

# I. ORGANIZATION OF THE NON-PROFIT AGENCY

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**Effective Date: April 21, 2008**

## A. INCORPORATION

Some non-profit groups and organizations are able to provide worthwhile services and accomplish their stated goals while operating as unincorporated non-profit associations. Usually, such associations do not generate revenue in excess of expenses and thus are not concerned with a tax liability. They are not dependent upon the generation of deductible contributions and do not plan to make application for public or private grant funds. However, experience has shown that most non-profit organizations need to be properly incorporated in accordance with the laws of North Carolina and to obtain tax-exempt status under Section 501 (c) of the Internal Revenue Code.

The incorporation process involves a significant amount of time and effort and the completion of certain paperwork. The process requires the organization and its incorporators to deal with important organizational matters, to clearly define the nature and purpose of the organization, and to formulate Articles of Incorporation and bylaws.

There are a number of benefits which result from incorporation such as separate and perpetual legal existence, limited liability, the right to receive public and private grant monies, etc. The formal documents consisting of the Articles of Incorporation, bylaws, board resolutions, and board minutes provide the structure and procedures which facilitate the organization's decision-making and operational process.

The success of a non-profit corporation is greatly influenced by the composition of its governing board as well as how active and committed individual members are to the organization. The board has ultimate legal authority and responsibility for the organization's overall activities and how it utilizes and accounts for available resources. Most boards leave the organization's day-to-day operations to management staff that have been recruited and hired by the board. The board devotes its time and effort into developing policies and procedures which hopefully will ensure achievement of the organization's overall goals and objectives.

The Articles of Incorporation which represent the basic governing document of the corporation specify:

1. Name of the corporation and its location and address.
2. Purpose for which the corporation is organized.
3. Period of duration (which may be perpetual).
4. Number and names of the initial directors.
5. Name and address of each incorporator.

## 6. Other data consistent with the incorporation statute.

Corporate bylaws represent the rules and regulations which govern the internal management of the corporation and specify the officers which normally consist of at least a chairperson/president, a secretary, and a treasurer selected from the board membership. In most cases, the bylaws stipulate that officers and board members will serve on a rotating term so that new members will be coming on the board on a continuing basis.

In North Carolina the Department of the Secretary of State is responsible for incorporating profit as well as non-profit organizations. The North Carolina Department of the Secretary of State, Corporations Division has published, "Incorporating Your Non-Profit in North Carolina" effective February 22, 2002. This guide can be accessed at <http://www.secretary.state.nc.us/Corporations/> then clicking "Nonprofit Corporation" under Guidelines to Incorporating. The following guidelines are extrapolated from that publication. Also, in view of the fact that incorporation represents a legal process, it is strongly suggested that the services of an attorney who is knowledgeable in this area be secured.

### **CORPORATE NAMES**

Part of the process of incorporating is choosing and reserving a name for the non-profit corporation. The Department of the Secretary of the State office will approve or reject proposed corporate names according to State corporation law, which requires that the name chosen must be distinguishable upon the records of the Secretary of State from the names of other non-profit or business corporations operating in North Carolina. Proper name selection is important in the process of incorporating because other parties may sue for unfair competition or trade name infringement if the name chosen is so similar to another corporation's name as to deceive or confuse the public.

The steps involved in choosing a corporate name are the following:

1. Selecting a name;
2. Determining whether it is feasible to use the name; and
3. Putting the name in use; and
4. Deciding on a trademark or service mark.

To obtain protection for a particular corporate name or to resolve a dispute over such a name, the advice of an attorney should be secured rather than contacting the Secretary of the State's office.

### **Selecting a Name**

In choosing the corporation's name there are certain requirements of which you should be aware.

1. A corporate name shall not contain language stating or implying that the corporation is organized for any purpose other than a purpose that is lawful and that is permitted by its Articles of Incorporation.
2. The corporate name must be distinguishable under the records of the Secretary of State, from the name of any domestic corporation or the name of any foreign corporation authorized to transact business or conduct affairs in this state, a corporate name reserved or registered, or a name used, reserved, or registered by a limited liability company, or a limited partnership or a limited liability partnership.

The choice of a name depends on many factors, but there is one important rule to follow. Do not choose a name because you have seen it elsewhere and believe it will work well for your own corporation, unless you obtain written permission of the party already using the name. Also, examine North Carolina General Statute §§55D-20 and 55D-21 for more details.

### **Feasibility of a Name**

After you have chosen a corporate name, you may do the following in order to determine if the name chosen is available for use.. You can check the telephone books in your area for similar names.

1. You can check the Register of Deeds permit office in your county and surrounding counties for similar names listed as assumed names or partnership names.
2. You can write or call the Department of the Secretary of State to determine if a proposed name would be available as a corporate name or whether your proposed name have been registered as a trademark or service mark under North Carolina law. .
3. You can check business directories, city directories, chamber of commerce lists, etc. in your locality for similar names.
4. For a fee, you can have an attorney or a trademark search firm conduct a trademark search through the U.S. Patent and Trademark Office for similar federal trademark or service mark registrations.
5. You can conduct searches similar to those outlined above in other states in which you plan to operate by contacting the officials in those states which are in charge of similar types of registration. The appropriate offices and the details of registration may vary according to the laws of each state.

