



	Approved	Denied
Action taken		1/24/05
Other:		
Verified by:	[Signature]	

WASILLA CITY COUNCIL ACTION MEMORANDUM

AM No. 05-01

TITLE: COUNCIL MEMBER USE OF TELECONFERENCING FOR A FORM OF PARTICIPATION DURING COUNCIL MEETINGS.

Agenda of: January 24, 2005

Date: January 17, 2005

Originator: Rob Sande, Council Member

Route to:	Department	Signature/Date
X	Rob Sande, Council Member	[Signature]
X	Finance *signature required	[Signature]
X	Clerk	[Signature]

REVIEWED BY MAYOR DIANNE M. KELLER: [Signature]

FISCAL IMPACT: yes\$ or no

Funds Available yes no

Account name/number:

Attachments:

SUMMARY STATEMENT:

Council Member Diana Straub recently began working for Representative Mark Neuman in Juneau. During her employment, she will be living in Juneau until the legislative session adjourns.

At the December 13, 2004, regular council meeting, she stated that she plans on teleconferencing five regular meetings during her absence and be in attendance for five regular council meetings.

WMC 2.04.070.C. states "Teleconferencing may be used for all lawful activities of the city and, if all voting individuals have an opportunity to evaluate all testimony and evidence, to vote on actions. **Teleconferencing may not be used as a regular form of participating for regular meetings of the council.**"

In regard to the last line of WMC 2.04.070.C, I request that Council hold a discussion pertaining to what "regular form of participation" means and evaluate the code to

determine if Council Member Straub is within the rights of participating at regular and special meetings and work sessions by teleconference during her absence from the city.

STAFF RECOMMENDED ACTION:

If after Council discussion it is determined that Council Member Straub's participation conflicts with Wasilla Municipal Code, Council requests and accepts the immediate resignation of Council Member Straub for Council Seat B.

LAW OFFICES

BIRCH, HORTON, BITTNER AND CHEROT

1127 WEST SEVENTH AVENUE • ANCHORAGE, ALASKA 99501-3399 • TELEPHONE (907) 276-1550 • (800) 478-1550 • FACSIMILE (907) 276-3680

HAL R. HORTON (1944 - 1998)

RONALD G. BIRCH**
WILLIAM H. BITTNER
KATHRYN A. BLACK
SUZANNE CHEROT
SABRINA L. DENNIS**
KIMBERLY A. DOYLE
KATHLEEN TOBIN ERB
MARK E. FINEMAN, P.E.
DOUGLAS S. FULLER*

MAX D. GARNER
GRETCHEN L. GASTON†
DAVID KARL GROSS
TINA M. GROVIER
PATRICIA M. HARDINA
WILLIAM P. HORN*
STEPHEN H. HUTCHINGS
ROY S. JONES, JR.*

DANIEL C. KENT
THOMAS F. KLINKNER
HARVEY A. LEVIN†
STANLEY T. LEWIS
GREGORY A. MILLER
MICHAEL J. PARISE
TIMOTHY J. PETUMENOS
ELISABETH H. ROSS**

JENNIFER C. ALEXANDER, OF COUNSEL

* D.C. BAR
** D.C. AND ALASKA BAR
† MARYLAND BAR
‡ VIRGINIA BAR
ALL OTHERS ALASKA BAR

1155 CONNECTICUT AVE., N.W.
SUITE 1200
WASHINGTON, D.C. 20036
(202) 658-5800
FACSIMILE (202) 658-1027

WRITER'S DIRECT DIAL (907) 263-7268 • FAX (907) 276-3680 • tklinkner@bhb.com

January 19, 2005

via EMAIL and FIRST CLASS MAIL

Mayor and Members of the City Council
City of Wasilla
290 East Herning Avenue
Wasilla, Alaska 99654

Re: Relocation of City Council Member to Juneau during Legislative Session

Ladies and Gentlemen:

You have asked what legal issues are presented by Council Member Diana Straub's decision to relocate to Juneau during the legislative session in connection with her employment. I conclude as follows:

- Council Member Straub's relocation to Juneau does not cause a forfeiture of her office under AS 29.20.140(a).
- The Council may declare Council Member Straub's office vacant if she is absent from the City for more than 90 calendar days, unless excused by the Council.
- The Council by two-thirds vote may declare Council Member Straub's seat vacant because she no longer physically resides in the City.
- Notwithstanding WMC 2.04.070.C, Council Member Straub may attend Council meetings by teleconference while she is in Juneau.

