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MEMORANDUM

TO: Alekka Fullerton
Borough Clerk



FROM: Brooks Chandler
Borough Attorney

RE: Witness Requirements for Absentee Ballots

DATE: October 13, 2020

You asked whether mail in absentee ballots that have not been witnessed as required by Borough code should be counted. Based on our review of last week's Superior Court decision ordering the state to eliminate the witness requirement for mail in absentee ballots for the November 2020 state and federal election in our opinion the answer is YES. The reasons for this conclusion are set forth in greater detail below.

FACTS

The Haines Borough allows voters to vote by mail or by facsimile using absentee ballots.

After the voter marks the ballot it is inserted into an envelope. The outside of the envelope requires the voter to supply either a social security number or a voter identification number or a date of birth. The voter must sign a certification declaring they; 1) are a citizen of the United States; 2) have been a Borough resident for at least 30 days; 3) have not asked for an absentee

ballot from any other state¹; and 4) are not voting in any other manner in this election. The envelope also contains this statement:

If I had this certification attested by witnesses other than an authorized official, it was because no official empowered to administer an oath was reasonably available

The envelope contains two forms called Witnessing Affidavit--- OPTION 1 and Witnessing Affidavit OPTION 2. The OPTION 1 form has a space for an “Official Authorized to Administer an Oath”² to sign. The OPTION 2 form has two “Witness Signature” lines and says, “If no authorized official is available, your oath may be witnessed by two (2) U.S. citizens age 18 or older”.

The Haines Borough held a municipal election on October 6. Three voters submitted absentee ballots inside envelopes without a witness signature in either the OPTION 1 or the OPTION 2 witness form. One of the envelopes submitted without a witness signature contained a handwritten note stating “Unable to comply due to COVID 19 no town clerk, no postmaster, no notary available”.

The envelopes without witness signatures have been segregated from other absentee ballots. The envelopes have not been opened. The canvass committee will meet at 6:30 October 13 and will need to decide whether to open and count these three ballots or reject them for not having a witness signature.

Four assembly members are to be elected from seven declared candidates. It is theoretically possible the unwitnessed absentee ballots will decide the outcome.

LAW

A. Haines Borough Code

1. Absentee Ballots. HBC 11.36.020 governs absentee voting. HBC 11.36.020 (C) states:

The borough clerk shall provide ballots for use as absentee ballots. The borough clerk shall issue rules and instructions to absentee voters to aid them in casting

¹We recommend the reference to “state” on the absentee ballot envelope be changed to “municipality”.

²Most commonly a notary public.

their ballots. The borough clerk shall prescribe the form of and prepare the voter's certificate, envelopes, and other materials used in absentee voting. The voter's certificate shall include an oath that the voter is a qualified voter³, a blank for the voter's signature, a certification that the affiant properly executed the marking of the ballot⁴ and gave the voter's identity⁵, blanks for the attesting official or witness⁶, and a place for recording the date the envelope was sealed and witnessed.

(Emphasis supplied)

HBC 11.36.020(F) also governs the mechanics of mail in absentee voting. This section states:

At any time on or before the day of the election, any voter issued an absentee ballot may appear before any person authorized by law to administer oaths, and in the presence of such officer cast the voter's ballot in the same manner the voter would cast it under this section in the office of the borough clerk or other place designated under this section. After executing the affidavit printed on the return envelope, the officer⁷ shall return the envelope to the voter who shall mail or deliver it to the borough clerk.

³The voter certification form we reviewed did not contain any oath that the person signing was a qualified voter. Instead, the voter certification indicates the voter is a U.S. citizen and has resided in the Haines Borough for thirty (30) days. It is possible for a person to have lived in the Borough for 30 days prior to the date of an election but not have registered to vote.

⁴The voter certification form we reviewed did not contain a certification the absentee ballot had been properly marked.

⁵The voter certification form we reviewed did not have any certification regarding the voter having presented identification.

⁶We recommend the Borough remove the second Witness Signature line from the envelope in future elections unless this section of code is amended to require two witnesses. The voter certification language should be changed to read "a witness" instead of "witnesses".

⁷The voter certification form we reviewed did not contain an "affidavit" for "the officer" to sign. Instead, the "officer" signs a standard notary form attesting that the voter signed the certification in the presence of the officer.

2. Counting Absentee Ballots. The process of counting absentee ballots is governed by Section 11.36.030. Subsection (B) says: “Absentee ballots received without an executed voter affidavit certificate (see HBC 11.36.020(C)) shall be marked as “Invalid,” and the time and date of receipt by the borough clerk shall be noted thereon.” Subsection (E) states, “Invalid absentee ballots shall not be counted.”

The Assembly sitting as the canvass committee is responsible for “judging the qualifications of those voters who cast questioned ballots, or whose absentee ballots were in some way questionable. In full view of those present the assembly shall make a determination upon each of these ballots”. HBC 11.48.020(A). Subsection(A)(2) states “An absentee ballot shall not be counted if: . . . 2. An official or the witnesses authorized by law to attest the voter’s certificate fail to execute the certificate”.

(Emphasis supplied)

Alaska Constitution

Article 5 Section 1 of the Alaska Constitution says “ Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election.”

Court Decisions

The State of Alaska also requires that mail in absentee ballots be witnessed. Application of the witness requirement to the November 2020 election was challenged by voters who claimed enforcing the witness requirement during a pandemic would violate their right to vote under the state constitution. The voters asked a judge to order the state to eliminate the witness requirement for the 2020 election.

In an October 5, 2020 order Superior Court Judge Dani Crosby ordered the State to eliminate the witness requirement for absentee ballots cast in the 2020 election. The judge based her order on a conclusion that, “application of the Witness Requirement during the pandemic impermissibly burdens the right to vote”⁸. That right is a constitutional right⁹.

Analysis

⁸Arctic Village Council League of Women Voters v. Meyer, Case No. 3AN-20-07858 (October 5, 2020 order granting preliminary injunction p. 14) (affm’d Sup. Ct. Order No. S-17902, Oct. 12, 2020).

⁹Alaska Constitution Art. 5, Sec. 1.

The constitutional right to vote addressed by the Superior Court applies to local elections. The specific facts related to the health risks associated with the pandemic may differ when viewed on a statewide basis as opposed to a Haines Borough perspective. The Superior Court decision was based on statistics including the disproportionate death rate from COVID-19 experienced by Alaska Natives on a statewide basis¹⁰. The health risk within the Borough associated with requiring a witness to an absentee ballot may be less than the state-wide risk.

But risk is a matter of individual perception. The court's conclusion that "If the Witness Requirement is not eliminated, it will force Plaintiffs and other voters to choose between risking their health by coming into contact with a witness or forgo their right to vote entirely"¹¹, applies equally to those voting in Borough elections and those voting in the upcoming November election. Since the Alaska Supreme Court affirmed the Superior Court order it is more likely than not a court would conclude rejection of unwitnessed absentee ballots by the Borough Assembly would violate the Alaska Constitution. This means enforcement of current Borough code provisions requiring rejection of unwitnessed absentee ballots would violate an individual's constitutional right to vote. Therefore we recommend the Assembly not enforce the witness requirements of Borough code when counting absentee ballots cast in the 2020 Borough election.

¹⁰Superior Court Order pp. 9-10.

¹¹Superior Court Order p. 12.