



NHAC

New Hampshire Association of Counties

Strategic Analysis:

Governance

Report of Findings

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March 2005



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## I. Governance Overview

### Introduction

A corporation is a legal entity with authority to act and have liability separate from its owners. It also allows for the “perpetual” existence of the corporation. Unlike for-profit corporations, nonprofits are not “owned”. A “governing body”, generally called a board of directors, is responsible for a nonprofit corporation.

### Governance

State and Federal laws give nonprofit corporations special rights and privileges because they provide a public benefit. A board’s voluntary leadership and oversight must keep the focus on that public benefit. A board’s primary duty is to uphold the public trust (fiduciary). This is a legal duty. Directors have three basic legal obligations<sup>1</sup>:

1. Duty of care—requires exercise of care, diligence and skill that an ordinary, prudent person would exhibit under similar circumstances.
2. Duty of loyalty—requires pursuit of organization’s best interests. A director should avoid self-dealing, absent full disclosure and board approval in each case.
3. Duty of obedience—requires action in accordance with the organization’s rules and in furtherance of its goals as stated in the mission statement, articles of incorporation and bylaws.

### Nonprofit Corporation Designation

State law governs the nonprofit corporate designation. The governing body is responsible for obtaining this designation and for assuring ongoing compliance.

#### Charter

The charter, also known as articles of incorporation, is a prerequisite for official status as a nonprofit corporation. The charter is a legal document filed with the secretary of state. Changes to the charter require formal amendment, also filed with the secretary of state. State law may have additional requirements, such as filing an annual report, to maintain nonprofit status.

#### Bylaws

Bylaws define structure and basic operating rules for the organization and the board of directors. These rules should be reviewed and updated regularly. When changes are made, the revised bylaws must be filed with the appropriate state department. Bylaws are required for nonprofit status.

### Tax-Exempt Designation

The Internal Revenue Service determines the tax status of an organization. If tax-exempt status is granted, the organization will receive a Letter of Determination from the IRS. Being a tax-exempt entity does not automatically make donations to the organization tax deductible to the donor. The Letter of Determination will state whether contributions to the organization are tax deductible or not. Tax-exempt organizations must file an annual Federal return. The Form 990 is



due on the fifteenth day of the fifth month after the close of the organization's accounting period. There is a penalty for each day the return is late.

It is important to note that not only must a tax-exempt organization be "organized" consistent with the public trust by virtue of the Articles of Agreement, the organization must also be "operated" consistent with those principles. The IRS may revoke an organization's tax-exempt status if the organization is not operated appropriately.

#### Other Requirements

Funding sources (grants) or other entities may have specific requirements in addition to state and federal requirements.

#### Roles and Responsibilities

In addition to legal and fiduciary responsibilities, board members have other roles. These roles may depend on the size and goals of the organization. The National Center for Nonprofit Boards<sup>1</sup> defines basic board responsibilities as:

1. Determining the organization's mission and purpose.
2. Selecting the chief executive.
3. Supporting the chief executive and assessing his/her performance.
4. Ensuring effective organizational planning.
5. Ensuring adequate resources.
6. Managing resources effectively.
7. Determining and monitoring the organization's programs and services.
8. Enhancing the organization's public image.
9. Ensuring legal and ethical integrity and maintaining accountability.
10. Recruiting new board members and assessing the board's performance.

Board members are not usually involved in the day-to-day operations and management decisions.

#### Conclusion

Board members must educate themselves about the nonprofit's activities and regulatory requirements to discharge their legal responsibility as a member of the governing body. There may be legal consequences for failure to adequately discharge these duties. Board members may be held personally liable; however state law may limit board member liability. Organizations may purchase directors and officers (D&O) insurance as well. However, these protections may not apply in all instances.

Additionally, nonprofit corporations are one of the fastest growing segments of the economy. Because of this growth and the highly publicized mismanagement in both private and public sectors, the operations of nonprofits are under increased scrutiny. It is more important than ever for board members to fulfill their legal and fiduciary duties.



**II. Industry Governance Analysis**

The bylaws of 14 non-profit associations from around the country were reviewed. Of the fourteen, eight (8) are state associations of county government and six (6) are other membership associations. One of the associations reviewed is based in New Hampshire. These organizations were chosen because the bylaws were readily available on the Internet. A complete list of the organizations reviewed is contained in the bibliography.

Despite the differences in titles and names, the documents were remarkably similar and follow the generally accepted governance roles for non-profit corporations.

Governance

The associations reviewed were defined as non-profit corporations organized under individual state law. The tax-exempt status was not defined within the bylaws. Review of their websites revealed that all appeared exempt under various sections of the 501(c) IRS Tax Code.

