

# Rogers Park Community Council MEMORANDUM

April 6, 2021

To: Executive Board of Rogers Park Community Council:

Steve Lindbeck, President  
Linda Chase, Vice-President  
Secretary (position vacant)  
Ric Wilson, Treasurer  
Jim Wright, FCC Representative

Subj: The proper delineation of roles between the community council and the Municipality, as applied to the pending resolutions regarding the proposed treatment center.

We are presented by the Municipality with a plan to use the property that was the Golden Lion Hotel, across 36<sup>th</sup> Avenue from our community council district. MOA assures us that it is to be for a class 3.3 treatment facility<sup>1</sup> and not for a homeless shelter. Concerned residents fear that it will become a homeless shelter. Note that the property appears to be zoned B3, which may trigger related concerns. I for one do not believe that the concerns are unfounded, and that we as a community council should be vigilant within our proper role.

The community council received a proposed resolution, by member Beth Abisoror, in response to another proposed resolution, by member Mark Foster. Both proffered resolutions address the planned treatment center at the location of the former Golden Lion Hotel. Both seek “a place at the table” in the sense of notice and opportunity to be heard about what form it will take and how it may co-exist with the surrounding neighborhoods. That concern is appropriate.

Unlike the Foster proposal, the Abisoror proposal provides terms by which representatives of the affected community councils would be involved in overseeing and administering the anticipated contract for treatment, with voting power in that regard, and would hold the power to nullify the contract.

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<sup>1</sup> My understanding is that a class 3.3 treatment center is by definition a fully enclosed facility. I have not researched that, and leave that concern to those who are better informed. In some dialogue with municipal representatives, it has been suggested that the grounds would not be fully enclosed at this site.

During a prior meeting of the community council I noted that certain provisions contained within the proposed resolutions have common ground, and appear to have merit, while the Abisror proposal is intemperate in tone<sup>2</sup> and partly illegal, so that passage of the resolution would be unpersuasive to MOA and I believe barred by law. I suggested that the two camps might explore common terms. The two proposals are presently on the table, awaiting review at the April meeting. To inform the members, I've explored the legal issues.

I contacted the office of the Municipal Attorney, and was advised that the Municipal Attorney is not authorized to provide a legal opinion to citizens outside of the municipal government. I was generally informed that the governing law is set forth at Title 7 of the Anchorage Municipal Code, which governs purchasing and contracts; and that I should also consider Title 2.40, which governs the proper role of community councils.

A summary of these laws is provided below, with my thoughts.

### **PURCHASING & CONTRACTING FOR PROFESSIONAL SERVICES**

Title 7 of the Anchorage Municipal Code governs Purchasing and Contracts and Professional Services. Key provisions are as follows.

§7.15.010, entitled “**Contracting authority**”, provides that “The municipality may ... contract with any person to acquire ... professional services ....”

§7.15.030, “**Powers and duties of purchasing officer**”, provides that the purchasing officer shall procure all “services”, but “services” is defined separately from “professional services”.

§7.15.060, entitled “**Contract administration**”, provides at subsection A as follows: “The using agency shall administer all contracts for ... professional services, except as otherwise designated by the mayor.” *Assembly member Meg Zaletel advises that in this case the using agency is Anchorage Health Department (AHD), which is working in conjunction with the purchasing officer on the RFP-contracting aspect.*

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<sup>2</sup> I note that the supporters of the Abisror proposal appear to be folks who have not taken an active part in our community council until recently, and may not be familiar with our proper role. Municipal law provides that bylaws should indicate “There shall exist between the [Community] Council and local government a cooperative relationship.” AMC §2.40.036 (Ex. A, Art. III). See RPCC Bylaws at Article III, second to last sentence. In order to have a “cooperative relationship”, communications should be civil in tone.

At the risk of oversimplification, **§7.15.070** and **§7.15.080** address “**Contract amendments**” by the mayor or city manager where changes in price are not involved, in the former, and by the Assembly where changes in price are involved, in the latter.

