

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

ALEX ASKEW,

PETITIONER,

V.

CASE NO.: CL21-5448

KAREN GREENHALGH,

RESPONDENT.

**ORDER ON RULES OF PROCEDURE FOR THE RECOUNT OF BALLOTS IN THE
ELECTION FOR THE HOUSE OF DELEGATES, 85TH DISTRICT**

This matter came before the full Recount Court of the Circuit Court of the City of Virginia Beach on November 29, 2021 for a hearing pursuant to Virginia Code § 24.2-802(B) to consider motions and finalize rules of procedure for the recount of ballots in the November 2, 2021 election for the House of Delegates 85th District ("HD-85"). The following Final Rules of Procedure are established by the full Recount Court appointed in accordance with Virginia Code § 24.2-802.1. See Ex. 1.

It is ORDERED:

I. PERIOD PRECEDING RECOUNT

1. All voting machine keys, poll books, statements of results, voting machine printed return sheets and printout tapes produced by computers and other machines, ballots, rejected absentee and provisional ballot envelopes, and other election materials used or produced in the HD-85 Election held on November 2, 2021 (the "Materials"), and previously delivered to the Clerk of the Virginia Beach Circuit Court, shall remain in safekeeping of the Clerk to whom they were delivered, who shall assure that such Materials remain secure and undisturbed. Voting equipment used in the HD-85 Election shall remain secure and undisturbed in the location where it presently is situated until released by the Clerk or the State Board of Elections to the respective general registrar for programming and testing;
2. To the extent that they have not already done so, the Clerk of the Virginia Beach Circuit Court shall:
 - a. secure all paper ballots and other election materials in sealed boxes;
 - b. place all sealed boxes in a vault or room, not open to the public or to anyone other than the Clerk and the Clerk's staff;
 - c. cause such vault or room to be securely locked except when access

is necessary for the Clerk or the Clerk's staff; and

- d. certify in writing to this Court the security measures taken by the Clerk following the election, with said certification provided to this Court on November 19, 2021, via email transmission. See EX. 2.
3. To the extent that the Clerk may have departed from the foregoing procedures before entry of the Final Rules of Procedure, the Clerk also shall inform this Court, in writing, explaining the nature of any such departure, as soon as reasonably possible. The Clerk shall also immediately provide the certification required by this paragraph and paragraph 2 to the Parties, and their counsel via email transmission;
4. Prior to the recount and redetermination, on November 29, 2021 at 2:30 p.m., the Clerk of the Circuit Court of the City of Virginia Beach and the Clerk's staff, as well as the General Registrar of the City of Virginia Beach (hereinafter, "the General Registrar") and the General Registrar's staff, shall enter the vault or room securing the election materials for the purpose of sorting said materials relevant to the HD-85 election specifically. Counsel for both parties shall be entitled to be present when the Clerk and General Registrar enter the vault or room, and for the duration of the time it takes to sort and resecure the election materials for this purpose;
5. Promptly upon request of the representative of either party, possessing a written statement that they are a representative of the Party signed by the Party's counsel, to this proceeding, the Clerk and General Registrar of the City of Virginia Beach shall provide such representative with access to the following documents from the Materials related to the November 2, 2021 HD-85 Election:
 - a. all statements of results, original and corrected;
 - b. computer print-out sheets and tapes;
 - c. abstracts of votes, original and corrected;
 - d. a precinct list showing the make and model of all voting machines delivered to each precinct in the 85th House District for use on election day and the number and type of machine;
 - e. all reports concerning election day problems or incidents in individual precincts that participated in the HD-85 election;
 - f. pollbooks, or the equivalent containing information normally found in pollbooks (whether paper or electronic);
 - g. the list of absentee ballots that were submitted through noon on

November 5, 2021, including the identity of the voters voting such ballots;

- h. the list of absentee ballots that were submitted through noon on November 5, 2021, that were deemed to have a material error or omission that rendered the ballot invalid, including the identity of the voters voting such ballots;
- i. the list of absentee ballots that were cured by noon on November 5, 2021 after having been deemed to have a material error or omission, including the identity of the voters voting such ballots;
- j. the records, notes, or minutes of any meeting where the Central Absentee Precinct voted to accept or reject absentee ballots, if any;
- k. all other records requested by either party that are reasonably related to the conduct of the election and/or recount; and
- l. any other materials used in the election, provided that individual ballots cast in the election shall not be examined at the preliminary hearing.

