


BOYD, CHANDLER & FALCONER, LLP

Attorneys At Law
Suite 302
911 West Eighth Avenue
Anchorage, Alaska 99501
Telephone: (907) 272-8401
Facsimile: (907) 274-3698
bcf@bcfaklaw.com

MEMORANDUM

TO: Haines Borough Assembly

CC: Bill Seward, Borough Manager

FROM: Patrick W. Manson
Boyd, Chandler & Falconer, LLP
Borough Attorney 

RE: Appeal Re Heli-ski Map Committee meeting of November 7, 2016

DATE: December 12, 2016

Our office was asked to provide recommendations concerning a citizen appeal of certain actions taken by the Heli-ski Map Committee during a meeting on November 7, 2016. The citizen believes two members of the committee have a substantial financial interest in heli-ski map change proposals, and therefore should have been prohibited from deliberating and voting on such proposals.

We have analyzed the appeal and reached the following conclusions:

1. The assembly must hold an appeal hearing to review whether a conflict of interest tainted the motions passed at the November 7 Heli-ski Map Committee meeting.
2. The assembly will need to investigate and make findings regarding the specific financial impacts of each proposal the members voted on. This includes determining the connection between voting at the advisory committee level and final assembly action.
3. Committee members should not have voted on their own proposals, but the impact of this error is likely limited.

4. If the assembly finds that any of the motions were tainted by a conflict of interest, the assembly is not automatically required to “throw out” the vote. The assembly may fashion a remedy that it feels is appropriate to the circumstances.

Based on these conclusions we recommend:

1. The Borough review its code of ethics to decide whether the assembly intends to prevent citizens serving on specific advisory boards and committees from voting on subjects about which the citizens have both particular knowledge as a result of their business operations and financial or personal interests.
2. The assembly consider Borough policy on appeal rights contained in HBC 2.60.130 and HBC 18.30.060.

The reasons for these conclusions and recommendations are discussed in greater detail below.

BACKGROUND¹

The appeal is from “the actions taken by the Heli-ski Map Committee on November 7, 2016. It is my contention that the Heli-ski Map Committee Chair erred when he allowed both members of the committee, who have a substantial financial interest, to vote on any Heli-ski map change proposals.” Two Committee members have ownership interests in heli-ski companies that operate in the borough. The appeal states this ownership interest—and nothing more—constitutes a “significant financial interest” in all matters relating to the map which, under HBC 2.06.030(C) and HBC 2.62.040(A) prohibit both members from deliberating and voting “on any of the proposed heli-ski map changes.” The appeal states that despite this alleged conflict, “the Heli-ski Map Committee chair ruled that one of the two heli-ski permit holders on the Committee, a Haines Borough resident representative, was not allowed to vote, but could answer specific questions directed to him during the proceedings.” The appeal therefore challenges the actions of the committee based on a perceived violation of HBC 2.06.030(C) and HBC 2.62.040(A).

We have reviewed the following records in order to investigate this complaint:

1. The appeal

¹ Please refer to pages 1-3 of our ethics opinion dated October 26, 2016 for additional background information on the Committee and context for this appeal.

2. The revised draft minutes of all 2016 meetings of the Heli-ski Map Committee, including November 7
3. A Chilkat Valley News story dated November 17, 2016
4. An audio recording of the November 1 Committee meeting

Unfortunately, no audio recording exists of the November 7 meeting, but we have also discussed the meeting with borough staff who were in attendance. The minutes provide the best record of what proposals were considered, who participated in the discussion, who voted on each motion, and whether the motions passed.

The Map Committee considered nine motions on November 7. Each motion recommended certain revisions, conditions, or access to the following areas: AKH-1, S-2, AKH-2a, AKH-2b, S3a, S3b, AKH-3a, AKH-3b, AKH-4a. The initials of each area indicate the heli-ski operator who proposed the change. “AKH” stands for Alaska Heliskiing, which is owned in part by Map Committee member Sean Brownell. “S” stands for Southeast Alaska Backcountry Adventures (or Sundberg), which is owned in part by Map Committee member Scott Sundberg.

