

Understanding Nonprofit “Members” and “Membership” For Hawaii Nonprofit Organizations

One of the first questions nonprofit organizations face when they seek to incorporate in the State of Hawaii (or in many other states too), is this: Does your organization have members? Under the Hawaii nonprofit law, officially referred to as the Hawaii Nonprofit Corporations Act, this is a mandatory question which must be answered at the time of incorporation. In the flurry to get the organization going, many people considering that question may simply say, “Why not?” or “Of course we want members.” But to properly answer this question, you must first understand what Hawaii nonprofit law considers “membership” to mean, which is different from what many people would be thinking about. Failure to understand the difference could mean failure to provide the minimum rights the Hawaii nonprofit law affords “members” of the nonprofit organization, which could in certain situations lead to a number of problems for the organization.

What “Member” and “Membership” Means Under the Hawaii Nonprofit Corporations Act

Under the Hawaii Nonprofit Corporation’s Act, if a person has been given rights, or obligations, of membership, under the organization’s articles or bylaws, then that person is a “member,” regardless what the organization actually calls that person (*e.g., member, supporter, affiliate, etc.*).¹ But first, a nonprofit organization has the right to decide on its own whether to have members,² including *delegates* of members (for large organizations),³ and the criteria and procedures for admission of members,⁴ including the right to require consideration, such as dues,⁵ and the right to establish classes of membership, with different rights associated among the classes.⁶

Once a Hawaii organization identifies in its articles that it has members, the following rights and responsibilities associated with membership in a Hawaii nonprofit corporation come into play, including the ones below:

- *Membership meetings and actions by members.* A membership organization is required to hold at least one membership meeting per year, where at a minimum, the president and chief financial officer must report on the activities and financial condition of the corporation.⁷ Members must be provided written notice of such meetings within specified time periods.⁸ A member may obtain a court ordered meeting, upon showing the organization failed to hold a regular meeting.⁹

Subject to certain requirements, including the nature of the issue, five percent of the members may force the holding of a special membership meeting.¹⁰

Membership actions may occur without meetings but require the written consent of eighty percent of the members.¹¹

- *Actions of the organization requiring the affirmative vote of the membership.* Unless the articles or bylaws preclude the right, the vote of the members is required on the following matters: election of directors (after the initial directors);¹² a director conflict of interest;¹³ and, determination and authorization of indemnification.¹⁴ Alternately, the Hawaii nonprofit law does not permit an organization to deny a member vote on the issues of: merger;¹⁵ the sale of assets other than in the regular course of activities;¹⁶ and the dissolution of the organization.¹⁷ In contrast, an amendment of the articles of incorporation does not require the vote of the members, unless the articles or bylaws expressly grant such a right.¹⁸
- *Voting rights of members.* "The right of the members, or any class or classes of members, to vote may be limited, enlarged, or denied to the extent specified in the articles of incorporation."¹⁹ (Although not specified therein, for consistency with other provisions in the Act, this provision must be read as being subject to the mandatory voting rights identified immediately above). A quorum of members is required to validate an action of the members.²⁰ Where the issue up for the vote has been properly noticed, a quorum requires ten per cent of the votes entitled to be cast, unless the articles or bylaws provide differently.²¹ Votes may be cast by proxy, unless prohibited in the articles or bylaws.²²
- *Potential liability of members.* Members are not liable to the nonprofit organization, or other third parties, except to the extent they owe dues or have other debts to the organization.²³
- *Termination, expulsion, suspension of members.* The nonprofit organization must provide fair and reasonable procedures before terminating, expelling or suspending members, and members are usually given up to a year to challenge such an action.²⁴ If an organization seeks to terminate all members or classes of members, a number of noticing procedures will be necessary, and the amendment will have to be supported by two-thirds of the members or class of members at a membership meeting.²⁵ In certain instances, members may have the right to bring a derivative action against the nonprofit corporation.²⁶
- *Inspection of records.* Members have a right to review some of the documents of the organization, including financial statements, subject to certain restrictions.²⁷

To Have Members, Or Not to Have . . . ?