If the Clerk or General Registrar do not have any of these materials, they shall so advise the Parties' counsel and identify its location.

- 6. The Clerk and General Registrar shall not be required to provide information that does not already exist in a document. However, the General Registrar shall be required to account to the Court and the Parties' Counsel in writing for the following:
 - a. any discrepancy between the number of accepted absentee ballots (shown in VERIS) and the number of votes counted (including overvote/undervote/write-in) in the ABS + PE precincts;
 - b. any discrepancy between the number of accepted early vote ballots (shown in VERIS) and the number of votes counted (including overvote/undervote/write-in) in the EV precinct.
- 7. In the event materials are maintained under seal by the Clerk, the Clerk, upon notice to the parties and with appropriate security measures in place, shall open the sealed materials for the purposes of granting the access granted provided for herein. The Clerk shall then reseal the materials and maintain them pursuant to the security measures mandated herein. The sealed materials obtained pursuant to this order shall be treated as confidential by the parties to this recount, the campaigns, and their legal counsel, as well as such experts and other persons retained to provide services related to this recount. They shall not be disseminated to any other party, and they may only be used in this proceeding absent further order

from this Court.

II. DATE, TIME, AND LOCATION OF RECOUNT AND VOTING MACHINERY

1. The recount of ballots and redetermination of the votes cast in the November 2, 2021 election for HD-85 shall take place on December 2 and 3 of the year 2021 beginning at 8:00 a.m. on December 2, 2021 and continuing on December 3, 2021 beginning at 8:00 a.m., if needed, at the:

Voter Registration and Elections Office
Virginia Beach Municipal Center Building #14
Agricultural Conference Room - 2nd Floor
2449 Princess Anne Road
Virginia Beach, VA 23456

The Clerk of Court shall arrange for the transportation and delivery of the election materials necessary for the recount to this facility under appropriate safeguards, and the General Registrar shall arrange for the transportation and delivery of the voting and counting machines needed for the recount under appropriate safeguards.

2. The recount and redetermination shall be conducted in accordance with the procedures and instructions established by the Final Rules of Procedure of the Recount Court. Additionally, to the extent not inconsistent with the provisions of the Final Rules of Procedure of the Recount Court, the recount shall be conducted in accordance with the State Board of Elections' Virginia Election Recounts Step-by-Step Instructions and its Ballot Examples for Hand-counting Paper or Paper-based Ballots for Virginia Elections or Recounts, both of which are incorporated by reference herein. The results shall be recorded on forms prepared by the State Board of Elections;
3. The type of tabulators/scanners used for the recount and redetermination shall be determined by the Electoral Board.

III. RECOUNT COORDINATORS, RECOUNT OFFICIALS, AND ALTERNATE RECOUNT OFFICIALS

1. One electoral board member representing each party shall serve as a recount coordinator, as selected by the Recount Court. The recount coordinators selected are Jeffrey L. Marks (Republican) and H. David Belote (Democrat).
2. In the event that both Democratic members of the Virginia Beach Electoral Board are unable to serve, Alex Askew shall be authorized to nominate a Recount Official to act as a Recount Coordinator. In the event that the Republican member is unable to serve, Karen Greenhalgh shall be authorized to nominate a Recount Official to act as a Recount Coordinator.

The Recount Coordinators and Recount Officials shall be officers of this Court acting under its jurisdiction. Nothing contained in this Order or in the procedures to be established for the recount shall be construed, however, to prevent the Parties or their counsel or representatives from communicating directly with Recount Coordinators.

