LEGAL CONSIDERATIONS IN ESTABLISHING A HISTORIC PRESERVATION ORGANIZATION

by Collette C. Goodman with revisions by Stefan Nagel

The overall purpose of a historic preservation organization is to engage in activities to preserve historic sites, districts, buildings, and objects. There are many specific ways to accomplish this general goal, including acquisition and restoration of historic structures; development and dissemination of a plan to preserve historic sites and districts; operation and maintenance of historic places for the benefit of the public; research and publication of educational material on the history and architecture of historic districts or sites; initiation of or participation in litigation to protect the public’s interest in preservation of historic buildings; supporting legislation that will further the cause of historic preservation; making gifts or contributions to groups that engage in preservation activities; or any combination of these approaches. Often a specific need motivates the formation of a preservation organization and influences strongly its choice of specific objectives.

Experience suggests that careful planning is essential to establishing a successful historic preservation organization. Planning involves the determination of those specific objectives that a group is most interested in accomplishing within the limits of its resources.

In addition, if nonprofit status is anticipated, the choice of activities may be affected by the impact of federal tax laws on nonprofit organizations. Organizations established in accordance with Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code will have the benefit of income exempt from federal tax. There is an important distinction between the two designations, however. Contributions to a Section 501(c)(3) organization are tax deductible by the donors as charitable contributions for federal income, gift, and estate tax purposes. Thus, a Section 501(c)(3) organization is in a more favorable position to attract contributions of money and other property. However, a Section 501(c)(3) organization may not engage, except to a limited extent, in efforts to influence legislation in order to further its purposes. On the other hand, a Section 501(c)(4) organization may engage in such legislative activities without limitation. These organizations are discussed in detail later.

Both Section 501(c)(3) and Section 501(c)(4) historic preservation organizations may obtain, subject to payment of an annual fee, a special third-class bulk mailing permit, which permits the mass mailing of printed literature at reduced postal rates. An application for these special rates
must be filed at the post office on Form 3624, Application to Mail at
Special Bulk Third-Class Rates for Qualified Nonprofit Organizations or
Associations.

In planning an organization, it is advisable to consult the applicable
provisions of state law, which may provide for exemption of the organiza-
tion from state income taxes under the same or similar conditions re-
quired for federal income tax exemption. State law may also relieve
the organization of the obligation to pay state sales taxes that otherwise
would be imposed on the purchase of supplies and other items. It should
also be ascertained whether under state law property owned and used by
the organization will be eligible for exemption from local real or personal
property taxes. Finally, some states, such as Michigan, New York, and
Massachusetts, provide for supervision and enforcement by the state
attorney general of charitable organizations. In these states, laws require
registration and annual reporting with the office of the attorney general.

Organizational Structures

Through its work with local historic preservation organizations, the
National Trust for Historic Preservation has found that generally there
are four organizational structures to consider: nonprofit corporations,
unincorporated associations, "sister organizations," and charitable trusts.

A corporate structure is usually chosen by groups that plan to be involved
in the acquisition and restoration of properties to facilitate acquiring title
to property. Also, corporations have the advantage of limited liability of
members for most of the organization's actions. While incorporation for
profit certainly is possible, practical considerations often require that
historic preservation corporations be organized on a nonprofit basis for
charitable and educational purposes, since a nonprofit corporation, if
properly organized and operated, will qualify as a Section 501(c)(3) or
Section 501(c)(4) organization and be eligible for the tax benefits that
accompany such status.

Some groups may find that the added formalities of incorporating are too
troublesome and the principal advantage—limited liability—is relatively
insignificant for them. These groups may choose to be unincorporated
associations. Associations formed to support the establishment of a
historic district often remain unincorporated. Similarly, groups brought
together for a particular purpose, such as to oppose demolition of a certain
historic structure, may find incorporation unnecessary for carrying out
their activities.

"Sister organizations" were devised because of the restrictions placed by
federal tax laws on the activities of Section 501(c)(3) organizations. Since
these organizations cannot engage, except to a limited extent, in legisla-
tive activities, some have formed a spin-off Section 501(c)(4) group to
engage in legislative activities while continuing to attract tax-deductible
contributions for the Section 501(c)(3) group.

A charitable trust is a fund of money or property administered by a
named trustee or trustees for charitable purposes in accordance with the
wishes of the grantor or person establishing the fund. In the case of a
preservation organization, the trustee would be directed to apply the
property placed in trust (for example, through grants to various groups) for
the historic preservation purposes specified in the trust instrument.
Often the trustee is a charitable nonprofit corporation that the grantor has
directed should be established to administer the trust.

Forming an Organization

Most historic preservation organizations are nonprofit corporations,
sometimes referred to in state statutes as nonstock corporations. The
basic guidelines for forming a nonprofit corporation will be found in the
requirements imposed by state law. Some states, such as New York, have
comprehensive statutes dealing specifically with nonprofit corporations.
Other states have no separate provisions for nonprofit corporations, but
include references to nonprofit corporations within the general corporate
law provisions.

Incorporation, in any event, will involve these basic steps:

- drafting articles of incorporation,
- filing articles of incorporation and paying filing fees,
- submitting annual reports and filing fees connected with them,
- drafting bylaws,
- holding an organizational meeting for the election of directors and
  officers, and adoption of bylaws, and
- holding annual meetings and other regular meetings.

Articles of Incorporation

Filing of articles of incorporation with the secretary of state or state
corporation commission usually is the event that gives a corporation its
legal existence. In some states, however, court approval is required.
Filing fees for nonprofit corporations vary from state to state ranging from
about $30 to more than $100. Upon finding that the articles of incorpora-
tion conform to law, the secretary of state or corporation commission
endorses them, files the original articles in the state office and issues a
certificate of incorporation to the organization. This certificate should be
kept, along with a copy of the articles, in the organization's minute book.

