued on March 22, within five (5) business days after the conclusion of the hearing as required by statute. *Id.*

22. The right of recall is a fundamental constitutional right, and statutes governing recall of public officials are to be liberally construed to facilitate the exercise of this right.

> [T]he power of recall -- like that of the initiative and referendum -- is a fundamental right of citizens within a representative democracy. Neither the legislature nor local lawmaking bodies may infringe constitutionally protected fundamental rights. Reservation of the power of recall in the people must be liberally construed in favor of the ability to exercise it; conversely, limitations on the power of recall must be strictly construed.

Shroyer v. Sokol, 550 P.2d 309, 311 (Colo. 1976).

23. The claims alleged by Protestors in one or more of the Protests are resolved as follows.

DIRECTORS NOT PERMITTED TO PROTEST PETITION FORMS

24. Taylor argued he was denied due process because he could not object to the petition form before it was approved by the DEO in December, 2023.

25. Taylor cites no right to protest to the petition form in the Colorado Constitution or in Colorado statute, and the DEO is not aware of any provision that affords such a right.

26. Protestors presented no evidence at hearing in connection with this argument.

27. Protestors made no reference to this argument at any point during the Protest Hearing.

28. Given the lack of legal authority for such a protest, the lack of evidence at hearing, and Protestors' effective waiver of this argument at hearing, this claim is denied.

ALLEGEDLY FALSE OR UNFOUNDED STATEMENTS IN GROUNDS FOR RECALL

29. Protestors claim that statements made on the Petitions about the rationale for the recall ("Grounds for Recall") were false or unsubstantiated and thus wrongly led to the successful petitioning for a recall election.

30. Protestors introduced certain exhibits and/or made offers of proof to establish the basis for this allegation.

31. By statute, a recall petition must identify the recall committee and the director to be recalled. It must also "[c]ontain a general statement, in not more than two hundred words, of the grounds on which the recall is sought, which statement is intended for the information of the electors of the special district. The statement must not include any profane or false statement." C.R.S. § 32-1-909(4).

32. Protestors rely on this statute's statement that the "statement must not include any… false statement." *Id.*

33. This statute also provides, "The electors of the special district are the sole and exclusive judges of the legality, reasonableness, and sufficiency of the grounds on which the recall is sought, and **said grounds are not subject to a protest** or to judicial review. *Id.* (emphasis added).

34. Moreover, the DEO's decision "that a recall petition is sufficient or is not sufficient" is subject to judicial review, "except that the **statement of the grounds on which the recall is sought… is not subject to such review**." C.R.S. § 32-1-910(3)(f) (emphasis added).

35. The Colorado Constitution is the original source for these restrictions on review by the DEO and reviewing courts of the Grounds for Recall.

36. About recall petitions, the Constitution requires:

> such petition shall contain a general statement, in not more than two hundred words, of the ground or grounds on which such recall is sought, which statement is intended for the information of the registered electors, and the registered electors shall be the sole and exclusive judges of the legality, reasonableness and sufficiency of such ground or grounds assigned for such recall, and **said ground or grounds shall not be open to review**.

Colo. Const., art. XXI, § 1 (emphasis added).

37. As to the constitutional provision providing for review of recall petitions by state courts, "The sufficiency, or the **determination of sufficiency**, of the [recall] petition referred to in this section **shall not be** held, or **construed, to refer to the ground or grounds assigned in such petition for the recall** of the incumbent." Colo. Const., art. XXI, § 2.

38. Protestors asserted at hearing that all of these prohibitions on any review of the Grounds for Recall relate only to whether those grounds were sufficient to justify the recall.

39. Protestors cited the Supreme Court's decision in *Bernzen v. City of Boulder*, 525 P.2d 416 (Colo. 1974), striking down a Boulder charter provision requiring that the statement of the grounds for recall be "sufficient." The Court invalidated that additional requirement to be met when setting for the grounds for recall in a petition. In so doing, the Court held that recall "is purely political in nature," and given that, "the dissatisfaction, **whatever the reason**, of the electorate is sufficient to set the recall procedures in motion." *Id*. at 418-19 (emphasis added). That is why "[c]ourts of law are not to intercede into the reasons" for the recall. *Id*. at 419.

40. The DEO also finds that the admonition that there be no "false statement" in the Grounds for Recall is directory rather than mandatory.