3. Each party shall submit to the Clerk and the Court a list of the names and addresses of recount officials and alternate recount officials, chosen from the list of Chief Officers and Assistant Chief Officers of election previously appointed in the November 2, 2021, General Election pursuant to Virginia Code § 24.2-115. Before submitting their lists, the parties shall reasonably attempt, in good faith, to confer with one another about their selections to ensure that duplicate officials are not selected. The persons selected by the parties are appointed as recount officials and alternate recount officials, subject to any disqualification by the Court for good cause shown.
 - a. There shall be three (3) recount teams. Each recount team shall consist of two (2) total recount officials—one recount official selected by Petitioner, and one recount official selected by Respondent.
 - b. Each of the parties shall also name three (3) recount officials as alternates for the recount.
4. Each of the parties shall submit to the Clerk of the Virginia Beach Circuit Court by no later than 5:00 p.m. on November 29, 2021, the names and addresses of the recount officials and alternate recount officials that they have chosen.
5. The Clerk of the Virginia Beach Circuit Court shall issue the necessary summonses to compel the attendance of the recount coordinators, recount officials, and alternate recount officials chosen by the parties at the location for and on the date(s) set for the recount, December 2 and 3, 2021.
6. The recount coordinators and recount officials shall be officers of the Court acting under its jurisdiction and shall be subject to training as may be provided by the State Board of Elections and/or recount coordinators, using training materials provided by the State Board of Elections. The parties shall be provided with 24 hours advance notice of all training sessions and logic and accuracy testing, and they shall be given the opportunity to attend any such training session. The parties shall be provided copies of training materials 24 hours in advance of those materials being provided to recount coordinators and recount officials. Additionally, the parties shall be permitted to observe the logistics and accuracy testing of the machinery that will be utilized in the recount and redetermination, either personally or through a representative.
7. Neither party nor the representative of each party, including but not limited to political parties and campaign committees, shall undertake any in- person,

telephonic, or electronic training of any recount coordinator, recount official, or alternate recount official in their duties. No written communication from a party or their representative to any recount coordinator, recount official, or alternate recount official shall be made *ex parte*. Any written communication to any recount coordinator, recount official, or alternate recount official shall be simultaneously served on counsel for the opposing party and filed with the Clerk of the Virginia Beach Circuit Court, except that communications addressing only the time and place of the recount, time and place of training, availability to serve, and similar administrative matters are not subject to this requirement.

8. For the recount and redetermination those entitled to be present are permitted to bring cellular devices so long as such devices are not used to take any photographs or record any audio or video of the recount proceeding. Such conduct is strictly prohibited.

IV. TRAINING AND OATH OF RECOUNT COORDINATORS AND RECOUNT OFFICIALS

1. Recount coordinators and recount officials shall check in at 8:00 a.m. on December 2, 2021 in location of the recount. They shall take their oath at that time and be given instruction and training.

V. RECOUNT OBSERVERS

1. Each party may appoint and is entitled to have present at the recount and redetermination one observer for each team of recount officials. Said persons shall qualify as observers by submitting to the recount coordinators a statement, signed by a representative of or by counsel for a party, giving the person's name and authorizing him or her to represent the candidate as a duly-designated observer. A photocopy form authorization shall suffice. Not later than 10:00 a.m. on November 30, 2021, the parties shall exchange with one another and lodge with the Clerk the form of their respective authorization statements that will constitute the credentials of the recount observers. In addition, each party and counsel for each of party may be present to observe the recount.
2. The observers shall have the right to communicate with their respective campaigns or legal counsel from the room(s) in which the recount is being conducted. Members of the Recount Teams, including Recount Observers, shall be allowed to bring electronic devices including cell phone, laptops, and other electronic devices into the room(s) in which the recount is being conducted so as to communicate with their respective campaigns or legal counsel, but they may not use any electronic device to photograph ballots or any other Materials. The observers and counsel for each Party shall have an unobstructed view of the work of the recount officials and shall not disrupt or otherwise interfere with the conduct of the recount in any way. Nothing contained herein shall be construed to prevent the Parties, their

representative, or counsel, from communicating directly with the Recount Coordinators during the recount, but they are prohibited from interfering with the members of the Recount Team in any way. Any questions from observers or legal counsel should be directed to the supervising recount coordinator.