Mr. Sundberg and Mr. Brownell participated throughout the meeting. There is no doubt that the committee and the public were aware of both men’s ownership interests in heli-skiing companies that would be affected by the assembly’s decision with regard to the Haines Borough Approved Commercial Ski Tour Areas Map. Both individuals appear to have freely acknowledged supporting their own proposals, but the minutes reflect that Mr. Sundberg abstained from voting on proposals submitted by him/his company. The minutes do not reflect that Mr. Brownell abstained from voting. We understand that he voted on all the proposals, including his own.

We believe the decision regarding both men’s participation was made at the November 1 Map Committee meeting, not at the November 7 meeting. At that meeting, it appears that the chair of the committee concluded that Mr. Brownell was entitled to vote on all proposals because he was appointed as an industry representative, but that Mr. Sundberg was not entitled to vote on his own proposals because he was appointed as a “random resident,” not an industry representative. The committee did not vote to overturn this decision (as it arguably had a right to do under HBC 2.06.080(A)), and no objections were noted at the meeting. Mr. Sundberg and Mr. Brownell appeared to agree to this outcome. Consequently, both individuals participated in deliberations on all proposals, including their own, but Mr. Sundberg abstained from voting on his own proposals. It is our understanding that this practice continued at the November 7 meeting.²

² Note that the November 1 decision of the committee/committee chair is not specifically at issue. Individual rulings of the chair are not appealable under code (only committee “actions

The appeal therefore challenges the validity of the committee's actions on the grounds that neither Mr. Sundberg nor Mr. Brownell should have participated or voted on the motions considered on November 7.

ANALYSIS

I. The motions/recommendations passed at the Heli-ski Map Committee's November 7 meeting are appealable.

Appeals are governed by HBC 2.60.130:

2.60.130 Appeal. An action or decision of a committee, board or commission may be appealed to the assembly within 10 days by filing with the manager a written notice of appeal expressly setting forth the grounds of the appeal unless otherwise provided for by the code. The mayor shall place the appeal on the next assembly meeting agenda and the assembly may continue the appeal hearing up to 30 days. After a hearing on the record, the assembly may, in whole or part, affirm, modify or deny the appeal. (emphasis added)

HBC 2.60.130 permits appeals of committee "actions." The only formal actions taken at the November 7 meeting were the passage of nine motions. These motions are voidable (but not *required* to be voided) if it is determined that either the deliberation or votes of certain members should have been prohibited by the ethics code. HBC 2.06.100(C). Since both challenged members participated or voted in the discussion on all motions, all nine are on appeal. Therefore, this appeal should be treated as one seeking to void all nine motions due to the participation of committee members who are alleged to have a substantial financial interest in the matters before the Map Committee.

The appeal was filed November 16 and is therefore timely. It has been properly placed on the next assembly meeting agenda (November 29). That meeting was subsequently cancelled due to inclement weather, so this appeal will be heard December 13. The assembly may hear the appeal at that meeting or may continue it for up to 30 days after November 29.

The procedures for the "appeal hearing" should be flexible. The mayor should serve as presiding officer. The proceeding is quasi-judicial, so the hearing is intended to serve a fact finding and adjudication function. The appellant bears the burden of proving that a conflict of

or decisions"). Nor was this appeal filed within 10 days after November 1. That said, the actions taken at the November 7 meeting could be tainted by a conflict of interest regardless of when and how the decision to allow such participation was made.

interest exists.³ Mr. Hallett may be provided an opportunity to present additional evidence or argument if the assembly wishes. The committee members whose actions are being challenged should be provided an opportunity to respond to the allegations identified in the appeal (and any in-person presentation by the appellant) if they wish. Comments from the public should not be accepted or considered because this is a quasi-judicial proceeding, but the assembly may pose questions to determine disputed facts. The assembly may decide by motion whether to affirm, modify, or deny the appeal in part or in its entirety.

