

# Letter of Concern

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

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

Re: Agenda Item 11C5 – Manager’s Recommendations on Heliski Map Amendments

Date: December 13, 2016

---

The Borough Manager has submitted his recommendations for heliski map amendments. The Assembly is asked to consider a motion directing the Manager to prepare a resolution adopting his recommendations and schedule a public hearing for 1/10/17. While I concede I am not an attorney, there are compelling legal reasons why the Assembly should NOT direct the Manager to prepare this resolution.

First, the Borough Manager and Committee chair violated HBC§ 2.06.30 (C) by allowing the heliski representative to deliberate and vote on his own map proposals. HBC § 2.06.030 (C) clearly prohibits committee members from deliberating and voting on matters in which they have a substantial financial interest. To adhere to this rule, the Borough attorney recommended the heliski representative be recused from deliberating and voting on his own map change proposals. However, the Manager and Committee chair allowed the heliski representative to deliberate and vote on his own map change proposals despite the attorney’s recommendation.

Second, the Borough Manager and Committee chair violated the Equal Protection Clause by applying the “substantial financial rule” unequally among committee members. The Manager and Committee chair discriminated against non-heliski representatives by exempting the heliski representative of the “substantial financial interest” rule. This allowed the heliski representative to deliberate and vote on his own map change proposals. All other members were required to comply with this rule and recuse themselves from matters in which the member had a substantial financial interest. This

discrimination deprived non-heliski representatives who otherwise qualified to vote on committee decisions of the fundamental right to participate equally in that franchise once it had been established. The Manager and Committee chair failed to have the sufficient justification required by the Equal Protection Clause to deprive non-heliski representatives of this fundamental right.

There is something fundamentally wrong when a local government is willing to apply the law unequally based on who a person is, or what they represent. Introducing the motion supports a flawed ideal of democracy – the “rule of men” instead of the “rule of law”. Therefore, I urge the Assembly to NOT direct the Manager to prepare the resolution.

### **QUESTIONS PRESENTED**

- I. Haines Borough Code § 2.06.030 (C) prohibits a committee member from deliberating or voting on matters in which the member has a substantial financial interest. The Borough Manager and the Heliski Map Committee chair allowed the heliski representative to deliberate and vote on his own map change proposals. Did the Manager and Committee chair violate HBC § 2.06.030 (C) by allowing the heliski representative to vote on his own map change proposals?
  
- II. The Fourteenth Amendment’s Equal Protection Clause protects against unjustified government discrimination that infringes upon fundamental rights. The Manager and Committee chair exempted the heliski representative from the “substantial financial interest” rule set out in HBC 2.06.030 (C). This allowed the heliski representative to deliberate and vote on his own map change proposals. All other committee members were required to comply with this rule and recuse themselves from deliberating and voting on matters in which they had a substantial financial interest. Did the Manager and Committee chair violate the Equal Protection Clause by applying the “substantial financial interest” rule unequally among the committee membership?

## SHORT ANSWERS

- I. Yes. The Manager and Committee chair violated the “substantial financial interest” rule set out in HBC § 2.06.030 (C) by allowing the heliski representative to deliberate and vote on his own map change proposals. (*See Pgs. 5 – 7*).
  
- II. Yes. The Manager and Committee chair violated the Equal Protection Clause by applying the “substantial financial interest” rule set out in HBC § 2.06.030 (C) unequally among the committee membership. (*See Pgs. 8 – 17*).

## FACTS

The borough manager established a Heliski Map Committee for 2016. Five members were selected for the committee as outlined in Code. *See Haines, AK., Code § 5.18.080 (1)(1)(c)*. One member represented the heliski industry, two members represented resident interests, one member represented conservation interests, and one member represented the assembly. *Id.* The committee was established to consider map change proposals from two heliski permit holders.

The two heliski permit holders who submitted map change proposals were both randomly selected for membership on the committee. One permit holder was randomly selected to representative heliski interests. The other permit holder was randomly selected to representative resident interests.

