

# Memorandum (Summary)

To: Members of the Haines Borough Assembly

From: Mike Denker, 203 Union St. / P.O. Box 298, Haines, AK 99827

Re: Ordinance 15-12-424 Amending *HBC 20.10.030 (A) Agenda* and the *Agenda Request for Assembly Action* form

Date: December 1, 2015

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I would like to submit the following summary of a memorandum I am preparing for assembly consideration. This summary memorandum will address issues with the proposed amendments to the policy wording in the “Note” section of the *Agenda Request for Assembly Action* form (herein: *Agenda Request*). I would welcome a legal review of the information should there be any questions regarding its validity or argumentation.

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## *Background and Question Presented*

On May 19, 2015, comments were submitted to the assembly regarding the Haines Borough policy regarding agendas.<sup>1</sup> The question asked if the policy regarding agendas provided in the “Note” section of the *Agenda Request for Assembly Action* form reconciled to Code.<sup>2</sup> The comments stemmed from an issue whereby Borough Manager David Sosa initially tried to withhold an *Agenda Request* from an assembly meeting agenda and meeting packet.<sup>3</sup>

The Assembly tasked the Government Affairs and Services Committee (GAS) to review the issue.<sup>4</sup> Subsequent recommendations from the GAS and the Assembly tasked the manager and clerk “with making sure HBC § 2.10.030 and the policy on the *Agenda Request* form are aligned.”<sup>5</sup> The manager and clerk have responded with proposed amendments to the wording in both the “Note”

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<sup>1</sup> See Denker, Michael. *HBC § 2.10.030 (A) – Does Borough Policy Regarding Agendas Reconcile to Code?*, Haines, Alaska, Borough public record, May 19, 2015.

<sup>2</sup> *Id.*, Pg. 1. Herein: *Agenda Request*

<sup>3</sup> *Id.* See also Chilkat Valley News, *Assembly want HARK cut options*, May 14, 2015, Pg. 1, 12.

<sup>4</sup> See Haines, Alaska, Borough Assembly Meeting Packet, Item 9B1, GAS report to the Assembly, June 23, 2015.

<sup>5</sup> See Haines, Alaska, Borough Assembly Meeting Packet, Item 11B1, Summary Statement of Ordinance 15-12-424. December 1, 2015.

section on the *Agenda Request* form, as well as amendments to the language within HBC § 2.10.030 (A).<sup>6</sup>

As proposed by the manager and clerk, the policy language in the “Note” of the *Agenda Request* form reads as follows:

“Note: The deadline for agenda topics is 10:00 a.m. the Monday (one week and one day) prior to an assembly meeting. Your request will most generally be placed on the agenda under “Correspondence/Requests” and is subject to all necessary paperwork being submitted in a timely manner. Please be aware that we may ask for additional supportive and/or background information in order to assist the assembly in making an informed decision. The clerk will provide copies for them. In a manager form of government, some matter may not be within the assembly’s purview and, as such, would be more appropriately handled by the borough manager. If that is the case, you will be contacted and we will discuss with you our recommendations for the best and most appropriate avenues for action.”<sup>7</sup>

The question presented is whether the proposed change in the policy language set out in the “Note” section of the *Agenda Request* form adheres to the Petition Clause of the First Amendment.

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*Short Answer*

No. While it is a step in the right direction, issues remain with this policy language. After further research on the subject, I argue that the proposed policy wording fails to adhere to the Petition Clause of the First Amendment under the rules developed by the Supreme Court. The main points that will support this contention are outlined below.

I.

The Petition Clause of the First Amendment applies when a person submits an *Agenda Request for Assembly Action* to the clerk. First, except in limited circumstances, submitting an *Agenda Request* to the clerk is petitioning activity protected under the First Amendment. Second, an assembly meeting packet, designed to deliver materials to the Assembly, is regulated under the First Amendment as a “limited public forum” under the rules developed by the Supreme Court.

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<sup>6</sup> *Id.*

<sup>7</sup> Haines, Alaska, Borough Assembly meeting packet, Item 11C1, Ordinance 15-12-424, proposed amendment to the policy on the Agenda Request for Assembly Action form, December 1, 2015.

II.

The amended policy statement in the “Note” section of the *Agenda Request* form allows for a person’s right to petition to be abridged. First, the amended policy unconstitutionally allows for petitioning activity protected under the First Amendment to be withheld from an assembly meeting packet due solely to the subject matter of an *Agenda Request*. Second, restraining protected petitioning activity prior to its expression is unconstitutional under the Supreme Court’s “Prior Restraint” doctrine. Third, the amended policy is unconstitutionally vague because it does not provide sufficient information about what matters are considered within the Assembly’s purview and would be more appropriately handled by the borough manager. Lastly, the amended policy is unconstitutional because it is overly broad and allows for both protected and unprotected petitioning activity to be restrained.

III.

The Haines Borough fails to have the sufficient justification demanded by the Supreme Court to abridge a person’s First Amendment right to petition the Assembly. First, the Borough’s interests for using the policy are less than compelling. Second, the provisions of the amended policy are not narrowly drawn. Third, the amended policy statement is improperly tailored to further the Borough’s purpose. Lastly, the Borough does not provide a reasonable alternative means to publically deliver petitions protected under the First Amendment to the Assembly.

Because of these reasons, the policy statements proposed in Ordinance 15-12-424 must be amended to ensure a person’s First Amendment right to petition the Assembly is protected.



*Recommendations*

To align the *Agenda Request* form to the First Amendment, I propose the changes stated below.

1. In the “Note” section of the *Agenda Request* form, remove the statement “In a manager form of government, some matters may not be within the assembly’s purview and, as such, would be more appropriately handled by the borough manager.” This statement is unconstitutionally vague because it does not provide sufficient information to the public about what these

matters consist of.<sup>8</sup> Additionally, the statement is unconstitutional because it is overly broad and allows for both protected and unprotected petitions to be withheld from an assembly meeting packet based solely on subject matter.<sup>9</sup> As such, the statement should either be removed in its entirety, or information should be provided to the public on the form as to what these unprotected matters are.

2. In the body of the *Agenda Request*, a section should be added to make the following inquiries:
  - a. “Are you an employee of the Haines Borough?”
  - b. “Is your request a matter of private concern related to your employment with the Haines Borough?”

These questions are designed to allow for a decision to be made on whether the *Agenda Request* qualifies as a petition that is protected under the First Amendment. Employees of the Borough have a First Amendment right to petition the Assembly as a citizen on matters of public concern, provided the petitioning activity does not disrupt the workplace or negatively affect the services the borough provides.<sup>10</sup> A petition from an employee is not protected when it involves matters of private concern related to the workplace.<sup>11</sup> Petitions from employees are also unprotected when the subject is of public concern but it disrupts the workplace or negatively affects the services provided by the Borough.<sup>12</sup>

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<sup>8</sup> See Chemerinsky, Erwin, *Constitutional Law: Principles and Policies*, 4<sup>th</sup> Ed., 2011, Pgs. 970 – 972, for an examination of the vagueness doctrine as it applies to the First Amendment.

<sup>9</sup> Regarding “Overbreadth” doctrine, see Chemerinsky, Pgs. 972 – 978; for content-based infringements, see Chemerinsky, Pgs. 960 – 970.

<sup>10</sup> See *Duryea v. Guarnieri*, 564 U.S. \_\_\_ (2011); see also *Pickering v. Board of Education*, 593 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983)

<sup>11</sup> Id.

<sup>12</sup> Id.