II. Summary of prior opinion

Many of the concepts at issue in this appeal were addressed in our office's ethics opinion dated October 26, 2016. In that opinion, we advised that the borough code of ethics did not categorically prohibit people affiliated with the heli-ski industry from participating in all heli-skiing matters that come before the Map Committee because this would defeat the purpose of including an industry representative on the committee. "Rather, each matter or item that comes before the committee is to be considered individually to determine whether a conflict of interest exists as to that particular item only." *Ethics Op.*, Oct. 26, 2016, p. 5. We did not indicate that different standards applied to each committee member.

Although we did not attempt to advise the committee on every possible scenario that could arise, we suggested several general guidelines. We explained that the primary question to be answered with regard to a potential conflict of interest is whether "a particular map change will have a significant and material impact on the permittee-member's financial interests...." *Ethics Op.*, Oct. 26, 2016, p. 6. This question is heavily fact dependent and cannot be answered through conjecture or assumptions; it must be answered using specific information to determine whether there is a reasonably foreseeable link between each committee action and the financial interests of the members.

Finally, we posited that, even absent a showing of significant financial interest, it would be appropriate for a committee member to be excused from deliberating and voting on proposed map changes submitted by the member. Whether or not such recusal is categorically required, there is likely to be a perception of bias in favor of one's own proposal. We therefore recommended that members be excused from voting on map change proposals submitted by the member. We advised that the member could nevertheless participate in the debate as a member of the public. We did not suggest that different members of the committee should be treated differently in this regard.

³ *Griswold v. City of Homer*, 925 P.2d 1015, 1029 (Alaska 1996).

III. The assembly should determine whether the committee's actions should be overturned due to a violation of HBC 2.62.040(A) or HBC 2.06.030(C).

The committee's motions have been appealed to the assembly for a determination whether those motions are tainted by a conflict of interest. In rendering this opinion, we have provided the relevant facts as we understand them, along with as much guidance and recommendations as possible, but due to both missing information and the assembly's role as the fact finder in this proceeding, we cannot provide a conclusive recommendation.⁴ However, the assembly may explore the currently unknown facts at the appeal hearing and exercise its own judgment to determine whether Mr. Sundberg and Mr. Brownell had a substantial financial interest in the map changes considered by the committee on November 7.

A. Substantial Financial Interest

Whether the votes cast by Mr. Brownell and Mr. Sundberg involved a "question on which the member[s have] a substantial personal or financial interest" depends upon the impact of the committee's recommendation for proposed map changes on the gross revenues of the companies they partially own.

The appeal asserts that the two committee members "have a substantial financial interest" in all the map change proposals as a result of their ownership interests in heli-ski companies within the borough. However, as explained in our previous ethics opinion, we do not believe the members are categorically precluded from participating in all heli-ski matters before the committee. Rather, each committee action needs to be reviewed individually to determine whether the action is reasonably likely to have a significant impact on a committee member's financial interests.

The Alaska Supreme Court has recognized that industry members bring valuable and necessary expertise to boards and committees dealing with that industry.⁵ However, the Court

⁴ The missing information and reasonable grounds for disagreement as to certain questions presented in this appeal stand in stark contrast to the appeal of the Tourism Advisory Board actions of November 10, on which we also provide an opinion today. In our professional opinion, the facts in the TAB appeal are sufficiently clear and would not legally support the conclusion that the TAB members violated Chapters 2.06 or 2.62. We do not believe there are any facts that could change that opinion, so have little difficulty providing a conclusive opinion and recommendation in that case.

