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MEMO

TO: City of Saint Paul

FROM: Ashburn & Mason, P.C.

DATE: December 8, 2022

SUBJECT: Executive Session and Acting Appointments

I. QUESTIONS PRESENTED

- A. What is the function and proper scope of a meeting in executive session under Alaska’s Open Meetings Act and the Saint Paul Code of Ordinances (“Code” or “SPCO”)?
- B. How does the Code treat acting appointments, and is it appropriate for high-level officials to serve in an acting capacity in other roles?

II. SHORT RESPONSE

- A. The function of an executive session is to allow a governmental body like the Saint Paul City Council to discuss certain sensitive subjects, which are specifically enumerated in Alaska’s Open Meetings Act and the Code, outside of public view; the scope of discussions in executive sessions is strictly limited to topics that are both legally permissible and expressly approved for discussion by motion during a public meeting.
- B. The Code is silent regarding acting appointments, and acting appointments are implicitly permitted; government officials commonly serve in an acting capacity in other roles.

III. DISCUSSION

- A. Alaska’s Open Meetings Act and Executive Session

As a general rule, the public business of political subdivisions of the State of Alaska, such as second-class cities, must be conducted in public meetings following a proper notice advising the public that there will be a meeting regarding matters of public concern. This rule is established by statute—the Open Meetings Act (“OMA”).¹ There is a way for public bodies to conduct business in private without violating Alaska law: Meetings in executive session are permitted, but public policy disfavors conducting public business in private, and courts strictly construe the statutory requirements for holding meetings in executive session.²

If a governmental body, or members thereof, conduct public business in a manner contrary to what OMA requires, the actions taken are voidable, and the governmental body will, at the very least, need to convene again for a properly-noticed public meeting to achieve what it attempted to accomplish without the opportunity for the public to observe and provide input.

1. *Alaska’s Open Meetings Act*

Alaska law requires that meetings of government agencies and entities be conducted in public.³ This mandate is codified in the OMA, which provides that “[a]ll 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.”⁴ The Council of the City of Saint Paul (“Council”) is a governmental body of a public entity subject to the Open Meetings Act.⁵

The definition of “meeting” under the OMA is broad—essentially, whenever more than three members of a governmental body, or a majority, whichever is less, convene to discuss matters upon which the governmental body is empowered to act, a meeting occurs.⁶ In Saint Paul’s case, there are seven councilmembers, so whenever four or more

¹ AS 44.62.310; *Cool Homes v. Fairbanks N. Star Borough*, 860 P.2d 1248, 1261 (Alaska 1993) (stating that “the people’s right to remain informed shall be protected so that they may retain control over the instruments they have created.” (quoting AS 44.62.312(a)(5))).

² AS 44.62.310(b); *Ramsey v. City of Sand Point*, 936 P.2d 126, 133 (Alaska 1997).

³ AS 44.62.310(a); *Hickel v. Se. Conference*, 868 P.2d 919, 928 (Alaska 1994) (discussing that “the principle underlying the Open Meetings Act and the public Records Act: open decision-making is one of the essential aspects of the democratic process”); see also *A Primer for City Council Members* (“Primer”) at 12–13 (“The State of Alaska Open Meetings Act (AS 44.62.310) says that all meetings of a governmental body of a public entity (including city councils) are open to the public.”).

⁴ AS 44.62.310(a).

⁵ AS 44.62.310(h)(1), (3).

⁶ AS 44.62.310(2).

councilmembers meet and discuss public business that the council could take action on, OMA applies.⁷

The essential requirements of the OMA are that meetings be properly noticed⁸ and held in public.⁹ Pursuant to the OMA and Alaska case law interpreting it, there is strong public policy in favor of open public process for matters of public concern.¹⁰ Accordingly, when meetings of governmental bodies are held in private without proper notice, there is a statutory mechanism that makes any of the actions taken at the non-compliant meeting voidable.¹¹ It is possible to cure the violation by undertaking to take the same action at a later, properly-noticed meeting open to the public, but if voided via a judicial action, actions undertaken at a non-compliant meeting will have no further force or effect unless cured through this process.

Despite Alaska's public policy favoring public meetings, the legislature recognized that there are certain matters that may need to be discussed outside of public view. Thus, it included an exception in OMA to the general rule of openness that allows for certain matters to be discussed in private in executive session.¹²

2. *Executive Session*

Executive sessions must begin with a properly-noticed public meeting.¹³ At a public meeting that otherwise complies with the OMA, the members of the governmental body may enter into a private executive session by a motion that passes by majority vote.¹⁴ “The motion to convene in executive session must clearly and with specificity describe the

⁷ Primer at 12 (“Under [OMA], a meeting is defined as a gathering of more than three members, or a majority of the members of the governing body, whichever is less. Therefore, public officials should exercise caution when engaged in discussion among themselves of issues outside of any publicly noticed meeting. This kind of discussion has been, and can be, construed as violating [OMA].”).