VI. CONDUCT OF THE RECOUNT

1. Prior to beginning the recount, the General Registrar and recount coordinators shall ensure that the scanners programmed for use in the recount are tested for logic and accuracy, using marked test ballots. During the week of November 29, 2021, each party shall be given at least 24 hours prior notice of the location and time for the testing, and each party is entitled to have one observer present to observe the testing in addition to legal counsel for each party. After the test ballots have been run, the General Registrar shall print the results from the test run. If the tabulator does not accurately count and set aside the test ballots, the recount coordinators and General Registrar or a designated employee or contractor shall require the tabulator to be reprogrammed and shall re-run the test ballots until the electoral board and General Registrar are satisfied that the tabulator is properly programmed and performing accurate counts. The scanners shall be “reset” to zero following the conclusion of the testing in the presence of the representatives of the Parties.
2. The General Registrar shall cause an appropriate number of scanners to be programmed to count only the ballots cast in the HD-85 Election and to set aside: (i) all ballots not listing Alex Askew and Karen Greenhalgh; and (ii) all ballots containing write-in votes, overvotes, and undervotes.
3. At the conclusion of recount activities on December 2, 2021, all HD 85 Election and recount Materials shall be delivered to the Clerk who shall secure them overnight using the security measures mandated in this Recount Order and shall deliver them to the Recount Court for its hearing or—if necessary—to the place of the Recount on December 3, 2021.
4. The recount and redetermination shall be conducted in accordance with the procedures and instructions established by this order and by the Virginia Code, and to the extent they are consistent with this order, in accordance with the standards promulgated by the State Board of Elections, including its publications of RECOUNTS - STEP-BY-STEP INSTRUCTIONS and VIRGINIA’S GUIDE TO HAND-COUNTING BALLOTS, both of which are incorporated by reference herein. The results shall be recorded on forms prepared by the State Board of Elections.
5. Under the direction of the Recount Coordinators, the Recount Teams shall run all optical scan ballots cast in the Election through the scanners. The ballots containing write-in votes, undervotes, overvotes, ballots that are set aside, any ballots not accepted by the Scanner, and any ballots for which a

Scanner could not be programmed to meet the requirements of this Recount Order shall be hand-counted using the standards promulgated by the State Board of Elections in its most recent publications *Recounts – Step-By-Step Instructions* and *Virginia’s Guide to Hand-Counting Ballots*.

6. Only a recount official may challenge a ballot. Any challenged ballot (i.e., one that recount officials during the hand counting phase of the recount procedure could not agree on the validity of the ballot or the voter’s intent as presented on the ballot) shall be placed in a separate envelope by the clerk for review and determination by the court. The written statement of any one recount official challenging a ballot shall be sufficient to require its submission to the court. Prior to the conclusion of the recount in each precinct, the recount officials shall segregate all ballots for which there is a question regarding the ballot’s validity (a “Challenged Ballot”) Prior to setting aside each Challenged Ballot, the Recount Coordinators shall provide counsel for each Party the opportunity to review it. The court may not consider the validity of any ballots (a) until the recount has been completed and (b) the Parties’ counsel have had reasonable opportunity to inspect all Challenged Ballots. The Recount Court shall review the Challenged Ballots in succession during its hearing, where counsel for both Parties shall be present and permitted to make arguments.
7. At the conclusion of the recount, the Recount Coordinators shall write down the number of valid ballots cast for each candidate and shall submit the results to Recount Court. The Recount Court shall supervise the recount and redetermination of the vote, with assistance from the Virginia Beach Electoral Board. The Recount Court shall allow the Parties to inspect the Challenged Ballots.
8. Any person is prohibited from knowingly possessing any firearm as defined in § 18.2-308.2:2 within 40 feet of any building or part thereof used as the place for the recount, unless such person is (a) any law-enforcement officer or any retired law-enforcement officer qualified pursuant to subsection C of § 18.2-308.016; (b) occupying their own private property that falls within 40 feet of a polling place (or other location for the recount); or (c) an armed security officer, licensed pursuant to Article 4 (§ 9.1-138 et seq.) of Chapter 1 of Title 9.1, whose employment or performance of their duties occurs within 40 feet of any building, or part thereof, used as a place for the recount.
9. In consideration of the ongoing COVID-19 pandemic, any person entitled to attend the recount, including the Parties, Recount Coordinators, Recount Officials, Alternate Recount Officials, Recount Observers, and legal counsel (or any other Party representative) must wear a mask covering their nose and mouth. The tables for each Recount Team should be placed so that at least (6) feet separate all people working at or observing the work at one table from the groups working at or observing the work at another table. However, no distance requirement shall prevent the Recount Observers and legal counsel (or any other Party representative) for either Party from having