I. Background.

I understand that Council Member Straub has accepted employment with a member of the State Legislature. Her employment requires that she relocate to Juneau during the months of January through April, plus the first half of the month of May, while the Legislature is in session. She will live in Juneau only in connection with her employment during the legislative session, and intends to return to the City after the session ends. While in Juneau, she will maintain a residence in Wasilla where her family will continue to live during her absence.

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Council Member Straub desires to continue to serve on the Council during the period that she is living and working in Juneau. While she is employed in Juneau, she expects to attend one regular Council meeting per month in person, and to attend the other regular monthly Council meeting by teleconference.

Council Member Straub's relocation to Juneau raises the following issues: (1) whether her relocation causes the forfeiture of her office under AS 29.20.140(a); (2) whether her relocation provides a basis for the Council to declare her office vacant under WMC 2.04.040; and (3) whether she is permitted to attend regular Council meetings by teleconference.

2. *Forfeiture of Office under AS 29.20.140(a).*

AS 29.20.140(a) provides that a Council member who ceases to be a City voter immediately forfeits office. This provision does not apply to Council Member Straub under the facts presented above. Council Member Straub's relocation would cause her to cease to be a City voter only if it resulted in a change in her domicile. Because her domicile remains in the City, her relocation does not cause her to cease to be a City voter, or to forfeit office under AS 29.20.140(a).

A person may vote in a City election only if the person has been a resident of the City for 30 days before the election.¹ Thus, a Council member who ceases to be a City resident also ceases to be a City voter, and thereupon immediately forfeits office. There are no criteria in statute, ordinance or court decisions for determining whether a person is a City resident for the purpose of qualification to vote in City elections. Court decisions from other states generally equate residence for the purpose of either voter qualification or qualification for elective office with the concept of domicile.² In general, one's domicile is where one presently resides and intends to remain indefinitely.³ Thus, a person's intent is an important factor in determining domicile.⁴ However, a person's intent concerning domicile is not established only by the person's subjective state of mind -- intent as to domicile also may be inferred from the objective circumstances of a person's living situation.⁵

¹ AS 29.26.050(a)(2).

² 3 McQuillin, Municipal Corporations §§12.06, 12.59.

³ *Perito v. Perito*, 756 P.2d 895, 897-898 (Alaska 1988).

⁴ Restatement (Second) of Conflict of Laws §18.

⁵ 3 McQuillin, Municipal Corporations §§12.06, 12.59.

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The Alaska statutes do include criteria for determining whether a voter resides in a house district for state elections.⁶ While there is no Alaska case authority that applies these criteria to determine whether a person is a resident of a municipality for the purpose of voting in a municipal election,⁷ several of these criteria apply the common law concept of domicile, and by analogy would provide guidance in applying the residence qualification for voting in City elections to the facts presented here:

- Temporary construction camps do not constitute a dwelling place.⁸
- A change of residence is made only by the act of removal joined with the intent to remain in another place. There can only be one residence.⁹
- A person does not lose residence if the person leaves home and goes to another country, state or place in this state for temporary purposes only and with the intent of returning.¹⁰
- A person does not gain residence in any place to which the person comes without the present intention to establish a permanent dwelling at that place.¹¹

I conclude that the domicile concept, as implemented in AS 15.05.020, is the best determinant of a person's residence for the purpose of qualification to vote in City elections. Applying that concept to the facts presented here, it does not appear that Council Member Straub intends to abandon her domicile in the City while working in Juneau. Her relocation is temporary, and for the specific purpose of employment. Once this purpose has been accomplished, it appears that she intends to return to the City. Therefore, I conclude that by temporarily relocating to Juneau under the facts presented here Council Member Straub does not cease to be a City voter, and will not forfeit her office under AS 29.20.140(a).

⁶ AS 15.05.020.

⁷ Indeed, one case specifically states that AS 15.05.020(10), which provides that a voter's address appearing on an official voter registration card is presumptive evidence of voting residence, does not apply to municipal elections. *Miller v. North Pole City Council*, 532 P.2d 1013, 1017, n. 10 (Alaska 1975).

⁸ AS 15.05.020(2).

⁹ AS 15.05.020(3).