⁵ See *Carney v. Board of Fisheries*, 785 P.2d 544, 548 (Alaska 1990) (quoting *Consumers Union of United States v. California Milk Producers Advisory Bd.*, 82 Cal. App. 3d 433 (1978))

also recognized that members may have a “narrow and specific interest” in certain matters that come before them.⁶ Where a member has a “peculiarly personal” interest in a specific matter, the member should be excused from voting on the matter.⁷

Borough Code incorporates this concept in HBC 2.06.020(B)(1): “There is no violation of this code of ethics if, as to a specific matter, a public officer’s...[p]ersonal or financial interest in the matter is...of a type that is possessed generally by the public or a large class of persons to which the public officer belongs....” This analysis is case-specific and heavily fact-dependent. “[T]he focus...[is] on the relationship between the public official’s financial interest and the possible result of the official’s action, regardless of the official’s intent.”⁸

HBC 2.06.020(B)(2) likewise focuses on this causal relationship, stating that there is no ethics violation if a public officer’s “[a]ction or influence would have an insignificant or conjectural effect on the matter....” This requires at least a reasonably foreseeable relationship between the official action and the member’s financial interests in order to find a conflict exists. The impact of a particular action or vote on a member’s financial interests need not be certain or definite, but it must be reasonably likely, not conjectural, and also “significant,” “substantial and material”. HBC 2.06.020(A)(3) and (B)(1).

(citing California law):

Merely because a board member derives income from within a given industry, he or she does not lose the ability to be objective. Nor does that person lose the capacity to make decisions beneficial to the public's interest. The public interest emerges from the competing interests of various groups in our society, including those from a given industry. The Act does not disallow that board member, who has a knowledge and a comprehension of how the industry interacts with society, from participating in governmental decisions which affect that industry.

⁶ *Carney*, 785 P.2d at 548. Similarly, the Court has stated that public officials participating in the legislative process should “refrain from voting on a bill which will inure to the legislator's financial benefit if the legislator’s interest is peculiarly personal, such as when a bill benefits only a tiny class of which the legislator is a member.” *Griswold v. City of Homer*, 925 P.2d 1015, 1026-27 (Alaska 1996) (quoting 1982 Formal Op. Att’y Gen. 4133).

⁷ *Griswold*, 925 P.2d at 1026-27.

⁸*Id.* at 1026 (citing *Carney*, 785 P.2d at 548).

In summary, to determine whether the two heli-ski operators on the committee have a substantial financial interest in each of the motions on appeal, the assembly must decide whether (1) each motion has more than a conjectural effect on the financial or personal interests of the member; (2) the interest likely to be affected by the motion is specific to the individual committee member and not “possessed generally by the public or a large class of persons to which the public officer belongs,” and (3) that impact on the interest is reasonably likely to be significant, substantial, and material.

B. Questions to be investigated and evaluated by the assembly.

Where reasonable people may differ as to whether a conflict exists, it is important for the fact finder to base its decision on a thorough understanding of the facts. The appellant has not provided enough information to determine whether a conflict existed with regard to each motion.⁹ However, the assembly can investigate the relevant unanswered fact questions at the appeal hearing to reach a determination.

1. *The threshold question is whether recommendations from the committee have more than a conjectural impact on Mr. Sundberg and Mr. Brownell.*

The context of the motions on appeal cannot be overlooked. By code, the Map Committee is required to provide recommendations to the borough manager regarding proposed changes to the Approved Commercial Ski Tour Areas Map. The borough manager then prepares a recommendation for the assembly. Neither the manager nor the assembly is bound by the committee’s recommendations, but the assembly does receive them. The assembly makes the final determination regarding areas that are open for skiing within the borough. In short, the Map Committee has no actual authority to decide whether areas are available for heli-skiing.

As noted above, a member’s action does not violate the code of ethics if the “[a]ction or influence would have an insignificant or conjectural effect on the matter.” HBC 2.06.020(B)(2). Our October 26 ethics opinion explained the significance of this rule in the context of the Map Committee:

This tenuous relationship between the committee members’ actions and the final result suggests that most committee recommendations have a somewhat conjectural impact on the permittee-member because the member’s recommendations have no reasonable assurance of ever becoming law. This suggests that allowing the

⁹ Strictly speaking, this means the appellant has thus far failed to carry the burden of proving that either of the members has a substantial financial interest in the motions because it is incumbent upon the appellant to provide enough information to support that conclusion.

permittee-member to participate and vote on most map changes would not violate the code of ethics.