With regard to proposed corporate names, the Department of the Secretary of State makes the decision whether a name will be rejected or accepted only on the basis of whether it is distinguishable from another corporation's name. It is your responsibility to decide how many of the searches outlined above are appropriate or necessary for your proposed corporate name.

### **Putting the Name in Use**

Once you have gone through the necessary steps to determining the availability of your corporate name, you are ready to put it in use. By properly filing its Articles of Incorporation or certificate of authority, a non-profit domestic or foreign corporation registers its name with our office. This filing means only that the chosen name is acceptable under the corporation laws. It does not guarantee that the use of that name will not be challenged by someone who has been using a similar name and who charges that the use of your chosen name constitutes unfair competition.

### **Trademark and Service Mark Registration**

*N C Gen. Stat. §§80-1-80-14.*

A trademark is a name, symbol, design, device or word used by a person to identify goods or products made or sold by him so that they will be distinguished from similar merchandise made or sold by others. A service mark is comparable to a trademark but is a mark used in connection with the sale or advertising of services, rather than goods or products. Trademarks and service marks may be registered under North Carolina law by filing with the Trademarks Division in the

Department of the Secretary of State any time after the mark has been used in commerce in North Carolina. Forms are available from the Department of the Secretary of State.

**NOTE:** Registration of trademarks and service marks under the federal law may be made by filing with the U.S. Patent and Trademark Office at any time after a mark has been used in a commercial transaction in interstate commerce. The assistance of a competent attorney is advised in case you want to procure a federal registration, due to the complexity of the registration procedure. Some public information is available directly from the U.S. Patent and Trademark Office. Both state and federal registration are voluntary, rather than mandatory, requirements for use of the trademark, although in some circumstances such registrations may be necessary for proper protection.

## ARTICLES OF INCORPORATION

Articles of Incorporation are the legal documents which must be filed in order to form a corporation. The information required to be included is detailed below. It is suggested that any other information be contained in your bylaws. (North Carolina General Statute §55A-2-02).

The Articles of Incorporation must include the following:

**1. Corporate Name.** The exact corporate name, including abbreviations, punctuation, etc., must be used consistently in all documents filed. For example, the corporate name stated in the caption of the documents filed must be identical to the name stated in article one.

**2. Designation as a Charitable or Religious Corporation.** A corporation which is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code is called a "charitable or religious corporation" in the North Carolina Non-profit Corporation Act. This term also includes a corporation which is organized exclusively for one or more purposes specified in Section 501(c)(3) and which must distribute its assets upon its dissolution to another "charitable or religious corporation" or to the United States or another State. If your corporation fits this description, the articles *must* include a statement to the effect that it is a "charitable or religious corporation."

**3. Registered Office and Agent.** A non-profit corporation is required to have a registered office and a registered agent (North Carolina General Statute §55A-5-01). The duty of the registered agent is to forward to the corporation at its last know address any notice, process or demand that is served on the corporation. A registered agent must be:

- (1) an individual who resides in North Carolina and whose business office is identical with the registered office;
- (2) a domestic corporation whose business office is identical with the registered office; or
- (3) a foreign corporation authorized to transact business in this State whose business office is identical with the registered office.

The Articles of Incorporation must set forth the street address (and the mailing address, if different from the street address) of the registered office, as well as the county in which the registered office is located, and the name of the initial registered agent. The registered office may, but need not be, the same as any of the corporation's places of business.

**4. Incorporator.** The person who signs and files the Articles of Incorporation is known as the incorporator. There must be at least one incorporator. The name and address of each incorporator must be indicated.

**5. Members.** Under North Carolina law, a non-profit corporation may or may not have members. If the corporation is to have members, this must be specified in the Articles of Incorporation. If the corporation is to have no members, there must be included a statement to that effect.

**6. Provisions for Distribution of Assets.** The North Carolina Non-profit Corporation Act requires that the Articles of Incorporation include provisions regarding the distribution of the corporation's assets upon its dissolution and termination of existence. Persons drafting the articles are allowed a great deal of flexibility in designing these provisions, but the provisions must not be inconsistent with law. You should consult North Carolina General Statute §55A-14-03 ("Plan of dissolution") for more specifics on distribution of a non-profit corporation'

**7. Principal Office.** You must state the street address, and mailing address, if different, of the principal office of the corporation in the state or country in which it is incorporated.

**Optional Provisions.** The Articles of Incorporation are allowed, but not required, to set forth any provision that can be included in the bylaws of a non-profit corporation. The articles may also contain:

1. a statement of the purpose or purposes for which the corporation is organized;
2. the names and addresses of the initial directors;
3. provisions relating to management and regulation of the corporation's affairs;
4. provisions which define, limit, or regulate the powers of the corporation, its directors, and its members (or any class of members);
5. provisions defining the qualifications, rights, and responsibilities of its member; and
6. provisions limiting or eliminating the personal liability of any director for monetary damages for breach of any duty as director.

