

Legal & Taxation Structures for Homestead Associations and Related Implications

By Brian I. Ezuka, Esq.

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Or...

“Things to Know About Homestead Associations
and How I Can Associate.”

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The typical homeowners association...

- Is composed of landowners in a housing development.
- Is commonly formed as part of the development or subsequently by the homeowners themselves.
- The members of the association typically consist of the homeowners, and annual dues paid by the members support the association.
- The association enables the members to act together in managing, maintaining and improving common areas in the development.
- The association provides members with opportunities for education, information exchange, social well-being, skill building and positive community development, among other benefits.

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- While your homestead organization may share many similar activities of the traditional homeowners association, it is unique . . .

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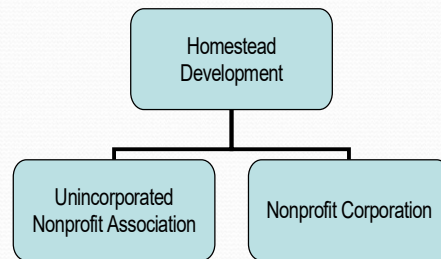
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- A Hawaiian homestead organization is guided by an overriding purpose to advance the positive development of native Hawaiians.

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- To further your homestead organization's purposes, you may take different structural forms, each of which are different with advantages and disadvantages.

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Homestead Options



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Some factors to consider:

- Formalities to establish the organization (or “how difficult is it to form?”).
- Necessity of governing documents (or “what, if any, documents must I have to govern operations and what goes in them?”)
- Administrative requirements (or “how burdensome will it be to operate under state law?”).
- Local annual reporting requirements (or “what local annual reporting requirements will I have?”).
- Legal liabilities of the parties involved (or “how protected am I?”).

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And...

- What is my objective (or “can I achieve my objective without incorporating or formally associating?”)

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The Unincorporated Nonprofit Association

Q: What is this? “An unincorporated organization . . . consisting of two or more members joined by mutual consent for a common, nonprofit purpose.”

Q: How difficult is it to form? Not difficult. No formal document is required to be filed with the DCCA (Department of Commerce and Consumer Affairs).

Q: What, if any, documents must I have to govern operations and what goes in them? None.

- The ease of formation and lack of formality are reflected in the lack of guiding provisions in the law. But nonprofit associations commonly establish guiding procedures through “articles of association” or “constitution” or other.
- The law provides for the application of principles of law and equity. And so common law and notions of fairness, justness and right dealing will apply to situations not addressed by the law, such as the rights and responsibilities of the managing members of the association.

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Q: How burdensome will it be to operate under state law? Hawaii's Uniform Unincorporated Nonprofit Association Act is limited in terms of administrative requirements.

Q: What local annual reporting requirements will I have? No state annual report is required to be filed with the DCCA.

Q: How protected am I? Somewhat.

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The Nonprofit Corporation

Q: What is this?

- Nonprofit corporations do not have shareholders or owners and also do not pay out dividends.
- Not typically the form of organization used to pursue private, profit-seeking endeavors.
- Typically formed by persons that desire a management and operational structure, protection from personal liability, and tax-exempt status with the IRS.

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Q: How difficult is it to form? Fairly complex endeavor that requires strict compliance with the law. Articles of incorporation must be properly prepared and submitted to the DCCA. Bylaws must be prepared and adopted.

- Cautionary note: Do not rely on forms or documents prepared for other organizations because they may not comply with Hawaii law and your particular operations, or provide for the protections and other benefits that you may be entitled to under the law.

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Q: What, if any, documents must I have to govern operations and what goes in them? You are required to have articles of incorporation, bylaws and certain federally required policies. All documents must comply with applicable Hawaii state and federal laws.

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Q: How burdensome will it be to operate under state law?

- In Hawaii, nonprofit corporations are governed by the Hawaii Nonprofit Corporations Act, Hawaii Revised Statutes Chapter 414D.
- The current nonprofit law replaced the previous law in July 2002 and made significant changes to Hawaii's nonprofit law. The law added favorable rules governing the operation of a nonprofit corporation.
- The current law is comprehensive with detailed operational provisions and standards.

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Q: What local annual reporting requirements will I have? Annual reports are required to be submitted to the DCCA.

Q: How protected am I? Very.

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To compare . . .

- The nonprofit corporation is the more prevalent form of organization because it offers the advantages of greater certainty in operation, guidance and protection from liability.
- In regard to forms of tax-exempt organizations: Generally, the Internal Revenue Code does not prescribe that an entity be an unincorporated association or nonprofit corporation to qualify for tax exemption. But for the above reasons, the corporate form is generally used today.

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Remember:

- The decision to establish a formal organization is a decision that will require commitment to the community and your objectives, and responsibility to the law.
- Your decision must be an informed decision. The workshops will give you only a part of the information you will need. You must apply your personal objectives and community needs to arrive at your decision.

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Questions?

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