

MEMORANDUM 10-15

TO: Walt Wrede, City Manager
City of Homer

FROM: Tom Klinkner

DATE: December 14, 2009

FILE NO. 506,742.451

RE: Ocean Drive Loop Special Service District

1. Introduction.

The purpose of this memorandum is to address questions regarding the Ocean Drive Loop Special Service District ("District"). State law authorizes the City by ordinance to establish, alter and abolish differential tax zones to provide and levy property taxes for services not provided generally in the City.¹ In 2006, the Council adopted Ordinance 06-53(S), establishing the District. The purpose of the District is to provide "special services to the properties in the Ocean Drive Loop Bluff Erosion Control Improvement/Assessment District that are not provided elsewhere in the City."² The District is funded with a property tax levied on properties in the District.³ The special services authorized in the District are limited to the levy and collection of taxes and other revenues that shall be appropriated for and expended as one or more grant awards to an eligible entity for the purpose of funding operation of the seawall for the benefit of all properties in the District.⁴ To be an eligible entity that may receive grant awards, an entity must meet the conditions for recognition as such prescribed in the Code.⁵

2. Is Homer Citizens for Erosion Control, Inc. an Eligible Entity?

Homer Citizens for Erosion Control, Inc., an Alaska nonprofit corporation ("HCECI"), has asked to be recognized by the City as an eligible entity under HCC 15.10.110. In support of this request HCECI has submitted copies of its articles of incorporation and bylaws, amendments to its bylaws, and information about its membership, all of which will be discussed below with the related conditions for recognition as an eligible entity. In summary, HCECI meets some, but not all, of the conditions for recognition as an eligible entity.

¹ AS 29.45.580.

² HCC 15.10.010(a).

³ HCC 15.10.020(a).

⁴ HCC 15.10.050(a), 15.10.100(a).

⁵ HCC 15.10.110.

The following are the conditions for recognition as an eligible entity and a response regarding whether HCECI meets each of them.

A. *Be independent of the City and organized for nonprofit purposes under the laws of Alaska as a corporation, company, partnership, or other recognized legal entity, and not an unincorporated association.*

This condition has been met. HCECI is organized as a nonprofit corporation under Alaska law. As such, it is independent of the City.

B. *Have as a primary purpose the Operation of the Seawall for the benefit of the properties in the Ocean Drive Loop Bluff Erosion Control Improvement/Assessment District.*

It is not clear whether this condition has been met. The Articles of Incorporation and Bylaws of HCECI each describe its purpose as follows:

The purpose of this corporation shall be to allow property owners to speak with a unified voice on matters concerning operation, maintenance and improvement of a seawall and any other erosion control system located within the Ocean Drive Loop Special Service District.

The stated purpose of HCECI, "to allow property owners to speak with a unified voice," does not specifically address operation of the seawall. It is unclear whether the stated purpose of HCECI is confined to advocacy on behalf of property owners, or whether it also includes actually performing the tasks defined as "Operation" in HCC 15.10.005 – "operation, maintenance, repair, reconstruction, improvement, insurance, and other related or similar activities conducted in the course of making and keeping the Seawall operational for its intended erosion control purpose." A clarifying amendment to HCECI's Articles and Bylaws is necessary to establish that this condition has been met. I recommend that the following clause be added at the end of the description of HCECI's purpose in both the articles and bylaws: "and to perform such operation, maintenance and improvement."

C. *Have membership open to every Property Owner and, in fact, include in its membership a broad representation of all Property Owners.*

This condition appears to have been met. The Bylaws of HCECI state that "each lot owner shall be a member." Thus, it appears that membership in HCECI is open to every property owner in the District. HCECI has presented evidence that a majority of property owners in the District are members, and that those property owners represent a majority of the property value in the District and of the linear frontage of the seawall.

D. *Have established bylaws or rules that (a) require all meetings of the entity's membership and its board of directors or similar governing body to be open to all Property Owners, regardless of membership; (b) afford all Property Owners a reasonable opportunity to*

be heard at such meetings; and (c) require reasonable notice to all Property Owners in advance of all such meetings.

This condition has not been met. Amendments to the Bylaws of HCECI require all meetings of HCECI's membership to be open to all owners of property in the District, afford all owners of property in the District an opportunity to be heard at meetings of HCECI's membership, and require reasonable notice of non-emergency meetings of HCECI's membership to all owners of property in the District. However, the amended Bylaws include no similar provisions regarding meetings of HCECI's board of directors. In addition, the bylaws could be improved by defining more specifically the form of the notice of meetings that HCECI will provide to property owners.

E. Have prepared a reasonable written plan to Operate the Seawall for the benefit of all properties in the Improvement District, including an annual budget that includes projected revenues and expenses for not less than two years.