**Powers** - North Carolina General Statute §55A-3-02 sets forth certain powers that all non-profit corporations have, unless the Articles of Incorporation state otherwise. Because these powers are statutory, they do not need to be listed in the Articles of Incorporation. Among these statutory powers are the following: to sue, and be sued; to complain and defend in the corporate name; to have and affix a corporate seal; to purchase, lease, acquire, hold, use, own, or otherwise deal in and with any real and personal property; to make contracts and incur liabilities; to elect or appoint officers; to make and alter by- laws; to lend money for corporate purposes; and to have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized.

**Period of Existence.** Unless the Articles of Incorporation or the Non-profit Corporation Act provide otherwise, every non-profit corporation is presumed to have perpetual duration. Consequently, it is not necessary to set forth a period of duration in the articles.

**Notarization Not Required.** Notarization is no longer required for documents filed with the Department of the Secretary of State. It is permissible for such documents to be notarized or

verified, but the notarization or verification must not be defective in any way or the document will be rejected.

**Filing the Document.** One executed original and one exact or conformed copy of the Articles of Incorporation signed by the incorporator(s) must be submitted to the Department of the Secretary of State by mail or in person, along with a check, money order, or cash for the filing fee required by law. A photocopy of the Articles of Incorporation is acceptable as a copy. The filing fee is \$60.

The Department of the Secretary of State will examine the Articles of Incorporation, and if the articles satisfy the requirements of the Non-profit Corporation Act, they will be filed by time-stamping and dating. The signed original will be retained by the Department of the Secretary of State. The copy will be certified and returned to the person who submitted it for filing.

Articles of incorporation are no longer required to be filed with the office of the Register of Deeds, as was the case under prior non-profit corporation law.

### ***Certificate of Authority***

A Certificate of Authority is a legal authorization which a foreign corporation must obtain in order to be able to conduct its affairs in this state (North Carolina General Statute § 55A-15-01). In order to be qualified to conduct its affairs in North Carolina, the corporation must complete and submit one executed original application for a Certificate of Authority to the NC Department of the Secretary of State. All of the sections must be completed in accordance with North Carolina General Statute 55A-15-03. The application can be found online at the Secretary of State's website listed <http://www.secretary.state.nc.us/Corporations/>. Select "Nonprofit Corporations" under Print Corporation Forms.

### ***BOARD OF DIRECTORS, MEMBERS, OFFICERS, AND BYLAWS***

All non-profit corporations must have an organizational structure and rules or bylaws by which they are managed. The organizational structure is comprised of directors and officers who handle the internal management of the corporation, and perhaps also of members, which may have the right to elect the directors of the corporation. The internal management of the corporation is regulated by the corporate bylaws and the Articles of Incorporation.

#### **Members**

A non-profit corporation may or may not have members. The fact that a corporation has or does not have members must be stated in the Articles of Incorporation.

Members are those persons who have membership rights in the organization in accordance with the provisions of its Articles of Incorporation or bylaws. Members may or may not have a right to vote on corporate matters. They may hold meetings and may elect the board of directors and officers, if permitted by the charter or by the bylaws.

Membership in a non-profit corporation entails certain rights and responsibilities. These should be stated in either the Articles of Incorporation or the bylaws. Other rights may be granted by statute.

#### **Directors**

Directors are those persons who are responsible for the management of the corporation. A non-profit corporation is required to have **at least one director**, or it may have more. The Articles of Incorporation or the bylaws may contain provisions for electing the directors. If a corporation has

members, the directors may be elected by the members, if the Articles of Incorporation or bylaws permit. If a corporation does not have members, the directors are elected or appointed in the manner and for the terms as provided in the Articles of Incorporation or bylaws.

### **Officers**

The day-to-day management of the corporation is provided by the officers of the corporation. The officers are elected or appointed as prescribed in the bylaws and their performance is overseen by the directors. If there is no such provision for their election or appointment, the officers are usually elected or appointed annually by the board of directors. The officers usually consist of a president, one or more vice-presidents, a secretary, a treasurer, and any other officer deemed necessary.

### **Bylaws**

In both membership and non-member corporations, a set of rules known as the bylaws governs the internal administration and regulation of the affairs of the corporation. The bylaws may contain any provisions not inconsistent with the law or the Articles of Incorporation. The initial bylaws must be adopted by the incorporators or board of directors. (North Carolina General Statute §55A-2-06).

### ***Tax Exempt Status Information***

The Department of the Secretary of the State provides some language that may be incorporated by reference into the Articles of Incorporation of non-profit corporations **only** if the corporation is intended to be tax-exempt under Section 501(c)(3) of the Internal Revenue Code, and if its activities and property are intended to be restricted to one or more of the purposes listed in the "Purposes of Corporation" provision. That language is found in a document titled, "**Tax Exempt Status information**" and may be accessed at <http://www.secretary.state.nc.us/Corporations/>. Select "Nonprofit Corporations" under Print Corporation Forms. Then select "**Tax Exempt Status information**".