

Violations in regard to Lutak Dock Project For Your Immediate Review

To: Members of the Haines Borough Assembly

From Lynn Canal Conservation, PO Box 964, Haines, AK, 99827

Date: September 22, 2022

Open Meetings Act Violations

The State of Alaska's Open Meetings Act (AS 44.62.310-.312) requires that all meetings of a public entity's governing body be open to the public and that the body provide reasonable notice of its meetings. The Open Meetings Act (OMA) is specifically made applicable to all municipalities by AS 29.20.020 and AS 44.62.310.

The State Policy Regarding Meetings (AS 44.62.312) states that "the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know," and "the people's right to remain informed shall be protected so that they retain control over the instruments they have created."

The OMA is intended to ensure that decisions made and actions taken are public knowledge and represent the will of the public that the governing body serves. In essence, the OMA protects the public's right to know.

There are multiple issues concerning the public process in regard to the Lutak Dock Redevelopment Project.

- On January 20, 2022, unknown to the public, a Lutak Dock Design Working Group devised a new Phase 3 design for the Lutak Dock.
- On March 24, 2022, seven Yukon mining executives discussed the Lutak Dock design with the Haines Borough Port and Harbor Advisory Committee (PHAC), a meeting that was not listed on the PHAC agenda.
- On August 30, 2022, a meeting took place at the dock. Six Borough Assembly members, the Borough Manager, the Borough Clerk, the Harbormaster, a member of the Planning

Commission and the Port and Harbor Advisory Committee, and the director of the Chamber of Commerce were present. It was billed as a tour of the existing facility but instead the Harbormaster introduced an entirely new dock design. Only a very few members of the public were present.

Discussion of Open Meetings Act Violations

Concerned about the lack of transparency while important decisions are being made for the future of the Haines Borough, Klukwan, and Southeast Alaska, Lynn Canal Conservation submitted a records request for all communications on the subject of the dock between June 2021 and April 2022. LCC sought this information from Borough staff and Assembly members. (Government employees, staff and Assembly members are required to submit these records to the public on request.)

On May 12, 2022 LCC received the results of the records request. As a result of its examination of these records, LCC learned of the existence of a secret Lutak Dock Design Working Group (LDDWG) consisting of the Haines Mayor, the Haines Harbormaster, a representative from the Port and Harbor Advisory Committee, a representative from the Planning Commission, the Borough Facilities Director, and two commercial corporations: Alaska Marine Lines and Delta Western. This is the group that met on January 20, 2022 in violation of the Open Meetings Act.

The meeting of the LDDWG on January 20, 2022 created a new Phase 3 design for the Lutak Dock. Phase 3 changed from a catwalk to an elevated dock platform. Following the January 20 meeting, the Harbormaster commissioned R&M Consultants to draw up a design for the new Phase 3.

On February 9, Phases 1, 2, and the new version of Phase 3 were combined into a single project. The combined design was presented to the public as a way for the Borough to save \$2 million. The urgent need for immediate approval was conveyed to the public. The Planning Commission voted to recommend approval to the Borough Assembly on April 7. The Assembly, on April 12, approved the resolution to combine Phase 1, 2, and the new Phase 3.

On March 24, 2022, seven Yukon mining executives attended a Haines Borough Port and Harbor Committee meeting and gave input on the new Phase 3. The presence of the Yukon mining executives was not announced in advance and the public was not informed. Kells Boland,

co-chair of the Yukon Joint Transportation Infrastructure Committee, described the scenario for how the Lutak Dock could serve the needs of Yukon mining interests, which currently do most of their business at the Port of Skagway.

But the Port of Skagway is transferring its interests to cruise ships. Therefore, the Yukon mining sector is looking to Haines as the next closest alternative. The Yukon mining executives agreed that the new Lutak Dock Phase 3 design would be sufficient for their short-term needs. They also discussed additional dredging to accommodate the increasing ore production from Yukon mines that are set to go into operation during the next ten years. The Haines Harbormaster said, "One of the things that we tried to encourage or envision is to be able to build upon this design into the future. . . to add two more [elevated platforms] . . . to allow for multi-loading points for a ship."

On April 26, 2022, the Haines Borough Resolution No. 22-05-973 created the "Lutak Dock Project Group," an "ad hoc committee, and temporary in nature." This group, which included the existing members of the Lutak Dock Design Working Group, sought to expand the group to include two members of the public. People applied for these positions, but the Borough Assembly did not approve the resolution. The former members of LDDWG are still listed with the Lutak Dock Project Group under the Haines Borough website's Boards and Commissions. The public has no way of knowing if the group continues to meet, and if so, what they are discussing.

On August 30, 2022, as discussed above, a group consisting of six Borough Assembly members, the Borough Manager, the Borough Clerk, the Harbormaster, a member of both the Planning Commission and the Port and Harbor Advisory Committee, and the director of the Chamber of Commerce came on what was billed as a "field trip" to the dock. On this visit, the Harbormaster introduced an entirely new dock design that creates multiple loading points for ships to accept ore cargo. Only a very few members of the public were present.

During that meeting, the Harbormaster introduced an entirely new design put forth by Turnagain Marine Construction. This new design would reinforce the existing dock rather than demolish it, by way of a massive steel wall built seaward of the existing dock. This would allow the 600-foot dock face to be maintained while also accommodating heavier loads.

