

## Memorandum

**To:** Board of Directors

**From:** Jeffrey G. Condit, P.C.

**Client:** Scappoose Drainage Improvement Company

**Subject:** Proposed Bylaws Amendments for Consideration at the June 27, 2022, Annual Meeting

**Date:** June 2, 2023

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### 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.

Amendments were first proposed to the membership at the August 9, 2021, annual meeting of the membership, but were withdrawn as result of testimony from the membership. The attached revised amendments eliminate the proposed modification to Section 5.1, which would have delegated the authority to the Board of Directors to adopt fees and regulations.

### 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 June 27, 2022.

A brief explanation of the format of the redlined version: The blue and underlined text shows 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.

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.<sup>1</sup> The proposed amendment would codify this practice. The proposed amendment also incorporates a "certificate of authority" form, as recommend by Debbie Murphey, representing CalPortland.

**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.

I received a question about the difference between a voting proxy and corporate representation proxy, and why a voting proxy is limited to 11 months. I don't know why there is an eleven month expiration date on proxies, particular since it also states "unless otherwise designated in the proxy," which effectively renders the limitation meaningless. It is not required by statute. I suspect that it comes from some early model bylaws that were shared among districts. I suspect that the reason for the limitation is so that a proxy doesn't get stale.

In regard to the corporate designation proxy as opposed to a voting proxy, I think they are two different things, but it is not clear from the statute. ORS 554.070(1) states:

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 as provided in the bylaws, and unless so agreed and determined pursuant thereto the holder of the legal title shall be entitled to vote.

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<sup>1</sup> 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 (see following discussion about proxy votes). 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.

Corporate owners may by resolution of their board of directors appoint and designate a proxy as provided by the bylaws. (Emphasis added.)

This underscored language suggests that only corporate owners can appoint a proxy and that the process for doing so has to be in the bylaws (hence the certificate of authorization). But ORS 554.070(2) contains the language from the Bylaws:

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 as provided in the articles of incorporation. In the absence of a provision in the articles of incorporation, each member 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. Nothing in the laws of Oregon shall be construed to 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. Except as provided in subsection (4) of this section or ORS 554.560 (Quorum for meeting), members representing a majority of the votes entitled to be cast 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 specially provided by law. (Emphasis added.)

The unscored language clearly allows any owner to give a voting proxy to another for as long as they want. The applicable rules of statutory construction are that text has to be read in context, the specific controls over the general, and two potentially conflicting provisions have to be construed so that they do not conflict, if possible. Since Section 1 deals with membership and Section 2 deals with voting, I think the best reading is that the corporate proxy referenced in Section 1 is to appoint a person to serve as the member on behalf of the corporation, while the proxy referenced in section 2 allows a member to designate another person to vote on the members and that applies to all members/owners, corporate or not. And since by its terms Section 2 supersedes all other law, In my opinion it controls.

**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 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 at the 2020 annual meeting about lack of notice of proposed Bylaws changes, 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.

Please feel free to contact me with any questions.