Because of concerns regarding conflicts of interest, the Borough attorney was asked by the Manager to provide an ethics opinion. The first question centered on whether a permit holder can serve in the “random resident” seat. *Memorandum from Patrick W. Munson, Haines Borough attorney, to Ron Jackson, Heliski Map Committee Chair (Oct. 26, 2016), Pgs. 1, 6*. The second question centered on whether code of ethics rules

“preclude a heliski permit holder from deliberating and voting on matters before the committee.” *Id.*

In the memorandum, the attorney stated a heliski permit holder is eligible to sit on the committee. *Id.* He also stated, “The permit holder and the committee must decide whether any of its members should be disqualified from deliberating and voting on a particular issue.” *Id.*

The attorney also considered another scenario. He stated that when a sitting committee member has also submitted map change amendments, the member should be recused from deliberating and voting on these matters. *Id.* He recommended the member “step down from the deus and participate as a member of the public presenting his or her map changes.” *Id.* The attorney recommendations were submitted to the Manager and the Committee Chair prior to the first Heliski Map Committee meeting.

The Committee held public meetings in late October and throughout November to consider the map change proposals. The record shows the Manager and Committee Chair allowed the Heliski representative to deliberate and vote on all nine of his map change proposals. *2016 Heliski Map Committee Proposals and Decisions (Consolidated), Memo from the Manager, Dec. 8, 2016.* The resident representative who also submitted map change proposals was recused from deliberating and voting on five of the six map change proposals he submitted. The Committee’s voting results and recommendations were prepared and submitted to the Manager in late November.

The Manager forwarded his recommendations for heliski map amendments on December 8, 2016. *Memo from the Manager, to the Assembly, Dec. 8, 2016.* In the memorandum, the Manager states, “I concur with the map committee’s recommendations to approve” several map change proposals submitted by the two heliski permit holders. *Id.* He continued, “Each of these areas received unanimous consent during deliberations from the committee.” *Id.* The Manager did not recommend several other areas that “did not receive full consent of the committee and were not recommended by the Alaska Department of Fish and Game due to the high probability of disturbing wildlife habitat. *Id.*

The Assembly is asked to consider the Manager’s recommendations at the December 13, 2016 public meeting. The question asked of the Assembly at this meeting is whether to direct the Manager to prepare a resolution adopting his recommendations and schedule a public hearing for January 10, 2016.

## **ARGUMENT**

### **I. The Manager and Committee chair violated the “substantial financial interest” rule set out in HBC § 2.06.030 (C) by allowing the heliski representative to deliberate and vote on his own map change proposals.**

The first inquiry is whether the Committee chair violated HBC § 2.06.030 (C). The public record clearly shows this rule was violated.

*A. HBC 2.06.030 (C) prohibits committee members from deliberating and voting on matters in which they have a substantial financial interest.*

Haines Borough Code provides code of ethics rules for public officials. These rules are essential to the conduct of free government”, and are provided to encourage public officials “to act in the public interest.” *Haines, AK., Code § 2.06.010*. The rules are designed to “improve standards of public service, and...promote and strengthen the faith and confidence of the people of [the] borough in their public officers.” *Id.*

Chapter 2.06 of Haines Borough Code applies to all “public officers”. *Id.* A “public officer” includes “a member or member-designate of a board or commission.” *Haines, AK., Code § 2.06.990*. The term “board or commission” includes a “committee”. *Id.* Considering a plain reading of this text, Chapter 2.06 applies to members of a committee such as the Heliski Map Committee.

The code of ethics rules require public officials, including committee members, to remove themselves from matters that present conflicts of interest. Code states:

“An assembly member or member of any board or commission may not deliberate or vote on any matter in which the member has a substantial personal or financial interest.” *Haines, AK., Code § 2.06.030 (C)*.

Therefore, this rule clearly prohibits committee members from deliberating and voting on matters in which the member may substantially benefit, either personally, or financially.

*B. To adhere to HBC 2.06.030 (C), the Borough attorney recommended a committee member be recused from deliberating and voting on his own map change proposals.*

Because of questions surrounding the permit holders who were selected for the committee, the Manager and Committee chair requested an ethics opinion from the Borough attorney. Two questions were asked: (1) whether a heli-ski permit holder is eligible to serve in the “random resident” seat, See *Attorney*, Pg. 2; and (2) whether code of ethics rules preclude a heli-ski permit holder from deliberating and voting on matters before the committee.” *Id.* The attorney provided a memorandum with his opinion on October 26, 2016.

In this memorandum, the attorney clearly stated some members of the committee had a conflict of interest. Specifically, he stated, “a sitting member who also submitted map changes for consideration should probably recuse himself from consideration of the changes he submitted.” See *Attorney*, Pg. 1. At the end of the memorandum he elaborated further on this point:

“Another scenario that needs to be considered is the committee’s actions regarding a map change proposal that is submitted by a sitting committee member. It seems much more likely that the member has a ‘personal or financial interest’ in such proposals because the member has already taken a position on the issue in the proposal. It is probably unrealistic to expect the member to be completely neutral on proposals he or she submitted. Having a member deliberate and vote on changes submitted by the member also creates a fairly obvious perception of a conflict of interest that may (understandably) trouble the public.