Articles of incorporation need not be lengthy or complex. State corpora-
tion statues must be consulted as they contain requirements for the
contents of the articles of incorporation. Typically, provisions relating to
the following matters will be included in the articles: name of organiza-
tion, duration, purposes, powers, members, distribution of assets upon
dissolution, address of initial registered office and name of initial regis-
tered agent, initial board of directors, name and address of each incorpora-
tor and signatures of incorporators.

Exhibit 1 contains a sample set of articles of incorporation adapted from
those of a Connecticut historic preservation organization. It should be
kept in mind, however, that this is a sample only, and each organization must draft its own articles in light of its particular needs and the requirements of its state laws.

The following, then, are general factors to be considered in drafting articles of incorporation.

**Purposes**

The purposes of the organization should be carefully and, in most cases, broadly stated. If it is reasonable to expect that the organization will expand its activities in the future, the purpose clause should not be limited to the single issue that brought the organization into being. In this case, a group will want to indicate a broad set of purposes such as illustrated in Article III of Exhibit 1.

**Powers**

A nonprofit corporation automatically has all of the powers specified in the state nonprofit (or other applicable) corporation statute and not expressly prohibited by its articles of incorporation or bylaws. A powers clause usually will state this fact and may also expressly mention some of the corporation's specific powers. For example, when an organization intends to engage in the acquisition and restoration of historic properties, a statement to the effect that the corporation has the power to do so often is included.

**Limitations**

Certain provisions limiting the activities that an organization may engage in are necessary in order for it to be exempt from federal income taxes and eligible for tax-deductible contributions as a Section 501(c)(3) organization. Article VII, Sections 1-5, of the sample articles of incorporation (Exhibit 1) illustrate standard types of required clauses. In particular, these provisions prevent the organization from engaging, other than to a limited extent, in efforts to influence legislation and from participating in political campaign activities. If the organization intends to qualify for exemption from federal income taxes under Section 501(c)(4), it is necessary to include only the prohibition on political campaign activities.

If the organization is to qualify as a Section 501(c)(3) organization, federal tax laws require that certain other restrictions be included in the articles of incorporation to protect the group's favorable federal tax status in the event it is a private foundation. The significance of being classified as a private foundation is discussed later. For purposes of drafting articles of incorporation, it is sufficient to know that a Section 501(c)(3) organization should include in its articles a provision similar to Section 6, Article VII, of the sample articles of incorporation in Exhibit 1. Federal tax regulations also provide that it is not necessary to have the private foundation restrictions in the articles of incorporation if a state statute applies these restrictions automatically to any organization that is a private foundation. Many states have enacted such statutes, but the provisions in these statutes vary and should be consulted in each case.
Members

Although under most state statutes it is not necessary for a nonprofit corporation to have members, to the extent that an organization will be dependent on contributions of money and other property or services, it will often want to confer membership privileges in return for such support. Membership provisions must be carefully considered, however, so as to reflect and reinforce the preservation activities to be undertaken. Members may or may not be given voting rights, for example, or they may be divided into classes only some of which have voting rights. Membership may confer such privileges as free admission to the organization’s historic properties and receipt of free publications. If an organization has voting members, the holding of an annual meeting and the need for other regular membership meetings are additional considerations. State law may permit voting on matters by mail, if the articles of incorporation or bylaws so provide.

Some states require that the articles of incorporation indicate whether a nonprofit corporation has members. Detailed information, however, pertaining to the members of the organization, i.e., qualifications for membership, manner of selecting members, voting rights or other membership privileges, voting by proxy, voting by mail, time and place of annual meeting and of other meetings, who may call meetings, when notices of meetings must be sent, and quorums, may be spelled out in the bylaws rather than the articles of incorporation.

Incorporators

The incorporators are those persons named in the articles of incorporation who are forming the organization. Some states require a minimum number of incorporators, such as one or two. The actual formation of the organization generally takes place when the incorporators meet, name the initial board of directors, sign the articles of incorporation and deliver the articles to the secretary of state or corporation commission.

The functioning of the organization will commence, however, with the organization meeting—the first meeting of the board of directors after the organization’s articles of incorporation have been filed. The purpose of this meeting is to elect directors, adopt bylaws, elect or appoint officers, and transact other business before the corporation, such as authorizing [by resolution] appropriate officers to establish a bank account, establishing committees, setting a dues schedule and collecting dues, and planning for future activities.

Bylaws

Bylaws should be tailored to the particular needs and activities of an organization. It is most important to avoid adopting rules and regulations that will prevent the organization from functioning with the desired degree of flexibility. In addition, state law should be consulted as to minimum requirements with respect to some matters covered by bylaws. Also, state law will contain rules that apply in the absence of a bylaw regarding particular matters, such as quorum requirements or notices of meetings. Generally speaking, however, there is room for more discretion.
in bylaws than articles of incorporation and, therefore, bylaws can vary greatly in length and detail. Exhibit 2 contains a sample set of bylaws.

The bylaws in Exhibit 2 are relatively short. A more detailed and formal set of model bylaws can be found in the *Model Nonprofit Corporation Act of the American Bar Association*. [See resource guide for ordering information.] Regardless of what form of bylaws seems most appropriate, it is likely that certain general considerations will be important, such as the need for and role of members. If the organization does not have members, or if members do not have voting rights, the board of directors generally will be self-perpetuating. That is, the members of each new board will be elected by the previous board. In order to maintain continuity, many organizations find it preferable to have directors serve staggered terms.

Committees and the authorities delegated to them are another crucial element in most historic preservation organizations. Although the responsibility for management of a nonprofit corporation lies with the entire board of directors, committees may be formed of board members to manage the organization and make decisions in specified areas between meetings of the board. Committees commonly formed include an executive committee empowered to conduct the affairs of the corporation between meetings of the board and a revolving fund committee delegated the power to buy and sell property. The law in many states requires that an organization’s bylaws expressly authorize the board of directors to establish committees of directors.