**§7.15.100** governs “**Multi-year contracts**” and provides that such contracts are subject to the availability of funds lawfully appropriated for that purpose in future years. *In short, the Assembly could discontinue funding down the road.*

**§7.20.020** governs “**Solicitation and acceptance of bids.**” By its terms, a Request for Proposals (RFP) shall be published at least 14 days before the last day on which bids will be accepted. *Speaking from experience, early disclosure of RFP terms prior to the date of publication would result in the risk of legal exposure to the municipality, typically due to potential claims of preferential treatment of one bidder over another because terms leaked out in advance. Accordingly, disclosure of RFP terms to us in advance of publication would appear to be prohibited.*

**§7.20.030** is entitled “**Award to be made only to responsible bidder.**” This is handled by the purchasing officer, in this case presumably with the input of the using agency. This ordinance sets forth the criteria used in making that determination. The criteria address the bidder’s experience, reputation, history of performance, resources, and other considerations. *The criteria do not include the degree of approval of residents or of community councils.*

**§7.20.040, “Procedures of award”**, provides that the award will go to the lowest responsive and responsible bidder, and further provides that the municipality has the power to reject all bids if it is in the best interest of the municipality to do so.

**§7.20.060, “Competitive sealed proposals; negotiate procurement”**, provides for an alternate procedure: competitive sealed proposals rather than competitive sealed bids. This appears to provide for greater flexibility when responding to the RFP. *It appears that this procedure would set forth specifications and contractual terms and conditions to which a proposal must respond, but allow for greater variation in the manner of performing the work.* Of note, section D provides that “the names of the responding firms, contents of the proposals, tabulations and evaluations thereof shall be open to public inspection only after assembly approval of a contract award.” (*emphasis added*) Again the municipality has the power to reject all bids if it is in the best interest of the municipality to do so.

**§7.20.090, “Emergency procurements”**, provides that the municipality may award a contract for professional or other services without competition, formal advertising or formal procedure where the mayor determines there is an

emergency threatening public health, safety or welfare which requires the contract be awarded without delay. *My best guess is that this is rarely invoked without a compelling emergency, as there is political and legal risk when using this power.*

§7.20.110 governs “**Bonds.**” This addresses bid bonds, performance bonds, and payment bonds. *As I understand it, a performance bond guarantees funds to complete the job. A payment bond guarantees payment of workers and suppliers.*

§7.20.120 – “**Waiver of Formal Procedure.**” The mayor may waive formal procedures when time is of the essence and the best interests of the municipality will be served by such action. The mayor must send a report to the assembly when this section is invoked. *My best guess is that this is rarely invoked without an emergency, as there is political and legal risk when using this power.*

§7.20.130 – “**Appeals.**” Any person adversely affected by the procedures or award of such a contract may ask the mayor or assembly to refer the matter to the bidding review board. But the bidding review board’s role is limited to seeing that the procedure was followed, and shall preserve the confidentiality of competitive proposals, tabulations, and evaluations as requires by AMC 7.20.060(E). *The implicit concern is fair competition. Accordingly, I do not believe this section contemplates community council or residents’ appeals of policy-making determinations or of contract awards (unless the resident also happens to be an aggrieved participant in the bidding process.*

## **THE COMMUNITY COUNCIL’S PROPER ROLE**

Community councils and procedures are governed by §8.01 of the Municipal Charter and Anchorage Municipal Code §2.40.010 *et seq.*

The purpose is generally stated as “to afford citizens an opportunity for maximum community involvement and self-determination.” §2.40.010. But the term “maximum” has stated limits.

The next subsection is “**Purpose of chapter**” and states that it is to provide “a direct and continuing means of citizen participation in government and local affairs” by giving (A) a method for expression and discussion of opinions, needs and desires; (B) government agencies a method to receive that input; and (C) local governing bodies an improved basis for decision-making. §2.40.020. These terms are incorporated into the Bylaws.