Bylaws

The bylaws varied in length from several to two dozen pages, none-the-less, there is a substantial amount of consistency. Five organizations have constitutions in addition to bylaws. A summary of the elements follows:

Bylaw Elements	#
Amendments	13
Assets	6
Board Composition/#	6
Committees	14
Compensation (BOD)	2
Conflict of Interest	3
Dissolution/Limitations	7
Dues	14
Election/Quorum	14
Executive Director/CEO	12
Fiscal Year	5
Indemnification	7
Individual Powers	1
Meetings	8
Membership	12
Name	12
Officer Duties	14
Officers	14
Purpose/Objective	13
Removal	14
Rules of Procedure	14
Terms of Office	14
Vacancy/Resignations	14
Voting	14
Other	14

- All bylaws contained language defining terms of office, elections, voting and removal from office.
- The non-county associations were more consistent with language defining dissolution, fiscal year, handling of assets and indemnity.



Roles and responsibilities

The variation of elected officials nationally contributed to variation in definition and structure of county associations. Functionally, however, the roles and responsibilities were generally consistent among associations reviewed. The roles and responsibilities were also consistent with the legal and fiduciary roles defined in the first section of this report.

Governing Body

A total of 12 organizations defined the board of directors as the unit with the general powers and authority of the corporation.

In these instances, the executive committee is composed of, at minimum, the officers of the corporation. Authority of the committee is limited to issues needing resolution prior to the next board meeting. In all cases, action taken by the executive committee must be reported to the full board for ratification.

Two county organizations vested the general powers and authority of the corporation with the executive committee. In both instances, membership on the committee extended beyond the officers. For these organizations, the board served in a policy approval capacity, met 2-3 times per year and consisted of 50 or more board members.

Committee Structure

Committee structure varied based on the services provided by the corporation. A core group of committees were similar to all associations reviewed:

Committee Name	#	
Audit*	3	*The trend among non-profit corporations is to separate audit oversight from the budget/finance committee as a result of Sarbanes-Oxley Act of 2002. While not currently <i>required</i> to comply with Sarbanes-Oxley, nonprofits are voluntarily complying with the intent of this legislation.
Executive	14	
Finance/Budget*	10	
Legislative/Gov. Relations	12	
Election/Nominating	10	
Planning/Development	2	
Membership	4	
Bylaws/Ethics	6	
Other	10	

Staff Executive Management

In all but one set of bylaws, the role and authority for an executive management staff position were defined. The executive position was defined as an agent of and accountable to the board of directors for implementation of activities on behalf of the association. In the two associations with an executive committee as the governing body, the executive is accountable to the committee. Specifically, the executive is responsible for the day-to-day activities, staff and fiscal management.



County associations were more likely to name this position “executive director” while non-county associations were more likely to follow for-profit executive titles such as “president/CEO”. In all instances, the executive is an ex-officio member of the board with no voting privileges.

In all associations reviewed, the executive is confirmed by vote of the board of directors. In three organizations, the bylaws stipulate the manner for removal from office with the remainder either silent or stating that dismissal must be compliant with the board-approved personnel policies. Two associations specifically stated that the executive is directed by the president of the board.

### Conclusion

- ▶ There is remarkable consistency in the bylaws among the fourteen associations reviewed despite the wide-variety of membership and purpose.
- ▶ The bylaws appear to be consistent with the generally accepted governance role described in the first section of this report.
- ▶ Determining compliance with the bylaws in regards to decision-making, authority, and adherence to the mission is not possible without an audit of the governing body meeting minutes.

### III. NHAC Governance Analysis

#### History and Introduction

Since 1975, the New Hampshire Association of Counties has served county government by facilitating inter-county relations and advocating on behalf of county government.

From 1975 to 1999, NHAC maintained an office and employed an executive director and three support staff. In 1999, the decision was made to outsource administration and the Dupont Group was subsequently retained.

During 2002, the Dupont Group announced that it would retain the government and public relations components but would no longer provide administrative services. After much discussion, the decision was made to re-establish an office and to hire two staff positions: an administrative director and an administrative assistant.

In March 2003, an administrative director was hired and the office was re-opened. A part-time administrative assistant was hired in 2004. When the position became vacant, the decision was made to hire a fulltime assistant, to begin January 2005. This office and staff configuration presently continues.

**The purpose of this analysis is to determine the governance requirements for NHAC, to assess compliance with these requirements and to develop recommendations based on the findings.**

#### Regulatory Requirements and Compliance

The primary resource for the following sections is the report, "Incorporation and Tax Exemption for New Hampshire Arts and Other Non-Profit Organizations: An Introductory Guide". The Guide was written by member law firms of the NH Business Committee for the Arts and is listed as a resource on the Secretary of State web page. This guide has been used by several thousand groups interested in incorporating as a NH voluntary corporation and in applying for federal tax-exempt status. The sections provided verbatim indicate the page numbers in the original report.

#### Nonprofit Corporation Designation (Pages 6-10)

RSA Chapter 292 governs voluntary corporations in New Hampshire. There are four basic steps involved with the incorporation process: (The details of each step are defined with the analysis of NHAC compliance.)