Therefore, a threshold question for the assembly is whether it is reasonably likely that a committee member's deliberations and votes on a recommendation to the manager and the assembly will impact the areas that are ultimately made available for heli-skiing. In other words, even if it is assumed that the map significantly impacts the committee member/permittee (which is a separate question), the assembly must decide whether there is more than a conjectural causal link between providing recommendations to the decision-maker and the ultimate decision.

We believe this is a very close question, and one upon which reasonable minds may differ.¹⁰ On one hand, it is not disputed that the committee's recommendations may be ignored and have no guarantee of affecting the outcome. The committee has no actual authority, so its actions are always subject to the whims and choices of another body. On the other hand, it is probably not realistic to assume that the committee's recommendations have no influence on the outcome. So the impact of the recommendations probably falls somewhere in between: they may have no impact, or they may be very influential.¹¹

On balance, this may suggest that the connection between the committee member's action and the outcome is more conjectural than definite because (1) there is arguably no way to predict whether any recommendation will be adopted by the assembly, and (2) at least one "intervening step" is required between the committee's recommendation and the areas arguably affected (namely, assembly approval of the proposed map change).¹² As noted in our October 26

¹⁰ The closeness of the "conjectural" determination also distinguishes this appeal from the appeal involving the Tourism Advisory Board. Reasonable minds may differ as to whether the recommendations of the Map Committee will influence, and even be adopted by, the assembly, thereby affecting the outcome. It is, however, entirely conjectural to suppose that a recommendation to the assembly regarding eligibility requirements and voting powers on the Map Committee will affect the map the assembly ultimately approves, and thereby impact permit holders' financial interests. For a more detailed explanation of conjecture that would be required to reach such a conclusion, please see page 6 of our opinion regarding the TAB appeal.

¹¹ One way to evaluate this is to review how prior Borough Assemblies and Borough Managers have acted on map committee recommendations. If this history is limited, the assembly could review how frequently committee recommendations by other committees on other matters are accepted by the assembly.

¹² See *Griswold v. Homer*, 34 P.3d 1280, 1287 (Alaska 2001) (holding that the possibility that a Homer city council member might start a business in the future that would be impacted by

opinion, that conclusion also finds some support in the fact that the assembly chose to appoint an industry representative to the committee, suggesting that the assembly did not believe it was inappropriate for a permit holder to participate in the process of recommending changes to the map.

However, the assembly could reach a different conclusion if it believes that the committee's recommendations are more likely than not to be adopted. This would support the conclusion that the committee member's actions have more than a conjectural effect on the outcome of the map.

Assembly members will have to evaluate this question at the hearing for themselves. The assembly could lawfully deny the appeal entirely if a majority of the assembly concludes that the effect of a specific member's participation in committee recommendations regarding the map is too conjectural to constitute a conflict of interest. If, however, a majority of the assembly believes that the member's participation is reasonably likely to impact the outcome of the map, then the assembly would need to consider additional questions presented below to decide the merits of the appeal.

2. *Do recommendations of the Map Committee involve a narrow and specific interest of Mr. Sundberg and Mr. Brownell?*

If the assembly concludes that committee members' actions are reasonably likely to influence the outcome of the map, then the next question is whether the individual members whose actions are being challenged possess an interest in each proposed area that is peculiar to each of them and is not "possessed generally by the public or a large class of persons to which the public officer belongs". HBC 2.06.020(B)(1). The assembly can interpret that phrase in a number of ways and decide what factors are most important. There are just three heliski operators within the borough, which is not likely to be considered a "large class of persons." Nor is the public likely to have a similar interest to the heli-ski operators on the committee. This may suggest that Mr. Brownell and Mr. Sundberg have narrow and specific interests in the proposals considered by the Committee.