41. Directory provisions are not construed to impose conditions that, if they are violated, will invalidate the act in question. *City & Cnty. of Denver Sch. Dist. No. 1 v. Denver Classroom Teachers Ass'n*, 2017 CO 30, ¶ 20, citing Directory, Black's Law Dictionary (6th ed. 1990). Only the violation of mandatory provisions of law can invalidate such an act.

42. This rule of construction is equally applicable when dealing with elections. "Unless an election regulation expressly declares that strict compliance with its requirements is essential, courts should construe such provisions to be directory in nature and not mandatory." *Bickel v. City of Boulder*, 885 P.2d 215, 226 (Colo. 1994).

43. The pertinent recall statutes about a petition's grounds for recall do not state they are to be strictly complied with. In fact, the outright prohibitions on the DEO's consideration of the grounds in a protest proceeding and on a court's consideration of such grounds in the context of judicial review is persuasive that this is not a standard that can be used to invalidate an otherwise valid recall petition.

44. Protestors' reliance on C.R.S. § 1-40-132, cited by *Fabec v. Beck*, 922 P.3d 330 (Colo. 1996), concerning allegedly false statements during petitioning is misplaced. That statute deals only with statewide initiative petitions.

45. Given clear, contrary legal authority against using the Grounds for Recall as the basis of a protest, this claim is denied.

ALLEGED INTIMIDATION OF RECALL OPPONENTS

46. Protestors called several witnesses who addressed their belief that the presence of political opponents and/or Heather Gardens security staff in public settings was intimidating to them and limited their exercise of protected political speech.

47. Protestors also showed certain video recordings of persons associated with the Recall Committee at public meetings and circulating Petitions.

48. "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *People v. Stanley*, 170 P.3d 782, 789 (Colo. App. 2007), citing *Virginia v. Black*, 538 U.S. 343, 360 (2003).

49. The DEO assessed the substance of these statements and the demeanor of the witnesses who testified. Witnesses mentioned their discomfort when they were near political opponents or certain security staff in the Heather Gardens complex.

50. No acts were described that rise to the level of a "true threat" to any person who could reasonably have said that they were in fear of bodily harm or death.

51. No alternative legal standard for what constitutes "intimidation" was provided by either party at hearing.

52. The DEO finds that personal discomfort with being in the presence of someone who has different political views or is dressed to fulfill the job description of security staff is not the legal equivalent of intimidation.

53. The DEO further finds there was no actual intimidation of persons opposing the recall, and no person was prevented from engaging in protected political speech relating to these recall petitions.

54. Given the lack of legal authority for asserting or sustaining such a protest and the lack of credible evidence on this issue at hearing, this claim is denied.

PETITIONS ALLEGEDLY UNATTENDED WHEN SIGNED

55. Protestors called witnesses who said they saw circulators who left unattended one or more shopping bags the witnesses thought contained petition forms and clipboards.

56. A photograph was entered into evidence, showing the back of one circulator who was said to be circulating petitions at the time but not watching the form itself.

57. Contrary testimonial evidence is also on the record, indicating that the circulators did not leave their petitions unattended and, if they looked away from a petition, the circulators were still in view of persons signing.

58. Regardless, Protestors did not identify specific signers who signed specific petitions when the circulator allegedly was not supervising the petitioning process. As a result, it cannot be known whether persons alleged to have signed without supervision were deemed to be eligible electors for purposes of the Sufficiency Determination.

59. Neither did Protestors identify specific petitions that were signed when a circulator allegedly was not supervising the petitioning process. Thus, if the practices surrounding a petition section were deemed to be at odds with legal requirements, the DEO could not identify which petition section(s) were affected in that way.

60. Thus, short of striking all signatures of certain circulators, regardless of whether those were petitions that were unattended for any period of time, the record provides no support for granting Protestors relief. Striking all such signatures is inconsistent with the fundamental nature of the right of recall and the requirement that the laws governing the exercise of this right be liberally construed in favor of persons advocating recall.

61. Protestors provided no constitutional or statutory provision that would warrant striking all signatures by a circulator based on the evidence they produced.

62. The fact that the record is silent on any specific names or any specific petition sections that would be invalid if there was credible evidence that petitions were signed when the circulator was not present makes it impossible to grant the protest on this ground.