1. Reserving corporate name
2. Filing incorporation documents
  - a. Articles of Agreement
3. Providing for management of the corporation
  - a. Board of Directors
  - b. Bylaws
4. Performing post-incorporation responsibilities
  - a. Renewal Return
  - b. Articles of Amendment
  - c. Governance





NHAC maintains its principal place of business in Concord, New Hampshire and is, therefore, subject to the laws of the state of New Hampshire. Regulatory requirements were identified and assessed for compliance. Items marked “compliant” indicates NHAC is compliant with the intent of the requirement. Items marked “not compliant” are addressed in the recommendation section of the report.

Compliance with NH (Secretary of State) voluntary corporation process:

1. Reserving corporate name:

The corporate name was duly reserved.

Status: Compliant

2. Filing of incorporation documents (RSA 292:2)

Articles of Agreement

The Articles of Agreement for NHAC were originally filed in 1975 and remained unchanged until 2004.

Status: Compliant

3. Providing for management of the corporation

Board of Directors

Pursuant to RSA 292:6, a voluntary corporation’s board must consist of at least five voting members, who are not the same immediate family or related by blood or marriage. An employee of the corporation is restricted from holding a voting position on the Board.

The Executive Committee is the governing body of the Association (Bylaws Article VIII: Executive Committee). NHAC’s governing body consists of at least five voting members, who are not the same immediate family or related by blood or marriage. No employees have a voting position on the Board.

Status: Compliant

Bylaws

Bylaws typically contain provisions for the regulation and management of the corporation, including responsibilities of the governing body and officers; members, if any; meetings; and election procedures.

Status: Compliant

The corporation should also maintain a record book containing important documents including incorporation documents, annual reports, and minutes of its proceeds at the registered office of the corporation. This is generally the responsibility of the Board Secretary or designee.

Status: Not compliant

4. Performing post-incorporation responsibilities

Renewal Return

The Secretary of State requires all nonprofit corporations to file a “renewal return” every five years. Failure to do so dissolves the corporation.

Status: Compliant. (The next return is due by December 31, 2005.)

Articles of Amendment (RSA 292:7)

In order to change items in the Articles of Agreement, Articles of Amendment must be filed with the Secretary of State and the office of the Municipal Clerk with the appropriate filing fees.

In 2004 language revisions were made to comply with tax-exempt requirements. Articles of Amendment were duly filed with the Secretary of State and with the office of the Concord City Clerk as required by RSA 292. In January 2005, these changes were officially approved by the Secretary of State's office.

Status: Compliant

Governance (Pages 11-15)

A corporation's governing body has legal duties and responsibilities for the management and oversight of the organization and includes the duties of care and loyalty.

**1. Duty of Care**

The duty of care requires a director to act in good faith and in a manner that the director reasonably believes is in the best interest of the organization.

- a) Ordinary Prudence: A director must discharge his/her duties with the care of an ordinarily prudent person in a like position under similar circumstances. Ordinary prudence requires the director to act in accordance with the following:
  - 1) Sound Judgment, Common Sense, and Informed Decisions: A director is expected to possess and exercise sound and independent judgment in reviewing the affairs of the organization. A director should discharge his/her duties with common sense and in a manner the director believes to be in the organization's best interests. A director must take into account the organization's nature, operations, finances and objectives. This does not mean that the director must guarantee the ultimate success of his/her conclusion or act only with excessive caution. Nor should it discourage a director from taking innovative and informed risks. As long as a decision is rational, informed and involves no conflict of interest, then a director should be insulated from liability.
  - 2) Diligence and Attentiveness: A director must be diligent and attentive. A director should be willing to spend sufficient time to become reasonably acquainted with the organization's affairs. A director should attend Board and committee meetings, and read materials provided to him/her in advance of these meetings. In sum, it is incumbent upon a director to participate actively in Board matters.
  - 3) Reasonable Inquiry: It is the director's responsibility to ensure that the information upon which he or she bases decisions is adequate and reliable. Thus, the duty of care encompasses an obligation of reasonable inquiry. A director cannot avoid liability by claiming ignorance if the circumstances are such that the director knew or should have known certain facts.

- 4) Circumstances Dictate Degree of Care Required: The standard of care required will vary depending on the circumstances. Factors to be considered include:
- i. The particular organization's size and complexity, as well as its unique goals;
  - ii. The organization's objectives and resources available at the time the decision was made;
  - iii. The urgency of the decision, and the potential risks and rewards associated with the decision; and
  - iv. The information available when the decision was made; and any special knowledge possessed by a director.

As a general rule, the Board should strive to attain a balance between minimizing risks and creatively using the organization's resources.