However, the assembly would need to make specific findings as to whether either or both individuals have a particularized interest in each proposal. In order to do so, the assembly should learn more specific information about the financial implications of opening or closing each area,

the zoning ordinance under consideration was "too speculative" to require recusal because either additional city council action or an "intervening step" (the starting of a new business) by the council member was required.

and whether Mr. Brownell or Mr. Sundberg has a greater financial interest in any of the areas than other operators do.¹³ If, for example, an area is located particularly close to one company's heli-pad, that company might have more to gain if the area is opened for use. Such a discrepancy might justify the conclusion that the benefitted member has a conflict of interest that should have precluded him from participating in the discussion as to that particular area. If, on the other hand, opening or closing each area affects all members of the industry similarly, then the owners of each heli-ski company may not have a peculiar and narrow interest in a particular area.¹⁴ They may, however, be deemed to have a narrow interest in the area because they are one of a small class of persons potentially benefitted by the decision with regard to the area.

The composition of the committee is relevant to this question as well. The assembly specifically required one industry representative to serve on the committee. In doing so, it clearly understood that the representative would have a unique interest in the outcome of the map. It would be somewhat incongruous for the assembly to now say that this interest creates or contributes to a conflict of interest as to all the proposed map changes.

In conclusion, we believe that while it may be reasonable to conclude that Mr. Brownell and/or Mr. Sundberg have a "narrow and specific" interest in certain map areas, the committee seems designed to allow them to advance that interest in most cases. There may be certain instances or proposals in which their participation creates such a special and unique conflict of interest that it would be unfair to allow them to participate, but (except as noted below) we cannot determine whether such circumstances exist here without detailed information on the impacts related to each area proposal.

If the assembly decides that Mr. Sundberg and/or Mr. Brownell possessed a narrow and specific interest in any of the individual proposals considered by the committee on November 7,

¹³ Under Alaska common law, an industry board/committee member will sometimes be deemed not have a conflict of interest in matters that affect all industry members similarly. *Carney*, 785 P.2d at 548. This principal, however, presupposes a larger and more diverse group of interest holders than exists in the heli-ski industry in Haines, and is arguably supplanted by the more specific version of this general rule stated in HBCO 2.06.020(B)(1). So we do not necessarily believe it applies with much force in this situation. That said, the assembly may certainly consider whether the matters before the committee affect all heli-ski operators similarly.

¹⁴ Mr. Hallett's appeal alludes to this concept by pointing out that approved heli-skiing areas are not exclusive and are open for use by all permit holders. While that undisputed fact suggests that proposed map changes may affect all heli-ski companies similarly, the assembly would need to inquire whether SEABA or AKH is likely to be impacted disproportionately from opening each area.

the assembly should proceed to the next step of the appeal by inquiring into the significance of the interest. Alternatively, if the assembly finds that the members' interests in each proposal is similar to the interests of the public generally or to a large class of persons, or that any special interest was essentially approved by the assembly when the committee was established, it should deny the appeal as to that item.

3. *Are Mr. Sundberg and Mr. Brownell's financial interests in each proposal significant, substantial, and material?*

Only conflicts which are "significant," "substantial and material" are prohibited. HBC 2.06.020(A)(3) and 2.06.030(C). No definition is provided for these terms, so the assembly must use its best judgment to determine whether any financial interest Mr. Sundberg and Mr. Brownell may have in the outcome of the appealed recommendations is significant, substantial, and material.

The answer will depend largely on the same type of information that is relevant to the previous question. For example, a request to open an area near one of the committee member's heli-pads could result in more use of nearby slopes, decreasing fuel costs. If the assembly determines that the amount of money likely to be saved under that scenario is "significant," it may conclude that the committee member should not have participated or voted on that proposal. Alternatively, the assembly may decide that certain areas are critical to attracting guests. If the assembly determined that the impact of opening or closing such areas was reasonably likely to affect one or both companies' sales, it could try to determine whether the financial impact would qualify as significant or substantial.

Unfortunately, there is no available information quantifying the likely financial impacts of each proposal. Without that information, we cannot provide even a general recommendation on which of the proposals might have significant and substantial financial impacts on each operator.