“We therefore recommend that the member recuse him or herself from the deliberations regarding the map changes submitted by the member. Instead, the member should step down from the deus and participate in the discussion as a member of the public presenting his or her map changes. The member would still be

involved in the discussion to the same extent as other advocates for particular map changes, but would not vote on the changes he submitted.” *Attorney*, Pg. 6.

Therefore, the Borough attorney provided the Committee and the manager with clear procedural guidance on issues regarding conflicts of interest.

*C. The Manager and Committee chair knowingly failed to follow the attorney’s recommendation and allowed the heliski representative to deliberate and vote on his own map change proposals.*

The Manager and Committee chair disregarded the attorney’s recommendation. The public record shows the Committee Chair allowed the heliski representative to deliberate and vote on all nine votes taken for his map change proposals. *2016 Heliski Map Committee Proposals and Decisions (Consolidated), Memo from the Manager, Dec. 8, 2016*. And at the November 21 committee meeting, members of the public reminded the Committee that the attorney recommended a committee member should be recused from deliberating and voting on his own map change proposals. Haines Borough, Alaska, *Meeting Minutes of the Heliski Map Committee*, Nov. 21, 2016. However, the Committee chair failed to adjust the Committee’s behavior even after being reminded of this recommendation. *Id.*

Therefore, the Committee chair clearly failed to follow the attorney’s recommendation. The chair allowed the heliski representative to deliberate and vote on all nine of the votes taken on his map change proposals. The chair must have done this knowingly because the attorney clearly recommended the heliski representative be recused from deliberating and voting on his own proposals. *See Attorney Memo, Oct. 26, 2016 Pg. 1, 6*. Moreover, during the November 21 meeting members of the public questioned why the Committee was failing to adhere to the attorney’s recommendation. Yet, despite all of this, the Committee chair failed to heed the attorney’s advice and continued to let the heliski representative deliberate and vote on his own map change proposals.

## **II. The Borough Manager and Committee chair violated the Equal Protection Clause by applying the “substantial financial interest” rule unequally among the committee membership.**

The Fourteenth Amendment’s Equal Protection Clause states, “No State shall...deny to any person within its jurisdiction the equal protection of the laws.” *U.S. Const., Amend. XIV*. Along with protecting against racial and gender discrimination, the Equal Protection Clause also protects individuals from unjustified government discrimination that infringes upon fundamental rights. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

To determine whether a state or local government violated the Equal Protection Clause, three questions must be asked. The first question is whether the government discriminated by classifying people differently based on some defining characteristic. If the government did discriminate, the second question asks whether that action infringed upon a fundamental right. Finally, if the discrimination infringed upon a fundamental right, the third question asks whether the government had the sufficient justification to do so?<sup>1</sup>

The facts will show the Heliski Map Committee violated the Equal Protection Clause of the Fourteenth Amendment. Three points will support this conclusion. First, it will be shown that the committee used a discriminatory government classification by unequally applying the “substantial financial interest” rule of HBC 2.06.030 (C) among the committee membership. Second, this discriminatory government classification infringed upon the fundamental right for each committee member to participate equally in committee voting and decision-making. Lastly, the committee did not have the sufficient justification to infringe upon this fundamental right.

---

<sup>1</sup> For a detailed exploration of equal protection analysis, see Galloway, Russell W. Jr., *Basic Equal Protection Analysis*, Santa Clara Law Review, Vo. 29 | No. 1, Article 4 (1989); see also *Constitutional Law: Principles and Policies / Erwin Chemerinsky – 4<sup>th</sup> Ed. p. cm. – (Aspen Student Treatise Series)*, 2011, Chapter 9 – Equal Protection.

- A. *The Manager and Committee chair discriminated against non-heliski representatives by applying the “substantial financial interest” rule unequally among the committee membership.*

*Rule of Law*

The first question in an equal protection challenge is whether the government used a discriminatory classification. In other words, the question asks whether the government classified and treated people differently based on some defining characteristic. The Supreme Court has held that only when a government action “has a substantial disparate impact on classes defined in a different fashion may [equal protection] analysis continue on the basis of the impact on those classes.” *Califano v. Boles*, 433 U.S. 282, 293-294, (1979).