63. In that regard, the DEO finds that the testimony adduced by Protestors falls short of establishing that petitions were actually signed when no circulator was present. In weighing the weight and credibility of witnesses who testified on this point, the DEO further finds that Protestors did not meet their burden of proof.

64. Given the lack of legal authority for such a protest and the lack of evidence at hearing, this claim is denied.

SIGNERS ALLEGEDLY DID NOT READ PETITIONS BEFORE SIGNING

65. The warning on recall petitions states, "Do not sign this petition unless you have read or have had read to you the proposed measure in its entirety and understand its meaning."

66. Protestors had certain witnesses testify they saw petition signers rapidly complete a signature line without spending a great deal of time to read the grounds for recall.

67. This admonition to petition signers to read the petition or to have it read to them is a directory, rather than a mandatory, provision of law. "Unless an election regulation expressly declares that strict compliance with its requirements is essential, courts should construe such provisions to be directory in nature and not mandatory." *Bickel, supra*, 885 P.2d at 226.

68. The pertinent recall statutes about directions to petition signers on the petition do not state they are to be strictly complied with. There is no attestation in the circulator's affidavit that every signer read or had read to him or her the grounds for recall. *See* C.R.S. § 32-1-910(2)(c). Thus, this part of the warning to signers is not a precondition to the validity of any petition signature or any circulator affidavit.

69. Regardless, Protestors did not identify specific signers who signed specific petitions without reading the grounds for recall. As a result, it cannot be known whether persons alleged to have signed in this manner were deemed to be eligible electors whose names could be struck from the eligible electors identified for purposes of the Sufficiency Determination.

70. Neither did Protestors identify specific petitions that were signed when a signer allegedly did not study the grounds for recall. Thus, if this practice was deemed to be at odds with legal requirements, the DEO could not identify which petition section(s) were affected in that way.

71. Thus, short of striking all signatures of certain circulators whose petitions contained names of signers who did not study the grounds for recall, the record provides no support for granting Protestors relief. Striking all such signatures is inconsistent with the fundamental nature of the right of recall and the requirement that the laws governing the exercise of this right be liberally construed in favor of persons advocating recall.

72. Protestors provided no constitutional or statutory provision that would warrant striking all signatures by a circulator based on the evidence they produced.

73. One protest alleges that no one read a sheet entitled, "Instructions for Recall Petitions," that was placed on a table where petition circulators were located. There is no legal requirement that signers read that sheet as a pre-condition to signing a petition, and Protestors cite none.

74. Further, Protestors do not allege or prove that the sheet contained any useful information for signers or that such information was not otherwise related by circulators.

75. Given clear, contrary legal authority against using the Grounds for Recall as the basis of a protest, this claim is denied.

SIGNERS ALLEGEDLY INDUCED TO SIGN PETITIONS

76. O'Meara alleges that electors were induced to sign petitions by the promise of food and drink at one or more gatherings of Heather Gardens residents.

77. A circulator must sign an affidavit that includes representations that he or she "neither has paid or shall pay and… believes that no other person has so paid or shall pay, directly or indirectly, any money or other thing of value to any signer for the purpose of inducing or causing such signer to sign such a petition." C.R.S. 32-1-910(2)(c).

78. Protestors allege that the food or drink advertised on a sign for a meeting of recall supporters constitutes a "thing of value" offered "for the purpose of inducing or causing" a signer to sign.

79. As to the meaning of "for the purpose of," a "purpose" is "something set up as an object or end to be attained." *Kidd v. Thomson Reuters Corp*., 925 F.3d 99, 104 (2nd Cir. 2019).

80. "Induce" means "to move by persuasion or influence, to call forth or bring about by influence or stimulation, and to cause the formation of." Merriam-Webster's Collegiate Dictionary 637 (11th ed. 2005).

81. "Cause" means "a reason for an action or condition" and "something that brings about an effect or result." *Id*. at 196.

82. No legal authority was presented at hearing to add any legal context to this claim other than the express language of the statute, cited above.

83. No evidence was presented at hearing that:

    (a) there was such food or drink of a nature or kind at the gatherings in question, sufficient to constitute a "payment" as an inducement to sign a petition;

    (b) food or drink was offered or accepted by any petition signer at the gatherings in question; or

    (c) if there was such food or drink, any person accepting food or drink actually signed a petition in return for such food or drink.

