

Cynthia Cumfer, Attorney at Law

A WORKSHOP FOR THE HISTORICAL CEMETERIES PROGRAM

Cynthia Cumfer, Attorney at Law

© Cynthia Cumfer, 2007

Legal services for nonprofit organizations

316 N.E. 28th Avenue
Portland, OR 97232
503.234.4282

GOALS FOR TODAY

Cynthia Cumfer, Attorney at Law

- Leave Knowing More than When You Came
- Use Plain English
- Ask Questions Freely
- Laugh
- Education, Not Legal Advice

Cynthia Cumfer, Attorney at Law

OVERVIEW

- State Law: Nonprofit Corporations
- Federal Tax-Exempt Law
- Duties and Liabilities of Directors

Cynthia Cumfer, Attorney at Law

STATE LAW: NONPROFIT CORPORATIONS

- Overview of Nonprofit Corporations
- Review of Articles, Amendments and Bylaws

OVERVIEW OF NONPROFIT CORPORATIONS

Cynthia Cumfer, Attorney at Law

- Types of Nonprofit Organization
- Types of Nonprofit Corporation
- Advantages of Incorporating as a Nonprofit
- Responsibilities of the Nonprofit Corporation

REVIEW OF ARTICLES, AMENDMENTS AND BYLAWS

Cynthia Cumfer, Attorney at Law

- Who Couldn't Find Them?
- Articles and Amendments
 - Check State's Website for Record of Amendments
- Bylaws

ARTICLES AND AMENDMENTS

Cynthia Cumfer, Attorney at Law

- When Filed?
- Purpose
- Mutual or Public Benefit
- Membership
- Dissolution
- Any Specific Provisions

BYLAWS

Cynthia Cumfer, Attorney at Law

- Purpose
 - Still valid?
- Membership
- Board of Directors
- Officers
- Amendments

MEMBERSHIP

Cynthia Cumfer, Attorney at Law

- Who Are Members?
- What are Their Rights?
- How is Membership Terminated?

BOARD OF DIRECTORS

Cynthia Cumfer, Attorney at Law

- Clear Provision for How Elected/Appointed?
- How Removed?
- Notice of Meetings?
- Quorum and Voting?

OFFICERS

Cynthia Cumfer, Attorney at Law

- President and Secretary? (May Be Called Something Else)
- How Elected or Chosen?

AMENDMENTS

Cynthia Cumfer, Attorney at Law

- Who Decides?
- How to Give Notice and Call Meeting?
- What Vote is Required?

FEDERAL TAX-EXEMPT LAW

Cynthia Cumfer, Attorney at Law

- (c)(3)s—Charities
- (c)(4)s—Social Welfare Organizations
- (c)(13)s—Cemetery Associations

(C)(3)s--CHARITIES

Cynthia Cumfer, Attorney at Law

- Public Benefit: Historical Preservation or Charity
- Plots for Public
- No Private Benefit
- Cannot Distribute Earnings
- Charitable Deduction to Donors If Gift
- More Leeway to Have Unrelated Business Income
- Excess Benefits Transactions

(C)(4)s—SOCIAL WELFARE ORGANIZATIONS

Cynthia Cumfer, Attorney at Law

- Public Benefit: Civic Improvement or Plots for Needy
- No Charitable Deduction
- Cannot Distribute Earnings
- Excess Benefits Transactions
- Unlikely Choice for Most Cemeteries

(C)(13)s--CEMETERIES

Cynthia Cumfer, Attorney at Law

- Mutual Benefit: Operated Exclusively for Benefit of Members and Those Who Cannot Afford Plots
- Must Hold Lots for Burial Purposes, Not Resale
- Can Engage in Burial and Cremation
- Cannot Engage in Business Not Incident to Purpose
- No Private Benefit
- Charitable Deduction to Donors if Gift (Unless to a Donor Advised Fund)

(C)(13)s—PERMISSIBLE ACTIVITIES

Cynthia Cumfer, Attorney at Law

- Perpetual Care Funds
- May Be Limited to Members of Extended Family
- Purchase of Adjacent Historical Property to Be Used for Burial Purposes
- Sale of Caskets Used Solely for Burials at Cemetery

(C)(13)s—IMPERMISSIBLE ACTIVITIES

Cynthia Cumfer, Attorney at Law

- Cannot Operate Mortuary
- Cannot Provide Burial Sites to Nonmembers (Other Than Needy)
- Cannot Distribute Earnings

DUTIES AND LIABILITIES OF DIRECTORS

Cynthia Cumfer, Attorney at Law

- Duties of Directors
 - Due Care
 - Loyalty
- Personal Liability
- Protection
- Great Time to Be a Director

DUTIES OF DIRECTORS: DUE CARE

Cynthia Cumfer, Attorney at Law

- Attentiveness
- Oversight
- Obey Laws
- Investigate Suspicious Circumstances
- Reasonableness Standard