The assembly will need to inquire about these facts at the hearing. We emphasize that the assembly's conclusions on this question should not be based on conjecture or assumptions. The burden is on the appellant to prove that the impact is reasonably likely to occur and that it is significant.

The assembly will need to delve into that question at the appeal hearing if—and only if—it first decides (1) that the Map Committee's recommendations have more than a conjectural effect on Mr. Sundberg and Mr. Brownell's financial interests, and (2) that Mr. Sundberg and Mr. Brownell have a specific and narrow interest in each of the motions made at the November 7 meeting.

C. The appeal may be upheld as to certain motions if the assembly decides that a committee member should not have deliberated or voted on proposals submitted by the committee member.

Finally, although we have focused almost exclusively on identifying “financial interests” in this opinion, we previously suggested that a committee member was likely to have a personal interest in map change proposals that he himself had submitted to the committee “because the member has already taken a position on the issues in the proposal.”¹⁵ We opined: “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.” To remedy this potential problem, we recommended that committee members not vote on their own proposals and participate in the discussion on their proposals only as members of the public, not as committee members.

It appears that both individuals participated in discussions pertaining to each of their proposals. Notably, the meeting occurred around a table in the public library, not in the assembly chambers, so there was no meaningful distinction between participating as a committee member or as a member of the public. Because we previously advised that the committee members should be permitted to discuss their proposals, we perceive no significant error with allowing the members to participate in the discussion as to all proposals, regardless of the capacity in which they did so, because there would not have been a meaningful distinction in their participation as committee members or members of the public.

However, whether either member should have *voted* on his own proposals is a closer question. One of the members abstained from voting on his own proposals. Mr. Sundberg did not vote on proposals to recommend action with regard to Areas S-2, S-3a and S-3b. Because he did not vote on his own proposals, there is no basis to overturn the motions as to Areas S-2, S-3a and S-3b based on the fact the Mr. Sundberg submitted them.¹⁶

¹⁵ Mr. Sundberg essentially confirmed that he had in fact already formed an opinion on his own proposals in the November 1 meeting. During the discussion regarding whether he would be participating and voting on his own proposals, he was asked whether he was “willing to participate in the conversation, but you’re basically recusing yourself from voting?” Mr. Sundberg responded, “Sure, because you know my answer.” *Heli-Ski Map Comte. Mtg.*, Nov. 1, 2016 (9:44-9:53).

¹⁶ The assembly could still find that his participation in the discussion of those matters constituted a conflict if it concludes that his financial interest in each area was significant, as explained in Sections A and B.

Mr. Brownell, however, voted on AKH-1, AKH-2a, AKH-2b, AKH-3a, and AKH-3b. He did so based on his (and the committee's) apparent belief that he was allowed to vote on such matters because he was appointed as the industry representative, not as a random resident like Mr. Sundberg.

We continue to believe a committee member should be excused from voting on proposals submitted by the member. First, it is likely that members have a "personal interest" in seeing such proposals succeed because they have already taken a position on them. Second, it is not realistic to expect committee members to be objective on their own proposals since they are effectively serving as an advocate for the proposal. Third, there is an obvious appearance of impropriety when a committee member votes on his own proposal. Whether or not the public official will actually benefit from the change, seeing elected officials vote on their own proposals that are perceived to benefit them does not "promote and strengthen the faith and confidence of the people of this borough in their public officers." HBC 2.06.010.

We therefore recommend that the assembly find that it was inappropriate for Mr. Brownell to cast a vote on the motions regarding AKH-1, AKH-2a, AKH-2b, AKH-3a, and AKH-3b.

However, the impact of this finding may be extremely limited, particularly if the assembly determines that the effect of Mr. Brownell's vote was too conjectural to constitute a conflict of interest because the committee is advisory only. Given the committee's limited power, that would be a reasonable conclusion.

IV. Available remedies

Borough code does not specify a remedy in the event an appeal succeeds. Mr. Hallett requests that the assembly disband the current Heli-ski Map Committee. This not a permissible remedy because, among other reasons, the committee is created by ordinance, was properly appointed, and cannot be disbanded by summary act of the assembly.

