


Memorandum

To: Board of Directors

From: Jeffrey G. Condit, P.C. 

Client: Scappoose Drainage Improvement Company

Subject: Proposed Bylaws Amendments for Consideration at the February 18, 2018, Annual Meeting

Date: July 12, 2021

You ask me to draft a memorandum explaining the proposed Bylaws amendments.

BACKGROUND

The Bylaws are the primary governance document for SDIC after the Articles of Incorporation. ORS 554.080(6). The SDIC Bylaws were initially adopted on August 19, 1996, when the former Scappoose Drainage District was reorganized as a drainage improvement company under ORS 554.375 to 554.390. The Bylaws have been amended twice since adoption, on February 28, 1997 (first amendment), and on February 13, 1998 (second amendment). An amendment to the Bylaws has to be approved by not less than two-thirds of the votes of the members (the property owners). ORS 554.080(6); Bylaws, Article 16.

DISCUSSION

Attached are clean and redlined versions of the proposed third amendment to the Bylaws. The third amendment will be considered at the annual meeting of the SDIC members on August 9, 2021.¹

A brief explanation of the format of the redlined version: The blue and underlined text show the additions, the red strikethrough text shows the deletions, and the green text shows existing text that was relocated. The third amendment only includes sections that are proposed to be amended.

¹ The annual meeting was originally scheduled on February 18, 2021, but was delayed as a result of COVID restrictions.

The proposed amendments:

Section 3.2: This amendment conforms the Bylaws to SDIC's past practice of allowing entity owners to designate a representative to serve on the Board. The question came up two years ago as to whether individual owners could appoint a proxy to serve on the Board. We ultimately concluded that the answer was "no" because only "members of the corporation" can serve on the Board. ORS 554.090. ORS 554.070(1) provides that "[e]very owner of land described in the articles of incorporation is a member * * *." But that raises the issue about representation on the Board by entity owners. The Board has historically allowed entity property owners to appoint representatives who can and have served on the Board, but this is not explicitly authorized by either the Bylaws or the statute.² The proposed amendment would codify this practice.

Section 3.3 and new Section 3.4: These revisions move the rules relating to proxies to a new section for ease of reading. The only substantive change is that Section 3.4 allows proxies to be designated by email, a provision I borrowed from the Sandy Drainage Improvement Company Bylaws.

Section 5.1: This is the most significant substantive change. It would delegate the authority to the Board to adopt regulations, including the ability to adopt fees to reimburse SDIC's costs for review of permits. The current Bylaws require any such regulations to be approved by a two-thirds vote of the members, so this would be a significant delegation of authority to the Board. It is common for smaller local governments to adopt fees to recapture their cost of permit review, particularly when they need to hire consultants to review permit applications. The policy behind such regulations is that the beneficiary of the permit should pay for those costs and not the general tax/assessment payers. Following is a link to the Multnomah County Drainage District regulations. <https://mcdd.org/what-we-do/review-process/>.

Section 6.8: These changes conform the Board meeting requirements to the Public Meetings Law, which is currently adopted and incorporated by reference in Section 4.3 of the Bylaws as the rules of procedure for both the Board and landowner meetings. The current two-day notice requirement for special meetings is inconsistent with the Public Meetings Law, which requires not less than 24 hours' notice for a special meeting. ORS 192.640(3). The revision also expressly allows for emergency meetings as provided in the Public Meetings Law, authority that the Board could need in order to take prompt action in a flood event. The Public Meetings Law

² ORS 554.070(1) allows corporate owners to appoint a proxy "as provided in the bylaws," but it is unclear whether a corporate proxy can serve on the Board, since all members can appoint proxies for the purposes of voting at member meetings. ORS 554.070(2). I recommend that this should be explicitly allowed in the Bylaws, because I think there would be a due-process issue if entity owners were precluded from service on the Board. I note that the trustee of a trust is considered to be the legal owner of property held in trust, and so could not appoint a representative to serve under this change but could serve personally as a Board member.

requires such emergency meeting notice as is reasonable given the nature of the emergency, and requires the minutes to describe the emergency. ORS 192.640(3). I also changed the number of Board members necessary to call a special or emergency meeting from two-thirds of the members to two members to avoid potential violation of the Public Meetings Law. Two-thirds of the members is a quorum of the Board. Under recent case law, communication among a quorum regarding a decision outside of a public meeting can itself violate the Public Meetings Law if it involves any substantive discussion. *See Tri-County Metro. Transp. Dist. of Or. (Trimet) v. Amalgamated Transit Union Local 757*, 362 Or 484, 412 P3d 162 (2018). While communications among a quorum for purely scheduling purposes would not be a “meeting,” any discussion of the substance of the agenda items at the meeting could be.

