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MEMORANDUM

TO: Kim Lane, Borough Clerk

FROM: Joseph N. Levesque, Borough Attorney *JNL*

DATE: June 23, 2020

RE: **ALLEGED OPEN MEETINGS ACT VIOLATION**
Our File No. 584-2700

This memorandum responds to allegations that the City and Borough of Wrangell ("CBW") violated Alaska's Open Meetings Act ("OMA") [AS 44.62.310] when it recently appointed a new member to the Assembly on June 9, 2020.

According to the accusation, the Assembly violated OMA by holding an anonymous vote during its public meeting.¹

ISSUE

Whether the CBW Assembly violated Alaska's OMA on June 9, 2020, when it appointed a new Assembly member.

SHORT ANSWER

No, the CBW Assembly did not violate Alaska's OMA when it appointed a new Assembly member on June 9, 2020.

FACTS

An Assembly member recently submitted a resignation letter to CBW. Following its Municipal Code of Ordinances ("Code") Section 3.04.040, the Assembly was required to meet and appoint a replacement Assembly member.

¹ The allegation, made in a June 10, 2020 email to the Borough Clerk by KSTK reporter June Leffler, does not appear to challenge any other process or procedure during the June 9, 2020, Assembly Meeting.

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At its June 9, 2020, meeting, the Assembly members were asked to nominate their respective choices by providing that information to the CBW Clerk via text message.² Once the Clerk had the information from the Assembly members, she announced the nominating results and a motion was made to appoint a new Assembly member. That motion was voted on by the Assembly in an open meeting by individual roll call vote. Accordingly, the nomination process used by CBW was not an actual vote for a candidate to replace the outgoing Assembly member.

Due to the outbreak of the 2019 novel coronavirus ("COVID-19") all CBW Assembly meetings have recently been held via a Zoom video conference link. This has compelled CBW to handle its business in a different manner than usual. For instance, rather than follow its normal procedure of allowing Assembly members to make voice nominations, a decision was made to collect the nominations via text message. This decision was made to level the playing field so that all Assembly members were able to make simultaneous nominations. It was also to streamline the process by introducing nominations in an efficient manner using the Zoom video conferencing. The Assembly, in using this nomination procedure was not attempting to circumvent OMA.

Underlying this change was a concern that some Assembly members have slow home internet service and might not be able to make their nominations before others with faster internet connections; so, the decision to use this nomination process was made under principles of fairness. Another glitch associated with the Zoom video conference is the raising of digital hands. When an Assembly member wishes to be heard by the Mayor during a meeting, the Assembly member raises his or her digital hand to be recognized. At times more than one Assembly member raises his or her hand at about the same time and the Mayor is not always aware which Assembly member raised their hands first. However, as explained below, all meetings are open to the public, are properly noticed and all votes are taken by roll call, so the public knows the vote of each Assembly member. Moreover, the actual texts used during the nominating process have been preserved by CBW's Clerk.³

LAW

Alaska's OMA states that:

² Due to a bad cell phone connection, one Assembly member was not able to text her nomination and called the Clerk to place her nomination choice.

³ All nominations have been preserved by CBW's Clerk in text message form, except the one made by voice nomination over the phone. Both the CBW Clerk and the respective Assembly member have signed a document memorializing and preserving that nomination as well.

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All meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law.

AS 44.62.310(a). There is no question that CBW is a governmental body of a public entity of the state and therefore subject to the OMA. AS 44.62.312 makes it clear that the policy behind the OMA (which is sometimes referred to as the Sunshine Law) is as follows:

- (a) It is the policy of the state that
 - (1) The governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;
 - (2) It is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;
 - (3) The people of this state do not yield their sovereignty to the agencies that serve them;
 - (4) The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;
 - (5) The people's right to remain informed shall be protected so that they may retain control over the instruments they have created;
 - (6) The use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.

- (b) AS 44.62.310(c) and (d) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and to avoid exemptions from open meeting requirements and unnecessary executive sessions.

Section 3.04.040 of CBW's Municipal Code of Ordinances ("Code" or "WMC") establishes procedures governing the filling of Assembly vacancies, and provides as follows:

- A. The assembly, by the majority vote of its remaining members, shall fill vacancies in its own membership including the vacancy in the office of mayor for the unexpired terms or until the vacancies are filled at elections.