However, it could be appropriate to reject or disregard the motions passed by the committee if they resulted from deliberations or votes that violated Chapters 2.06 or 2.62. HBC 2.06.100(C) states that "any borough action taken in violation of this chapter is voidable, except that the interest of third parties and the nature of the violation may be taken into account." Therefore, if the assembly decides that any of the Committee's November 7 motions were passed in violation of HBC 2.06.030(C), it may elect to void the motions/recommendations. However, because the ordinance states that such actions are "voidable" (as opposed to simply "void" or "voided"), the decision whether to void the motions is for the assembly. If it elects not to void the motions, it may fashion another lawful and appropriate remedy.

The assembly should consider “the interest of third parties and the nature of the violation” when fashioning a remedy. If we assume the best case for the appellant (*i.e.*, that the assembly decides the two committee members had a significant financial or personal interest in some or all of the motions), then it may be that the entire November 7 meeting is tainted by the participation of both members. However, the nature of the violation—if there was one at all—was unintentional and in some ways inevitable based simply on the composition of the committee. This militates against imposing extreme remedies.

The alleged conflicts were also disclosed and well-known to the committee and the public at the time the members participated in the meeting and cast their votes. This is critical because disclosed conflicts are not as nefarious as undisclosed conflicts. The Alaska Supreme Court has suggested that when a potential conflict is widely disclosed, the action taken by a public official can be allowed to stand unless “the member's interest and participation are so great as to create an intolerable appearance of impropriety.”¹⁷

It is also appropriate to consider whether the recommendations would have passed without the votes of any members who are determined to have had a conflict of interest. In this case, all nine motions passed unanimously. Therefore, even if one or both of the heli-ski industry members’ votes are disregarded, the motions would still have passed.

In our opinion, these circumstances militate against extreme remedies even if the assembly finds that a violation occurred. At most, we recommend the assembly remand any motions it determines are tainted by a conflict of interest for reconsideration without the participation/votes of the member with the conflict. Alternatively, the assembly could instruct the manager to prepare his recommendation without considering the committee’s recommendations from November 7. Finally, since it is the assembly that makes the final decision anyway, the assembly could simply choose to re-hear any proposals it determines are tainted by a conflict of interest.

ADDITIONAL RECOMMENDATIONS

We recommend that the assembly review application of the code of ethics to advisory board and committee members. One purpose of most advisory committees is to obtain input from people with knowledge on particular subjects. The majority of such people may have a “significant financial or personal interest” in matters that regularly come before the committee. They also would be the most motivated to volunteer the time required to serve on such a committee. If the assembly desires for people in affected industries to serve on advisory committees, it would be wise to amend the conflict of interest rules to exclude advisory

¹⁷ *Griswold*, 925 P.2d at 1029.

committees. Alternatively, the Assembly may determine the better approach is to limit advisory committee membership so as to prohibit business owners from serving on committees that make policy recommendations on matters impacting their business. Business owners could participate in the committee process as interested members of the public but could not vote (or perhaps could not even serve). If this is the desired result, we suggest amending code provisions pertaining to particular advisory committees.

We also recommend the assembly review HBC 2.60.130 and evaluate the benefit of requiring mandatory appeal hearings of any “action” taken by any committee. Unconditionally permitting such appeals is not required by law or due process and may significantly impede governmental functioning. It is also not consistent with other provisions of borough code. For example, whether the assembly hears an appeal of a Planning Commission decision (which can have a significant impact on a number of residents) is optional. See HBC 18.30.060. But under HBC 2.60.130, the assembly must hear appeals of minor motions by a committee making a recommendation to the Borough manager. This is inconsistent and disproportional. If Borough policy is to provide broad rights of appeal in all circumstances, HBC 18.30.060 should be amended to require the assembly to hear appeals of Planning Commission actions. Alternatively, HBC 2.60.130 should be amended to also allow the assembly the discretion not to hear an appeal from an “action” of an advisory committee.