There are two ways to establish the presence of a discriminatory government classification. First, a “facial” classification is one where the discrimination is readily apparent in the wording of the law. See Russell W. Galloway Jr., *Basic Equal Protection Analysis*, 29 Santa Clara L. Rev. 121 (1989), Pg. 123; see also Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 4<sup>th</sup> Ed. (2011), Pg. 686. For instance, consider a law requiring property ownership to qualify for membership on a government committee. This law discriminates “on its face” because the classification is obvious in the wording of the law. In this example, only people who own property qualify for membership based on the wording of the law.

Second are “as applied” classifications. This is where the law is neutral “on its face”, but the government’s application of the law leads to a discriminatory impact. *Id.* Take, for example, the same law requiring property ownership to qualify for membership on this committee. This is a clear “on its face” classification with regards to property ownership. However, an “as applied” gender classification may also exist if it can be shown that 95% of property owners are men. In effect, the property ownership requirement could also have an “as applied” discriminatory impact on women as well.

In sum, the first step in equal protection analysis is to determine whether a discriminatory government classification exists. This classification can be either “on its face” or “as applied”. If a classification is determined to exist, either “on its face” or “as applied”, the equal protection clause applies and analysis may continue. See *Califano*, 293-294.

*Applying the Rule of Law*

For the purposes of HBC § 2.06.030 (C), the Manager and Committee chair distinguished between two different classes of committee member. This class system revolved around whether a member represented heliski interests. The one member representing heliski interests was placed in one class of committee membership. All other committee members were arbitrarily placed in the “non-heliski interest” class. The Manager and Committee chair then discriminated by applying the facially neutral “substantial financial interest” rule differently for the two classes of committee member.

For example, the heliski representative was treated differently by being exempted from the “substantial financial interest” rule. This member was allowed to deliberate and vote on his own map change proposals. The record shows the Committee held a total of nine votes on the map change proposals submitted by the heliski representative committee member. *2016 Heliski Map Committee Proposals and Decisions (Consolidated), Memo from the Manager, Dec. 8, 2016*. And the Manager and the Committee chair treated the heliski representative differently by allowing this committee member to vote on all nine map change proposals submitted by his company. *Id.*

All other committee members did not receive the same treatment under the Code. For example, the Manager and Committee chair required the resident representative who submitted map change proposals to comply with the “substantial financial interest” rule. The record here shows the Committee held seven votes on map change proposals submitted by the resident representative. *Id.* However, this member was required to comply with the rule and recuse himself from six of those votes. *Id.* So, the record clearly shows the two committee members who submitted map change proposals were treated differently based on whether the member represented heliski interests.

Based on the record, the Manager and Committee chair clearly used a discriminatory classification by applying the facially neutral “substantial financial interest” rule differently for each class. Committee members were first defined differently based on whether a member represented heliski interests. The facially neutral “substantial financial interest” rule was then applied differently for each “class” of member. The heliski representative was exempted from the “substantial financial interest” rule of HBC § 2.06.030 (C) and allowed to deliberate and vote on his own map change proposals. All other committee members were classified differently and required to comply with this rule and recuse themselves from deliberations and votes on matters in which they had a substantial financial interest. Therefore, the Manager and Committee chair imposed a “substantial disparate impact” on non-heliski representatives by treating different committee members differently for the purposes of HBC § 2.06.030 (C).

*B. This discriminatory action infringed upon the fundamental right for committee members to participate equally in committee voting and decision-making once the franchise has been established.*

The next question is whether the discriminatory classification deprived committee members representing “non-heliski interests” of a fundamental right. Because the Committee established voting as the process for decision-making, the fundamental right of voting was indeed involved.

*Rule of Law*

The U.S. Constitution undeniably protects the right for qualified voters to vote in state and federal elections. *Reynolds v. Simms*, 377 U.S. 533, 554 (1964). This right “ranks[s] among our most precious freedoms.” *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). The right to vote is essential “since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.” *Reynolds*, at 562. Thus, “the right of suffrage is a fundamental matter in a free and democratic society.” *Id.*

Nevertheless, state and local governments may establish qualifications for the right to vote. State and local governments “have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot.” *Kramer v. Union Free School Dist.* No. 15, 395 U.S. 621, 625 (1969). The power to fix qualifications is not a matter of dispute here.

However, “the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.” *Harper v. VA. Board of Elections*, 383 U.S. 663 (1966). When it comes to political equality, “the concept of ‘we the people’ under the Constitution visualizes no preferred class of voters, but equality among those who meet basic qualifications.” *Reynolds*, at 558. This concept of “equality among voters” is a basic principle in the Constitution. *Id.*, at 560.