- b) Selection and Retention of Competent Management: In order to fulfill one's duty as a director, a director must rely on others. The Board will not be held responsible for the acts and omissions of those to whom authority is vested as long as the Board did not and should not have known that those individuals were not acting responsibly or in compliance with the law.
- 1) Reasonable Reliance: A director must act on the basis of informed judgment. A director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, prepared and provided by (1) officers or employees of the organization, if the director reasonable believes they are reliable and competent in the matters presented; (2) legal counsel, public accountants or other individuals, if the director reasonably believes they are addressing matters within their professional expertise; or (3) a Board committee, if the director reasonable believes that its report merits confidence. Questions should be asked if a report seems inadequate, but a director is not required to personally exhaust every possible source of information before relying on the opinions of others.
  - 2) Ongoing Review: One way to ensure that management and Board Committees are acting responsibly, in compliance with the law, and consistent with the goals of the organization is by implementing policies and procedures for review of their actions. These policies and procedures should be designed to ensure that the Board will be promptly and fully apprised of any problems confronting the organization.
  - 3) Circumstances Should Be Considered: The circumstances will dictate the propriety of the delegation of duties and the degree of reliance on others. For example, it may be appropriate to delegate authority where the underlying matter is of relatively insignificant consequence to the organization.

## 2. Duty of Loyalty

The duty of loyalty means that a director must always act in the best interests of and maintain an undivided loyalty to the organization.

- a) Avoid Appearance of Impropriety: The best policy is to avoid any transaction, which would even suggest the appearance of preferential treatment, unfair transaction or usurpation of an opportunity for the organization.
- b) Full Disclosure: If a situation arises where a director's absolute and unconditional loyalty to the organization might be questioned, that director should make full and complete disclosure to the entire Board. A disinterested Board may approve the transaction or contract after a thorough and independent review of it to determine if it is in the organization's best interests.

## 3. Other

- a) Conflict of Interest: The Board is required (RSA 292:6-a and RSA 7:19, II) to adopt a conflict of interest policy, which specifically addresses potential conflicts of interests. A disclosure form designed to elicit information regarding potential conflicts may be created and used as a prerequisite to membership on a Board. Procedures may be implemented that regulate how conflicts are resolved.
- b) Limitation of Actions: RSA 508:17 governs protection of volunteers (directors) of a nonprofit organization from civil liability brought on the basis of any act or omission resulting in damage or injury.
- c) Pecuniary Benefit Transactions and Prudent Investor Standards: New Hampshire has adopted laws that govern "pecuniary benefit transactions" and to set general standards governing prudent investments by an organization's board of directors. These laws are outside the scope of the introductory guide, however, these laws play a large role in the proper management of a NH nonprofit organization.
  - i. RSA 7:19-a II(d) governs "pecuniary benefit transaction" which are transactions made by an organization in which an officer, director, or trustee has an interest. As such, the organization and its Board must follow strict guidelines in order to avoid penalties.
  - ii. RSA 564-A:3-b provides investment guidelines for the prudent investment and management of funds.

### Analysis

The assumption by NHAC leadership had been that the Association was an "instrumentality of county government" and, therefore, did not need to comply with these requirements. Through the strategic planning process in 2004, it was discovered that the Association is governed by the legal requirements of a "voluntary organization under NH law.

*See: 6/8/2004—James Phipps—Legal Analysis*

Status: Not compliant.

### Tax-Exempt Designation

The IRS requires the following information in order to make a tax-exempt determination:

Form SS-4: Application for Employer Identification Number

Form 8718: User Fee for Exempt Organization Determination Letter Request; and either

Form 1023: Application for Recognition of Exemption for 501(c)(3) Organizations; or

Form 1024: Application for Recognition of Exemptions under all other sections of 501(c)  
A certified copy of the organization documents must be filed with the application.

Analysis

In October 2004, amendments to the articles of agreement and bylaws were approved by the general membership at the annual meeting. This action allowed the Association to pursue tax-exempt status under the 501(c)(6) section of the IRS Code.

Form SS-4: Application for Employer Identification Number

Status: Compliant

Form 8718: User Fee for Exempt Organization Determination Letter Request

Status: In process

Form 1024: Application for Recognition of Exemptions under all other sections of 501(c)

Status: In process

Other State and Federal Requirements

Attorney General: Charitable Trusts Unit

Any non-profit organization which solicits funds from the general public for charitable purposes or which distributes funds for charitable or community purposes, with the exception of churches and other religious institutions, must register with and report to the Attorney General Charitable Trusts Unit (RSA 7:28 I, II). This includes any organization organized as tax-exempt under Code 501(c). Registration is a one-time event accomplished by filing Form NHCT-1. When a completed application has been approved the AG's office will issue a Certificate of Registration. Once an organization is registered, it is required to file annual reports (NHCT-2A) with the Attorney General's office. The organization may be required to file Form 990 with the AG's office instead of NHCT-2A. If a charitable nonprofit organization fails to meet the statutory obligations, the Attorney General, may, through the superior court process, request the imposition of civil penalties of up to \$10,000. An annual return does not need to be filed with the Department of Revenue Administration.

Status: The tax-exempt designation is trigger for this requirement.

Local Property Tax Exemption

Status as an exempt organization for federal and state income tax purposes does not necessarily create exempt status from local property taxes. Only very narrow categories of real estate and personal property are exempt. RSA 72:23 V, governs real estate and personal property owned by a charitable organization. In order to be exempt from this taxation, the organization must file an annual return with the NH Department of Revenue Administration and the local tax assessor.