⁸ AS 44.62.310(e) (“Reasonable public notice shall be given for all meetings required to be open under this section. The notice must include the date, time, and place of the meeting and, if the meeting is held by teleconference, the location of any teleconferencing facilities that will be used. Subject to posting notice of a meeting on the Alaska Online Public Notice System as required by AS 44.62.175(a), the notice may be given using print or broadcast media. The notice shall be posted at the principal office of the public entity or, if the public entity has no principal office, at a place designated by the governmental body. The governmental body shall provide notice in a consistent fashion for all its meetings.”).

⁹ AS 44.62.310(a); *Gold Country Estates Pres. Grp., Inc. v. Fairbanks N. Star Borough*, 270 P.3d 787, 795 (Alaska 2012).

¹⁰ *E.g., Hickel v. Se. Conference*, 868 P.2d 919, 928 (Alaska 1994).

¹¹ AS 44.62.310(f); *Cool Homes v. Fairbanks N. Star Borough*, 860 P.2d 1248, 1260 (Alaska 1993).

¹² AS 44.62.310(b).

¹³ AS 44.62.310(b).

¹⁴ AS 44.62.310(b).

subject of the proposed executive session without defeating the purpose of addressing the subject in private.”¹⁵ The only topics that may be discussed in the executive session are those specifically mentioned in the motion.¹⁶

Under the OMA, “[t]he 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) matter 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.”¹⁷

So, under the OMA, four or more members of the Council may discuss topics of public concern that fall within the subject matter listed in (1)–(4) outside of public view, but before that can happen, there must be a public meeting where there is a motion to enter into executive session to discuss, the topic or topics to be discussed are defined with sufficient specificity, and the motion passes by majority vote.

In addition to being subject to the rules governing executive session under the OMA, the Council of the City of Saint Paul is also subject to Saint Paul’s own ordinance governing executive sessions that largely mirrors the OMA codified as Saint Paul City Ordinance (“SPCO”) 2.15.140. The only material difference is that it grants an additional right to a person who may be discussed in executive session under AS 44.62.310(c)—in addition to the right to be noticed that the Council intends to discuss matters which may prejudice the reputation and character of the person in executive session and the right to request a public hearing, as provided for in the OMA, SPCO 2.15.140 expressly mandates that the discussion must occur in public, if the person so requests.

Once in executive session, a public body like the Council must avoid straying away from the topics of discussion that were publicly approved via motion.¹⁸ For example, if Saint Paul is facing a potential legal liability and there is a motion at a public Council meeting to discuss the liability in private in executive session, the Council may not veer into a discussion about a proposed ordinance unrelated to the legal issue. If it were to do

¹⁵ AS 44.62.310(b); *Ramsey v. City of Sand Point*, 936 P.2d 126, 133 (Alaska 1997)

¹⁶ *Stauffenberg v. Comm. for an Honest & Ethical Sch. Bd.*, 903 P.2d 1055, 1056 n.2 (Alaska 1995)

¹⁷ AS 44.62.310(c).

¹⁸ *Univ. of Alaska v. Geistauts*, 666 P.2d 424, 427 n.2 (Alaska 1983); SPCO 2.15.140(a).

so and then vote on and pass the ordinance when back in public session without apprising the public of the contents of the discussion in executive session, the ordinance would be voidable and exposes Saint Paul to litigation and related costs.

Though the Council is permitted to discuss the topics approved in the motion for executive session in the session, it cannot take any action on them out of public view.¹⁹ For another example, if the Council is concerned about an appointive employee of the City of Saint Paul because of an issue that may negatively affect that employee's reputation, it may discuss the matter in executive session, assuming the employee is provided notice of the executive session and is given an opportunity to request that the discussion be public. However, it cannot take any action regarding that person's employment in executive session. If the Council decides that action is necessary, it must take that action when it reconvenes in public session.

B. Acting Appointments Under the Saint Paul Code of Ordinances

The Council is responsible for two appointive positions: (1) a city manager; and (2) a city clerk.²⁰ The City Manager ("Manager") is then responsible for appointing "the Finance Director, Director of Public Safety/Chief of Police, and attorneys as necessary."²¹

The Manager's duties are laid out in SPCO 2.20.040:

- (a) Appoint, suspend, or remove City employees and administrative officers, except for the City Clerk or officers appointed by Council;
- (b) Supervise enforcement of City laws and carry out directives of the City Council;
- (c) Prepare and submit the annual budget and capital improvement program to the Council;
- (d) Execute the budget and capital program as adopted;
- (e) Make monthly financial and other reports to the Council on City finances and operations;
- (f) Report to the Council at the end of each fiscal year on the finances and administrative activities of the City;

¹⁹ *Id.*; AS 44.62.310(b).