Ultimately, the maxim holds that institutions of government must be “structured as to represent fairly all the people.” *Kramer*, at 628. This is because, “any unjustified discrimination in determining who may participate in political affairs...undermines the legitimacy of representative government.” *Id.*, at 626. Therefore, “once the franchise [of voting] is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.” *Id.*, at 629.

Thus, the Equal Protection Clause of the Fourteenth Amendment protects the right for individuals who otherwise qualify to vote to equally participate in that franchise once it has been established. As stated above, this doctrine applies to federal, state and local elections. And because the fundamental principle of representative government is at stake, the same must be true for voting as a member of a local government committee.

#### *Applying the Rule of Law*

The Manager and Committee chair’s discriminatory classification deprived committee members of the fundamental right to equally participate in committee voting once that franchise had been established. Early on in the committee process, the Committee decided to use voting as a means for making decisions. However, it appears the Committee chair decided to apply the “substantial financial interest” rule of HBC § 2.06.030 (C) unequally among the committee membership. As such, the heliski

representative was exempted from the rule and allowed to deliberate and vote on his own proposals. However, all other committee members were required to comply with the rule and recuse themselves from deliberations and votes on matters in which they had substantial financial interests.

This discriminatory treatment violated the core principle of equality protected by the Equal Protection Clause. The Manager and Committee chair clearly failed to treat committee members – equally for the purposes of committee voting and decision-making. As a result, the heliski representative was granted the benefit of preferred voting status. All other committee members were burdened by being treated unequally in the process. Therefore, the discriminatory classification used by the Manager and Committee chair “undermine[d] the legitimacy of representative government” on this committee. Ref. *Kramer*, at 626.

*C. The Manager and Committee chair failed to have the sufficient justification to infringe upon the fundamental right for members to participate equally in committee voting and decision-making.*

The final question is whether the Manager and Committee chair had sufficient justification to deprive committee members of the fundamental right at stake. Because this right involves the political franchise of voting, they failed to have this justification.

*Rule of Law*

Because the right to vote “is preservative of other basic civil and political rights”, *Reynolds*, at 561-562, “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Id.* This scrutiny is required because, “statutes granting the franchise to residents on a selective basis pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives.” *Kramer*, at 626-627. Moreover, the Supreme Court has stated, “if a challenged state statute grants the right to vote to some bonafide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.” *Id.* Thus, “the

government must have a truly significant reason for discriminating, and it must show that it cannot achieve its objective through any less discriminatory alternative.” Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, Pg. 687.

Additionally, under this level of scrutiny, “the government has the burden of proof.” *Id.* The government must demonstrate that the discrimination is “necessary to promote a compelling state interest.” *Kramer*, at 626-627. However, this “strict scrutiny is virtually always fatal to the challenged law.” Chemerinsky, Pg. 687.

It must be conceded here that the cases referenced above concern voting in federal and state elections, and not voting on a committee. In *Reynolds*, the issue centered on an apportionment scheme that “debased...a citizen’s vote in a state or federal election.” *Reynolds*, at 534. In *Harper*, the Court weighed the issue of whether a Virginia “poll tax” violated the Equal Protection Clause. *Harper*, at 663. In *Kramer*, the Court consider a New York education law that distributed the right to vote in certain school district elections to residents who “own or lease taxable realty in the district.” *Kramer*, at 621. Finally, in *Williams*, the Court ruled on whether an Ohio election law regulating the selection of electors discriminated against new political parties seeking a ballot in a presidential election. *Williams*, at 23.

However, the constitutional guidelines these cases provide are relevant to this issue. These cases all involve the political right of voting. This political right “constitutes the foundation of our representative society.” *Kramer*, at 626. Constitutional law scholar Lawrence Tribe has stated that cases “involving the right to vote...share with the first amendment and the due process [clause]...a core structural idea that the right at stake is really one to equal participation in governmental and societal decision-making.” Lawrence Tribe, *American Constitutional Law*, 2<sup>nd</sup> Ed., 1988, Pg. 1460.

Therefore, in accordance with these constitutional principles, a person must surely have the right to participate equally in committee voting and decision-making once that franchise has been established by that committee. Accordingly, any government infringement of the committee members fundamental right to participate equally in the voting franchise on a committee must satisfy the highest level of scrutiny.

*Applying the Rule of Law*

The Manager and Committee chair have failed to demonstrate a compelling Borough interest sufficient to overcome the burden of “strict scrutiny”. However, there do appear to be two different justifications at play here to account for this discriminatory treatment.