A number of organizations need, or are required by state or federal law, to have members, for example, condominium “apartment owner” associations.²⁸ It makes particular sense in those cases because membership is tied to ownership of a property interest. A similar example is an organization furthering the interest of workers, such as a labor union which is there to serve a group of workers. To qualify as a labor organization under 501(c)(3) of the Internal Revenue Code, the organization, not unsurprisingly, must have members.²⁹

In contrast, a lot of 501(c)(3) public charities are *not* membership organizations. In those cases, they are run completely by a self-perpetuating board of directors. This permits, among other things, a more streamlined organization (which even without members is subject to a great number of checks and balances). These nonmember organizations nonetheless usually want people to support them and to associate with them. These nonmember organizations also want to recognize their donors and supporters. So, a nonmember organization might still identify its donor in a number of ways that suggest “membership,” such as an *associate*, or *supporter*, or *partner*, or, even *member*. This is permitted by the law because, as explained earlier, corporate rights and responsibilities for members only come when the rights are expressly provided in the articles or bylaws of the organization.

Notwithstanding the above, there are some organizations that could be *nonmember* organizations but who choose to be member organizations for a variety of reasons, either historical or strategic. For example, the national organization, Sierra Club, is a membership organization, and its wide-spread members are given the right to vote on a variety of issues by written ballot.³⁰

Precautionary Measures for Hawaii Nonmember Organizations

Although not required, a *nonmember* organization may choose to include language in its articles or bylaws explaining that its right to identify people as “members” (or similar names) does not create any implied form of membership, as recognized by the Hawaii Nonprofit Act.

Precautionary Measures for Member Organizations

A membership organization needs to carefully identify in its articles and/or bylaws what rights will be granted to members, fully understand those places where members’ voting rights are mandatory under the Hawaii Nonprofit Corporations Act, and adopt articles and bylaws that carefully guide the decision makers with respect to the necessary procedures for notice, meetings and voting for members. The organization’s directors and officers should become knowledgeable regarding members

rights, and have counsel available to help determine when a proposed action or decision will trigger members’ rights.

¹ Hawaii Revised Statutes (“HRS”) § 414D-14 provides these definitions:

“Member” means (without regard to what a person is called in the articles or bylaws) any person or persons having the rights and obligations of membership pursuant to a corporation’s articles of incorporation or bylaws.

“Membership” refers to the rights and obligations a member or members have pursuant to a corporation’s articles, bylaws, and this chapter.

Under HRS 414D, a “person” can be an individual or an entity.

² HRS § 414D-83.

³ *Id.* § 414D-91.

⁴ *Id.* § 414D-82.

⁵ *Id.*

⁶ *Id.* §§ 414D-84.

⁷ *Id.* § 414D-101.

⁸ *Id.* § 414D-105. Who must receive notice is governed by *Id.* § 414D-107. Notice may be waived upon meeting certain procedures. *Id.* § 414D-106. Members are entitled to a copy of the membership list created for such notice. *Id.* § 414D-109.

⁹ *Id.* § 414D-103.

¹⁰ *Id.* § 414D-102.

¹¹ *Id.* § 414D-104.

¹² *Id.* § 414D-134(a).

¹³ *Id.* § 414D-150(e).

¹⁴ *Id.* § 414D-164(e).

¹⁵ *Id.* § 414D-202(a)(2).

¹⁶ *Id.* § 414D-222(b).

¹⁷ *Id.* § 414D-242.

¹⁸ *Id.* § 414D-182(a).

¹⁹ *Id.* § 414D-110.

²⁰ *Id.* § 414D-111.

²¹ *Id.* § 414D-111(a).

²² *Id.* § 414D-113.

²³ *Id.* § 414D-85, 86, 87.

²⁴ *Id.* § 414D-89.

²⁵ *Id.* § 414D-89, 89.5.

²⁶ *Id.* § 414D-90.

²⁷ *Id.* §§ 414D-302 - 306

²⁸ *See, e.g.*, HRS 514B-102(b) providing that the association shall consist exclusively of all the unit owners.

²⁹ A 501(c)(5) “labor organization is a *membership organization* of employees or representatives of employees.” IRS Exempt Organization Determinations Manual § 7.25.52.1 (emphasis added).

³⁰ Based on author’s review of Sierra Club’s March 1, 2010 Bylaws.