¹⁰ AS 15.05.020(4).

¹¹ AS 15.05.020(5).

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3. *Declaring a Council Member's Seat Vacant.*

A. *Introduction.*

AS 29.20.170 permits the City to determine by ordinance the manner in which a vacancy occurs on the Council. As authorized by AS 29.20.170, WMC 2.04.040.A determines the manner in which a vacancy occurs on the Council, with the following provisions relevant to the present situation:

A. The council shall declare a council seat vacant when the person elected:

* * *

2. Is physically absent from the municipality for ninety (90) calendar days unless excused by the council;

* * *

8. No longer physically resides in the city and the governing body by two-thirds votes declares the seat vacant, except that if a council member ceases to be a voter in the city, the member immediately forfeits the office;

* * *

The grounds in WMC 2.04.040.A for declaring a seat on the Council vacant are very similar to corresponding grounds in AS 29.20.170 that would apply if the City had not adopted an ordinance to determine the manner in which a vacancy occurs on the Council. Thus, those grounds will be interpreted to be consistent with the provision in AS 29.20.140(a) for forfeiture of office upon ceasing to be a City voter.¹²

Since AS 29.20.140(a) already addresses the consequences of a Council member's ceasing to maintain a domicile in the City, the provisions for the vacation of a Council member's seat upon the Council member's physical absence from the City for 90 calendar days under WMC 2.04.040.A.2, or upon the Council member's ceasing to physically reside in the City under WMC 2.04.040.A.8, must refer to a change in physical location rather than a change of domicile. WMC 2.04.040.A.8 also supports this interpretation by explicitly contrasting ceasing to physically reside in the City with forfeiting office by ceasing to be a voter in the City.

¹² AS 29.20.140(a) and AS 29.20.170 both were enacted as part of the revision of Title 29 of the Alaska Statutes that was adopted in 1985, and deal with related subjects. Thus, a court would construe these statutes together, so that all of their provisions have meaning and no provision conflicts with another. *See, Bullock v. State, Dept. of Community and Regional Affairs*, 19 P.3d 1209, 1214-1215 (Alaska 2001).

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B. *Physical Absence from the City for 90 Days.*

While living and working in Juneau, Council Member Straub would be “physically absent” from the City even though she has not changed her domicile. Thus, the Council could declare her seat vacant under WMC 2.04.040.A.2 upon her unexcused physical absence from the City for the required 90-day duration, even if she continues to maintain her domicile in the City, and continues to be a City voter. This authority is discretionary. While the initial clause in WMC 2.04.040.A states “the council *shall* declare a council seat vacant...,” the reference to excused absences in WMC 2.04.040.A.2 indicates that the authority to declare an office vacant under this provision must be discretionary.

Applying WMC 2.04.040.A.2 to Council Member Straub’s situation raises two additional questions. The first is whether Council Member Straub’s physical absence from the City has been excused. The second is whether WMC 2.04.040.A.2 applies only if her 90 days of physical absence occurs within some particular period of time.

Being excused by the Council under WMC 2.04.040(2) consists of two elements. One element is the act of excusing the absence. A court has stated that, “‘excused’ in this context seems clearly to imply a valid action properly taken by a person or body having the power to authorize an absence, be it the formal grant of a leave of absence or a more informal permission to be temporarily absent.”¹³ Under WMC 2.04.040(2), the person or body having the power to authorize a council member’s physical absence from the City is the Council. Thus, for a particular absence to be excused under WMC 2.04.040(2), the Council must act affirmatively (for example, by motion) to excuse the absence. The other element in determining whether an absence is excused is deciding whether the circumstances warrant excusing a particular absence.

The case law indicates that a standard of reasonableness governs the Council’s decision whether to excuse an absence. An excusable absence “is one...which is both a matter of reasonable necessity from the point of view of the officer and at the same time not unduly prejudicial to the public.”¹⁴ Thus, determining whether to excuse an absence “depends entirely on the particular circumstances and a balancing of the reasonableness of the conduct of the officer in view of the demands of the public.”¹⁵ In determining whether to excuse Council Member Straub’s absence, the Council must balance her need to be in Juneau to pursue her

¹³ *Golaine v. Cardinale*, 361 A.2d 593, 599 (N.J. Super., 1976).

¹⁴ *Id.*

¹⁵ *Golaine*, 361 A.2d at 600.