a meaningful opportunity to observe the recount.

VII. RECOUNT COURT TO CONVENE

1. The full Recount Court, as appointed pursuant to Virginia Code § 24.2-801, shall convene on December 3, 2021 at 10:00 a.m. in the Virginia Beach Circuit Court for the purpose of determining all matters raised by the Parties pertaining to the recount and redetermination of the vote, including to hear any arguments and rule on any Challenged Ballots, and to certify to the State Board of Elections and the Virginia Beach Electoral Board, the vote for each candidate to the recount, the results of the recount and to declare the person who received the higher number of votes to be elected.

VIII. MOTIONS AND OBJECTIONS

The parties shall file any motions and objections to these preliminary rules of procedure in writing with the Clerk of the Virginia Beach Circuit Court no later than 2:30 p.m. on November 29, 2021.

IX. MISCELLANEOUS

1. The City of Virginia Beach shall pay the costs of conducting the recount from its fiscal year 2021 general funds.
2. Wherever this Proposed Recount Procedural Order requires delivery of any notice of document to any Party or their counsel, such notice or document shall be provided to the following counsel of record at the email addresses indicated below:

- (a) Counsel for Alex Askew


Kathryn E. Yukevich: kyukevich@elias.law
Jonathan S. Berkon: jberkon@elias.law
Jeffrey A. Breit: jeffrey@bbtrial.com

- (b) Counsel for Karen Greenhalgh

Dallin Holt: dholt@holtzmanvogel.com
Jason Torchinsky: jtorchinsky@holtzmanvogel.com

It is so ORDERED.

Entered this 5th day of November 2021


The Honorable Leslie L. Lilley
Chief Judge, 2nd Judicial Circuit

Phillip L. Hairston

The Honorable Phillip L. Hairston
Judge, 13th Judicial Circuit

Jayne A. Pemberton

The Honorable Jayne A. Pemberton
Judge, 12th Judicial Circuit

SEEN AND AGREED:

Kyrke

Counsels for Petitioner
Kathryn E. Yukevich, Esquire
Elias Law Group LLP

AB

Jeremy A. Breit, Esquire
Breit Cantor

Dallin Holt

Counsel for Respondent
Dallin Holt, Esquire
Holtzman, Vogel, Baran, Torchinsky & Josefiak, PLLC