§2.40.050 “**Functions**” provides that the community councils have advisory functions, including: C. Respond to local government proposals submitted to community councils pursuant to section 2.40.060.

§2.40.060 “Municipal responsibilities to community councils” include “A. Notice and submission of proposals for review by community council.” Absent an emergency, this should include “all land use, social and economic proposals” that “will have a significant impact on all or a substantial portion of district residents.” It provides for “Timely notice” with regard to rezoning, special exceptions, variances, conditional use, etc., and that opportunity for participation shall be afforded in the initial stages of planning as well as at subsequent stages of proposal development. Again, however, “participation” is “advisory” in nature. This section contains a table describing what notice is required in basic circumstances involving proposed land use changes, and in particular provides for notice to community councils within 1000 feet of subject public lands or facilities. This is of course a minimum requirement. Greater notice is permitted but not necessarily required.

§2.40.070 “Additional citizen participation in municipal government.” Nothing contained in this chapter is intended to deny or limit in any manner the right of persons individually or in groups to petition the assembly or otherwise participate in municipal government under existing procedures and practices.”

§2.40.080 – “Capacity to sue or be sued.” “Neither this chapter nor section 8.01 shall be interpreted to empower, to authorize or to provide legal capacity to community councils to sue or be sued in any court.”

#### **SOME THOUGHTS:**

As shown above, contract administration is generally the role of the using agency, in this case the ADH. To obtain votes to determine matters of contract or project administration at the treatment center, as proposed by the Abisror proposal, the community council would be part of contract and project administration. This is beyond and outside of our statutory function as *advisory* councils. **We may provide input to the Municipality about our preferences, but we may not assume the role of the government to implement our preferences, making decisions about whether they go into the RFP, making contract award or rejection decisions, or administering the contract.**

Further, to vote at matters of contract or project administration, and/or to have a veto power over continuing such a contract or project, would expose the community council to **the risk of being sued** for its decisions in that regard.

The community council is not a limited liability entity, such as a corporation or an LLC. Therefore, in a lawsuit it would arguably be exposed as an unincorporated association. **An unincorporated association is treated like an unincorporated**

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**partnership in the eyes of the law. The assets of each member are exposed,** with the complicating factor for the plaintiff that the plaintiff bears the burden of identifying who was a member at the key time(s).

Alaska law recognizes that an unincorporated association may be sued. The Alaska Supreme Court recognizes unincorporated associations' legal existence, their rights to sue and be sued. Alaska Civil Rule 17(b) provides that an unincorporated association may be sued. Alaska Civil Rule 4(d)(6) prescribes how to serve an unincorporated association.

When the community council acts within its proper public function, it arguably has immunity, whether absolute or qualified, from suit. I know of no instance where the issue has come up, because community councils generally don't put themselves in that position, or are not permitted to do so.

**When it chooses to step outside of its statutory function as an advisory council, the community council would then run a significant risk that the MOA might revoke its standing as a community council.**

There are steps that the community council can take to protect itself from liability should it wish to assume non-advisory functions within the statutory framework, and perhaps cease to be a lawful community council. For example, the community council could incorporate, presumably as a non-profit, thereby becoming a limited liability entity. With or without incorporation, the community council could obtain liability insurance to protect itself, but I am unaware of any available liability insurance that protects the insured from its purposeful actions that might result in an alleged breach of contract or interference with contract, as here. That is a subject best addressed by an appropriate insurance agent or broker, subject to analysis of precise insurance contract terms by a legal professional.

I believe that the community council must limit itself to advisory functions described above. An alternate proposed resolution, incorporating features that appear to be common ground from the prior proposal, is proffered for the community council's consideration. Linda Chase and Ric Wilson worked with me on the alternate proposed resolution.

Jim Wright