84. Given the lack of legal authority for such a protest and the lack of evidence at hearing, this claim is denied.

ALLEGED NON-CORRESPONDENCE OF DATES ON CIRCULATOR AFFIDAVITS

85. In their closing argument only, Protestors allege that on certain petition sections, the circulator's date on the affidavit does not match the notary public's notarization date.

86. Specific petitions identified as affected by this issue were Petitions A-1, A-2, A-4, A-5, A-6, and A-7, all of which call for the recall of Daniel Taylor.

87. Additionally, the only other petitions identified as affected by this issue were Petitions C-4, C-5, C-9, C-10, C-11, C-12, C-13, and C-14, all of which call for the recall of Robin O'Meara.

88. Colorado law relating to district director recalls requires that any protest "**must set forth specifically** the grounds of the protest," C.R.S. § 32-1-910(3)(d)(I) (emphasis added). And the Colorado Constitution also requires of recall petition protests that they "**set[] forth specifically** the grounds of such protest." Colo. Const., art. XXI, § 2 (emphasis added).

89. "Specific" means "of a particular or exact sort" or "so clearly expressed as to leave no doubt about the meaning." *Specific*, Merriam-Webster Online Dictionary (https://www.merriam-webster.com/thesaurus/specific) (last viewed March 20, 2024).

90. The total silence in the protests about this allegation means it was neither particularized nor clearly expressed in the filed protests.

91. As to petition protests subject to the mandate that they state "specifically the grounds of such protest," the Colorado Supreme Court has held this requirements is jurisdictional, and "the [election officer who receives a protest] is without power to act in the absence of a substantial compliance with these requirements." *Brownlow v. Wunsch*, 83 P.2d 775, 782 (Colo. 1938), citing *Ramer v. Wright*, 159 P. 1145, 1146 (Colo. 1918).

92. Protestors do not argue that they substantially complied with the specificity requirement, and it is clear they did not substantially comply.

93. First, Protestors admit their protest did not specifically raise the objection about non-correspondence of dates on the circulator affidavit. At hearing, Protestors were asked, "Which of the protests raised the issue of the lack of correspondence in dates? In other words, who among the protestors teed this issue up for purposes of this hearing?". Counsel responded: "We **generally argued** that petitions, the way in which the petitions were circulated and the face of the, what was on face of the petition themselves, sufficiency on the face of the petitions." (Emphasis added.)[2]

94. Second, Protestors insist they are not required to comply with the requirement for specificity in a protest. When asked at hearing, "But you didn't make the allegation that this was a deficiency in the petition… in the protest?", counsel responded, "I'm not required to make that allegation."[3]

95. Third, Protestors explained they did not raise the discrepancy in dates on circulator affidavits before closing argument because, had they done so, the Recall Committee would have been able to present evidence to address this concern. "No, I'm not required to do that [allege non-correspondence of dates] ahead of time and help them present the evidence to – they would just have someone come up and say 'Oh no, I promise I watched it.' They could overcome all deficiencies in the protest based on–in the petition–based on that."[4]

96. Thus, Protestors did not substantially comply with this requirement based on any of the factors required to be considered in assessing substantial compliance. *See Bickel, supra*, 885 P.2d at 227 (setting forth the tests for substantial compliance). Notably, the purpose of the statute requiring specificity was not substantially achieved. Notice was not provided to the opposing party or the DEO before the matter came to hearing or even during the hearing, except during closing argument. As Protestors admit, timely notice would have allowed the Recall Committee to adduce evidence that could "overcome all deficiencies"

[2] March 15, 2024 Hearing recording at 12:03:10-30.
[3] March 15, 2024 Hearing recording at 12:09:11-14.
[4] March 15, 2024 Hearing recording at 12:09:24-41.

about the circulator affidavit dates, raised at the last moment by Protestors. The ability to develop a full record is key to facilitating the exercise of a fundamental right and is precisely why the requirement for specificity applies to these recall petition protests that are heard on an expedited basis. *Comm. For Better Health Care v. Meyer*, 830 P.3d 884, 898 (Colo. 1992) ("permitting proponents to introduce evidence to establish the validity" of circulator affidavits "is sufficient to assure that the right to the initiative is not unduly burdened").

