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MEMORANDUM

TO: Alice Ruby, Mayor

CC: Dillingham City Council

FROM: Sam Severin & Robert Palmer, Attorneys for City

RE: Mayor voting

DATE: June 10, 2025

You asked for a legal opinion to clarify when you can vote. A city council functions best when all members are present and vote. However, when faced with council member absences or abstentions and when required to adopt legislation by statute (and local code), an Alaska mayor may declare a tie and vote.

Background. At the regular Council meeting on June 5, 2025, we understand (i) a motion to set the budget ordinance (Ord. 2025-01) for introduction and public hearing failed and (ii) a motion to adopt the resolution establishing the mill rate (Res. 2025-20) also failed. Both had three votes in favor, two against, and one councilmember was absent. As provided in greater detail in other memos, the Council is required to appropriate funds for a budget by June 30 and establish the mill rate by June 15.[1]

Mayor's ability to vote. The Mayor can only vote in the case of a tie.[2] The question then turns to what is a tie? In a six-member body, a 3-3 vote is clearly a tie. But what about when there are three "yes" votes but only two "no" votes cast because a member is absent: can the Mayor vote? Or, when a council member abstains from voting, can that create a tie? For the purposes of mayoral voting, a tie can exist in a variety of situations including when a member is absent and the vote is 3-2.

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[1] AS 29.35.100(a) (appropriate funds for budget); DMC 4.12.050 (requiring budget to be adopted by June 30); AS 29.45.240(b) ("A municipality shall annually determine the rate of levy before June 15."); DMC 4.15.020(B) (same).

[2] AS 29.20.250(b) ("The mayor may take part in the discussion of a matter before the governing body. The mayor may not vote, except that the mayor of a first class city or the mayor of a borough with a manager form of government may vote in the case of a tie."); AS 29.20.130 (describing a city council as a six members); AS 29.71.800 (defining "council" as the governing body of the city and "governing body" as the legislative body of a municipality that is the council for a city); DMC 2.18.030(A); DMC 2.09.160(C) & (D) ("D. Four affirmative votes are required for the passage of an ordinance, resolution or motion.").

First, a tie can exist when the mayor's vote affects the results.[3] A 1948 Alaska case, *In Re Kaye*, exemplifies this rule. In *Kaye*[4] the Territory of Alaska Federal District Court was asked whether a mayor—who could only vote in case of a tie—could vote when a six-member council was divided 3-2 because one member was absent and four votes were required to enact legislation. The applicable statute stated that the mayor "shall have authority to vote only in case of a tie." The court concluded the Mayor of Fairbanks could vote because the 3-2 vote of the six-member council prevented passage or rejection of the matter, so a tie existed. The current statute on mayoral voting, AS 29.20.250(b), continues the same substantive language as the territorial statute at issue in *Kaye*.

Second, since the *Kaye* decision, the Alaska Legislature partially clarified other municipal parliamentary procedures regarding vote counting. Under AS 29.20.160(d) all members are counted, which means abstentions and absent members are treated like "no" votes for the purposes of determining whether a majority vote or a tie exists:

> Actions of a governing body are adopted by a <u>majority of the total membership of the body</u>. Each member present shall vote on every question, unless required to abstain from voting on a question by law. The final vote of each member on each ordinance, resolution, or substantive motion shall be recorded <u>"yes" or "no"</u>, except that if the vote is unanimous it may be recorded "unanimous."[5]

In many parliamentary bodies, an action is carried if the majority of votes cast are "yes." Under that voting system, a member not voting has a consequence that is different from a member who votes "no" because casting a "no" vote means that the action requires an additional "yes" vote to pass.[6] This is not the case for many Alaska city councils.

In Alaska, the number of "yes" votes required remains the same regardless of the number of "no" votes, abstentions, and absences. Because of the language in AS 29.20.160(d), an action carries only if it receives "yes" votes from a majority of the total

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[3] AS 29.20.160(f) (a municipality may determine rules of procedure and order of business); DMC 2.09.090(A) (adopting Robert's Rules of Order (RRO) except as modified by the Council); RRO 44:12 (the presiding officer can, but is not obliged to, vote whenever his vote will affect the result—that is, he can vote either to break or to cause a tie).

[4] *In re Kaye*, 11 Alaska 556, 559 (D. Alaska 1948).

[5] AS 29.20.160(d).

[6] *E.g.*, RRO 44:1 (when the term *majority vote* is used without qualification, it means more than half of the votes cast by persons entitled to vote, excluding blanks or abstentions, at a regular or properly called meeting.).

membership. Thus, a member who affirmatively votes "no" is functionally the same as a member who does not vote because the member abstains or is not present. Because of the statutory requirement that actions of a council are adopted by a majority of the total membership of the body, for tie vote tallying purposes, it is more accurate to think of there being two possible actions a council member can take: voting in favor or *not* voting in favor. There is no logical difference between voting "no" and not voting at all. Each of these three actions – an affirmative "no," abstaining, and not attending the meeting – has the same result of a council member not voting "yes." Therefore, each is treated the same for purposes of determining whether a tie exists.

From a policy perspective, AS 29.20.160(d) incentivizes council members to fulfill their elected duty to attend council meetings and vote. The following demonstrates why a 3-2 vote with one absent member must be considered a tie that the mayor can break.

> *Example.* If all six council members attend a meeting and three vote "yes" and three vote "no," a tie clearly exists and the mayor can vote to decide the matter. However, if one of the members who voted "no" were instead absent or abstained, a 3-2 situation would occur and arguably prevent the mayor from voting. Then, <u>an absent or abstaining member would have more power than if they were present and voted</u>.[7]

Under AS 29.20.160(d), an absence or abstention is treated as an affirmative "no" vote for the purposes of determining a tie and enabling the mayor to vote.[8]

In summary, Council members have a duty to attend Council meetings and vote, and a Council member does not gain voting power by being absent or abstaining. The Mayor can only vote in case of a tie. A tie exists when there are three Council members voting "yes" and three members who do *not* vote "yes." Such a rule allows the Mayor to prevent the breakdown of the legislative process and ensures the City complies with mandatory duties like adopting a budget and fixing the mill rate.

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[7] *See Launtz v. People ex rel. Sullivan*, 113 Ill. 137, 144 (1885) (emphasis added) ("What the propriety of giving to a refusal to vote more potency than to a vote cast?--of allowing a gain from violation of duty, in making the refusing to vote of more effect in governing the action of the body of which one is a member, than voting?").

[8] *Cromarty v. Leonard,* 216 N.Y.S.2d 619, 629 (1961) (concluding without a governing law to the contrary, an abstention was properly counted as a vote against, which triggered a tie)*; Rhinesmith v. Goodfellow*, 111 N.J.L. 604, 607 (1933) ("Their refusal or failure to vote justified recording them in the negative."); *Young v. Yates*, 19 Mont. 239 (1897); *Launtz v. People ex rel. Sullivan*, 113 Ill. 137, 144 (1885).