Status: Unknown

Public Employee Retirement (RSA 100A:1, VII-c)

County corrections officers must be certified to qualify for Group II retirement. Under RSA 100A, NHAC is the certifying authority for county corrections officers. NHAC is required to establish "physical, mental, educational, and other qualifications" for initial and continuing certification.

Analysis

NHAC established the Certification Board to oversee this regulatory requirement. The Certification Board established the Code of Administrative Rules and Certification Standards. The document and related procedures are currently being revised.

Status: Compliant

State Business Profits Tax Exemption

Business organizations with gross business income in excess of \$50,000 are required to file a NH Business Profits Tax return. However, if a non-profit organization is expressly made exempt from federal income taxation, then it is exempt from NH Business Profits Tax. No specific filing needs to be made with the NH Department of Revenue Administration.

Status: Unknown

Employee Withholding

Nonprofit corporations that pay wages have the same responsibilities for withholding, depositing and reporting Federal and State taxes as for-profit corporations. However, public charities are excluded from the Federal Unemployment Tax Act (FUTA) for services rendered by employees.

Analysis

NHAC contracts with ADP for payroll and payroll tax management services.

Status: Compliant

Public Inspection of Annual Return and Application for Tax-exempt Status

The IRS requires charitable organizations to make available for public inspection the last three years of annual returns (Form 990) as well as a copy of the organization's Application for Federal Tax Exemption. The organization is not required to provide or distribute its annual returns or exemption application, but it is required to have a copy available for inspection. The IRS states that the required information should normally be available on the day of the request for inspection and during the normal business hours of the organization's office. The IRS will assess penalties for noncompliance with this policy.

Status: The tax-exempt designation is trigger for this requirement. However, Association may not be required to file Form 990 if its revenue is determined to be exempt under 501(a).

Sarbanes-Oxley Act of 2002

This Act technically applies to companies that have registered equity or debt securities with the US Securities and Exchange Commission. Since non-profits do not generally issue stock it would, on the surface, appear that nonprofits are exempt from this legislation. "While not subject to SEC oversight, nonprofits do have numerous constituencies to which they routinely answer. This may include government regulators: federal, state, and local; private accrediting agencies, their own governing boards, the media; various funders; and members, customers or employees"<sup>2</sup>, states Richard Larkin, CPA.

Status: Not compliant



**Other Entities**

It is unknown if NHAC must comply with requirements from other entities.

**Roles and Responsibilities**

Bylaws typically contain provisions for the regulation and management of the corporation, including responsibilities of the governing body and officers; members, if any; meetings; and election procedures. A critical factor for bylaws, regardless of content, is that bylaws meet regulatory requirements and the Association abides by its own rules. A review of Association Bylaws indicates:

Affiliates	Not defined
Amendments	X
Annual Budget	X
Board of Directors	X
Code of Conduct	Not defined
Committees	X
Dissolution	X
Dues	X
Election/Quorum	Quorum not defined
Executive Comm (Officers)	N/A
Executive Director	Not defined
Governance	X
Indemnification	X
Meetings	X
Membership	X
Name	X
Officer Duties	X
Officers	X
Organizational Structure	X
Purpose/Objective	X
Termination	X
Terms of Office	X
Vacancy	X
Voting	X

Analysis

While the bylaws appear to be consistent with most of the standard elements, the actual definitions are often conflicting and do not provide for the consistent regulation and management of the Association. Due to these conflicts, an analysis of each section was not conducted. A review of the minutes indicates the Association may not be acting in accordance with its bylaws and governance structure. Several particular concerns are reviewed below.

Status: Not compliant

Organizational Structure (Article V)



The organizational structure of NHAC consists of the Executive Committee, Board of Directors, Officers, and general membership. The Executive Committee is defined as the governing body and, in the absence of the Committee; the Board of Directors has the authority to act on behalf of the Association.

Analysis

The structure of the Association appears to have been modeled after the organizational structures of county government and the National Association of Counties. The names of the two governing groups are not consistent with conventionally understood definitions. An attempt was made to change the names of the governing body. The item was presented for vote at the 2003 Annual Meeting and failed. The current organizational structure may not appropriately support the governance requirements of the Association due to its size, poor attendance and failure to comply with established bylaws.

The Association is a duly authorized nonprofit corporation in the state of New Hampshire. As such, it is subject to various laws and regulations that are different from those of county government. The governance structure is even more critical for a tax-exempt organization.

The roles and responsibilities for the current structure are not clear and are often conflicting. For example:

- a) The Board of Directors is not active and has not met in the past two years;
- b) The actual decision-making role of the officers' is not consistent with the bylaws; and
- c) The Commissioners Council is responsible for approval of the budget and setting dues/assessments but is not included in the organizational structure. The Council has not been involved in setting individual affiliate dues.