This is not the Lutak Dock Design plan that the Borough presented in its application for a \$20 million federal grant from the Department of Transportation (USDOT). Turnagain Marine's new design has not been approved by the Maritime Administration (MARAD, the branch of the USDOT that oversees Federally funded port infrastructure projects.) Turnagain's design has not

been presented to the Haines Borough Planning Commission, as required by Haines Borough Code 18.30.040(I)(1). Nor has it been introduced to the public.

Yet Turnagain's design is the one proposed for a vote on Thursday, September 22.

Violations of Haines Borough Code

On Thursday, September 22, the Haines Borough Assembly will vote on Resolution 22-09-996, which would approve the contract with Turnagain Marine Construction for the progressive design-build of the new design for an amount not to exceed \$310,000. The resolution proposes approval of the contract without public input or consultation with the Planning Commission. This violates Haines Borough Code 18.30.040(I)(1), which requires plans for the construction of new borough facilities with a value of over \$25,000 to come to the commission for review and a public hearing at the conceptual stage of design.

Additionally, according to Haines Borough Code 3.60.060, "Contracts for public improvements shall be by competitive sealed bid and be awarded to the lowest qualified bidder. "Public improvement" as used in this chapter means the on-site field surveying, erection, rehabilitation, alteration, construction, placement, creation or expulsion, demolition or removal of buildings, roads or other improvements to real property under contract for the borough." However, the Borough put out a request for proposals for the design, permitting, and construction of the Lutak Dock project. This is a very different acquisition process than competitive sealed bidding. The public deserves to know if/why the Lutak Dock project is exempt from the restrictions and provisions of Haines Borough Code 3.60.060.

Inaccuracies in RAISE Grant Application

There seem to be inaccurate representations of the need for a new dock in the Haines Borough's RAISE grant application narrative, which says, "Dock closure would create a significant economic barrier for businesses and residents in Haines, with effects extending to the region.

The increase in transportation costs from a modal shift to truck transportation is expected to impact the cost of goods and services in Haines for both consumer- and industrial-end users.” Freight operations transitioned seamlessly to AML’s RORO in December 2020 when the assembly closed the face of the Lutak dock with no need for a shift to truck transportation. The grant narrative and Benefit-Cost Analysis appear to misrepresent both the baseline scenario and the “most likely” outcome should the Lutak dock fail.

Public Opposition

There has been significant public opposition and testimony requesting opportunities for public input, such as town hall meetings, at all stages of the Lutak Dock project. However, there has not been a single Lutak Dock town hall meeting (where a vote has not taken place) since June of 2021. The scope of the project has changed dramatically since then.

It’s clear from public testimony that the Lutak Dock project is a matter of public concern, but the Borough has failed to provide sufficient opportunity for public discourse.

We urge the Borough Assembly to delay a vote on Resolution 22-09-996, which approves the design-build contract with Turnagain Marine Construction, until the above issues are addressed.

Sources

LCC’s sources include public Borough records received as a result of its records request and postings on the Haines Borough website. Quotes and other information come from statements made at meetings, including the recording of the March 24, 2022 Port and Harbor Advisory Committee meeting.

Phase 3 of the Lutak Dock Project came from a secret meeting of the Lutak Dock Design Working Group - OMA Violation

Lynn Canal Conservation

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September 9, 2022

Attn: Alekka Fullerton, Haines Borough Clerk
Cc: Annette Kreitzer, Haines Borough Manager

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We are submitting this issue of concern for immediate borough attention. We argue that Phase 3 of the Lutak Dock Project originated from a January 20, 2022 secret meeting of the Lutak Dock Design Working Group in violation of the Open Meetings Act (OMA). The public was not informed of the existence of the working group, or of their January 20 meeting. As such, the borough should abandon Phase 3 of the Lutak Dock Project until such time as a series of open, inclusive public meetings are held in order to explain and present the information from that meeting that resulted in the current Phase 3 design. Our argument follows.

FACTS

On **June 22, 2021**, the Haines Borough Assembly passed Resolution 21-06-919 in support of the first two phases of a four-phased Lutak Dock replacement project.¹ In **November 2021**, the Haines Borough was selected for a conditional, reimbursable \$20 million federal grant from the U.S. Department of Transportation for Phases 1 and 2 of the Lutak Dock project. In **December 2021**, a “Lutak Dock Design Working Group” was assembled by Haines Borough Harbormaster Shawn Bell and Haines Borough Manager Annette Krietzler to “help refine the design of the Lutak Dock”.² The group membership has not changed from then until now. The group consists of Shawn Bell (Harbormaster), Doug Olerud (Mayor), Ed Coffland (Facilities Director), Fred Gray (Port and Harbor Committee), Don Turner Jr. (Planning Commission), and stakeholder/industry representatives Jake Eckhardt (Delta Western) and Michael Ganey (Alaska Marine Lines).³

¹Haines Borough Assembly. Resolution 21-06-919. June 22, 2021. Haines Borough Government. https://www.hainesalaska.gov/sites/default/files/fileattachments/borough_assembly/page/30677/res_21-06-919_confirmation_lutak_dock_design_final.pdf

