

MEMORANDUM

11-~~108~~110

TO: JO JOHNSON
CITY CLERK, CITY OF HOMER

FROM: THOMAS F. KLINKNER

RE: ESTABLISHMENT OF PORT AND HARBOR IMPROVEMENT
REVENUE BONDING PROJECT COMMITTEE, AND APPOINTMENT
OF ITS MEMBERS

CLIENT: CITY OF HOMER

FILE NO.: 506,742.100

DATE: JULY 5, 2011

Resolution 11-060, adopted by the Council on June 13, 2011, "supports the establishment of a committee to develop a plan for the implementation of a Port and Harbor Improvement Revenue Bonding Project." Resolution 11-060 further states that "the committee will consist of six members, three representatives from the Homer City Council (to be appointed by the Mayor and approved by the Council), the Harbormaster, and two members from the Port and Harbor Advisory Commission (to be selected by the Port and Harbor Advisory Commission)." You have asked whether two committee members may be selected by the Port and Harbor Advisory Commission without appointment by the Mayor and confirmation by the Council. I conclude that all committee members should be subject to appointment by the Mayor and confirmation by the Council.

To respond to your question I also have needed to address other questions regarding the establishment of the committee and the selection of its members.

The first question is whether AS 29.20.320 applies to the establishment of the committee and the selection of its members. AS 29.20.320 provides:

29.20.320. Other boards and commissions. (a) The governing body may by ordinance establish advisory, administrative, technical, or quasi-judicial boards and commissions.

(b) Members of boards and commissions, except for members of the board of adjustment and assembly members serving on the board of equalization, are appointed by the mayor and confirmed by the governing body.

Resolution 11-060 establishes a "committee," rather than a "board" or a "commission." Nonetheless, I conclude that AS 29.20.320 governs the establishment of the committee and the selection of its members, because the term "boards and commissions" in AS 29.20.320 is intended to encompass all deliberative bodies that the City may create. Although a deliberative body sometimes is called a "committee" or "task force" or the like, rather than a "board" or "commission," the designation of a deliberative body by a name other than "board" or "commission" does not exempt the body from the requirements of AS 29.20.320. AS 29.20.320 comprehensively identifies boards and commissions by their functions, rather than by the titles assigned to them. AS 29.20.320(a) refers to bodies whose functions are "advisory, administrative, technical, or quasi-judicial." Thus, even if a body's function is advisory only, it is a "board" or "commission" for the purposes of AS 29.20.320, regardless of the name assigned to it.

While it is not clear that AS 29.20.320(a) mandates that the Council establish a deliberative body only by ordinance, using an ordinance avoids uncertainty regarding the validity of the establishment of a deliberative body, which is particularly important if the body has regulatory or quasi-judicial powers. AS 29.20.320(a) states that the governing body "may by ordinance" establish boards and commissions. While the Alaska Supreme Court has stated that the phrase "may...by ordinance" in another section of Title 29 is permissive, and does not preclude action by means other than an ordinance, that discussion is hypothetical only, and occurs in a context significantly different than that of AS 29.20.320(a).¹ Therefore, I recommend that all boards and commissions, particularly those with regulatory or quasi-judicial functions whose actions are intended to have the force of law, should be established by ordinance.

AS 29.20.320(b) clearly requires that members of boards and commissions, excepting only the board of adjustment and board of equalization, be appointed by the Mayor and confirmed by the Council. This appointment and confirmation process should be applied to all members of the committee, regardless of its designation by a name other than "board" or "commission."

Please let me know if I may be of further assistance in this matter.

¹ *Interior Cabaret, Hotel, Restaurant & Retailers Ass'n. v. Fairbanks North Star Borough*, 135 P.3d 1000, 1004-1005 (Alaska 2006).