I defer to the City Manager's conclusion that this condition appears to be minimally satisfied.

F. Provide written assurance that it will use amounts received under a grant award in accordance with its plan and solely for eligible grant purposes.

This condition has not yet been met, but could be met through incorporation of the required assurance in HCECI's grant application or grant agreement.

G. Prepare and submit to the City Manager an application at such time, and in such manner, and containing such information as the City Manager may require.

This condition has not yet been met, but would be met when HCECI applies for a grant.

3. *Is the Council Required to Make Grants to an Eligible Entity?*

No, the making of a grant is within the Council's discretion. HCC 15.10.100 provides:

15.10.100 Grants authorized. a. Revenue collected by the City under this chapter ***may*** be appropriated and expended for one or more grant awards to be used for the limited purpose of funding Operation of the Seawall for the benefit of all properties in the Improvement District.

b. ***The City Council shall have final approval of all grant awards and recipients.*** (Emphasis added).

However, the purpose of the District (and the taxes levied therein) is "limited to the levy and collection of taxes and other revenues that shall be appropriated for and expended as one or more

grant awards to an eligible entity.”⁶ If the Council does not make grants to an eligible entity, it should consider whether to refund taxes collected in the District. HCC 15.10.060 provides:

15.10.060 Excess tax revenue. If no grant awards are made under this chapter to an eligible entity, or if at any time the City Council determines Special Service District tax revenues exceed the needs of the Special Service District, the City Council may authorize a refund of the excess tax revenues collected under this chapter to the taxpayers in proportion to amounts paid in by such taxpayers.

4. *May the Council Levy a Tax in the District that Is Not Based on Property Value?*

No. The only taxes that the Council may levy in the District must be based on property value. The statutory authorization to form the District provides that it is established “to provide and levy *property taxes* for services” (emphasis added). For purposes of property taxation, the assessor is required to assess real property at its full and true value as of January 1 of the assessment year.⁷ There is no authority for taxing real property in the District on a basis other than property value, and the seawall itself is not subject to taxation as personal property.⁸

Real property taxation is the only means for the City to obtain payments from property owners for seawall operation where the payment obligation would be enforceable by a lien on property in the District. The only mechanism available to allocate costs of operating the seawall on a basis other than property value where the payment obligation would be enforceable by a lien on property in the District would be through assessments levied by a private homeowners’ association, such as would be formed for a planned unit development or condominium. HCECI is not such an association. To implement this mechanism, owners of property in the District must create in the District a “common interest community” through the recording of a declaration of covenants, conditions and restrictions.⁹ A homeowners’ association is formed to manage the common interest community,¹⁰ which has the power to assess properties in the community for common expenses, enforceable by a lien on those properties.¹¹ These assessments would allocate common expenses among the properties in the common interest community in accordance with allocations set out in the declaration.¹² Those allocations would be determined by agreement among the participating property owners, and could be based on, among other things, each property’s seawall frontage.

⁶ HCC 15.10.050(a).

⁷ AS 29.45.110(a).

⁸ AS 29.71.800(19) defines “real property” as “land and improvements, all possessory rights and privileges appurtenant to the property, and includes personal property affixed to the land or improvements.”

⁹ AS 34.08.090.

¹⁰ AS 34.08.310, 34.08.320.

¹¹ AS 34.08.460, 34.08.470.

¹² AS 34.08.460, 34.08.150.

5. *May the Council Abolish the District?*

Yes. State statute authorizes the Council to “establish, alter and *abolish* differential tax zones” (emphasis added).¹³ The statute does not specifically address what must be done with tax revenues from the District that are on hand when the District is abolished. However, state law only allows the Council to levy taxes in the District “for services not provided generally in the City,” indicating that revenue from the levy of taxes in the District may be used only for District purposes¹⁴. The purpose of the District (and the taxes levied therein) is “limited to the levy and collection of taxes and other revenues that shall be appropriated for and expended as one or more grant awards to an eligible entity.”¹⁵ The Council is authorized to refund excess revenue from taxes levied in the District to “the taxpayers in proportion to amounts paid by such taxpayers,”¹⁶ and should so refund any tax revenues from the District that remain upon abolition of the District and payment of all expenses of administering the District.

However, if the District is abolished, the City could not obtain payments from property for seawall operation through real property taxation, without which the payment obligation would not be enforceable by a lien on property in the District. Without a tax lien to enforce payment, administration and collection of the payments would be prohibitively cumbersome and expensive for the City.

¹³ AS 29.45.580.

¹⁴ *Id.*

¹⁵ HCC 15.10.050(a).

¹⁶ HCC 15.10.060.