In addition, it may be desirable to have other committees not having the authority of the board of directors. These committees need not be comprised only of board members. A nominating committee, for example, often plays a vital role in the evolution of an organization by insuring that a slate of qualified persons is presented for election as directors. Other committees may have useful administrative tasks—such as an advisory committee on historic structures, a newsletter committee and a fund-raising committee.

The officers of an organization and their functions, powers, and duties are important considerations. The number of officers will depend on the size of the organization, although state law may require a minimum number. The duties of officers should be specified in the bylaws. For example, does the treasurer sign checks alone on behalf of the organization or must checks be co-signed by the president or another officer? Authority to sign other contracts, such as mortgages and deeds, must be appropriately assigned.

Maintaining books and records also is an important function. Careful minutes should be kept of all meetings of members, directors and committees. The bylaws usually assign this responsibility to the secretary, who should establish a minute book for this purpose. The minute book should contain a copy of the organization’s articles of incorporation, its certificate of incorporation, a copy of its bylaws, and the minutes of the organizational meeting and of all other meetings. The minutes should accurately record all action taken at the meeting, especially resolutions concerning such matters as authorized expenditures and formal positions on preservation issues. At subsequent meetings of members, directors, or
committees, the minutes should be approved and any corrections recorded. It may be expedient to circulate copies of the minutes prior to meetings. The minutes should be signed by the secretary or person who took them.

Changes

If changes must be made to the articles of incorporation or the bylaws, state law must be consulted. Usually, if members are entitled to vote on an amendment to the articles of incorporation, at least two thirds of the members present must approve it in order for it to be adopted. Otherwise, a majority of the board in office (rather than a quorum) may adopt an amendment to the articles. Procedures prescribed by state law also must be followed in filing amendments to articles of incorporation and paying filing fees. Bylaws can be amended more easily, since that power may be vested in the board of directors. If the organization is exempt from tax as a Section 501(c)(3) or 501(c)(4) organization, the Internal Revenue Service must be notified of any changes in the organization's articles or bylaws and care must be taken that changes do not jeopardize the organization's tax-exempt status.

Other Types of Organizations

An unincorporated association is formed by the adoption by the organizers of articles of association or a set of bylaws and the election of officers. No specific form is prescribed as to the bylaws. They probably will resemble closely the combined articles of incorporation and bylaws of an incorporated organization.

Sister organizations are simply two separate corporations or organizations. The difference between them is that one organization is a Section 501(c)(4) organization, which may engage in legislative activities, and the other is a Section 501(c)(3) organization, which may engage in legislative activities only to a limited extent. The two entities must be truly separate, however, and the Section 501(c)(3) organization cannot be used to subsidize the Section 501(c)(4) organization. Legal counsel should be consulted to insure that the two organizations are properly organized and operated. The governing instruments of each should follow the forms described earlier for corporations or unincorporated associations.

In forming a charitable trust, state laws and specific provisions of the Internal Revenue Code, such as Section 664, pertaining to the establishment of trusts, including provisions pertaining specifically to charitable trusts, should be consulted.

Qualifying for Federal Income Tax Exemption

Obtaining an exemption from federal income taxes usually is an integral part of the organizing process, regardless of the organizational form chosen. As noted, a historic preservation organization may qualify for exemption as either a Section 501(c)(3) organization or a Section 501(c)(4) organization. These two types of organizations are defined in the Internal Revenue Code as follows:
Section 501(c)(3): Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, (except as otherwise provided in subsection [h]), and which does not participate in, or intervene in [including the publishing or distributing of statements], any political campaign on behalf of any candidate for public office.

Section 501(c)(4): Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare . . . and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

The important distinction here concerns deductions. The income of a Section 501(c)(3) organization is exempt from federal income tax and contributions to the organization are deductible for federal income, estate and gift tax purposes (up to a certain percentage of a donor's adjusted gross income in the case of the federal income tax deduction). The income of a Section 501(c)(4) organization is also exempt from federal income tax, but an individual who contributes to the organization may not deduct the contribution for federal tax purposes.

It is also important to note that a Section 501(c)(3) organization that loses its exemption by reason of its legislative activities may not convert to a Section 501(c)(4) organization.

Section 501(c)(3) Status

Clearly, organizations with Section 501(c)(3) status are in a more favorable position to attract contributions of money or other property. A historic preservation organization that qualifies for this special tax status, however, must meet the requirements of Section 501(c)(3) of the Internal Revenue Code. Thus:

1. The organization must be organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes.

2. No “substantial” part of its activities may consist of carrying on propaganda campaigns or otherwise attempting to influence legislation. Alternatively, in lieu of this indefinite guideline, a Section 501(c)(3) organization may elect the application of a specific ceiling on lobbying expenditures under Section 501(h) of the Internal Revenue Code.

3. It may not participate in or intervene in to any extent (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office.

4. No part of the net earnings of the organization may inure to the benefit of any private shareholder or individual.
All of these restrictions must be reflected in the organization’s governing instrument, as illustrated by Articles VII and VIII of the sample articles of incorporation (Exhibit 1). The following discussion suggests some guidelines for determining whether the organization conforms with these restrictions.

**Charitable and Educational Purposes**

A historic preservation organization will need to rely on its activities being considered “charitable and educational” (and possibly “scientific”). For example, the Internal Revenue Service has ruled that an organization formed for the purpose of promoting an appreciation of history through the acquisition, restoration and preservation of houses, churches and public buildings having special historical and/or architectural significance, and making such restored buildings available for public viewing, is carrying on activities similar to those of a museum and therefore is organized for “charitable and educational” purposes. (Rev. Rul. 75-4570, 1975-2 C.B. 207)

In addition, Internal Revenue Service regulations point out that the term *charitable* includes all purposes that fall within the broad outlines of the term *charity* in its legal sense (Treas. Rcg. § 1.501(c)(3)-1(d)(2)). These regulations note, for instance, the term *charitable* includes lessening the burdens of government and promoting social welfare through efforts “to combat community deterioration.” The acquisition and restoration of historic properties that are not simply converted into historic house museums but are sold or leased for other purposes might qualify as “charitable” and “educational” under certain circumstances. However, to be tax exempt, groups that undertake this type of rehabilitation must demonstrate that their primary purpose is not the carrying on of an “unrelated trade or business.”

