

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: January 10, 2017 Interim Manager Appointment Decision

Date: January 24, 2017

I am submitting this memorandum to express concerns related to the interim manager appointment made at the January 10, 2017 assembly meeting. I will argue the assembly and the mayor violated Section 5.03(A) of the Haines Borough Charter because the decision was not based solely on professional qualifications.

Failure to uphold the Charter is a serious matter. As such, **those who voted for the motion should move to reconsider the appointment in a manner that conforms to Section 5.03(A) of the Charter.** If there are any questions with the information contained in this memorandum, I recommend forwarding it to the borough attorney for a professional legal review.

QUESTION PRESENTED

Section 5.03(A) of the Haines Charter states, “The manager is selected solely on the basis of professional qualifications.” According to the public record, those voting in favor of the motion to appoint the resident applicant based their decision on reasons other than professional qualifications. Did this action violate Section 5.03(A) of the Haines Charter?

SHORT ANSWER

Yes. The decision violated Section 5.03(A) of the Haines Charter. First, Section 5.03(A) applies to the selection of an interim manager. Second, the text of Section 5.03(A) clearly states the selection of a borough manager shall be made “solely on the

basis of professional qualifications.” Third, according to the public record, those voting in favor of the motion to appoint the resident applicant based their decision on reasons other than professional qualifications. *Pgs. 3 - 6.*

FACTS

The Haines Borough is a manager form of government as set out in Title 29 of Alaska Statutes. Qualifications, appointments and responsibilities of the borough manager are set out in Section 5.03(A) of the Haines Borough Charter. This section of the Charter states the following:

“The assembly shall appoint the manager as chief administrative officer, who serves at the pleasure of the assembly. The manager is selected solely on the basis of professional qualifications.” *Haines Borough Charter, Art. V, Sec. 5.03 (A).*

This is the sole provision in the Charter providing guidance to the assembly on the qualifications required for selecting a borough manager.

In late December, two persons submitted applications for the position of interim borough manager until such time the assembly could appoint a permanent manager. *Haines Borough, AK., Assembly Packet, Jan. 10, 2017, Item 11C4, Pg. 83-85, Assembly Agenda Bill.* One applicant was a resident of the Haines Borough who at the time served as Director of Public Facilities for the Haines Borough, and who also has served as interim manager in the past. *Id., Pg. 83.* The other applicant was a non-resident, and a retired municipal administrator who has served several times as municipal manager for other communities in Southeast Alaska for twenty years. *Id., Pg. 84-85.* No other persons submitted applications or resumes for the position of interim borough manager.

The assembly was to consider the appointment decision at the January 10, 2017 assembly meeting. Prior to the meeting, the clerk provided the assembly with pertinent provisions of Charter and Code regarding the appointment decision. *Id., Pg. 82.* Section 5.03(A) was not included in this information. *Id.* However, members of the public provided the assembly with the text of Section 5.03(A) in two separate memorandums before the meeting. *Denker Public Comments, Public record for Item 11C4 of the Jan.*

10, 2017 assembly meeting; Josephson Public Comments, Public record for Item 11C4 of the Jan. 10, 2017 assembly meeting.

The assembly considered the applications at the January 10 assembly meeting. After the mayor introduced the item, a motion was made and seconded to select the resident applicant for the position. Appointment of Interim Manager, audio of Agenda Item 11C4 of Haines Borough Assembly meeting, Jan. 10, 2017. Each assembly member, along with the mayor, then explained the reasons for either agreeing or disagreeing with the motion to appoint the resident applicant. *Id.* According to the public record for the meeting, those in favor of the motion to appoint the resident applicant cited several reasons for their decision. *Id.* These reasons included staff confidence; “team dynamics”; “cost savings”; familiarization with current issues; “boots-on-the-ground” managerial experience; and a desire to “hire local”. *Id.* The members not in favor of the motion expressed concerns regarding professional qualifications, experience, and removing the resident applicant from his position as Director of Public Facilities. *Id.*

Following the debate, the assembly held a vote. The assembly voted 3 – 3 on the motion to appoint the resident applicant. *Id.* As per Haines Borough Code, the mayor then voted to break the tie. *Id.* She voted in favor of appointing the resident applicant to serve as interim borough manager. *Id.*

ARGUMENT

The decision to appoint the resident applicant for interim manager violated Section 5.03(A) of the Haines Borough Charter for the following reasons.

I. Section 5.03(A) of the Charter applies to the selection of an interim manager.

The first question is whether Section 5.03(A) of the Charter applies to an “interim” manager position. It clearly does.