97. There has been no allegation, and there was no testimony or other evidence presented, that any circulator completed his or her affidavit on one day and had it notarized on an earlier day, much less months or a full year earlier. Instead, Protestors maintain that *any* difference between the dates on the circulator's affidavit is fatal to the petition's legitimacy. This approach is a "mechanistic application of administrative policies [that] is… unduly restrictive in the circumstances of this case." *Id*. at 899.

98. Protestors' citation of C.R.S. § 1-4-905(2)(III) and C.R.S. § 1-40-111 do not lead to a different legal conclusion. The former statute deals only with candidate petitions, and the latter deals only with statewide initiative petitions. No corollary provision exists in the special district recall statutes.

99. A discrepancy in dates on the circulator's affidavit "may" establish the notarization was invalid. *Fabec, supra,* 922 P.3d at 345 (goal of requiring correspondence in these dates is to prevent "fraud, abuse, or mistake" in the petitioning process). But that means a discrepancy also *may not* lead to a determination of invalidity.

100. Omission of a required date on a petition, if that particular date is "not material," can mean that the petition "substantially complied with the statute's requirements." *Town of Erie v. Town of Frederick*, 251 P.3d 500, 506 (Colo. App. 2010).

101. One consideration in evaluating a typographical issue on a petition (such as using a pre-printed "2023" on a petition that is likely to be circulated and notarized in 2024) is that "[t]here is no claim that any of the signatures are stale." *Board of County Comm'rs v. City & County of Denver*, 566 P.2d 335, 338 (Colo. 1977). Here, there is no claim and no evidence that any of the circulator signatures are stale because a notary public notarized a petition after a circulator signed the affidavit.

102. Therefore, the DEO finds the Recall Committee substantially complied with the requirements for completion of circulator affidavits because:

(a) the DEO approved the petition, form containing "2023" in the notary block, on December 15, 2023;

(b) the only date discrepancy that is alleged to exist is on petition forms where the DEO-approved form contained the year "2023" pre-printed in the notary block, which year was not changed by notaries public to "2024;"

(c) in each of the petition sections challenged on this ground, the day and month of the circulator's signature matches precisely the day and month of the notary public's notarization;

(d) because the petition could not have been circulated or notarized in January or February of 2023 (when the discrepancy in dates is alleged to exist), as the petition form had not been approved or printed at that time, it was not possible that the petition sections in question were signed by circulators on the dates they used on their signature lines and notarized by notaries public on the dates they used in their notary blocks with the pre-printed "2023;"

(e) the Recall Committee substantially complied with the statute, as any error made because notaries did not cross out "2023" was made in good faith and did not reflect an intent to deceive the public or the DEO and Protestors concede that, had the Recall Committee been on notice this claim would be made, they "could overcome all deficiencies" alleged about date discrepancies; and

(f) the Recall Committee substantially complied with the statute, as the purpose of the statute was substantially achieved because circulator affidavits could only have been completed on the matching days and months set forth in the affidavits, given that the petition form was not approved until December, 2023, and could thus not have been signed by circulators in 2024 and notarized by notaries public in January or February, 2023.

NO COST SUMMARY ON PETITION FORM

103. In closing argument only, Protestors alleged that C.R.S. § 1-12-108(3.5) requires that each recall petition contain an estimate of the costs of a recall election.

104. No protest that was filed with the DEO identified this issue as a subject to be addressed as a matter of the protest hearing. For the reasons stated above, Colorado law relating to district director recalls requires that any protest "must set forth specifically the grounds of the protest." C.R.S. § 32-1-910(3)(d)(I). And the Colorado Constitution also requires of recall petition protests that they "set[] forth specifically the grounds of such protest." Colo. Const., art. XXI, § 2.

105. "Specific" means "of a particular or exact sort" or "so clearly expressed as to leave no doubt about the meaning." *Specific*, Merriam-Webster Online Dictionary (https://www.merriam-webster.com/thesaurus/specific) (last viewed March 20, 2024).

106. The total silence in all protests about this allegation means this claim was neither particularized nor clearly expressed in the filed protests.

107. Because the Colorado Supreme Court has made it clear that the requirement for specificity in a petition protest is jurisdictional, *Brownlow, supra*, 83 P.2d at 782, the DEO is precluded from considering this claim. Therefore, as a matter of law, the DEO is without jurisdiction to consider this claim, raised only in closing argument.