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employment against any prejudice to the performance of her duties that would result from her absence.¹⁶

It is unclear whether the 90 days of absence described in WMC 2.04.040(2) must occur within any particular period of time. AS 29.20.170(2), from which WMC 2.04.040(2) is derived, includes the following variation in wording from the ordinance provision:

2. is physically absent from the municipality for 90 *consecutive* days unless excused by the governing body;
(Emphasis added)

The word "consecutive" was omitted from WMC 2.04.040(2). However, without some limitation on the duration in which a 90-day absence must occur, a Council member's office could be vacated if the Council member simply took a month's vacation in each year of the member's three-year term. At a minimum, we can be sure that WMC 2.04.040(2) authorizes the declaration of a vacancy in a Council member's office if the Council member is absent without excuse for 90 consecutive days. It remains unclear how to apply WMC 2.04.040(2) to a series of shorter absences that total 90 days or more.

C. No Longer Physically Resides in the City.

Under the facts presented here, I conclude that Council Member Straub "no longer physically resides" in the City while living and working in Juneau, even though she has not changed her domicile, and continues to be a City voter. Thus, WMC 2.04.040.A.8 would authorize the Council, by a two-thirds vote, to declare Council Member Straub's seat vacant. However, I also conclude that this authority is discretionary. While the initial clause in WMC 2.04.040.A states "the council *shall* declare a council seat vacant...", the two-thirds vote requirement in WMC 2.04.040.A.8 indicates that the authority to declare an office vacant under this provision must be discretionary.

4. Attending Meetings by Teleconference.

While employed in Juneau, Council Member Straub intends to attend one regular Council meeting per month by teleconference. WMC 2.04.070.C states terms under which a Council member may attend a meeting by teleconference:

C. Teleconferencing may be used for all lawful activities of the city and, if all voting individuals have an opportunity to

¹⁶ *Golaine*, 361 A.2d at 600-601.

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evaluate all testimony and evidence, to vote on actions.
Teleconferencing may not be used as a regular form of participating for regular meetings of the council. (Emphasis added)

This provision raises the question whether Council Member Straub's proposed attendance of regular Council meetings by teleconference would be a prohibited use of teleconferencing "as a regular form of participating" in regular Council meetings.

The Wasilla Municipal Code does not describe what constitutes a regular form of participating in regular Council meetings for the purpose of this provision. A dictionary definition of "regular" includes the following meanings that pertain to this issue:

Customary, usual or normal...Conforming to set procedure, principle or discipline...Occurring at fixed intervals; periodic.¹⁷

Council Member Straub's proposal to attend alternate regular council meetings by teleconference during a period of four and one-half months might well be considered to be "conforming to set procedure" or "occurring at fixed intervals," and thus to be a "regular form of participating" proscribed by WMC 2.04.070.C.

However, the prohibition in WMC 2.04.070.C on using teleconferencing "as a regular form of participating for regular meetings of the council" appears to be preempted by state law. AS 29.20.020 provides in part that the "[m]eetings of all municipal bodies shall be public as provided in AS 44.62.310." It appears that AS 29.20.020 prohibits the City from adopting open meetings procedures that differ from those in AS 44.62.310, the state Open Meetings Act.¹⁸ AS 44.62.310(a) provides that "[a]ttendance and participation at meetings by members of the public or by members of a governmental body may be by teleconferencing." The policy of the Open Meetings Act supports the availability of teleconferencing for the convenience of meeting participants. 44.62.312(a)(6) states that, "[i]t is the policy of the state that...the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings." AS 29.20.020 thus appears to require that Council members be permitted to attend Council meetings by teleconferencing without the restriction on regular attendance by teleconferencing that is imposed by WMC 2.04.070.C.

¹⁷ The American Heritage Dictionary of the English Language (1979), p. 1096.

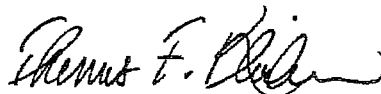
¹⁸ See, *Walleri v. City of Fairbanks*, 964 P.2d 463, 467 (Alaska 1998) (limitation on executive sessions in city charter is preempted by broader authorization for executive sessions in AS 44.62.310).

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

Yours truly,

BIRCH, HORTON, BITTNER and CHEROT



Thomas F. Klinkner

TFK/cm