Affiliate Members (Article VIII)

Article VIII is the only section that mentions affiliates in the bylaws. This section designates the affiliate presidents (or designee) as members of the Board. This section also states: "There will be the following affiliate councils who have full power and authority to collectively associate, discuss and meet at the times and place they so choose. They are: County Commissioners, Registers of Deeds; County Treasurers, County Sheriffs, County Attorneys, County Nursing Home Administrators, County Correctional Administrators, County Human Services Administrators, County Human Resources Administrators, and County Finance/County Administrators. The Board of Directors is governed by the Executive Committee."

Analysis

Other than the statement that the Executive Committee governs the Board, there are no other definitions regarding governance or management for affiliates. There is a lack of consistency among the active affiliates.

*See: Initial Affiliate Analysis located in Section V of this report.*

The following items were identified and should be formally addressed:



- a) The Sheriffs Affiliate is actually The NH Sheriffs Association, Inc. and is a duly authorized non-profit, tax-exempt corporation. As such has its own tax identification number and governance structure. What is the appropriate “relationship”, if any, between NHAC and NHSA?
- b) The Registers of Deeds Affiliate defines itself as “NH Register of Deeds Association”. However, this name has not been registered with the Secretary of State’s office and does not appear to be a duly authorized business in NH. New Hampshire law requires that “a person conducting business under any name other than his/her own legal name must register with the Secretary of State”. Also, the Deeds Affiliate maintains its own bank account. What are the governance issues, if any, related to NHAC?
- c) The Nursing Home Administrators Affiliate maintains its own bank account and the same question applies. This affiliate also signs contracts. Since this affiliate is not a recognized legal entity, is this appropriate action and would such action put the Association at risk?
- d) The dues structure should be consistent among the affiliates. The bylaws indicate that only the Commissioners Council has authority to set dues/assessments. However, it is clear from the spreadsheet that nearly all affiliates set a dues requirement.

#### Committees

There is no general paragraph defining the committee structure in the current bylaws. The only committee specifically mentioned is the Nominating Committee (Article XII).

#### Analysis

A general paragraph defining committees was approved several years ago but was not incorporated the bylaws. The Nominating Committee article is not consistent in regards to definitions used in other sections of the bylaws.

#### Membership

Membership is mentioned, at a minimum, in Articles III, IV, V and IV.

#### Analysis

In each of these instances, a different name or definition is used. The confirmation of nominations is listed as the role of both the Executive Committee and the General Membership.

#### Officers (Article VI)

The officers of the Association are: president, president-elect, vice president(s), clerk, treasurer, and immediate past president. Each term of office is two years. If an officer misses three or more consecutive meetings of the Executive Committee without due cause, the officer may be replaced by a vote of the Executive Committee upon recommendation of a majority of the officers of the Association.

#### Analysis

- 1) If an officer enters as a clerk and is re-elected for each two-year term, the director will serve a total of 12-14 years as an officer. This is an extraordinary commitment



and may not be in the best interests of the officer or the Association. While the bylaws do not define the expectation that an officer will advance from clerk to president, it has been the standard operating procedure for the Association. In 2003, the Nominating Committee took the unusual action of not nominating the president-elect for the president position. In other associations, directors serve a maximum of 5-7 years, including any years served as an officer.

- 2) An appointed official can serve as the Treasurer. However, only elected officials may serve in the other offices. There is no term limit for the Treasurer. While some continuity is desirable, it may not be in the Association's best interest for the same person to serve in this capacity for an extended period of time. There may be audit and regulatory requirements that determine the maximum length of time a treasurer may serve in that role.
- 3) There has been a history of officers consistently missing meetings and officers not interested in progressing "through the ranks". Other than the two-year term limits for each office, there is not an overall term limit for a person to serve as an officer. While there are guidelines for the removal of a habitually absent officer, termination of an officer has not been implemented. The governance and the leadership requirement of the Association are not well-served by members who are not committed to their role as an officer.



#### IV. Strategic Issues and Recommendations

The purpose of this analysis was to:

- ▶ Determine the governance requirements for NHAC
- ▶ Assess compliance with these requirements; and
- ▶ Develop recommendations based on the findings.

This section contains recommendations for items identified as not compliant.

##### State and Federal Regulatory Requirements

- 1) Corporate Documentation: The Corporation should maintain a record book containing important documents including incorporation documents, annual reports, and minutes of its proceeds at the registered office of the corporation. This is generally the responsibility of the Board Secretary or designee.

###### Recommendation

- a) Develop and maintain an institutional file containing vital elements.

*See: Section V for a draft index for the institutional file.*

- 2) Ongoing Review: One way to ensure that management and the Board are acting responsibly, in compliance with the law, and consistent with the goals of the organization is by implementing policies and procedures for review of their actions. These policies and procedures should be designed to ensure that the Board will be promptly and fully apprised of any problems confronting the organization.

###### Recommendation

- a) Develop and maintain a master list of NHAC Regulatory Requirements.  
*See: Section V for a draft list of regulatory requirements.*
- b) Develop policies and procedures for regulatory compliance, including a review by the governing body.