108. Aside from this jurisdictional hurdle for Protestors, C.R.S. § 1-12-108(3.5) does not even apply to special district recall petitions. In 2014, the General Assembly repealed express language in C.R.S. § 32-1-906 that provided for the applicability of Article 12 of Title 1 to special district recall elections. *See* 2014 Sess. Laws, Chap. 170, p. 623, § 15. It is incumbent on the DEO, as it would be on any court, to give effect to the General Assembly's purpose in amending and repealing statutes. *See Empire Lodge Homeowners Ass'n v. Moyer*, 39 P.3d 1139, 1152 (Colo. 2001). Because this requirement in Title 1 did not apply to special district recall petitions in 2023, the statutory provision cited by Protestors did not affect the recall petition formatting here. *People v. Montera*, 575 P.2d 1294, 1285 (Colo. 1978) (the terms of a repealed statute have "no operative effect").

109. There is no specific requirement for a cost estimate of the recall election in the statutory scheme pertaining to recalls of special district electors, found in C.R.S. §§ 32-1-906-915. Protestors do not allege that there is. Therefore, the recall petition was not required to contain the cost estimate of an election.

110. Given the lack of legal authority to claim that an election cost estimate was required on these recall petitions, this claim is denied.

ALLEGED DISQUALIFYING INTEREST OF NOTARY PUBLIC

111. In their closing argument only, Protestors allege that on certain petition sections, the notary was disqualified because she was a named party to the transaction. Specifically, Protestors object to the notarizations by Michelle Audet.

112. The alleged disqualifying interest, according to Protestors' closing argument, is the fact that Michelle Audet was identified by her former title, "Resident Services Coordinator," in this statement within the Grounds for Recall: "Since [the director to be recalled] took office, the Chief Executive Officer, the Chief Financial Officer, the Security Chief, the Clubhouse Manager, the Maintenance Manager, and the Resident Services Coordinator have resigned."

113. This argument was not raised specifically in any of the filed protests. For the reasons set forth above, Protestors' attempt to raise it only at the end of the hearing violates the statutory and constitutional requirements for specificity in protests of recall petitions. Colo. Const., art. XXI, § 2; C.R.S. § 32-1-910(3)(d)(I).

114. Protestors offer no explanation or justification of their failure to specifically allege this ground for challenging the Sufficiency Determination. And because the statute makes no provision for amending a protest, their eleventh hour argument cannot be deemed to be an authorized amendment to their protest. *Brownlow, supra*, 83 P.2d at 782.

115. This failure to specifically include a notary's disqualification in any of the protests deprives the DEO of jurisdiction to substantively consider this claim.

116. Regardless of the DEO's lack of jurisdiction, after raising this issue in closing argument, Protestors admitted that Michelle Audet's name was not on the petition form. Protestors did contend that "everyone knew" Audet had been the Resident Services Coordinator as referred to in the Grounds for Recall.[5] Protestors stated there had been testimony of two recall proponents who knew of Audet's former role but provided no record evidence that her role was known universally among Heather Gardens residents or even that it was known to all persons who saw or signed the petition. "Closing argument is proper where there is evidence in the record on the issue in question." *Polster v. Griff's of America, Inc.*, 525 P.2 1179, 1181 (Colo. App. 1974); *see People v. Rojas*, 181 P.3d 1216, 1223 (Colo. App. 2008) (closing argument "must be confined to the evidence admitted at trial").

117. Protestors cite *Griff v. City of Grand Junction*, 262 P.3d 906 (Colo. App. 2010) for the proposition that a person may be "named" in a petition without actually having their name used. In that case, protestors sought to invalidate an annexation petition section that was notarized by a person who signed that section of the petition. *Id*. at 908.

118. Protestors here did not cite the actual holding of *Griff*. "We conclude that the narrow language in section 12-55-110(2)(b)[6] **limits notarial disqualification to the most suspect situations**, such as where a candidate notarizes his or her own nomination petition. This interpretation results in the invalidation of fewer signatures and provides more ready access to the ballot, in accordance with public policy in Colorado." *Id*. at 911 (emphasis added).