*The Advisory Role of the Committee as a Justification*

First, the Manager and Committee chair may have used the type of committee as a justification for their decision. The Heliski Map Committee is an advisory committee. Its role is to deliberate and vote on map change proposals and make recommendations to the Borough Manager. Thus, this type of committee does not make binding law.

The attorney referenced this advisory role in his memorandum. He stated, “the committee’s authority is limited: it makes recommendations that go to the manager, who is free to use those recommendations or ignore them in preparing his own recommendations for the Assembly, who ultimately approves the heliski map.” Attorney, Pg. 6. He continues, “this suggests that allowing the permittee-member to participate and vote on most map changes would not violate the code of ethics.” *Id.* However, it must be noted the attorney did not recommend the committee treat committee members differently for the purposes of HBC § 2.06.030 (C).

Regardless of the reasoning behind this possible justification, an advisory committee is still required to adhere to equal protection standards. In *Quinn v. Millsap*, 491 U.S. 95 (1989), the Supreme Court ruled on a Missouri reorganization plan for St. Louis and St. Louis County. The plan required land ownership for appointment to the “board of freeholders” that made recommendations for reorganization. *Quinn*, at 95. The Missouri Supreme Court “relied exclusively on its interpretation of the Equal Protection Clause and held that the Clause had no relevancy, because the board does not exercise general governmental powers.” *Id.*

However, the Supreme Court reversed the lower court’s ruling in the *Quinn* ruling. *Id.* The Court stated, “the Missouri Supreme Court’s ruling that the Equal Protection Clause had no relevancy to the case because the board of freeholders exercised no general

governmental powers reflects a significant misreading of this Court’s precedents.” *Id.* The Court continued, “The fact that the board serves only to recommend a plan of reorganization to the voters, and does not enact any laws of its own, cannot immunize it from equal protection scrutiny.” *Id.* Therefore, the *Quinn* ruling establishes the precedent that advisory committees must still adhere to equal protection guidelines.

*The Assembly’s Expectation of a Conflict of Interest as a Justification*

Second, the fact that the Assembly required a heliski representative on the committee may also be a justification for treating committee members unequally. The attorney also noted this fact in his memorandum. He stated, “It is extremely likely that the Assembly understood and perhaps even expected that the industry seat would be filled by a permit holder.” Attorney, Pg. 5 (emphasis attorney’s). He continued,

“This suggests that the Assembly – the legislative body responsible for enacting the code of ethics – did not believe that allowing a permit holder to serve and participate in the committee’s efforts was a conflict of interest. Rather, it suggests a deliberate choice to be sure that permit holders and industry professionals were included on the committee.” *Id.*

Once again, however, the attorney did not suggest the committee should treat different committee members differently. Nevertheless, the Manager and Committee chair may have misconstrued the attorney’s language and used it as a justification to apply the code unequally.

However, the Assembly’s “belief” that no conflict would exist is not sufficient justification to deprive individuals of the fundamental right to participate equally in committee voting and decision-making. Additionally, the Assembly is required to abide by the Code it created. Just because a “deliberate choice” may have been made to include permit holders on the committee does not absolve the Assembly or the Committee of the provisions in Code, much less adherence to the Equal Protection Clause. And here again, the attorney never recommended the committee treat different members differently.

Ultimately, then, there does not appear to be a justification sufficient to overcome “strict scrutiny”. Only the most compelling of reasons can justify depriving committee

members of their right to participate equally in committee voting and decision-making. Absent such a compelling interest, this right was violated. And, once again, it is the Borough’s burden to provide such a compelling interest.

## **CONCLUSION**

There is something fundamentally wrong when a local government is willing to apply the law unequally based on who a person is, or what they represent. And that is exactly what appears to have happened with the Heliski Map Committee. The Manager and Committee chair clearly violated the “substantial financial interest” rule required by HBC § 2.06.030 (C). More significantly, however, they applied this rule unequally based on the interests a committee member represented. In doing so, they violated the fundamental right for a committee member who is otherwise qualified to vote on committee decisions to participate equally in that franchise once it had been established. The Equal Protection Clause is designed to protect against just this type of government discrimination.

Ultimately, the motion to be considered supports a flawed ideal of democracy. Directing the Manager to prepare a resolution advocates “the rule of men” instead of “the rule of law”. Therefore, I urge the Assembly NOT to direct the Manager to prepare a resolution adopting his recommendations on heliski map amendments.