- 3) Conflict of Interest: The Board is required to adopt a conflict of interest policy, which specifically addresses potential conflicts of interests. A disclosure form designed to elicit information regarding potential conflicts may be created and used as a prerequisite to membership on a Board. Procedures may be implemented that regulate how conflicts are resolved.

###### Recommendation

- a) Determine if the current bylaws are compliant.
- b) Develop disclosure form.
- c) Provide Board education regarding appropriate behavior.

- 4) Limitation of Actions: RSA 508:17 governs protection of volunteers (directors) of a nonprofit organization from civil liability brought on the basis of any act or omission resulting in damage or injury.

###### Recommendation

- a) Determine if the current bylaws are compliant.

- b) Develop Board education regarding appropriate behavior and consequences for failure to comply.
- 5) Pecuniary Benefit Transactions and Prudent Investor Standards: New Hampshire has adopted laws that govern “pecuniary benefit transactions” and to set general standards governing prudent investments by an organization’s board of directors. These laws play a large role in the proper management of a NH nonprofit organization.
- A) RSA 7:19-a II(d) governs “pecuniary benefit transaction” which are transactions made by an organization in which an officer, director, or trustee has an interest. As such, the organization and its Board must follow strict guidelines in order to avoid penalties.
  - B) RSA 564-A:3-b provides investment guidelines for the prudent investment and management of funds.

Recommendation

- a) Determine if the current bylaws are compliant.
  - b) Develop Board education regarding pecuniary benefit transactions.
  - c) Develop Board education regarding prudent investment and management of funds.
  - d) Develop investment guidelines.
  - e) Develop financial policies.
- 6) Tax-Exempt Designation  
In 2004, NHAC approved pursuing tax-exemption as a trade organization under Code 501(c)(6). The application is in process.
- Recommendation
- a) Determine if NHAC should pursue 501(c)(3) tax-exempt status for the education and research activities of the Association.

- 7) Attorney General: Charitable Trusts Unit  
Any non-profit organization which solicits funds from the general public for charitable purposes or which distributes fund for charitable or community purposes, with the exception of churches and other religious institutions, must register with and report to the Attorney General Charitable Trusts Unit (RSA 7:28 I, II).

Recommendation

When the tax-exempt status has been received:

- a) Register, using Form NHCT-1, with the AG’s office.
  - b) File the Certificate of Registration in the institutional file.
  - c) File annual report (NHCT-2A) with the Attorney General’s office. The organization may be required to file the Form 990 with the AG’s office instead of NHCT-2A. Failure to do so may result in civil penalties of up to \$10,000. An annual return does not need to be filed with the Department of Revenue Administration.
- 8) Renewal Return  
The Secretary of State requires all nonprofit corporations to file a “renewal return” every five years. A fine of \$25 per day is imposed for each day the return is late. Failure to do so dissolves the corporation.

Recommendation

- a) Assure 2005 annual report is filed no later than December 31, 2005.
- b) Set up reminder system for 2010 report.

9) Employee Withholding

Nonprofit corporations that pay wages have the same responsibilities for withholding, depositing and reporting Federal and State taxes as for-profit corporations. However, public charities are excluded from the Federal Unemployment Tax Act (FUTA) for services rendered by employees.

Recommendation

- a) Determine if NHAC is excluded from FUTA.

10) Local Property Tax Exemption

Status as an exempt organization for federal and state income tax purposes does not necessarily create exempt status for local property taxes. Only very narrow categories of real estate and *personal property* are exempt. RSA 72:23V, governs real estate and personal property owned by a charitable organization. In order to be exempt from this taxation, the organization must file an annual return form with the NH Department of Revenue Administration and the local tax assessor.

Recommendation

- a) Determine if NHAC is excluded from personal property taxes.

11) State Business Profits Tax Exemption

Business organizations with gross business income in excess of \$50,000 are required to file a NH Business Profits Tax return. However, if a non-profit organization is expressly made exempt from federal income taxation, then it is exempt from NH Business Profits Tax. No specific filing needs to be made with the NH Department of Revenue Administration.

Recommendation

- a) Verify that the Notice of Determination exempts NHAC from this requirement.

12) Public Inspection of Annual Return and Application for Tax-exempt Status

The IRS requires charitable organizations to make available for public inspection the last three years of annual returns (Form 990) as well as a copy of the organization's Application for Federal Tax Exemption. The organization is not required to provide or distribute its annual returns or exemption application, but it is required to have a copy available for inspection. The IRS states that the required information should normally be available on the day of the request for inspection and during the normal business hours of the organization's office. The IRS will assess penalties for noncompliance with this policy.

Recommendations

- 1) Determine if NHAC income is excludable under 501(a).
  - a) If excludable, no additional action is necessary.
  - b) If it is not excludable, then Form 990 must be filed and the last three years of Form 990 are available for public inspection.
- 2) When Notification of Tax-exemption is received:
  - a) Assure that a copy of the Application for Federal Tax Exemption is available for inspection during the normal business hours.