Article 16: This change requires a copy of any proposed Bylaws amendment to be mailed to the members at the same time as notice of a meeting of the members under Section 4.2. Section 4.2 requires the mailed notice of the meeting to be sent not less than seven days prior to any meeting of the members. In light of the concern about lack of notice of proposed Bylaws changes at the 2020 annual meeting, I thought this would be a helpful clarification because the Bylaws currently do not provide for any notice. It makes sense (and saves costs) to send any proposed amendments with the notice of meeting, and it provides members with a minimum of seven days to review the proposed changes before the meeting.

PROCEDURE

The landowners could vote on the amendments as a package, or the Board could call for a vote on specific amendments individually. Section 5.1 is the most significant substantive change; the rest of the amendments are mostly housekeeping clarifications that will not significantly change the District’s past practice.

Please feel free to contact me with any questions.

THIRD AMENDMENT TO THE BYLAWS

OF

THE SCAPPOOSE DRAINAGE IMPROVEMENT COMPANY

Pursuant to the vote of the Members at the annual meeting of the Scappoose Drainage Improvement Company held on ~~February 18~~August 9, 2021, sections of the Bylaws of the Scappoose Drainage Improvement Company are hereby amended to read as follows:

ARTICLE 3

MEMBERS

Section 3.1. Eligibility: Members of the corporation may be individuals, partnerships, corporations, associations and firms of every type and description.

Section 3.2. Qualifications of Members: Every owner of land described in the articles of incorporation is a member of the corporation, and membership is lost or gained through a sale or purchase of any of said land, as the case may be, by which the legal title is transferred. In case of sale or purchase under contract without transfer of legal title, the parties may agree with respect to voting such land in a separate written agreement filed with the corporation, and unless so agreed and determined pursuant thereto the holder of the legal title shall be entitled to vote. The corporation may rely upon records of the county assessor for a determination of the legal ownership of property in the absence of more persuasive evidence.

~~Corporate owners may by resolution of their~~Where title to land is held in the name of a legal entity (including without limitation partnerships, private or public corporations, public bodies authorized by Oregon law, and limited liability companies) rather than a natural person, the governing or managing body of a legal entity may appoint ~~and designate a proxy. Other members may also vote by proxy~~a representative to represent and vote on behalf of that owner.

The authorized representative will file a certificate of authority with the corporation on a form provided by the corporation and may serve until such certificate is withdrawn or replaced by the legal entity. Such authorized representative will be the member of the corporation for the purpose of service on the Board of Directors as provided in Section 6.4 of these Bylaws.

Section 3.3. Voting Rights of Members: At all meetings of the members of the corporation, each member who attends in person, or by proxy appointed in writing, shall be entitled to vote the amount of acreage of the land owned by the member on the basis of one vote for each acre of land. An owner of less than an acre of land has one vote. For purposes of calculating number of votes, fractions of .5 or more shall be rounded up and less than .5 shall be rounded down. For example, the owner of 1.2 acres has 1 vote, the owner of 1.5 acres has 2 votes. Nothing shall prevent any owners of land, or members of the corporation, from joining in a voting trust or from giving a proxy or power of attorney to vote such membership for a term of years or until the happening or performance of a named contingency or condition. ~~No proxy shall be valid after eleven months from the date of its execution unless otherwise provided in the proxy.~~ Except as provided in Section 4.1.6 of these Bylaws, a majority of the acreage shall be necessary to constitute a quorum for the transaction of business at all landowners' meetings, and a majority vote shall govern in all cases except as otherwise specifically provided by law.

Section 3.4. Proxies: Any member entitled to vote at a member meeting may authorize another person or persons to act for such member by proxy. Every proxy must be in writing and signed by the member, or by e-mail setting forth information from which it can be reasonably determined that the proxy was authorized by such member. ~~No proxy shall be valid after the expiration of 11 months from the date thereof unless otherwise~~

provided in the proxy.