IRS regulations define the term *educational* as instructing the public on subjects useful to the individual and beneficial to the community. Thus, another permissible activity would be development and dissemination of information about a plan to preserve historic sites and structures in a particular community.

Other types of activities that historic preservation organizations engage in are also clearly charitable and educational: researching the history and architecture of a state, district, or historic structure; acquiring and preserving writings, newspapers, maps, journals, and other articles for the benefit of the public that shed light on history and architecture; holding meetings and forums for the instruction and information of members and the public; conducting tours of historic sites and districts; publishing periodicals on historic preservation; and sponsoring academic research and studies.

It should be emphasized that a historic preservation organization will not qualify for Section 501(c)(3) status if its governing instrument permits it to engage in noncharitable activities even though the organization in fact engages only in historic preservation activities. Thus, the articles of incorporation should expressly limit the organization to engaging only in “charitable” and “educational” activities, as shown in Section 2, Article VII, of the sample articles of incorporation in Exhibit 1.
Trade or Business

To qualify under Section 501(c)(3), an organization is not precluded from engaging in a trade or business substantially related to the exercise or performance of historic preservation purposes (apart from merely providing income or funds to carry out such purposes). An example would be to charge the public reasonable fees for admission to a historic building or for tours of a historic district. Another example is to sell books or other publications relating to historic preservation.

If the preservation organization engages in an unrelated trade or business, it will not necessarily lose or be denied tax-exempt status. It is permissible to do so without loss or denial of the exemption, provided that the primary purpose of the organization does not become that of engaging in an unrelated trade or business. But the organization will be subject to tax on the unrelated trade or business income.

If the primary purpose of the organization is considered to be the operation of an unrelated trade or business, it will not qualify for tax exemption even if all of the profits from such a trade or business are expended in furtherance of historic preservation purposes. The distinction between what constitutes a related and an unrelated trade or business thus may be critical, especially with the emphasis in historic preservation now changing to adaptive use rehabilitation. Traditionally, restoring historic buildings and making them available for public viewing qualifies a historic preservation organization for exemption under Section 501(c)(3). It is becoming more common, however, for historic preservation organizations to restore buildings and sell or lease them for new uses, such as offices, stores, restaurants and apartments, thus keeping the buildings as functioning parts of the community.

Engaging in this type of redevelopment activity demands that the organizations distinguish itself from the commercial real estate developer. The Internal Revenue Service has ruled that a tax-exempt organization does not jeopardize its exemption if it conducts extensive educational activities in connection with the preservation work and limits the involvement in real estate acquisition, development, and sale to those instances where:

1. Buildings, sites, and districts are genuinely of cultural, historic, or architectural merit, or necessary to the implementation of a preservation plan for a historic district, or community; and

2. Acquisition, development, and sale of the property by the preservation organization accomplishes preservation purposes and the continued preservation of the property after its sale is guaranteed by means of restrictive covenants (Rev. Rul. 86-49, 1986-1 C.B. 243).

Legislative and Political Activities

The restrictions on legislative and political activities of Section 501(c)(3) organizations have a significant practical impact. The restriction on political activities is clear-cut: a Section 501(c)(3) organization may not to any extent participate in or intervene in, directly or indirectly, any political campaign on behalf of or in opposition to any candidate for public office. As to legislative activities, a Section 501(c)(3) organization,
unless it elects the application of specific lobbying expenditure ceilings available under Section 501(h), is subject to the restriction that no “substantial” part of its activities may consist of influencing, or attempting to influence, legislation. The impact of this restriction is quite complex, however, and deserves some elaboration.

“Influencing” legislation includes [1] “direct lobbying” of members and employees of a legislative body and any other government official involved in the formulation of legislation, and [2] “grass-roots lobbying,” that is, attempting to influence the public for the purpose of influencing legislation by publicly advocating adoption or rejection of specific legislative proposals or urging the public to contact legislators about legislation pending before a legislative body. “Legislation” includes action by the Congress, by any state legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure. It does not include administrative actions by a governmental agency to implement legislation. Thus, in the area of zoning, for instance, a historic preservation organization could seek enforcement of zoning regulations by applying for or opposing exceptions or variances, when necessary to carry out preservation activities, without running afoul of the restriction on legislative activities. However, if the organization advocates changing the zoning law itself, it enters into the sphere of restricted legislative activities and stands to be denied Section 501(c)(3) tax-exempt status if such activities are substantial.

Furthermore, in the view of the Internal Revenue Service it is irrelevant whether the legislation that an organization seeks to promote or defeat would help or impede the ability of the organization to promote its charitable and educational purposes. (Rev. Rul. 67-293, 1967-2 C.B. 185. See also, Commarano v. U.S., 358 U.S. 498 (1959)). If a substantial part of the organization’s activities involves attempts to influence such legislation, the organization cannot qualify as a Section 501(c)(3) organization. The IRS has conceded, however, that an organization is not engaging in efforts to influence legislation if it is requested by a legislative committee to furnish a representative to testify as an expert witness on pending legislation in the organization’s area of interest (Rev. Rul. 70-449, 1970-2 C.B. 111). In other words, an attempt to influence legislation entails affirmative action and requires something more than a response to a committee invitation.

In addition, it is permissible for a Section 501(c)(3) organization to engage in “self-defense” lobbying, that is, lobbying for or against legislation that would affect the existence of the organization, its powers and duties, or its tax-exempt status or the deductibility of contributions to the organization.

Another important distinction is that while a Section 501(c)(3) organization is not permitted to undertake substantial legislative activities, it is not prevented from engaging in litigation to accomplish its purposes. Thus, the organization could oppose the destruction of a historic building through initiating or participating in a lawsuit brought, for example, under federal or state environmental protection laws.