119. This restriction "function[s] to **disqualify only the notaries who are designated by name on the face of the document** they notarized." *Id*. at 910 (emphasis added). Examples of "one who is named as the subject matter of the petition" would be "a political nominee or **a sponsor whose name is printed on the petition for all signatories to view**." *Id*. (emphasis added).

120. Audet is not "designated by name on the face of the document" notarized, and her name is not "printed on the petition for all signatories to view."

121. One cannot be implicitly or passively "named" in a document. *Id*., citing *Waterwatch of Ore., Inc. v. Boeing Agri-Industrial Co*., 155 Ore. App. 381, 963 P.2d 744, 746 (Or. Ct. App. 1998).

122. Accordingly, petitions notarized by Michelle Audet are valid under the terms of the notarial statute, C.R.S. § 24-21-504(2)(a), and the signatures of eligible electors on those petitions count toward the needed signature totals for a recall election.

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[5] March 15, 2024 Hearing recording at 12:04:55-:05:05.

[6] This statute has been removed from Title 12. The new version is found at C.R.S. § 24-21-504(2)(a) (to be disqualified, notary must be "named in the record that is to be notarized").

CONCLUSION

For the reasons stated above, all Protests that are the subject of this proceeding are denied, and the DEO's Sufficiency Determinations concerning the recall petitions applying to Daniel Taylor, Rita Effler, Robin O'Meara, and Craig Baldwin stand. Therefore, the recall petitions pertaining to Daniel Taylor, Rita Effler, Robin O'Meara, and Craig Baldwin are sufficient. Pursuant to C.R.S. § 32-1-910(4)(a)(I), the petitions and the DEO's certificate of sufficiency shall be submitted to the District Board of Directors.

AJ Beckman, Designated Election Official
Heather Gardens Metropolitan District

Decided this 22nd day of March, 2024
Corrected this 25th day of March, 2024

CERTIFICATE OF SERVICE

I, Arielle Campo, hereby affirm that a true and accurate copy of the **Order of Designated Election Official on Protests to Sufficiency Determination of Recall Petitions for Directors of the Heather Gardens Metropolitan District (Corrected)** was sent via email, this 25th day of March, 2024, to the following on behalf of the parties represented at hearing:

Daniel Taylor,
Counsel for Protestors
danieltaylor@cotaxatty.com

Martha Karnopp
Counsel for Recall Committee
karnopplaw@gmail.com

Arielle Campo, Deputy Designated Election Official
Heather Gardens Metropolitan District

ADDENDUM 1 – LIST OF ADMITTED HEARING EXHIBITS

Exhibit Number	Party Offering Exhibit	Exhibit Title
DEO 1	Designated Election Official	Original Recall Petitions
DEO 2	Designated Election Official	Sufficiency Determination: Taylor
DEO 3	Designated Election Official	Sufficiency Determination: Effler
DEO 4	Designated Election Official	Sufficiency Determination: O'Meara
DEO 5	Designated Election Official	Sufficiency Determination: Baldwin
DEO 6	Designated Election Official	Protest of Daniel Taylor
DEO 7	Designated Election Official	Protest of John Rasmussen
DEO 8	Designated Election Official	Protest of Deborah Parker
DEO 9	Designated Election Official	Protest of Robin O'Meara
DEO 10	Designated Election Official	Protest of Gwendolyn Alexander
DEO 11	Designated Election Official	Protest of John Guise
DEO 12	Designated Election Official	Protest of Forrest McClure
P 1	Protestors	Email from Daniel Taylor requesting surveillance footage
P 2	Protestors	Photo of Carol Ann Mayne, John Guise and Kevin Keator
P 3	Protestors	Motion to Quash Subpoena to Produce
P 4	Protestors	Email from Travis Keenan regarding Discovery of Items
P 5	Protestors	Email from Daniel Taylor to Management regarding complaints Received concerning Security's Conduct after 1/11/2024 Board Meeting.

P 6	Protestors	Heather ‘n Yon article with entries from Linda Savage, Susan Miller Nonean Price and Mary Ann Stuart
P 7	Protestors	Heather ‘n Yon article with entry from John Guise
P 8	Protestors	Photo of Linda Savage speaking with Security
P 9	Protestors	Photo of Carol Ann Mayne, John Guise and Kevin Keator
RC 1	Recall Committee	Recall Circulator Training Sheet
RC 2	Recall Committee	Close up video of clubhouse on 1/6/2024