²Email from Annette Kreitzer to Doug Olerud. December 2, 2021. Subject: Lutak Dock Design Working Group. LCC Public Records Request. <https://static1.squarespace.com/static/567f047140667a31535ca527/t/630fcb764f9bff758010a95b/1661979511674/1+LD DWG.pdf>

³Email from Annette Kreitzer to Shawn Bell. March 29, 2022. Subject: Lutak Design Working Group. LCC Public Records Request. <https://static1.squarespace.com/static/567f047140667a31535ca527/t/630ff5edf325bc394829f402/1661990382715/2.pdf>

On **January 20, 2022**, the Lutak Dock Design Working Group met to discuss what Shawn Bell (the Haines Harbormaster) called “alternate phase 3 options.”⁴ The day before the meeting, Bell sent out an email to the group in which Bell said, “My goal for tomorrow is to lay the ground work for the meeting (w/ or w/out Roberts Rules), understand the expectations/purpose of the group, re-familiarize ourselves with the existing conceptual drawings, and evaluate alternate phase 3 options. In addition, John Daley w/ R&M has agreed to take part in the meeting to help answer any design questions and provide his expertise.”⁵

Following the meeting, Bell emailed Annette Kreitzer (Haines Borough Manager). His message to her said, “The Lutak Dock Design Group met today and discussed the alternate phase 3 options. The group was in favor of supporting the 40’ wide elevated dock as a preferred phase 3. I plan to scrap the existing phase 3 (recapturing uplands by the ferry terminal) and replace it with the elevated dock.”⁶ On **January 26, 2022**, Bell e-mailed John Daley (R&M Consultants), and proposed that he: “Create a new document that shows a completed phase 1-3 w/ budget “ including the new ideas for Phase 3, which would eliminate the catwalk and create an elevated dock.”⁷

On **February 9**, Bell (Harbormaster) requested a cost estimate from R&M for the complete project: “We were hoping to be able to show the cost savings from completing phase 3 at the same time as the rest of the project.”⁸ On **February 16**, the Borough signed a Task Authorization with R&M Consultants to provide engineering services for a revised Phase 3 cost estimate.⁹ On **February 24**, the new Phase 3 conceptual drawings were introduced to the Port and Harbor Committee (PHAC).¹⁰ On **February 28**, Bell sent the new Phase 3 conceptual drawings to the Lutak Dock Design Working Group members. Bell said: “We recently had R&M complete the

⁴Email from Shawn Bell to Lutak Dock Design Working Group members. December 28, 2021 Subject: Lutak Dock Design Working Group. LCC Public Records Request.
<https://static1.squarespace.com/static/567f047140667a31535ca527/t/630fcbec33234b3761d6125d/1661979629439/2+lutak+group.pdf>

⁵Email from Shawn Bell to Lutak Dock Design Working Group. January 19, 2022. Subject: RE: Lutak Dock Design Working Group. LCC Public Records Request.
<https://static1.squarespace.com/static/567f047140667a31535ca527/t/630fcc1fa0e2d067dbf3ce9/1661979680250/3.pdf>

⁶Email from Shawn Bell to Annette Kreitzer. January 20, 2022. Subject: Lutak Design Group. LCC Public Records Request.
<https://static1.squarespace.com/static/567f047140667a31535ca527/t/630fcc71de2f6e7b3adffd59/1661979762803/4.pdf>

⁷Email from Shawn Bell to John Daley. January 26, 2022. Subject: Recap. LCC Public Records Request.
<https://static1.squarespace.com/static/567f047140667a31535ca527/t/630fe0f40d3e15540ef730a7/1661985013598/revised.pdf>

⁸Email from Shawn Bell to Jean Cumlat. February 9, 2022. Subject: RE: Haines Lutak Dock. LCC Public Records Request.
<https://static1.squarespace.com/static/567f047140667a31535ca527/t/630feaaaf34aca154051c5c72/1661987504061/1-3+Combined.pdf>

⁹ R&M Task Authorization No. 5: Revised Phase 3 Cost Estimate Updates (2022). LCC Public Records Request.
<https://static1.squarespace.com/static/567f047140667a31535ca527/t/630fe26e0105a770f2be9a4d/1661985391704/Task+Order+5.pdf>

¹⁰Port and Harbor Advisory Committee. Approved Minutes. February 24, 2022. Haines Borough Government.
https://www.hainesalaska.gov/sites/default/files/fileattachments/port_and_harbor_advisory_committee/meeting/32400/phac_approved_minutes_2-24-22.pdf

revised phase 3 conceptual drawings (attached). One set shows the entire project completed all at once and the other shows phase 3 being completed at a later date. These drawings capture the groups feedback from the previous meeting.”¹¹

On **April 7, 2022**, the Planning Commission voted to recommend a resolution that would combine Phase 1, Phase 2, and the new Phase 3 to the Borough Assembly.¹² The public was told that the Haines Borough would save around \$2 million by combining the three phases into one project and completing the permitting for the new Phase 3 at the same time. The Assembly approved Resolution 22-04-963 on **April 12, 2022**.¹³

ARGUMENT

Alaska Statute 44.62.310 (h)(1) defines a “governmental body” as “**an assembly, council, board, commission, committee or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity.**” The Lutak Dock Design Working Group had the authority to make recommendations to the public entity (the Haines Borough) in regard to the design of the Lutak Dock project. By this definition it is classified as a “governmental body,” making its meetings subject to the Open Meetings Act.

