

Memorandum

To: Members of the Haines Borough Assembly; Mayor Jan Hill

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

Re: Ports and Harbors Advisory Committee Ad in Nov. 3, 2016 Edition of the Chilkat Valley News

Date: November 8, 2016

This memorandum addresses concerns I have regarding the placement of an ad by the Ports and Harbors Advisory Committee (PHAC) in the November 3rd edition of the Chilkat Valley News (CVN). These concerns center on procedural issues only, and are not related to the substance of the ad. I would recommend forwarding this memorandum to the Borough attorney for a professional legal review if there are any questions with the information.

STATEMENT OF FACTS

The Ports and Harbors Advisory Committee (PHAC) placed an ad in the November 3rd edition of the Chilkat Valley News asking residents to join them in supporting the Haines Harbor Expansion Project. The public records for the September 29th and October 27th PHAC meetings contain no information that the PHAC discussed placing the ad, or whether they voted on a motion recommending to the Assembly that an ad be taken out. Additionally, the public records for recent Assembly meetings contain no information that the Assembly received recommendations from the PHAC to place the ad, or whether the Assembly passed a motion directing the PHAC to place such an ad.

ISSUES

1. Under Haines Borough Code, did the PHAC overstep their authority by placing the ad in the CVN without being directed to do so by the Assembly?
2. If the decision to place the ad was made by motion in a PHAC meeting but was not recorded in the minutes, was there a violation of Haines Borough Code?
3. If the PHAC made a decision to place the ad outside of a public meeting, was the Alaska Open Meetings Act violated?

SHORT ANSWERS

1. Yes. The PHAC clearly violated Haines Code by placing the ad. Under HBC 16.08.010 (C), the PHAC is advisory only and may not take actions outside of “deliberating” and “making recommendations” without being directed to do so by the Assembly. However, the record indicates the PHAC took this action on it’s own without Assembly direction. Therefore, the PHAC violated HBC 16.08.010 (C) by placing the ad without being directed to do so by the Assembly. *See Pgs. 3 - 4.*
2. Yes. If a motion to place the ad was passed but not recorded in meeting minutes, the PHAC violated Haines Code. Under HBC 2.60.120, the vote of each member on every question must be recorded in the meeting minutes. However, the public records for September and October PHAC meetings contain no information that a vote to place the ad was held. Therefore, if a motion was passed and not recorded, the PHAC violated HBC 2.60.120. *See Pgs. 4 - 5.*
3. Yes. If a decision to place the ad was made outside of a public meeting, the PHAC violated the Alaska Open Meetings Act. Under AS 44.62.310 (a), all meetings of government bodies such as the PHAC must be open to the public. However, the public record for September and October PHAC meetings do not show a motion to place the ad was held, much less passed. Therefore, if the decision to place the ad was made outside of a public meeting, the PHAC violated AS 44.62.310 (a) of the Alaska Open Meetings Act. *See Pgs. 5 - 6.*

ANALYSIS

1. Under HBC 16.08.010 (C), the PHAC overstepped their authority by placing the ad in the CVN without being directed to do so by the Assembly.

The first issue to consider is whether the PHAC overstepped their authority by placing an ad in the CVN without being directed to do so by the Assembly. According to the information available, they clearly did.

Chapter 16.08 of Haines Borough Code provides for a Ports and Harbors Advisory Committee to assist with harbor management. Under HBC 16.08.010 (C) of this chapter, the PHAC is vested with certain powers. The full text of this provision is as follows:

“The port and harbor advisory committee shall deliberate over matters concerning the construction, improvement, maintenance, use, operation and regulation of borough port and harbor facilities, and make recommendations regarding these issues to the assembly, either directly or through the manager or harbormaster.”

HBC 16.08.010 (C)

Clearly interpreted, the PHAC acts in an advisory capacity and is vested with only two powers; the power to “deliberate” over matters related to ports and harbors, and the power to “make recommendations” to the assembly regarding these matters. *Id.* As such, the PHAC may not take actions outside of “deliberating” and “making recommendations” without being directed to do so by the Assembly.

In this matter, the public record for recent meetings contains no information that the Assembly directed the PHAC to place the ad. The minutes from recent Assembly meetings bear this out. No information is contained in the minutes for Assembly meetings held in September and October to indicate the Assembly received recommendations from the PHAC, much less directed the PHAC to place the ad. Absent this information, the Assembly did not direct the PHAC to place the ad.

In sum, because the ad was placed without direction from the Assembly, the PHAC violated HBC 16.08.010 (C). Code clearly establishes the PHAC as an advisory body vested with only the power to “deliberate” and the power to “make recommendations.

Thus, absent information suggesting otherwise, the PHAC appears to have acted on their own to place the ad without being directed by the Assembly, and in so doing violated Haines Borough Code in the process.

2. The PHAC violated HBC 2.60.120 if they passed a motion to place the ad but did not record the vote in the public record for a meeting.