An organization may also engage in nonpartisan analysis, study, or research and use the results to inform or educate the public, even though the recommended plans and policies can only be carried out through
legislation or even though, based on its findings, the report supports or opposes pending legislation. To qualify as nonpartisan, however, the analysis, research or study must present an independent and objective exposition of a particular subject matter. Furthermore, if the group subsequently uses its research as a basis for a lobbying effort, the research may be viewed as a legislative activity rather than as an independent non-legislative activity.

Any suitable means may be chosen to distribute the results of this type of research, with or without charge. Dissemination of the research findings, however, may not be limited to persons who are interested only in one side of a particular issue.

For example, it would be considered lobbying if a historic preservation organization were to advocate enactment of a historic district ordinance. However, without limitation, it may conduct surveys and studies as background for a proposed ordinance and hold meetings and forums to educate the public and comment on the merits of a proposed ordinance.

Under the election to lobby safe harbor provisions discussed below, Congress has created two other exceptions to the definition of lobbying, which are guidance to nonelecting organizations (Section 4911(d) of the Internal Revenue Code of 1986, as amended). Nonprofit organizations are allowed to communicate with their members on legislative matters of direct interest to the members so long as the members are not urged to lobby or urged to encourage others to lobby. An organization may also engage in routine communications with government officials so long as the principal purpose of that communication is not the influencing of legislation.

Finally, since a Section 501(c)(3) organization may engage in legislative activities to an "insubstantial" extent without impairment of its tax-exempt status, it is important to understand what constitutes an insubstantial amount of activity. Unfortunately, the determination is a factual one and there are no clear guidelines. The courts have stated that a percentage of expenditures standard is not appropriate, and that the determination requires a complex balancing of an organization's legislative activities in relation to its objectives and circumstances.

It was precisely because of this lack of a definite guideline that the elective provision in Section 501(h) of the Internal Revenue Service Code was created. The vagueness of the existing standard generally discouraged legislative activities by Section 501(c)(3) organizations. The elective provision in Section 501(h) remedies this problem by setting relatively specific limits on expenditures for influencing legislation. The basic permitted level ("lobbying nontaxable amount") for a year is 20 percent of the first $500,000 of the organization's expenditures for charitable, educational, etc., purposes ("exempt function expenditures"), plus 15 percent of the second $500,000, plus 10 percent of the third $500,000, plus 5 percent of any additional "exempt function" expenditures, subject to a maximum of $1,000,000 for any one year. [While the provision for making an election is contained in Section 501(h), these expenditure ceilings and related definitions are contained in Internal Revenue Code Section 4911.]
Within those limits, moreover, a separate limitation is placed on so-called grass-roots lobbying—that is, attempts to influence the general public on legislative matters. The “grass-roots nontaxable amount” is one-fourth of the “lobbying nontaxable amount.”

The Section 501(h) election may be made any time within the tax year to which the election first will apply. [IRS Form 5768 should be used for making the election.] Groups that make the Section 501(h) election are required to disclose annually their total lobbying and grass-roots lobbying expenditures, as well as the related ceilings.

An electing organization that exceeds either the general limitation or the grass-roots limitation in a taxable year is subject to an excise tax of 25 percent of its excess lobbying expenditures. Furthermore, if an electing organization’s lobbying expenditures normally (that is, on the average over a four-year period) exceed 150 percent of the limitations, the organization loses its tax-exempt status as a Section 501(c)(3) organization and is not permitted to shift its status to a Section 501(c)(4) organization.

Distribution of Earnings

A final restriction imposed upon a Section 501(c)(3) organization is that no part of its net earnings may inure to the benefit of any private shareholder or individual. The organization will meet this requirement if, on dissolution, its assets, by reason of a provision in the organization’s articles of incorporation, will be distributed to other Section 501(c)(3) organizations. This restriction does not, however, prevent the payment of a reasonable allowance to an individual for services rendered to or expenses incurred on behalf of the organization.

Public Charity and Private Foundation

A Section 501(c)(3) organization may also be ruled a private foundation as opposed to a public charity. Basically, a private foundation is a Section 501(c)(3) organization that is not thought to have a sufficiently broad base of support to be considered publicly supported. Often private foundations are funded by a single source such as one family or company. The Internal Revenue Code and accompanying regulations contain various tests for determining whether or not an organization is a private foundation.

While an explanation of these tests is beyond the scope of this discussion, it is important to note that there are three main disadvantages to classification as a private foundation:

1. Private foundations are subject to excise taxes on net investment income.

2. Contributions to most private foundations are tax deductible to a more limited extent than contributions to a publicly supported organization. That is, if an organization qualifies as a public charity, contributions to it are tax deductible under Section 170 of the Internal Revenue Code up to 50 percent of the donor’s adjusted gross income (except for contributions of capital gain property, which are generally subject to a limit of 30 percent of the donor’s adjusted gross income).
income) and contributions in excess of the percentage limitation may be carried over for a five-year period. Deductions for contributions to most private foundations, in contrast, generally are limited to 30 percent of the donor's adjusted gross income. As with donations to public charities, there is a five-year carryover for contributions in excess of this percentage limitation.

3. Private foundations have greater difficulty than public charities in attracting grants from other private foundations because of certain expenditure responsibility requirements imposed on private foundations.

Section 501(c)(4) Status

A Section 501(c)(4) organization may engage in activities that are more activist in nature since it is not subject to the restriction on legislative activities imposed on a Section 501(c)(3) organization. Thus, it may engage without limitation in efforts to influence legislation, but it still may not participate, directly or indirectly, in the campaigns of candidates for public office.

If engaging in legislative activities is important to carrying out an organization's historic preservation purposes, the group should first consider whether, by making an election under Code Section 501(h), it would have sufficient scope for such activities. If not, consideration should be given to establishing both a 501(c)(3) organization and a 501(c)(4) sister organization. In this way, the tax deductibility of contributions, insofar as they are used for the group's educational and charitable, nonlegislative activities may be preserved.