AS 44.62.312, the State Policy Regarding Meetings, states that the actions and deliberations of the defined government units must be taken and conducted openly, and that the OMA “shall be construed narrowly in order to effectuate (this policy) and to avoid exemptions from open meetings requirements....” The State Policy Regarding Meetings is designed to maintain “open” and “inclusive” meetings to ensure all citizens, not just a select few, are allowed to participate in the decision-making process.

The January 20, 2022 meeting of the Lutak Dock Design Working Group resulted in a new Phase 3 design. The group posted no notice, kept no minutes, and offered no opportunity for the public to listen or be involved. The Haines Borough violated the rights of the public to an ‘open’, inclusive, public process on a matter of significant public interest. The working group, its January 20, 2022 meeting, and any subsequent meetings are in violation of the Open Meetings Act.

According to AS 44.62.310.(f), “A governmental body that violates or is alleged to have violated this section may cure the violation or alleged violation by holding another meeting in compliance with notice and other requirements of this section and conducting a substantial and public reconsideration of the matters considered at the original meeting.” The Haines Borough did not attempt this remedy, and the remedy they did attempt failed: on April 26, 2022, the

¹¹Email from Shawn Bell to Lutak Dock Design Working Group. February 28, 2022. Subject: Lutak Design Working Group Update. LCC Public Records Request.
<https://static1.squarespace.com/static/567f047140667a31535ca527/t/630fe11c2504d0302226e88a/1661985053430/6.pdf>

¹²Haines Planning Commission. Resolution 21-06-919. June 22, 2021. Haines Borough Government.
https://www.hainesalaska.gov/sites/default/files/fileattachments/planning_commission/meeting/32475/adopted_minutes_4-7-22.pdf

¹³Haines Borough Assembly. Approved Minutes. April 12, 2022. Haines Borough Government.
https://www.hainesalaska.gov/sites/default/files/fileattachments/borough_assembly/meeting/32251/4-12-22.pdf

Haines Borough Assembly worked with the Mayor to draft Resolution No. 22-05-973, which would rename the Lutak Dock Design Working Group to the Lutak Dock Project Group, and expand the existing members of the former working group to include two residents from diverse backgrounds.¹⁴

The resolution¹⁵ stated that “The Lutak Dock Working Group was a Staff Advisory group. Going forward, this group will be named the Lutak Dock Project Group and it will be an Ad Hoc advisory committee to the Assembly. As such, all public meetings will be subject to the Open Meetings Act, will be noticed and held in public.” The resolution was put to a vote by the Assembly on May 24, 2022. Despite significant public interest in the group and residents applying for the positions, **the motion to adopt Resolution 22-05-973 failed.**¹⁶ However, the Lutak Dock Design Working Group (now called the Lutak Dock Project Group) is still listed under ‘Boards and Commissions’ on the Haines Borough website.¹⁷ The public has no way to know whether the group is still meeting, and if so what public business or decisions continue to be deliberated outside of the public’s view.

According to Haines Borough Municipal Code 2.60.010, “**committees, boards and commissions are advisory to the mayor, manager, and assembly.**” The Port and Harbor Advisory Committee and Planning Commission are advisory to the Mayor and the Borough Assembly. A member from the Port and Harbor Advisory Committee and a member from the Planning Commission are members of the Lutak Dock Design Working Group. These committee members were privy to a discussion of Lutak Dock designs that the public wasn't included in.

CONCLUSION

The Lutak Dock Design Working Group met the definition of a "government body" under AS 44.62.310(h)(1) of the OMA. As such, meetings of this group were subject to the provisions of the OMA. However, no public notice was provided for the January 20, 2022 meeting of the group. Additionally, no minutes were taken, nor was the public provided an opportunity to comment. As such, we argue this to be a violation of the OMA. The borough should abandon Phase 3 of the Lutak Dock project until such time as the January 20, 2022 meeting can be recreated with the same information provided in accordance with the provisions of AS 44.62.310(f) of the OMA.

The ongoing existence of the Lutak Dock Design Working Group, now called the Lutak Dock Project Group, is an ongoing violation of the OMA. The public is still being excluded from the

¹⁴Haines Borough Public Notice. Posted May 5, 2022. Seeking Letters of Interest for Appointment to... Lutak Dock Project Group. Haines Borough Government.
https://www.hainesalaska.gov/sites/default/files/fileattachments/boards_and_commissions/page/32477/ldpg_initial_request_for_loi_for_appointment.pdf

¹⁵ Haines Borough Assembly. Agenda Bill No.: 22-1178. May 24, 2022. Haines Borough Government.
https://www.hainesalaska.gov/sites/default/files/fileattachments/borough_assembly/meeting/32254/10a_-_creation_of_lutak_dock_project_group.pdf

¹⁶ Haines Borough Assembly. Approved Minutes. April 26, 2022. Haines Borough Government
https://www.hainesalaska.gov/sites/default/files/fileattachments/borough_assembly/meeting/32252/4-26-22.pdf

¹⁷ Haines Borough Boards and Commissions. Lutak Dock Project Group. Haines Borough Government.
<https://www.hainesalaska.gov/bc/lutak-dock-project-group>

decision-making process. AS 44.62.312 states that “the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know”, and “the people’s right to remain informed shall be protected so that they retain control over the instruments they have created.” The Haines Charter Preamble asserts: "The right to access a well maintained public record of all actions of public officials in accordance with the charter, so that the citizens of the borough may retain control over the affairs of their government."

