MUNICIPALITY OF ANCHORAGE
OFFICE OF THE MUNICIPAL ATTORNEY

Memorandum

DATE: November 1, 2021

TO: Anchorage Assembly Leadership

FROM: Patrick Bergt, Municipal Attorney PB

CC: Dave Bronson, Mayor

SUBJECT: Anchorage Municipal Code 3.20.140.A.1.b. and A.1.c.

This memorandum is provided in response to an October 21, 2021 letter from Anchorage Assembly Leadership, through its Chair and Vice Chair, Suzanne LaFrance and Christopher Constant, respectively, to Anchorage Mayor Dave Bronson regarding Anchorage Municipal Code ("AMC") 3.20.140.A.1.b. and A.1.c.

Because Leadership's letter touched on issues related to Municipal Code, Anchorage Charter ("Charter"), and Alaska law, the administration felt a response from the Department of Law was appropriate.

For reasons further explained below, it is the Department of Law's position that, because AMC 3.20.140.A.1.b. and 1.c. create "for cause" protection and durational terms for an executive mayoral appointee, the ordinance clearly violates the Charter and the separation of powers doctrine. The Chief Equity Officer serves at the pleasure of the mayor and, like other at will mayoral executive appointees, s/he can be dismissed for any reason or for no reason at all. The ordinance should be amended to reflect the same.

I. AMC 3.20.140.A.1.b. and 1.c. violate Article 5.02.(a) of Municipal Charter which clearly states that the power to remove mayoral executive appointees is vested in the mayor.

The Alaska Constitution vests "all local government powers" in boroughs and cities.[1] It authorizes the voters of a first class city to adopt a home rule charter and provides that "[a] home rule borough or city may exercise all legislative powers not prohibited by law or by

[1] Alaska Const., art. X, § 2.

charter."[2] As you know, the Municipality of Anchorage ("MOA" or "Anchorage") is a unified home rule municipality with a strong-mayor form of government.[3] Anchorage's executive and administrative power is vested in its mayor and encompasses most municipal departments, agencies, and boards and commissions.[4] The legislative powers of Anchorage's Municipal government are vested in the Assembly.[5] The MOA's system of checks and balances are written into its Charter. As the legislative branch of a home rule municipality, the Anchorage Assembly is legally bound to comply with the terms of the MOA's Charter when enacting ordinances.[6] Accordingly, "an ordinance is invalid if it conflicts with [our] charter."[7]

The MOA's Charter states that:

> The mayor shall appoint all heads of municipal departments, subject to confirmation by the assembly, on the basis of professional qualifications. *Persons appointed by the mayor serve at the pleasure of the mayor*.[8]

Our Charter is plain and unambiguous—executive mayoral appointees[9] serve at the pleasure of the mayor and therefore may be dismissed by the mayor without cause. The express language of our Charter clearly, unequivocally, and unconditionally vests in the mayor the authority to remove mayoral executive appointees for any reason or for no reason. It is also significant that our Charter explicitly limits the mayor's executive

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[2] Alaska Const. art. X, § 11.

[3] Charter, art. III, § 3.01; *see also Area G Home & Landowners Org., Inc. (HALO) v. Anchorage,* 927 P.2d 728, 729 (Alaska 1996).

[4] Charter, art. V; AS 29.20.220 and .250.

[5] Alaska Const., art X, § 4; Charter art. IV, § 4.01.

[6] Alaska Const., art. X.

[7] *Canfield v. Sullivan*, 774 F.2d 1466, 1469 (9th Cir. 1985).

[8] Charter, art. V, § 5.02 (*emphasis* added). *See also Commission Commentary on Anchorage Municipal Charter: An aid to legislative history, to assist in the interpretation of the Charter document*, § 17.11 (Aug. 20, 1975) ("As used in this Charter, 'may' is permissive, 'shall' is mandatory, and 'may not' or 'shall not' are prohibitive.").

[9] For purposes of this letter, unless otherwise noted, all references to executives or executive officers are limited to mayoral appointees to executive positions like the Chief Equity Officer; they do not encompass appointments to quasi-administrative or quasi-judicial bodies, like boards and commissions.

appointment power by requiring Assembly confirmation of specific appointees; it places no such limitation on the mayor's removal power, however. Where certain things are designated in an ordinance, all omissions should be understood as exclusions.[10] In other words, because the Charter allows the Assembly a role in the appointment process, but omits any language granting the Assembly authority over the removal process, it should be understood as the equivalent of an express exclusion of such a power. The Assembly cannot read into the Charter what the Charter excludes by omission.