The next issue to consider is whether there was a violation of Haines Borough Code if the PHAC passed a motion in a meeting to place the ad but failed to record that vote in the public record. Here again, this would be a clear violation of code.

Chapter 2.60 regulates committees, boards and commissions of the Haines Borough. This chapter covers the rules for all meetings of these bodies. Under HBC 2.60.120 of this chapter, the following is required:

“Unless otherwise provided by resolution, the committee, board or commission shall keep minutes of the committee, board or commission proceedings and such minutes shall record the vote of each member upon every question.” *HBC 2.60.120.*

This provision protects the public’s access to a well-maintained record as guaranteed in the Haines Borough Charter Preamble and Bill of Rights.

There is a clear requirement in this provision to record votes in meeting minutes. The word “shall” here denotes “an imperative or mandatory” requirement. *Black’s Law Dictionary* 1375 (6th Ed. 1990). As used in this context, the word imparts a duty and “is inconsistent with a concept of discretion. *Id.* And while there are some contexts where “shall” is permissive,¹ in this context “shall” denotes an obligation because the public’s interest is at stake. See Antonin Scalia & Bryan Garner, *Reading Law*, 1st Ed. 2012, Pgs. 112 - 115. Thus, the PHAC must record the votes on all motions made during meetings, and reflect those votes in meeting minutes.

¹ See Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 1st Ed. 2012, Pgs. 112 – 115, Discussion of the Mandatory / Permissive Canon of statutory interpretation.

Yet, even though recording votes on motions is a requirement, the public records for recent PHAC meetings make no mention of a motion to place an ad. Neither the September 29, nor the October 27 PHAC meeting minutes include the passing of a motion to place such an ad. And as stated above, the public records for recent Assembly meetings contain no such information as well. Thus, if a vote was made to pass a motion to place the ad, then this vote was not recorded in the public record for the meeting.

If a vote did occur and was not recorded, it would be a clear violation of code. As stated, HBC 2.60.120 requires recording such votes in meeting minutes. Therefore, a failure to record a vote to place the ad in meeting minutes would be a violation of HBC 2.60.120.

3. The PHAC violated AS 44.62.310 (a) of the Alaska Open Meetings Act if the decision to place the ad was made by a majority of the members outside of a public meeting.

The final issue to consider is whether there was a violation of the Alaska Open Meetings Act if the decision to place the ad was made outside of a public meeting. If this did occur, it most certainly would have been a violation of State law.

Article 06 of the Alaska Administrative Procedures Act regulates open public meetings of governmental bodies. This Article provides regulatory guidance for all meetings of public entities like the Haines Borough. Under AS § 44.62.310 of this article, “all meetings of governmental bodies of a public entity of the state are open to the public...”. *AS § 44.62.310 (a)*. The term “governmental bodies” here applies to committees such as the PHAC that serve in a solely advisory role to a public entity like the Haines Borough. See *AS § 44.62.310 (h)(1)*. Additionally, the term “meeting” in this provision is defined to mean “a gathering...of more than three members or a majority of the members” of the governmental body. *AS § 44.62.310 (h)(2)*. Thus, under the Open Meetings Act as it is known, all PHAC meetings are required to be open to the public.

However, as stated earlier, the public records for recent PHAC meetings contain no information that a vote took place. If this lack of information in the public record is accurate, then there was no deliberation held, or vote made, in a public meeting to place the ad. The conclusion to be drawn here, then, is that the decision to place the ad was made by a majority of PHAC members outside of a public meeting.

If this is indeed the case, then there was a direct violation of AS § 44.62.310 (a). As stated, State law clearly requires public meetings to be open to the public. This requirement protects the public's interest that actions of government "be taken openly and that their deliberations be conducted openly." *AS § 44.61.312 (2)*. It is also intended to protect "the people's right to remain informed...so [the people] may retain control over the instruments they have created." *AS § 44.62.312 (5)*. Thus, if the decision to place the ad was made outside of a public meeting, it would be a serious violation of State law indeed.

CONCLUSION

The decision by the PHAC to place the ad in the CVN has three issues associated with it. In the first, there was a clear violation of HBC 16.08.010 (C) because the PHAC overstepped their authority by taking an action to place the ad without being directed to do so by the Assembly. In the second, the PHAC violated HBC 2.60.120 if a motion was passed in a public meeting and the vote was not recorded in the minutes. Lastly, the PHAC violated AS 44.62.310 (a) of the Alaska Open Meetings Act if the decision to place the ad was made by a majority of PHAC members outside of a public meeting. Given the information available at the time of drafting this memorandum, it is difficult to envision a scenario where there was not a violation of Haines Borough Code, the Alaska Open Meetings Act, or both.

The Assembly should take immediate, clear and decisive action in this matter. Advisory committees overstepping their authority and acting without Assembly direction is a serious matter. If left unaddressed, the Assembly could be at risk of losing control of