EXECUTIVE SECRETARY
KARL R. HADE

**ASSISTANT EXECUTIVE SECRETARY &
LEGAL COUNSEL**
EDWARD M. MACON

COURT IMPROVEMENT PROGRAM
SANDRA L. KARISON, DIRECTOR

EDUCATIONAL SERVICES
CAROLINE E. KIRKPATRICK, DIRECTOR

FISCAL SERVICES
BARRY M. WENZIG, DIRECTOR

HUMAN RESOURCES
RENÉE FLEMING MILLS, DIRECTOR

SUPREME COURT OF VIRGINIA



OFFICE OF THE EXECUTIVE SECRETARY
100 NORTH NINTH STREET
RICHMOND, VIRGINIA 23219-2334
(804) 786-6455

JUDICIAL INFORMATION TECHNOLOGY
MICHAEL J. RIGGS, SR., DIRECTOR

JUDICIAL PLANNING
CYRIL W. MILLER, JR., DIRECTOR

JUDICIAL SERVICES
PAUL F. DELOSH, DIRECTOR

LEGAL RESEARCH
STEVEN L. DALLE MURA, DIRECTOR

LEGISLATIVE & PUBLIC RELATIONS
ALISA W. PADDEN, DIRECTOR

MAGISTRATE SERVICES
JONATHAN E. GREEN, DIRECTOR

MEMORANDUM

TO: The Honorable Phillip L. Hairston, Judge
Thirteenth Judicial Circuit
The Honorable Leslie L. Lilley, Chief Judge
Second Judicial Circuit
The Honorable Jayne A. Pemberton, Judge
Twelfth Judicial Circuit

CC: The Honorable Tina E. Sinnen, Clerk
Ms. Norma L. Catoe, Judicial Assistant
Ms. Sandra S. McCarthy, Judicial Assistant
Ms. Tiffany C. White, Judicial Assistant

FROM: Kristi S. Wright *KSW*

DATE: November 18, 2021

RE: Designation for Virginia Beach Circuit Court

Thank you for agreeing to sit in the Circuit Court of the City of Virginia Beach to hear the petition for recount for the election held November 2, 2021, for the Office of Member, House of Delegates, 85th House District, Commonwealth of Virginia. Referenced recount is filed pursuant to Sections 24.2-800 et seq. of the Code of Virginia.

Judge Lilley, Chief Judge of the Second Judicial Circuit, will serve as coordinating judge.

Thank you for accepting this assignment.

KSW:mej
Enclosure

Supreme Court of Virginia

To All To Whom These Presents Shall Come — Greetings:

Know Ye, That I, DONALD W. LEMONS,

Chief Justice of the Supreme Court of Virginia, by virtue of authority vested in me by law,
do hereby designate –

The Honorable Phillip L. Hairston
Judge of the Thirteenth Judicial Circuit
and
The Honorable Jayne A. Pemberton
Judge of the Twelfth Judicial Circuit

to preside in the Circuit Court of the City of Virginia Beach
with

The Honorable Leslie L. Lilley
Chief Judge of the Second Judicial Circuit

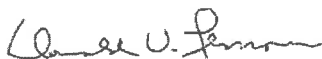
as members of a three-judge court, authorized by section 24.2-800 et seq. of the Code of
Virginia 1950, in the case of –

Alex Askew
v.
Karen Greenhalgh
CL21-5448

In Re: Petition for Recount of the Ballots
in the General Election held on November 2, 2021,
for the Office of Member, House of Delegates,
85th House District, Commonwealth of Virginia.

To be heard on a date set by the
Chief Judge of the three-judge court, and continuing
until the matters presented in this case
have been disposed of according to law.

It is so Ordered. Given under my hand and seal this 18th day of November 2021.



Chief Justice of the Supreme Court of Virginia (SEAL)

Office of the Clerk of the Circuit Court

Judicial Center - Building 10B
2425 Nimmo Parkway
Virginia Beach, Virginia
23456-9017

Tina E. Sinnen
Clerk

TO: The Honorable Leslie L. Lilley
FROM: Tina E. Sinnen, Clerk
DATE: November 19, 2021

I, Tina E. Sinnen, Clerk, certify that the proper security measures have been taken to secure all printed ballots and other election materials in sealed boxes, placed all the sealed boxes in our vault which is not open to the public or anyone other than the Clerk and her staff, cause the vault to be securely locked except when access is necessary for the Clerk and her staff.

A handwritten signature in black ink, reading "Tina E. Sinnen". The signature is written in a cursive style with a large, looping initial "T".

Tina E. Sinnen, Clerk
Virginia Beach Circuit Court