As noted earlier, a Section 501(c)(3) organization that loses its exemption by reason of engaging in legislative activities in excess of that permitted under such status may not convert to Section 501(c)(4) status. Thus, under certain circumstances to avoid this penalty a Section 501(c)(3) organization may wish to convert voluntarily to Section 501(c)(4) status.

Applying for Exemption

Even though an organization meets all of the requirements for exemption as either a Section 501(c)(3) organization or a 501(c)(4) organization, it is not automatically exempt from tax. In order to be recognized as tax exempt by the Internal Revenue Service, the organization must file an IRS Application for Recognition of Exemption (using Form 1023 of the IRS for a Section 501(c)(3) organization and Form 1024 for a Section 501(c)(4) organization). The exemption if granted, will be effective as of the date when the organization was formed, provided, in the case of a Section 501(c)(3) organization, that the application was filed within 15 months of the date of formation. As part of its application for recognition of exempt status as a Section 501(c)(3) organization, a historic preservation organization that also intends to qualify as a public charity must seek a ruling as to its nonprivate foundation status.

A determination that an organization is exempt remains in effect as long as there are no substantial changes in the organization's character, purposes, or methods of operation. This means that a change in form—
even a merger with another tax-exempt historic preservation organization—requires the submission of a new application for recognition of exempt status.

Filing Returns

Finally, even though the IRS has recognized the tax-exempt status of a historic preservation organization, the organization still is obligated to file an annual information return on Form 990 (Form 990-PF, in the case of a private foundation). Organizations other than private foundations are not required to file a return, however, if their annual gross receipts do not normally (that is, on the average over the preceding three-year period) exceed $25,000. In addition to the foregoing, organizations that are subject to tax on their unrelated business taxable income are required to file returns on Form 990-T.

Legal Counsel

In forming a historic preservation organization, it is important to obtain legal counsel to prepare the articles of incorporation and bylaws, or other governing instrument, and to advise on tax considerations. There may be a lawyer in the group who would volunteer to perform its legal work. On the other hand, it may be unrealistic to rely on this type of informal arrangement and at the same time meet a timetable for establishing the organization. A lawyer in the group nevertheless can help find appropriate counsel, as well as generally assist in the group’s client role.

Resources

*The Legal Obligations of Nonprofit Boards: A Guidebook for Board Members.* Jacqueline Covey Leifer and Michael B. Glomb. Washington, D.C.: National Center for Nonprofit Boards. 1993. This publication outlines the legal responsibilities and requirements that board members, an executive staff must know when working with every category of IRS-defined grouping. To order a copy contact: National Center for Nonprofit Boards, 2000 L Street, Suite 510, Washington, D.C. 20036. (202) 452-6262, fax number: (202) 452-6299. The cost is $26 with a $5 shipping and handling charge.

*How to Apply for Recognition of Exemption of an Organization.* IRS Pamphlet 557. To order call: (800) 829-3676.

*Nonprofit Corporations, Organizations and Association.* 5th ed. Howard L. Oleck. Engelwood Cliffs, N.J.: Prentice-Hall, 1988. A comprehensive text that explains how to form a nonprofit organization or association. The public library should have a copy; if not, ask the librarian to order a copy. The cost is $99.


**Acknowledgments**

*Legal Considerations in Establishing a Historic Preservation Organization* was prepared for the National Trust for Historic Preservation by Collette C. Goodman, an associate of the law firm of Covington and Burling in Washington, D.C. It was revised in 1991 by Stefan Nagel, assistant general counsel, National Trust for Historic Preservation.
Exhibit 1

The following sample Articles of Incorporation for an incorporated, nonprofit Section 501(c)(3) historic preservation organization were adapted from those of a Connecticut historic preservation organization. It should be kept in mind that this is a sample only and each organization must take into account its own particular needs and the applicable state nonprofit corporation statute. Also, appropriate changes, as suggested in the text of the article, should be made in the case of a Section 501(c)(4) organization.

CERTIFICATE OF INCORPORATION

NAME OF ORGANIZATION

The undersigned hereby form a corporation under the Non-Stock Corporation Act of the State of ____________.

ARTICLE I. NAME. The name of the Corporation is ____________.

ARTICLE II. TERM. The term of the Corporation shall be perpetual.

ARTICLE III. PURPOSES. The Corporation is organized to operate exclusively for charitable and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue law) and, more specifically: to discover and memorialize the history and architecture of [name of State or community]; to discover, purchase, commission or otherwise procure, publish and in any other way preserve writings, newspapers, blueprints, maps, journals and the like which shed light on the history and architecture of [name of State or community]; to research, discover, procure, purchase, restore and assure the preservation of buildings, land, homes, or other articles which may relate to the history and architecture of [name of State or community]; to establish and maintain historic homes, buildings or exhibits and land leased to or owned by the corporation; to hold meetings and other activities for the instruction and information of members and the public; and to accept donations of money, real property or other property for the above purposes.

ARTICLE IV. POWERS. The Corporation shall have, without limitation by the specification thereof, the following powers, all of which shall be exercised exclusively in connection with the promoting or carrying out of the purposes of the Corporation mentioned in Article III hereof: to undertake, either alone or in conjunction or cooperation with others, any lawful acts and things and engage in any and all lawful activities which may be necessary, useful, suitable or desirable for the furtherance of any or all the purposes for which the Corporation is organized and to aid or assist other organizations, the activities of which are such as to further any of such purposes.

ARTICLE V. MEMBERS. The Corporation shall have one class of members, who shall be entitled to vote. Any individual or organization interested in supporting the purposes of the Corporation may become a
member of the Corporation by filing an application in such form as the Board of Directors shall prescribe, and subject to the payment of such dues as the Board of Directors shall establish from time to time. Other conditions and regulations of membership, and the rights and privileges of members shall be determined and fixed by the bylaws.