Municipal code further substantiates that the Assembly has no authority to displace the mayor's power to remove mayoral executive appointees, and that the mayor need not show cause for such removal:

> *Executive employees are "at will" employees and serve at the pleasure of the mayor* or the responsible official of the appointing authority…[11]
>
> Employees occupying an executive position are appointed by and serve at the pleasure of the responsible official for the appointing authority. As such, the responsible official *may dismiss, demote or suspend any employee occupying an executive position for any reason, or no reason, without right of grievance or appeal.*[12]

The code acknowledges that the mayor, and only the mayor, may terminate executive mayoral appointees. Accordingly, AMC 3.20.140.A.1.b. and 1.c. unlawfully infringe upon the powers granted to the mayor by Charter.[13]

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[10] *Croft v. Pan Alaska Trucking, Inc.*, 820 P.2d 1064, 1066 (Alaska 1991) (*citing Puller v. Municipality of Anchorage*, 574 P.2d 1285, 1287 (Alaska 1978).

[11] AMC 3.30.172.K.; AMC 3.30.176.A. (*emphasis* added); s*ee also Canfield v. Sullivan*, 774 F.2d 1466, 1468 (9th Cir. 1985) (stating that "an 'executive' serving at the pleasure of the mayor . . . lack[s] any property interest in his employment.").

[12] *Id*.

[13] *See Canfield*, 774 F.2d at 1469 ("an ordinance is invalid if it conflicts with a city's charter").

II. An ordinance creating "for cause" and durational term protections of an executive mayoral appointee usurps the mayor's executive function.

Separation of powers between and among the three branches of government is a long-recognized, well-settled, and core doctrine of American jurisprudence. The doctrine is intended to preclude the exercise of arbitrary power and to safeguard the independence of each branch of government: "One branch's threat to the independence of another . . . may therefore violate separation of powers."[14]

In *Myers v. United States*,[15] the United States Supreme Court addressed the precise controversy at issue—namely, whether the head of the executive branch of government has the exclusive constitutional authority to remove an executive officer s/he nominated who was confirmed by the legislative branch. The Court found that, under the separation of powers doctrine, "[t]he power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment," and that the chief executive (in this case, the mayor) retains "the exclusive power of removal" with respect to executive appointees.

In *Bradner v. Hammond*,[16] the Supreme Court of Alaska "recognize[d] the separation of powers doctrine" and echoed the U.S. Supreme Court's reasoning regarding executive appointments confirmed by the legislature. For example, it acknowledged that "the appointment of executive officers is an executive function" and warned that "without such a power, the responsibility for executing executive duties would be diffused and the goal of separation of branches of government, avoiding too great a concentration of power in one branch, would be defeated."[17]

Because the power to remove is incident to the power to appoint, *Bradner*'s logic is equally applicable to the mayor's removal power. Imposing "for cause" protections and durational terms for mayoral executive appointees usurps functions that are within the sole province and discretion of the mayor. The separation of powers doctrine and our Charter preclude such actions.

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[14] *State v. Recall Dunleavy*, 491 P.3d 343, 367 (Alaska 2021).

[15] 47 S.Ct. 21, 27 (1926).

[16] 553 P.2d 1, 5 (1976).

[17] *Id*. at 6-7.

III. The authority cited by the Assembly in its letter is not persuasive.

The cases the Assembly cites are distinguishable from the matter at issue here and do not support the Assembly's position. Unlike *Liberati v. Bristol Bay Borough,*[18] this dispute is not over the "proceedings of the governing body of a municipality," but rather over the *results* of those proceedings. The process that led to this ordinance is not at issue; rather, it is the ordinance itself that is the problem. *Liberati* therefore is inapposite. Additionally, in *Municipality of Anchorage v. Anchorage Police Dept. Employees Ass'n,*[19] the Supreme Court of Alaska only presumed an ordinance was constitutional if it was enacted "within the legislative power of the municipality," which is not the case with AMC 3.20.140.A.1.b. and 1.c. Consequently, that case also is not persuasive.

IV. Conclusion.

The Chief Equity Officer serves at the pleasure of the mayor. Like other executive mayoral appointees, s/he can be dismissed at will for any reason or no reason at all. Attempts to insulate mayoral executive appointees with "for cause" limitations or durational terms clearly violate the Charter and Constitutional separation of powers doctrine.

[18] 584 P.2d 1115, 1118 (Alaska 1978).

[19] 839 P.2d 1080 (Alaska 1992).