Section 5.1. Enumerated Powers: The Directors of the corporation are a body corporate with power:

5.1.1 To sue and be sued.

5.1.2 To contract and be contracted with.

5.1.3 To have and use a corporate seal and to alter the same at pleasure.

5.1.4 To purchase, condemn by the power of eminent domain, possess and dispose of such real and personal property as may be necessary and convenient to carry into effect the objects of the corporation, and to take, hold, possess and dispose of all real and personal property donated to such corporation by the United States or by any state, territory, county, city or other municipal corporation or by any person, for the purpose of aiding in the objects of such corporation.

5.1.5 To appoint such subordinate officers, employees and agents as the business of the corporation may require, and prescribe their duties and compensation.

5.1.6 To make, establish or amend these Bylaws ~~and other rules and regulations~~, not inconsistent with the laws of the state, the Articles of Incorporation, or the covenants and provisions of the landowners' notice provided in Oregon Revised Statutes 554.170 to 554.190, ~~if any is filed~~, prescribing the manner and mode of conducting the business of the corporation, ~~distributing and using water for, irrigation (to the extent authorized by Board policy), usage of any drainage or flood control works, and enforcing the collection of rates, tolls, charges, fees, fines and assessments, but such.~~ Any amendment to these Bylaws, ~~rules and regulations~~ must be ratified by two-thirds of the votes entitled to be cast by the members of the corporation.

5.1.7 To adopt rules and regulations necessary or convenient to carry out or enforce the powers and duties of the corporation. This includes the authority to enact or impose fees or charges to recover the corporation's cost for staff, consultants, or other contractors to process or review land use applications, applications for permits from the United States Army Corps of Engineers or the Federal Emergency Management Agency, or other permits or approvals for actions on property within the corporation's boundary when the corporation is empowered by law to review or approve such permits. Such fees or charges shall not exceed the actual or the average cost of conducting such review or approval. The Board of Directors shall adopt such rules or regulations by resolution at a regular business meeting of the Board. Notice of the intent to adopt such a resolution shall be mailed to the members not less than 20 days prior to the meeting. Any member may attend the meeting and make comment orally or in writing regarding such resolution prior to the decision of the Board of Directors on the proposed resolution. The draft resolution containing the rules or regulations shall be available at the time notice is mailed to the members. A copy of the draft resolution shall be made available to any member upon request.

5.1.8 ~~5.1.7~~ To make, levy and collect any assessment in proportion of the benefits received, upon the lands described in the articles of incorporation, for the purpose-of providing the amount of money required to be raised by the corporation through such assessments for any purposes whatsoever, including maintenance and operation, estimated delinquencies on assessments, principal and interest of maturing indebtedness, and such reserve as may be necessary as provided by resolution of the Board of Directors, subject to the limitations, restrictions and provision of any recorded landowners' notice.

Section 6.8. ~~Notice for~~ Meetings of the Board of Directors ~~Meetings: Regular~~
~~meetings of the~~ The Board of Directors shall ~~be held~~ hold a regular meeting of the Board each
month at ~~such a~~ day, time, and place ~~as shall, from time to time, be~~ determined by the Board of
~~Directors. Special~~ In addition, the Board may call special and emergency meetings of the Board
~~of Directors shall be called by the Secretary when requested by the~~ as provided in the Oregon
Public Meetings Law. The President or ~~when requested in writing by any~~ two-thirds members of
the ~~Directors. Notice of the~~ Board may call a special or emergency meeting. Meeting notice and
procedures shall ~~be given to each Director either in person or by mail or telephone and must be~~
~~received by the Director not less than two days prior to the meeting~~ comply with the Public
Meetings Law.

ARTICLE 16

AMENDMENTS

These Bylaws may be amended by vote of two-thirds of the votes entitled to be
cast by of the members of the corporation. The vote on any amendment shall be at a meeting of
the members called for that purpose. A copy of the proposed Bylaws amendment shall be
included in the mailed notice provided to members under Section 4.2.

Adopted ~~February 18~~ August 9, 2021, by action of the Board of Directors pursuant
to a favorable at least two-thirds vote of the members of the Scappoose Drainage Improvement
Company at an election held on ~~February 18~~ August 9, 2021.

By: _____
Geoff Wenker, President

By: _____
Director

Name: _____

By: _____
Director

By: _____
Director

Name: _____

Name: _____

By: _____
Director

Name: _____