**ARTICLE VI. BOARD OF DIRECTORS.** The management and control of the Corporation shall be vested in a Board of Directors members of which shall be elected in the manner provided in the bylaws.

**ARTICLE VII. PROSCRIBED ACTIVITIES.**

1. The Corporation is nonprofit and no part of the Corporation's income is distributable to its Directors or officers, and the Corporation shall not have or issue shares of stock or pay dividends.

2. The Corporation is organized and, notwithstanding any other provisions of this Certificate of Incorporation, shall be operated exclusively for charitable and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, and the regulations thereunder, as the same now exist and may hereafter be amended from time to time.

3. In no event shall any part of the net earnings of the Corporation inure to the benefit of, or be distributable to, its members, Directors or officers or to other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article III hereof.

4. No substantial part of the activities of the Corporation shall be carrying on of propaganda or otherwise attempting to influence legislation, nor shall the Corporation participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office. These restrictions are not necessary in the case of a Section 501(c)(4) organization.

5. Notwithstanding any other provision of this Certificate of Incorporation, the Corporation shall not carry on any other activities not permitted to be carried on by a corporation, contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code of 1986, or the corresponding section of any future tax code, or (b) by a corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1986 or the corresponding section of any future tax code.

6. If the Corporation shall be or become a private foundation as such term is defined by Section 509, then the Corporation shall be required to distribute its income for each taxable year at such time in such manner as not to subject it to tax under Section 4942, and the Corporation shall be prohibited from engaging in any act of self-dealing [as defined in Section 4941(d)], from retaining any excess business holdings [as defined in Section 4943(c)], from making any investments in such manner as to subject the Corporation to tax under Section 4944, and from making any taxable expenditures [as defined in Section 4945(d)]. The statutory references in
this Paragraph 6 are to the Internal Revenue Code of 1986, and the regulations thereunder, as the same now exist and may hereafter be amended from time to time.

**ARTICLE VIII. DISSOLUTION.** In the event of the dissolution of the Corporation, all its assets remaining, after the payment of all debts and obligations of the Corporation, shall be distributed to such one or more organizations which have purposes and objects similar to those of this Corporation and are exempt from United States income taxes under the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986, as the Board of Directors may select, and if more than one, in such shares and proportions as the Board of Directors may determine. Any such assets not so disposed of shall be disposed of at the District Court of the county in which the principal office of the corporation is located, exclusively for such purposes or to such organization or organizations, as said Court shall determine, which are operated and organized exclusively for such purposes.

**ARTICLE IX. ADDRESS.** The address of the initial registered office of the corporation is:

The name of the initial registered agent at the foregoing office is:

**ARTICLE X. INCORPORATORS.** The name and address, including street and number, of each incorporator is:

**IN WITNESS WHEREOF,** the incorporators hereof have signed this Certificate of Incorporation on the dates indicated beside their signature:

<table>
<thead>
<tr>
<th>Name</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

County of   )
State of   ) ss:

On this ___ day of _______ 19__, before me, a Notary Public in and for the County of _________, State of _________, personally appeared _______________ and _______________, to me known to be the persons named in and who executed the foregoing instrument, and severally acknowledged they executed the same freely and for the intents and purposes therein stated.

__________________________
Notary Public

My Commission Expires:
Exhibit 2

The following is a sample set of bylaws for an incorporated, nonprofit historic preservation organization. Where applicable, provisions of the Connecticut Nonstock Corporation Act have been applied. It should be kept in mind that this is a sample only and each organization must take into account its own particular needs and the applicable state nonprofit corporation statute.

BYLAWS OF

ARTICLE I
NAME AND PRINCIPAL OFFICE OF CORPORATION

Section 1.01. The name of this corporation shall be ____________________________ (hereinafter referred to as the “Corporation”). Its principal office will be in _________________________.

ARTICLE II
MEMBERS

Section 2.01. Any individual or organization interested in supporting the purposes of the Corporation may become a member of the Corporation by filing an application in such form as the Board of Directors shall prescribe, and subject to the payment of such dues as the Board of Directors shall establish from time to time. Each member shall be entitled to one vote. The first members of the Corporation shall consist of the members of the Board of Directors first elected at the organization meeting of the Corporation.

Section 2.02. The Board of Directors may in its discretion suspend the voting privileges of any member who has been and remains in default in his financial obligations to the Corporation for a period of six (6) months or longer.

Section 2.03. Any member may resign by submitting written notice of resignation to the Secretary.

ARTICLE III
MEETINGS OF MEMBERS

Section 3.01. Meetings of the members shall be held at such place or places, either within or without the [name and State], as may from time to time be fixed by the Board of Directors.

Section 3.02. The annual meeting of the members shall be held in the spring of each year on the date fixed by the Chairman. A report of the meeting and of the activities of the Corporation for the preceding year shall be sent to all members following the annual meeting.

Section 3.03. Special meetings of the members may be called by the Chairman, President, Secretary, or one third of the Board of Directors, and shall be called by the President upon written application of ten (10) percent of the members of the Corporation.
Section 3.04. Written notice of each meeting of the members, stating the place, day, and hour of the meeting and, in the case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than seven (7) nor more than fifty (50) days before the date of the meeting, either personally or by mail, by or at the direction of the Chairman, President or Secretary, to each member, subject to waiver of notice as provided in the ______________________ Nonstock Corporation Act.

ARTICLE IV
BOARD OF DIRECTORS

Section 4.01. The Corporation shall be governed by a Board of twelve (12) Directors. The first Board of Directors shall be elected by the incorporators of the Corporation named in the Certificate of Incorporation and thereafter the Board shall be elected by the members of the Corporation. The term of office for each Director shall be three (3) years, except that the term of office for each member of the first Board of Directors shall be determined by the incorporators. Four (4) directors shall be elected at each annual meeting of the members. Nominations shall be made by a Nominating Committee appointed by the Board and shall be set forth in the notice of the annual meeting. A majority of the members of the Nominating Committee shall consist of members of the Corporation who are not then Directors. Each Director shall hold office for the term for which he is elected and until his successor shall have been elected and qualified. Directors in office may be reelected for one or more additional terms.