13) Sarbanes-Oxley Act of 2002

Since non-profits do not generally issue stock it would, on the surface, appear that nonprofits are exempt from this legislation.

Recommendation

- a) Review nonprofit resources to determine industry action in relation to this Act.
- b) Analyze potential applications for NHAC.
- c) Implement appropriate best practices.

14) Other Regulatory Requirements

Recommendation

- a) Determine if NHAC is subject to other regulatory requirements.
- b) Determine the definition and status of “public charity” in Section 509(a)(1).

15) Overall Governance

NHAC has grown and evolved since it began in 1975. The Association has great potential for continued growth. Compliance with regulatory requirements as well as a governing structure that supports future growth is critical. The 2005-06 Executive Committee has 113 members. On average, approximately 20 people regularly attend the monthly meetings; those 20 may or may not have attended previous meetings. The governance and leadership requirements of the Association are not well-served by members who are not committed to their leadership and fiduciary role as a member of the Executive Committee. It is, therefore, critical that the governing requirements be defined and enforced.

Recommendations

- a) Determine if the structure, as defined by the current bylaws, supports NHAC’s regulatory requirements and strategic directions.
- b) Revise bylaws.
- c) Assure appropriate management of Association bylaws.

16) Governance of Affiliates

The liability and accountability for NHAC as it relates to affiliate activities is unknown at this time. The activities of affiliates must not jeopardize NHAC’s nonprofit and tax-exempt status.

Recommendations

- a) Define the management structure for all affiliates.  
*See: Section V for draft Affiliate Structure “map”.*
- b) Define the legal implications, if any, of affiliate activities.
- c) Define affiliate governance in the bylaws (i.e. legal names, bank accounts, financial reporting, establishing and collecting dues, affiliate bylaws, signature authority, etc.)
- d) Define the expectations between an affiliate and NHAC.
- e) Determine the appropriate relationship between NHAC and the NH Sheriffs Association, Inc.



17) Committees

Committees are an important component for addressing the wide-variety of programs and services offered by the Association. However, there is very little structure and formal governance related to these activities.

Recommendations

- a) Define the purpose, role and governance for each major committee to the Board, including but not limited to: leadership roles within the committee, term of members, voting, reporting, authority, etc.)
- b) Assure language is consistent throughout the bylaws.

18) Membership

NHAC is a membership organization and has several levels of membership.

Recommendations

- a) Define membership levels.
- b) Determine role and governance of each level.
- c) Assure consistency throughout the bylaws.

19) Officers

The leadership needs of the Association will continue to grow. The governance and leadership requirements of the Association are not well-served by members who are not committed to their role as an officer. It is, therefore, critical that the role of the officers be defined and enforced.

Recommendations

- a) Determine the appropriate number and term for officers.
- b) Determine the appropriate nomination and election process for officers.
- c) Determine the appropriate role and accountability for officers.
- d) Determine and enforce attendance policy.

20) Executive Management

In most nonprofit organizations, board members are not involved in day-to-day activities. The board relies on an executive staff member, generally called an executive director. The executive director is accountable to the board for meeting stated objectives.

Recommendations

- a) Determine the title and role of the executive staff member.
- b) Determine appropriate reporting and accountability of executive management.
- c) Define the title, role and responsibilities in the bylaws.

## V. Attachments and Bibliography

### Attachments

- a) James Phipps—Legal Analysis (6/8/2004)
- b) Preliminary Affiliate Analysis
- c) NHAC Institutional File (draft)
- d) NHAC Regulatory Requirements (draft)
- e) Affiliate Map (draft)
- f) Current Bylaws
- g) “Board Responsibilities”; ASCS
- h) “Sarbanes-Oxley and Nonprofits”; BDO Newsletter, April 2003.
- i) “Quick Reference Guide for Directors of Charitable Trusts and Non-Profit Organizations in NH”; Charitable Trust Unit of the Attorney General’s Offices.

### Bibliography

1. American Society of Corporate Secretaries and The National Center for Nonprofit Boards, “A Summary of Organizational Governance Principles and Resources for Directors of Nonprofit Organizations”; <http://www.governanceprofessionals.org/governnfp/board.shtml>
2. BDO Newsletter, “Sarbanes Oxley and Non-Profits” by Richard Larkin, CPA; Technical Director, Nonprofit Services; April 2003
3. State County Association Bylaws Reviewed
  - a) Association of County Administrators of Alabama
  - b) Arizona Association of Counties
  - c) Colorado Counties, Inc.
  - d) Idaho Association of Counties, Inc.
  - e) Missouri Association of Counties
  - f) Nebraska Association of County Officials
  - g) North Dakota Association of Counties
  - h) National Association of Counties
4. Other Non-profit Association Bylaws Reviewed
  - i) HealthReach Community Health Centers
  - j) Home Builders & Remodelers Association of NH
  - k) Professional Convention Management Association
  - l) New England Business Travel Association
  - m) International Association for Exhibition Management
  - n) American Society of Association Executives
  - o) NH Sample Bylaws