Although it’s been more than 180 days since the violation, we request an exemption, simply because the public was unaware of the existence of the Lutak Dock Design Working Group until May 12, 2022, when Lynn Canal Conservation received the results of a public records request. We argue that the 180 day clock starts on May 12, 2022 because that’s when the information was received. We also argue that since the Lutak Dock Design Working Group still exists, this group represents the definition of “governmental body” and so all future meetings should be subject to the OMA. The current Phase 3 originated from a meeting of the Lutak Dock Design Working Group in violation of the OMA. Until a public, inclusive meeting is held on behalf of the new Phase 3, all actions taken on behalf of the new Phase 3 of the Lutak Dock project should be voided.

We look forward to your response.

Sincerely,

Jessica Plachta
Executive Director
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March 24, 2022 PHAC Meeting - OMA Violation

Jessica Plachta

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September 9, 2022

Attn: Alekka Fullerton, Haines Borough Clerk

Cc: Annette Kreitzer, Haines Borough Manager

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We are submitting this issue of concern for immediate borough attention. We argue the March 24, 2022 Port and Harbor Advisory Committee meeting to be in violation of Alaska's Open Meetings Act (OMA). The borough should abandon all revisions made to the Lutak Dock design concepts until such a time that the March 24 meeting can be recreated with the same information provided in accordance with AS 44.62.310(f) of the OMA.

FACTS

On **March 24, 2022**, seven representatives from the Yukon Chamber of Mines, the Yukon Producers Group, and the Joint Transportation and Infrastructure Committee of the Yukon Chamber of Commerce attended a Port and Harbor Advisory Committee (PHAC) meeting via Zoom and discussed the Lutak Dock conceptual design plans. The presence of the Yukon representatives was not posted on the agenda prior to the March 24 meeting.¹

In an email from Kells Boland (co-chair of the Yukon Joint Transportation and Infrastructure Committee) to Terry Pardee (chair of the PHAC) on the day before the meeting, Boland said he forwarded Pardee's evite to a group of Yukon executives and said, "We look forward to better understanding the future potential of Lutak Dock as a tidewater access alternative for Yukon business and industry."²

At the March 24 meeting, Boland explained that since Skagway won't be renewing its lease for the ore dock with the Alaska Industrial Development and Export Authority (AIDEA), Yukon's mining sector is looking to Haines as the next closest alternative. Boland conveyed that they will

¹Port and Harbor Advisory Committee. March 24, 2022. Regular Meeting Agenda. Haines Borough Government. https://www.hainesalaska.gov/sites/default/files/fileattachments/port_and_harbor_advisory_committee/meeting/32441/3_phac_agenda_24mar22.pdf

²Email from Kells Boland to Terry Pardee. March 23, 2022. Subject: Lutak Dock Redevelopment. <https://static1.squarespace.com/static/567f047140667a31535ca527/t/631a90944a2b512fde9bd20f/1662685333818/Terry+evite.pdf>

need to have another system in place within two years. They discussed the infrastructure that would be needed at the rebuilt Lutak Dock in order to utilize a “rotainer” containerized bulk handler system that would avoid the need for an ore dock and a ship loader.³

Ausenco Bulk Handling Practice Lead Joel Schiriff, who works for the Yukon government to increase the territory’s access to tidewater ports, examined the Lutak Dock conceptual designs in order to assess the new facility’s capacity to serve as a mineral export facility for the Yukon: “Now, your existing dock with the sheet pile cells – and looking at the existing section that’s suggesting mud line at -30 to -35. If you could get that cleaned up to -35 in the short term, that would probably still allow the system to be put in in the short term to manage Minto.”

After the Yukon representatives signed off, PHAC members discussed modifying the Lutak Dock conceptual designs based on Schiriff’s feedback. In response to whether additional dredging would be “at the top of the food chain” right now, the Harbormaster replied, “In my mind, it would be...because that would affect the integrity of the slope (that whole rip rap slope) and so it would affect larger scale items.”

Following the meeting, on **March 31, 2022**, the Chilkat Valley News reported: “To remedy the violation, the borough is planning another public meeting on the same subject at a yet-to-be-determined date, again inviting Yukon industry representatives as well as other potential dock users.”⁴ However, that meeting has yet to happen.

On **April 14, 2022**, the Chilkat Valley News reported: “When the presentation wasn’t listed on the PHAC agenda, borough staff said Pardee violated the Open Meetings Act. Olerud ultimately removed Pardee from the committee last Thursday after Pardee, initially agreeing to step down as chair, declined to step down days later challenging the claim he had violated the OMA.” According to the Chilkat Valley News, after Pardee declined to step down, Olerud told Pardee, “Your rescinding your resignation shows me that you don’t value process to the degree necessary. With that in mind, I am removing you from the Ports and Harbors Committee.”⁵

ARGUMENT

AS 44.62.310(h)(1) defines “governmental body” as “**an assembly, council, board, commission, committee or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity.**” According to Haines Borough Code (HBC) 2.60.010, “committees, boards and commissions are advisory to the mayor, manager, and assembly.” The PHAC is advisory to the Assembly, and thereby the PHAC is classified as a “governmental body”, making its meetings subject to the OMA.