²⁰ SPCO § 2.20.010.

²¹ SPCO § 2.20.010.

(g) Prepare and make available for public distribution an annual report on City affairs;

(h) Execute other powers and duties specified in this title or lawfully prescribed by the Council.

The Manager answers to the Council and is tasked with managing public safety, enforcing the law, including executing directives of the Council, and managing and executing the budget. Consistent with those responsibilities, as stated above, the Manager is tasked with appointing the Director of Public Safety/Chief of Police (“Director”) and the Finance Director. As further explained below, the SPCO permits the Manager to appoint persons to those roles in an acting capacity.

1. *The Saint Paul Code of Ordinances Is Silent Regarding Acting Appointments*

The SPCO does not distinguish between regularly-appointed officials and officials serving in an acting capacity. As SPCO is silent on the issue, whether it is possible for person to serve in a higher-level appointive role in an acting capacity depends on the specific code provisions governing that role and how the entity or person empowered to appoint the position approaches the issue.

For example, the City Clerk serves at the pleasure of the Council.²² This means that the City Clerk is an at-will employee and can be terminated at any time by the Council without cause.²³ The Council is thus free to appoint a City Clerk in an acting capacity so that that the essential functions of the City Clerk can be performed while the Council searches for a person to serve in a longer-term capacity. The Council could also appoint a city manager in an acting capacity, but it would have to be handled differently.

SPCO 2.20.020(a) provides: “The City Manager’s term shall be set by the City Council and be established in an employment agreement.” Thus, whereas the Council is free to simply designate a city clerk as “acting,” if it wishes to appoint a city manager in an acting capacity, it must specify a definite, and likely short but renewable, term of employment in an employment agreement that states that the Manager is serving in an acting capacity.

These same principles apply to the Manager’s ability to appoint a finance director or police chief in an acting capacity. With respect to the Director, SPCO 8.05.020 provides:

²² SPCO 2.20.020(a).

²³ *Ramsey v. City of Sand Point*, 936 P.2d 126, 132 (Alaska 1997) (“A public employee who serves at the pleasure of his employer can have no expectation of continued employment and therefore does not have a property interest in his job.”).

The Director of Public Safety shall be the head of the Department of Public Safety. The Director of Public Safety is an administrative officer of the City appointed by the City Manager and removable by the City Manager.

This means that the Director, like the City Clerk, is an at-will employee, and the Manager has wide discretion to appoint and remove the person serving in the role. As such, the Manager is free to appoint a Director on an acting basis; indeed, pursuant to the Manager's fiscal responsibilities, the Manager may deem it necessary to appoint a Saint Paul official already serving in another role as Acting Director for budgetary reasons.²⁴

Under the Code, the Director is obligated work closely with the Manager.²⁵ The Director ultimately answers to the Manager, and the Director requires the approval of the Manager for major decisions.²⁶ Although the Code establishes the Director position as separate from the Manager position for a reason, *i.e.*, both positions entail significant responsibilities best managed by two persons, there are natural efficiencies associated with combining the Manager and Director roles when budgetary constraints prevent filling both positions.

And as the Manager is ultimately responsible for managing Saint Paul's budget and overseeing the Director and the Department of Public Safety,²⁷ the Manager is well-situated to determine that it is in Saint Paul's best interests to serve as Acting Director until the budget allows the position to be filled. By unifying those particular positions, more efficiencies are gained than, say, if the Council were to appoint the Manager as Acting City

²⁴ Pursuant to SPCO 2.20.040(a), the Manager has broad authority to “[a]ppoint, suspend, or remove City employees and administrative officers, except for the City Clerk or officers appointed by Council.” Accordingly, although there are no Code ordinances that specifically govern positions such the Saint Paul Public Works Director, the Manager has the inherent authority under the Code to appoint an acting or temporary Public Works Director, or any other City position except for the City Clerk or other officers appointed by the Council, either for budgetary reasons, or any other reason reasonably related to the Manager's ethical obligations under the Code to prudently execute the duties of the chief executive of Saint Paul.

²⁵ *See, e.g.*, SPCO 8.05.030(a) (establishing that Director is to “[c]arry out the duties and responsibilities of the Department [of Public Safety] under the supervision and control of the City Manager”); SPCO 8.05.030(c) (establishing that the Director is to “[s]elect all Department employees, but all such appointments and the number thereof shall require the prior written approval of the City Manager” and has the authority to fire employees “with the prior written approval of the City Manager”); SPCO 8.05.030(i) (establishing that the Director is to “[d]evelop and maintain service data and prepare for analysis and reporting to the City Manager and City Council and recommendations for Department funding and planning”).