First, the text of Section 5.03(A) reasonable implies the term “manager” includes “interim manager”. In his book *Reading Law*, the late Supreme Court justice Antonin

Scalia outlines the canons of statutory interpretation. His canon No. 8, the “Omitted-Case Canon”, states that “nothing is to be added to what the text states or reasonable implies”. *Antonin Scalia & Bryan Garner, Reading Law 93 (2012)*. He continues, “a matter not covered is to be treated as not covered.” *Id.* Essentially, “if [a government body] had intended to provide additional exceptions, it would have done so in clear language.” *Id., citing Petteys v. Butler, 367 F.2d 528 (8th cir. 1966) (Blackmun, J., dissenting)*. Therefore, because the drafters of Section 5.03(A) of the Charter did not specify the provision applies only to a “permanent” manager, this omission reasonably implies the term “manager” includes both “interim manager” and “permanent manager”.

Second, a reading of the term “manager” that is inclusive of both “interim manger” and “permanent manager” is consistent with and harmonious to the entirety of Haines Borough Code and the Charter. Scalia and Garner state, “a word or phrase is presumed to bear the same meaning throughout a text.” *Id., Pg. 70*. Additionally, “there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.” *Id., Pg. 180*. This is applicable here as other sections of Charter and Code do not distinguish a difference between an “interim manager” versus a “permanent manager”. Thus, a reading that reasonably implies the term “manager” includes “interim manager” is consistent and harmonious with the rest of Haines Charter and Code.

Third, the clerk interprets the term “manager” to include “interim manager” in both Charter and Code. In the information provided to the assembly before the January 10 assembly meeting, the clerk provided the assembly with various sections of Charter and Code that applied to the appointment. *See Assembly packet, Jan. 10, 2017, Pg. 82*. In all of these provisions, the term “manager” or “borough manager” is used. It can only be concluded that the clerk provided these provisions because, in her interpretation, they all applied to the “interim manager” appointment. Thus, we must conclude the clerk reasonably implies that “manager” includes “interim manager” as it provides a consistent and harmonious reading throughout the Charter and Code.

Therefore, Section 5.03(A) of the Haines Charter applies to the selection of an interim manager.

II. The text of Section 5.03(A) clearly requires the assembly to consider only professional qualifications when selecting an interim manager.

The next question is whether the text requires the assembly to consider only professional qualifications when selecting an interim manager. A plain reading of the text indicates it clearly does.

First, the text of a provision is the primary source of law and should be plainly interpreted. In his book *The Five Types of Legal Argument*, Wilson Huhn states, “legal text is to be interpreted according to its plain meaning.” *Wilson Huhn, The Five Types of Legal Argument 19 (2008)*. Scalia and Garner agree. In Canon No. 6, they state, “words are to be understood in their ordinary, everyday meanings.” *Reading Law, Pg. 69*. This canon is “the most fundamental semantic rule of interpretation” that governs the interpretation of all law including constitutions, statutes, rules, and private instruments.” *Id.*

In this matter, recall that Section 5.03(A) states, “The manager is selected solely on the basis of professional qualifications.” *Haines Borough Charter, Art. V, Sec. 5.03(A)*. Merriam Webster defines the word “solely” to mean “to the exclusion of all else.” *Merriam-Webster.com, “Solely” def.* In ordinary, plain English the term “solely” is to be interpreted exactly how we all think it should be interpreted. Thus, a plain reading of Section 5.03(A) clearly requires the assembly to consider only professional qualifications when selecting the manager. All other reasons must be excluded to adhere to a plain reading of the text.

III. The public record shows those who voted in favor of the motion failed to base their decision solely on professional qualifications.

The final issue to consider is whether the assembly failed to consider only professional qualifications when selecting the interim manager. The public record clearly shows those favoring the motion to appoint the resident applicant based their decision on matters other than professional qualifications.

In the audio of the January 10 assembly meeting, those favoring the motion cited numerous reasons why they favored the resident applicant over the non-resident applicant. These reasons included staff confidence and staff recommendations; “team dynamics”; “cost savings”; familiarization with current issues; “boot-on-the-ground” experience; and a desire to “hire local”. *Audio of agenda item 11C4, Jan. 10, 2017 assembly meeting*. In fact, the mayor clearly admitted, “We are talking about [the resident applicant] not having professional managerial experience, and that’s absolutely true.” *Id.* She stated that “boots-on-the-ground” managerial experience was more important. *Id.*

Thus, much of the debate on the decision centered on many reasons not related to the professional qualifications of the two applicants. The public record clearly indicates those voting in favor of the resident applicant based their decision on reasons other than professional qualifications as required by Section 5.03(A) of the Charter.

CONCLUSION

Those who voted in favor of the motion to appoint the resident applicant for interim manager violated Section 5.03(A) of the Charter. First, Section 5.03(A) of the Charter applies to the decision to appoint an interim manager. Second, the text clearly states the assembly must base the decision to select an interim manager “solely on the basis of professional qualifications.” Lastly, the public record clearly shows that those who voted in favor of the decision to appoint the resident applicant failed to base their decision solely on professional qualifications.

Failure to uphold the Charter is a serious matter. **As such, those who voted for the motion to appoint the resident applicant should reconsider their vote in a manner that conforms to Section 5.03(A) of the Charter.**