³ Port and Harbor Advisory Committee. March 24, 2022. Meeting Recording. Available at: <https://drive.google.com/file/d/111Xrr82vr8VQ15MQhg5RD1XOh9zfn5w3/view>

⁴ Clayton, K. (2022, March 31). Yukon Industry Reps Say Lutak Dock Could Be Used To Ship Ore: Harbor committee violates Open Meetings Act. *Chilkat Valley News*. <https://www.chilkatvalleynews.com/story/2022/03/31/news/yukon-industry-reps-say-lutak-dock-could-be-used-to-ship-ore/15860.html>

⁵ Clayton, K. (2022, April 14). Assembly approves phase 3 concept for Lutak Dock: Officials attempt to assuage ore transfer concerns. *Chilkat Valley News*. <https://www.chilkatvalleynews.com/story/2022/04/14/news/assembly-approves-phase-3-concept-for-lutak-dock/15896.html>

According to AS 44.62.310(e) of the OMA, "Reasonable public notice shall be given for all meetings required to be open under this section" and "The governmental body shall provide notice in a consistent fashion for all its meetings." The public was not alerted to the presence of the Yukon representatives at the March 24 PHAC meeting because there was no mention of their attendance on the meeting agenda. If the public had, we presume there would be more than one member of the public in attendance. The Lutak Dock is a controversial and complex issue that has warranted significant public testimony.

The Alaska Supreme Court has ruled that important issues must be specifically identified in the advance notice of the meeting and listed on the agenda. In Anchorage Independent Longshore Union Local 1 v. Municipality of Anchorage, the court addressed whether the municipal port commission's consideration of a permit application had to be specifically mentioned on the agenda posted prior to the meeting. The Supreme Court noted the OMA's "reasonable public notice" standard and stated, "The timing and specificity of 'reasonable notice' is necessarily dependent upon the complexity and importance of the issue involved." This suggests that if the court found the matter was too complex or important to be considered without specifically posting it on the agenda, then the court would find that to be a violation of the OMA.⁶

According to the Haines Borough Organizing Chart (2019)⁷ the citizens of the Haines Borough oversee the Assembly and Mayor, who oversee the Manager and Clerk and other borough officers. "Officers are appointed by and serve at the pleasure of the assembly." Boards and committees report to the Mayor and Assembly, and all are ultimately subject to the will of the people.

The Haines Charter Preamble also protects public process. Section 18.03. of the Haines Charter Preamble states: "The assembly by ordinance shall adopt procedures for reasonable public notice of all meeting." The question of whether a matter to be considered must be listed specifically on a published or posted agenda presents another facet of the requirement of reasonable public notice. Reasonable notice provides enough notice that a concerned party will have notice of a proposed action within enough time to be involved in the deliberations.

CONCLUSION

The Port and Harbor Advisory Committee met the definition of a "government body" under AS 44.62.310(h)(1) of the OMA, and therefore meetings of this group were subject to the provisions of the OMA. Since no prior and public notice was provided for the attendance of Yukon representatives at the March 24, 2022 PHAC meeting, we argue this to be a violation of AS 44.62.310(e) of the OMA.

The PHAC violated the public's right to participate in the decision-making process when they failed to post the discussion with Yukon industry representatives on the March 24 meeting agenda. At any point, the discussion could have been rescheduled to a future date to allow for the required public notice to be given, especially given that the subject discussed is a matter of

⁶Alaska's Open Meetings Law. Gordon J Tans. October 2002. 3rd Edition. Available at: <https://www.commerce.alaska.gov/web/Portals/4/pub/Alaska's%20Open%20Meetings%20Law.pdf>

⁷ Haines Borough Organization Chart. Effective September 10, 2019. Haines Borough Government. https://www.hainesalaska.gov/sites/default/files/fileattachments/administration/page/1570/org_chart_-_adopted_eff_9-10-19.pdf

significant public concern. Discussing the newly combined phases 1-3 of the Lutak Dock design plans with Yukon representatives without offering the public a seat at the table is a clear violation of the OMA.

The borough should release all changes made to the Lutak Dock design concepts since the March 24, 2022 PAHC meeting. Any changes to the Lutak Dock design plans resulting from feedback from Yukon mining executives should be voided, and the March 24, 2022 meeting should be recreated in accordance with the provisions of AS 44.62.310(f) of the OMA.

We look forward to your response.