- B. If a vacancy occurs before the beginning of a regular filing period for candidates for assembly members, and the unexpired term extends beyond the time when the terms of assembly members elected that year begin, then a mayor or assembly member for that place shall be elected at the regular

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election of that year to serve the rest of the unexpired term beginning at the time the terms of assembly members elected that year begin.

Neither the OMA nor CBW's ordinances prescribe a voting method for appointing replacement Assembly members. The motion to appoint a replacement Assembly member was made during an open meeting and a roll vote was conducted as is required by AS 44.62.310(a), which states in relevant part:

Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. The vote at a meeting held by teleconference shall be taken by roll call.

Research reveals that there are no Alaska Supreme Court cases directly on point. Cases from other states unequivocally show that, if the CBW Assembly had used a secret ballot to appoint the new Assembly member such action would be a violation of the OMA. However, the CBW Assembly did make a motion to appoint the new Assembly member and the Clerk called for a roll call vote during the open meeting. Accordingly, the public was not denied the right to witness how individual Assembly members voted.

An Ohio case is illustrative of how using a secret ballot alone during an open meeting violates OMA. In *Village of Bratenahl*,⁴ the court found that the OMA was violated when the village council selected a president pro tempore by secret ballot. In that case, the council decided to vote by secret ballot. The secret ballots were privately tallied by the village solicitor and the resulting votes were not announced to the public. Instead, the solicitor announced only the winner of the secret ballots. Accordingly, the public was denied the right to know how individual council members voted.

In reversing the lower court, the Ohio Supreme Court wrote:

Not only must the meeting be open, but any official action (for example, the election of a president pro tempore) must take place in an open meeting. We read this to mean that that portion of the meeting in which the formal action is taken here, the vote – must be open.⁵

In contrast, the CBW Assembly did conduct a roll call vote on the proposed candidates in its public meeting. Accordingly, the public was not denied the right to know how individual

⁴ *State Ex Rel., More Bratenahl v. Village of Bratenahl*, 157 Ohio St. 3d 309 (2019).

⁵ *Id.* At 312.

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Assembly members voted and the nomination texts, including the details of who made them, are preserved.

Having no published Alaska Supreme Court case to analyze OMA on this exact issue and having discovered conflicting cases from other jurisdictions [all based upon each state's own statutes governing open meetings act] a review of Attorney General Opinions was performed.⁶

A Kansas Attorney General Opinion while acknowledging that no binding action can be taken by secret ballot, qualified the law stating that "...[d]elegates may, however, vote by paper ballot if each delegate signs his or her name on the ballot and the ballots are open for public inspections."⁷

Echoing a similar interpretation, a 1994 Alaska Attorney General's Opinion determined that "... the practice of voting by mail does not conflict with the strong mandate of the Open Meetings Act against secret votes, as the identity of each board member and their respective votes are preserved and made public."⁸

CONCLUSION

While there are no Alaska Supreme Court cases interpreting "secret voting" in Alaska. A 1994 Alaska Attorney General Opinion states that voting by ballot is not in conflict with OMA. The CBW Assembly, forced to meet by video conference chose to use a ballot form for nominating a new Assembly member. Such a nomination was not intended to be the actual vote, it was a mechanism to use a more efficient method of nominating the new Assembly member. It was not an attempt to circumvent OMA and the actual vote that took place in open session by individual roll call vote allowed the public to view how each Assembly member voted.

⁶ *Carney v. State Bd. Of Fisheries*, 785 P.2d 544, 548 (Alaska 1990) (while not controlling, Attorney General Opinions are entitled to some deference when dealing with matters of statutory interpretation).

⁷ Kan. Atty. Gen. Op. 86-176, 1986 WL 238406 at 1.

⁸ 1994 Alaska Op. Atty. Gen. (Inf.) 287 (Alaska A.G.), 1994 WL 796606 at 2 (not surprisingly, even the City of Newport Beach, California [the state that introduced the first open meetings law] has interpreted "the Brown Act" similarly stating: "However, it is the view of this office that members of a body may cast their ballots either orally or in writing so long as the written ballots are marked and tallied in open session and the ballots are disclosable public records.") <https://www.newportbeachca.gov/home/showdocument?id=10519> at 31.