ATTENTIVENESS

Cynthia Cumfer, Attorney at Law

- Attend Meetings
- Observe Corporate Formalities
- Follow Corporate Bylaws and Mission
- Make and Follow Board Policies
- Keep Current

MANAGEMENT OVERSIGHT

Cynthia Cumfer, Attorney at Law

- Approve Organizational Chart
- Regular Reports from Executive Director
- Employee Policies
- Dangerous or Risky Activities

MANAGEMENT OVERSIGHT: BEST PRACTICES

Cynthia Cumfer, Attorney at Law

- Board Management Policies
- Record Retention Policy
- Whistleblower Policy

FINANCIAL OVERSIGHT

Cynthia Cumfer, Attorney at Law

- Regular Financial Reports
- Ensure Funding
- Restricted Funds
- Proper Investment Policies
- Establishment of Compensation
- Audit

FINANCIAL OVERSIGHT: SPECIAL ISSUES

Cynthia Cumfer, Attorney at Law

- Loans to Officers and Directors
- Pay Taxes and Worker Compensation
- Independent Contractors v. Employees

FINANCIAL OVERSIGHT: BEST PRACTICES

Cynthia Cumfer, Attorney at Law

- Audit Committee
- Excess Benefits Transactions Policy
- UMIFA and UPMIFA
- Board Financial Policies

OBEY LAWS

Cynthia Cumfer, Attorney at Law

- Cemetery Rules
- (c)(3) Restrictions and Penalties
 - Campaigning
 - Lobbying
 - Insider Transactions

INVESTIGATE SUSPICIOUS CIRCUMSTANCES

Cynthia Cumfer, Attorney at Law

- What is “suspicious”?
- Alert Other Board Members
- Consider Privacy Needs
- Record Investigation and Result

REASONABLENESS STANDARD

Cynthia Cumfer, Attorney at Law

- Best Judgment Rule
- Due Care Means that You Act Reasonably
- Reasonableness Depends on Your Background and Expertise
- No Monday Morning Quarterbacking

DUTIES OF DIRECTORS: LOYALTY

Cynthia Cumfer, Attorney at Law

- Place Loyalty to Corporation First
- Conflicts of Interest
- Exploitation of Corporate Opportunities

CONFLICTS OF INTEREST

Cynthia Cumfer, Attorney at Law

- Oregon Law
- IRS Concerns
- Best Practices
 - Adopt Conflicts Policy
 - Adopt Excess Benefits Transactions Policy

EXPLOITATION OF CORPORATE OPPORTUNITY

Cynthia Cumfer, Attorney at Law

- Opportunities that Come to Corporation Belong to Corporation
- Using Knowledge of Donors and Funders
- Exploitation Breached Duty of Loyalty Even If Done to Benefit Another Nonprofit

PERSONAL LIABILITY

Cynthia Cumfer, Attorney at Law

- Failure to Use Due Care
- Failure to Observe Rules on Conflicts and Loyalty
- IRS and State Penalties
- Agreement to Be Liable
- Who Might Sue

PROTECTION

Cynthia Cumfer, Attorney at Law

- Follow Best Practices
- Maintain Proof of Correct Behavior
- Reliance on Reports

MORE PROTECTION

Cynthia Cumfer, Attorney at Law

- Limitations on Liability
 - Federal Law: Volunteer Protection Act
 - Oregon Law: Volunteer Directors
 - Corporate Protection
- Insurance

RED FLAGS

Cynthia Cumfer, Attorney at Law

- Board Protective Culture
- Board Not Running Organization
- Membership Vote Not Obtained
- Financial Hot Buttons

ORGANIZATIONAL CHECKLIST FOR YOU AS DIRECTOR

Cynthia Cumfer, Attorney at Law

- Articles of Incorporation or Amendments—Limitation on Personal Liability
- Articles or Bylaws—Indemnification
- Board Policy Manual
- Employee Policies
- Board Orientation/Manual

RESOURCES: WRITTEN MATERIALS

Cynthia Cumfer, Attorney at Law

- Cumfer and Sohl, Oregon Nonprofit Corporation Handbook
- Nonprofit Times
- Chronicle of Philanthropy
- American Bar Association, Committee on Nonprofit Corporations, Guidebook for Directors of Nonprofit Corporations
- Hill and Mancino, Taxation of Exempt Organizations

ORGANIZATIONAL RESOURCES

Cynthia Cumfer, Attorney at Law

- Technical Assistance for Community Services (tacs.org)
- Board Source (boardsource.org)
- Independent Sector (independentsector.org)
- Council on Foundations (cof.org)
- IRS (irs.gov/charities)
- Guidestar (guidestar.org)

THANK YOU

Cynthia Cumfer, Attorney at Law

- Oregon State Historical Cemeteries Program
- You Who Serve on Nonprofit Boards, as Executive Directors and Staff, and as Volunteers