Sincerely,

Jessica Plachta

Executive Director

Lynn Canal Conservation

jessica@lynncanalconservation.org

August 30, 2022 Assembly Meeting OMA Violation

Lynn Canal Conservation

PO Box 964
Haines, AK 99827
907-766-2295

September 21, 2022

Attn: Alekka Fullerton, Haines Borough Clerk

Cc: Annette Kreitzer, Haines Borough Manager

103 3rd Avenue S.
PO Box 1209
Haines, AK 998227
Haines, AK 998227

We are submitting this issue of concern for immediate borough attention. We argue that a new Lutak Dock design concept was introduced at an improperly noticed August 30, 2022 meeting in violation of the Open Meetings Act (OMA). As such, the Borough Assembly should delay a vote on **Resolution 22-09-996**, which approves the contract with Turnagain Marine Construction for the Design-Build of the new design concept until there is an opportunity for public process in accordance with **AS 44.62.310(f)** of the OMA, and until the Planning Commission is granted the opportunity to review the new design as per **HBC 18.30.040(I)(1)**. Our argument follows.

FACTS

On August 30th, 2022, six Assembly members, the Harbormaster, the Borough Manager, the Borough Clerk, a member of both the Planning Commission and the Port and Harbor Advisory Committee, the director of the Chamber of Commerce, and members of the public gathered at the Lutak Dock for a field trip publicly noticed as a “Borough Assembly Field Trip to Lutak Dock.” (It noted, “The public is welcome to attend, if interested.”) The purpose of the field trip was advertised as a “general overview of the existing facility.”¹

At the August 30 meeting, the Haines Borough Harbormaster conveyed that the borough would be moving forward with an entirely new Lutak Dock design concept proposed by Turnagain Marine Construction in their response to the Haines Borough’s Request for Proposal (RFP). The new design would reinforce the existing dock rather than demolish it, by way of a steel wall built 10-15 ft seaward of the existing dock.

¹ Haines Borough Public Notice. (2022, August 25). Borough Assembly Field Trip to Lutak Dock. https://www.hainesalaska.gov/sites/default/files/fileattachments/borough_assembly/meeting/32605/assembly_field_trip_notice-lutak_dock.pdf

The new design proposal is outlined in Exhibit D of the Haines Borough’s draft contract with Turnagain Marine, which states “The design and parameters for the Lutak Dock Restoration Project are that the design will rebuild the existing Lutak Dock to include a new O Pile retaining wall, leaving existing cells in place, and tied back to the existing fill... **This will be a shift from the three phased concept originally submitted with the RAISE Grant application in that there will be no filling of uplands as noted for the planned Phase 1, nor the Phase 3 pass/pass.**”²

On September 22, 2022, the Haines Borough Assembly will vote on a resolution to approve the contract between the Haines Borough and Turnagain Marine Construction for the construction of the new design concept. **Resolution 22-09-996** is “A Resolution of the Haines Borough Assembly authorizing the Borough Manager to execute a contract with Turnagain Marine Construction, for the Progressive Design-Build of the Lutak Dock Replacement Project for an amount not-to-exceed \$310,000.00.”³

ARGUMENT

AS 44.62.310(h)(1) of the OMA defines “governmental body” as an “**assembly, council, board, commission, committee or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity.**” The Assembly is authorized to establish policies or make decisions for the public entity (the Haines Borough) and is thereby defined as a “governmental body.”

For a decision-making or policy-making body, **AS 44.62.310(2)(A)** of the OMA defines a meeting to be: “a gathering of members of a governmental body when more than three members or a majority of the members, whichever is less, are present, a matter upon which the governmental body is empowered to act is considered by the members collectively, and the governmental body has the authority to establish policies or make decisions for a public entity.” In this case, the more than three Assembly members present at the August 30 meeting constitute a majority of the members of a “governmental body,” making it a meeting, and that meeting subject to the OMA.

According to **AS 44.62.310(e)** of the OMA, “**Reasonable public notice** shall be given for all meetings required to be open under this section“. The governmental body shall provide notice in

² Haines Borough Assembly. 9-22-22. Special Assembly Meeting - Lutak Dock. 9-22-22 Special Meeting Agenda PACKET. Lutak Dock Replacement Design-Build Agreement, Exhibit D (pg. 222).
https://www.hainesalaska.gov/sites/default/files/fileattachments/borough_assembly/meeting/32618/9-22-22_special_meeting_agenda_packet.pdf

³ Haines Borough Assembly. 9-22-22. Special Assembly Meeting - Lutak Dock. 9-22-22 Special Meeting Agenda PACKET. Resolution 22-09-996. (pg. 3)
https://www.hainesalaska.gov/sites/default/files/fileattachments/borough_assembly/meeting/32618/9-22-22_special_meeting_agenda_packet.pdf

a consistent fashion for all its meetings.” The borough has demonstrated consistency in accurately reflecting the meeting topic on public notices. The public notice given for the August 30 meeting was not a clear and accurate reflection of the matter that would be discussed (the new Lutak Dock design concept.)

Alaska Supreme Court has concluded that it is important for the public notice to be given clearly. In *Hickel v. Southeast Conference*, the court found that the notice of a meeting was not reasonable because it was not clear from the public notice whether a “meeting” or a “hearing” was going to occur. The court concluded the meeting, otherwise properly noticed, violated the OMA. This illustrates that the reasonable notice requirement may be violated if complex or controversial issues are not clearly listed on the public notice or agenda, even if the meeting was otherwise properly noticed.⁴

AS 29.20.020(a) of the Open Meetings Act says, “The governing body shall provide reasonable opportunity for the public to be heard at regular and special meetings.” The public did not have a reasonable opportunity to be heard because they did not have proper notice alerting them of the topic to be discussed at the August 30 meeting. The public did not have the opportunity to attend a meeting that many would have had they known a topic of significant public interest would be addressed.

