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December 21, 2011

VIA ELECTRONIC DELIVERY ONLY

Ms. Kristie L. Smithers, MMC
City Clerk
City of Wasilla
290 E. Herning Avenue
Wasilla, AK 99654-7091

RE: Council Member's Duty to Attend Meetings
Our File No.: 505,780.124

Dear Kristie:

You have asked whether a Council member (i) may refuse¹ to attend a Council meeting; and (ii) may refuse to attend an executive session of the Council. In summary, I conclude that a Council member's refusal to attend a properly scheduled and noticed meeting of the Council is contrary to the Council member's duty as an elected official, and the oath that the Council member took upon assuming office. I also conclude that a Council member ordinarily has the same duty to attend an executive session held pursuant to a motion approved by a majority of the Council. In contrast, a Council member has a duty not to attend a meeting including other Council members that is held in private without proper notice.

A primary duty that a Council member is elected to perform is attending and participating in the deliberations of the body to which he or she has been elected:

Representative government imposes a responsibility upon elected officials to give proper attention to the duties of their office, one of which is the regular attendance at and participation in the meetings of the body

¹ As used here, the term "refuse" refers to an intentional decision on the part of the Council member not to attend, in the absence of any circumstance that would justify the Council in excusing the absence, such as illness, requirements of the member's employment or a vacation of reasonable duration.

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to which they have been elected. The public is entitled to know it is being represented and not neglected by those it has placed in office.²

Moreover, before taking office, a Council member subscribes to an oath to discharge the duties of office "to the best of my ability." The Alaska Constitution prescribes the following oath for all public officers:

All public officers, before entering upon the duties of their offices, shall take and subscribe to the following oath or affirmation: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of Alaska, and that I will faithfully discharge my duties as to the best of my ability." The legislature may prescribe further oaths or affirmations.³

There also is a statutory requirement that a municipal official such as a Council member take an oath to perform the duties of the office:

Before taking office a municipal official shall affirm in writing that the duties of the office will be honestly, faithfully, and impartially performed by the official.⁴

A Council member's refusal to attend a Council meeting is inconsistent with the undertaking in the member's oath of office to discharge the duties of office to the best of the member's ability.

² *Corvelli v. Fonseca*, 732 A.2d 1147, 1152 (N.J. Super. Ct. Law Div. 1999).

³ Alaska Constitution, Art. XII, §5. A Council member has the attributes of a "public officer" for the purpose of this oath requirement:

The most important characteristic of an office is that it involves a delegation to the individual of 'some of the sovereign functions of government, to be exercised by him for the benefit of the public.' Second, an office is created by the constitution or authorized by statute. Third, the duties of an office are prescribed by the constitution or by statute or 'necessarily inhere in and pertain to the administration of the office itself.' Fourth, an office has permanence and continuity. *Larson v. State*, 564 P.2d 365, 369 (Alaska 1977) (citations omitted).

⁴ AS 29.20.600.

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The Alaska Open Meetings Act permits executive sessions of the Council for the following purposes:

The following subjects may be considered in an executive session:

- (1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity;
- (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;
- (3) matters which by law, municipal charter, or ordinance are required to be confidential;
- (4) matters involving consideration of government records that by law are not subject to public disclosure.⁵

The Council is required to proceed as follows to hold an executive session:

If permitted subjects are to be discussed at a meeting in executive session, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that are listed in (c) of this section shall be determined by a majority vote of the governmental body. The motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private.⁶

Thus, to hold an executive session a majority of the Council must adopt a motion (i) that the purpose of the executive session is to discuss a matter listed in AS 44.62.310(c), and (ii) that clearly and specifically describes the subject of the executive session.

A member of the Council may disagree with a motion to hold an executive session because he or she believes (i) the executive session is not being held to discuss a matter listed in AS 44.62.310(c); (ii) the motion to hold the executive session does not clearly and specifically describe the subject of the executive session; or (iii) even if the motion satisfies the requirements of the statute, the Council member prefers that the Council discuss the matter in public session. The Council member may express that disagreement by voting against the motion to hold the executive session.

The decision to hold an executive session is made by a majority vote of the Council. Once a majority of the Council has determined, using the proper procedure, to hold an executive session on a permitted subject, a Council member who refuses to

⁵ AS 44.62.310(c).

⁶ AS 44.62.310(b).

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attend the executive session is not performing the duty to attend and participate in the deliberations of the Council. A Council member's duty to attend and participate applies to all stages of the deliberative process, including those that occur in an executive session. "[D]eliberation connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision."⁷

In contrast, a Council member may have a duty not to participate in an executive session that clearly is illegal. For example, a council member has been held to have a duty to leave a meeting when she knew it included other council members and was held in private without the required notice.⁸ It is unclear whether an Alaska court would apply this rule to an executive session held at a properly noticed meeting on the vote of a majority of the Council. In my opinion the rule could be applied only where the legal defect in the executive session was very clear—for example, where the motion to hold the executive session stated a purpose for the executive session other than one permitted by AS 44.62.310(c), or where the Council's discussion during the executive session went beyond the topic for which the executive session was held. In the many cases where reasonable minds might disagree about the legality of an executive session held at a properly noticed meeting on the vote of a majority of the Council,⁹ I predict that the court would hold that the duty to attend prevails.

Yours truly,

BIRCH HORTON BITTNER & CHEROT


Thomas F. Klinkner

TFK:cm

⁷ *Brookwood Area Homeowners Ass'n, Inc. v. Municipality of Anchorage*, 702 P.2d 1317, 1322 (Alaska 1985), quoting *Sacramento Newspaper Guild*, 69 Cal.Rptr. 480, 485 (Cal. App. 1968).

⁸ *Kansas City Star Co. v. Shields*, 771 S.W.2d 101, 103 (Mo. App. 1989).

⁹ AS 44.62.310(b) requires both that a motion to convene in executive session clearly and specifically describe the subject of the proposed executive session, and that the motion not be so explicit about the subject that it defeats the purpose of addressing the subject in private. The tension between these two requirements may make it difficult for a Council member to determine whether a particular executive session is being held legally, or whether the discussion during the executive session has strayed from the approved subject of the executive session.