²⁶ *See generally* SPCO 8.05.030.

²⁷ SPCO 2.20.040.

Clerk, as the Manager saves the time that would ordinarily be expended overseeing and approving actions of the Director.

2. Higher-Level Officials May Serve in an Acting Capacity for Other Roles

A review of Alaska case law demonstrates that it is not unusual for a mayor or city manager to appoint a police chief on an acting basis or for higher-level public officials to serve in other official positions on an acting basis.²⁸ This is also true throughout the United States.²⁹ Although as discussed above, the SPCO does not expressly provide for acting appointments, it implicitly allows for appointive positions to be filled on an acting basis so long as the other requirements of the code are fulfilled. In addition to the examples from Alaska and other states cited below, federal law expressly contemplates that positions will from time-to-time need to be fulfilled on an acting basis. The Federal Vacancies Reform Act (the “Vacancies Act”) of 1998 discusses who may serve in an acting capacity, and when.³⁰

Two things are notable about the Vacancies Act with respect to the question of whether Saint Paul appointive officials may take on dual roles at the discretion of the person or entity responsible for appointing the vacant appointive position in question. First, it permits senior level officials to serve in an acting capacity.³¹ Second, and more importantly, courts typically hold that the Vacancies Act does not apply to the extent that the duties of the vacant position are delegable.³² In other words, unless the duties of the vacant position must be performed by someone in that position, whether in an acting or more long-term capacity, the position’s duties may be delegated to other government officials.

²⁸ See, e.g., *City of Fairbanks v. Rice*, 20 P.3d 1097 (Alaska 2000) (**discussing that the Fairbanks police chief was simultaneously serving as city manager in an acting capacity**); *Okpik v. City of Barrow*, 230 P.3d 672, 677 (Alaska 2010) (discussing that the mayor of the City of Barrow’s appointment of an acting finance director).

²⁹ *Murphy v. Luongo*, 338 N.J. Super. 260, 268, 768 A.2d 814, 818 (Super. Ct. App. Div. 2001) (**holding that a New Jersey mayor had the “inherent authority to appoint” an acting police chief on an interim basis in the absence of any contrary legal authority**); *Bedinghaus v. Moscow*, 41 Ohio Misc. 2d 1, 5, 536 N.E.2d 58, 63 (Ct. Com. Pl. 1987) (discussing that the mayor of a village in Ohio had authority to appoint a police chief on acting basis); *Kimber v. Dominguez*, No. : NNH-CV-22-6120210, 2022 Conn. Super. LEXIS 452, at *1 (Super. Ct. Apr. 25, 2022) (discussing that a Connecticut mayor had the authority to appoint an acting police chief); *Capibianco v. Civil Serv. Com.*, 60 N.J. Super. 307, 311, 158 A.2d 834, 837 (Super. Ct. App. Div. 1960); *Kimber v. Dominguez*, No. : NNH-CV-22-6120210, 2022 Conn. Super. LEXIS 452, at *1 (Super. Ct. Apr. 25, 2022).

³⁰ 5 U.S.C. § 3345 *et seq.*

³¹ 5 U.S.C.S. § 3345(a).

³² See, e.g., *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1336 (Fed. Cir. 2022); Guidance on Application of Fed. Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 72 (1999).

Although the Vacancies Act governs federal agencies and does not control what happens in Saint Paul, it illustrates that acting appointments are so common within governmental agencies that there is a federal statute governing procedures for vacancies and acting appointments, and that federal law expressly provides that it is appropriate to delegate the duties of the vacant position where practicable.

With respect to Saint Paul, the SPCO does not prohibit the Manager from appointing a Director in an acting capacity, nor does it prohibit the Manager from appointing himself to that role. And as the Manager is responsible for the financial health of the community, it is consistent with the Manager's legal obligations to appoint himself as Director on a non-permanent basis where Saint Paul's resources do not reasonably permit hiring a Director. Another way of looking at it is the Director's responsibilities are delegable, and it is logical to delegate those responsibilities to the person who is ultimately responsible for the Director's decisions—the Manager.³³

³³ The Manager's power here as the chief executive of Saint Paul to determine that it is most cost effective to delegate the Director's duties to himself is checked by the Council, as the Manager serves at the pleasure of the Council. *See, e.g.*, Primer at 22 ("Cities may have either a mayor as chief executive, or a manager form of government. With the manager form of government, AS Title 29 grants the manager the executive authority to run the operations of the city. . . . The manager is hired by and serves at the pleasure of the [C]ouncil.").