We also argue the August 30, 2022 meeting is in violation of the following sections of Haines Borough Code (HBC). The **Haines Borough Charter Preamble** ensures “The right to access a well maintained public record of all actions of public officials in accordance with this charter, so that the citizens of the borough may retain control over the affairs of their government.” **HBC 2.10.040(A)** states, “Minutes of all regular and special meetings shall be taken by the clerk or the clerk’s designee. Audio recording shall also be made of these meetings.” The borough failed to keep minutes or provide a recording of the August 30 meeting. This does not align with the public’s right to a well-maintained public record, and thus we argue the August 30 meeting to be in violation of both the Haines Borough Charter Preamble and HBC 2.10.040(A).

We also argue the August 30 meeting to be a violation of **HBC 2.10.050(a)**, which states “In all matters of parliamentary procedure not covered in the rules of the assembly, Robert’s Rules of Order shall be applicable and govern.” The borough failed to take minutes at the meeting, as per Robert’s Rules of Order, which is a violation of HBC 2.10.050(a).

HBC 2.10.050(b) states that “The borough assembly rules and order of business shall be observed in all cases unless suspended temporarily for a special purpose by the vote of the majority of assembly members present.” Since the Assembly did not vote to suspend the rules

⁴ Alaska’s Open Meetings Law. Gordon J Tans. October 2002. 3rd Edition. Available at: <https://www.commerce.alaska.gov/web/Portals/4/pub/Alaska's%20Open%20Meetings%20Law.pdf>

and order of business at the August 30, 2022 meeting, we argue the meeting to be in violation of HBC 2.10.050(b).

Finally, The Haines Borough Planning Commission is required by code to evaluate the design prior to coming before the assembly. If the design changes significantly from the approved concept, the new design should come before the Planning Commission for review. **HBC 18.30.040(I)(1)** states, "Plans for the construction of new borough facilities with a value of over \$25,000 shall come to the commission for review and a public hearing at the conceptual stage of design. At that time, the commission shall decide whether additional public hearings and design review are required at the 35 percent, 65 percent, and 95 percent stages of design." Turnagain's Basis of Work conceptual drawings are dated August 4, 2022.⁵ Failing to present Turnagain's conceptual design to the Planning Commission or the public for their review is a violation of Haines Borough Code.

Additionally, the contract contains provisions binding the borough to the new dock design concept introduced at the illegitimate August 30, 2022 meeting. In fact, the "Agreement Between Owner and Design-Builder - Cost Plus Fee with an Option for a GMP" being proposed for Turnagain Marine's contract directs the design-builder to use the design set out in Exhibit D.⁶ The only changes that can be made to the Owner's Program are ones that "constitute a further development or refinement of the design for the Project." Thus, adopting the resolution by default adopts the new design.

CONCLUSION

The Assembly members in attendance at the August 30 meeting met the definition of a "government body" and therefore meetings of this group were subject to the provisions of the OMA. Since no adequate public notice as to the true topic of discussion was provided in advance, no minutes and no recording were taken, we argue the August 30 meeting to be in violation of the OMA.

The Haines Borough Planning Commission is required by Haines Borough Code to evaluate the new conceptual design, hold a public hearing, and report to the Assembly. We argue the August 30 meeting to be in violation of the OMA, and therefore should not be counted as a public hearing at the conceptual stage of the new design, which is in violation of Haines Borough Code.

⁵ Haines Borough Assembly. 9-22-22. Special Assembly Meeting - Lutak Dock. Supporting Documents: Turnagain Basis of Work Drawings.

https://www.hainesalaska.gov/sites/default/files/fileattachments/borough_assembly/meeting/32618/lutak_dock_replacement_basis_of_work_drawings_8-4-2022.pdf

⁶ Haines Borough Assembly. 9-22-22 Special Meeting Agenda PACKET. Turnagain Marine RFP, pg 106. Progressive Design Build Agreement between Haines Borough and Turnagain Marine, Pg. 142.

https://www.hainesalaska.gov/sites/default/files/fileattachments/borough_assembly/meeting/32618/9-22-22_special_meeting_agenda_packet.pdf

Failing to provide the Planning Commission with the new design for review makes the August 30 meeting in violation of **HBC 18.30.040(I)(1)**.

The Haines Borough Assembly does not have the authority to authorize a contract binding our municipality to a specific design concept for our public facilities without proper public process, or public approval. As such, the borough should stop seeking Assembly approval of Turnagain Marine's contract and abandon the new design until at least one town hall meeting is held in accordance with the sections of Haines Borough Code and Alaska State laws referenced above. At the September 22, 2022 meeting, the Assembly should refrain from voting on Turnagain Marine's contract and by extension the design contained within the document. A vote should not be held until such time as the OMA violation has been remedied in accordance with **AS 44.62.310**. The Planning Commission should review the new conceptual design and hold a public hearing prior to consideration of **Resolution 22-09-996** by the Assembly.

We look forward to your response.

Sincerely,

Jessica Plachta

Executive Director

Lynn Canal Conservation

jessica@lynncanalconservation.org