Section 4.02. Any vacancy occurring in the Board of Directors (other than a vacancy resulting from the normal expiration of a term of office) may be filled by the affirmative vote of a majority of the then members of the Board of Directors, though less than a quorum of the Board. A Director elected to fill a vacancy shall be elected for the unexpired term of his/her predecessor in office. Any Director may resign by submitting written notice of resignation to the Secretary. Any Director may be removed from office at any time with or without cause by the affirmative vote of two thirds of the Directors in office.

ARTICLE V
MEETINGS OF THE BOARD OF DIRECTORS

Section 5.01. Meetings of the Board of Directors, regular or special, may be held within or without the State of ______________ upon not less than two (2) days' notice to each Director, either personally or by mail, telephone or telegram, subject to waiver of notice as provided in the ______________________ Nonstock Corporation Act. Neither the business to be transacted at, nor the purpose of any regular or special meeting of the Board of Directors need be specified in the notice or waiver of notice of such meeting. Regular meetings shall be held at least once each year or more often as established by resolution of the Board of Directors. Special meetings of the Board of Directors may be called by the Chairman or by the written request of a majority of the Directors in office.

Section 5.02. One third of the number of Directors fixed in the bylaws shall constitute a quorum for the transaction of business. The act of the
majority of the Directors present at a meeting at which a quorum is present shall be the act of the Board of Directors. If a quorum shall not be present at any meeting of the Board of Directors, the Directors present may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present.

Section 5.03. Any action required or permitted to be taken at a meeting of the Board of Directors may be taken without a meeting of consent in writing, setting forth the action so taken, shall be signed by all of the Directors.

ARTICLE VI
COMMITTEES

Section 6.01. The Board of Directors, by resolution adopted by a majority of Directors in office, may designate or appoint one or more committees, including without limitation an Executive Committee, each of which shall consist of two or more Directors, which committees, to the extent provided in said resolution, shall have and exercise the authority of the Board of Directors in the management of the Association. Other committees not having and exercising the authority of the Board of Directors in the management of the Association may be designated and appointed by a resolution adopted by a majority of the Directors present at a meeting at which a quorum is present. The designation and appointment of any such committee and the delegation thereto of authority shall not operate to relieve the Board of Directors, or any individual Director, of any responsibility imposed upon them by law.

ARTICLE VII
OFFICERS

Section 7.01. The officers of the Corporation shall be elected annually by the Board of Directors and shall consist of a Chairman, one or more Vice Chairmen, a President, a Secretary and a Treasurer, and may include one or more Vice Presidents and such other officers and assistant officers as may be deemed necessary. Any two or more offices may be held by the same person, except the offices of President and Secretary.

Section 7.02. The Board of Directors may require any of the officers or employees of the Corporation to give bond to the Corporation with sufficient sureties, conditioned upon the faithful performance of the duties of their respective offices or employments.

Section 7.03. Any officer elected or appointed by the Board of Directors may be removed at any time with or without cause by the affirmative vote of two thirds of the Directors in office. Any vacancy occurring in any office of the Corporation (other than a vacancy resulting from the normal expiration of a term of office) shall be filled by the Board of Directors not sooner than thirty (30) days after written notice of the vacancy has been mailed to all members.

The Chairman

Section 7.04. The Chairman shall be the chief executive officer of the Corporation and shall preside at meetings of the Board of Directors and at meetings of the members.
The Vice-Chairmen

Section 7.05. The Vice-Chairmen shall respectively have such powers and perform such duties as may be assigned to them by the Board of Directors or the Chairman. In the absence or disability of the Chairman, the Vice-Chairmen, in the order determined by the Board of Directors, shall perform the duties and exercise the power of the Chairman.

The President

Section 7.06. The President shall be the chief operating officer of the Corporation; he/she shall have general and active management of the affairs and property of the Corporation, and shall see that all orders and resolutions of the Board of Directors are carried into effect.

The Vice Presidents

Section 7.07. The Vice Presidents shall respectively have such powers and perform such duties as may be assigned to them by the Board of Directors, the Chairman or the President. In the absence or disability of the President, the Vice Presidents, in the order determined by the Board of Directors, shall perform the duties and exercise the power of the President.

The Secretary

Section 7.08. The Secretary shall keep the minutes of all meetings of the Board of Directors, of all meetings of committees of directors appointed in accordance with Section 6.01 of these bylaws, and of all meetings of the members. He/she shall give, or cause to be given, such notice of all meetings of the Board of Directors and all meetings of the members as may be required by the bylaws, and shall perform such other duties as shall be assigned to him/her by the Board of Directors, the Chairman or the President.

The Treasurer

Section 7.09. The Treasurer shall have the custody of the corporate funds and securities and shall keep full and accurate accounts of receipts and disbursements in books belonging to the Corporation and shall be responsible for depositing all moneys in the name and to the credit of the Corporation in such depositories as may be designated by the Board of Directors. He/she shall be responsible for disbursing the funds of the Corporation in accordance with the directions of the Board of Directors, and shall render to the Board of Directors, at its regular meeting, or when the Board of Directors so requires, an account of all his/her transactions as Treasurer and of the financial condition of the Corporation.

ARTICLE VIII
CONTRACTS, CHECKS, DEPOSITS AND FUNDS

Section 8.01. Except as the Board of Directors may generally or in particular cases authorize the execution thereof in some other manner, all checks, drafts and other instruments for the payment of money and all instruments of transfer of securities shall be signed in the name and on behalf of the Corporation by the Treasurer or by such other officers, or
agents or employees of the Corporation, as may, from time to time, be
designated by the Board of Directors. All instruments of transfer of
personal property other than securities, all instruments of conveyance of
real property and all contracts and agreements shall be signed by such
officers or agents as the Board of Directors shall direct, and in any event,
they may be signed by any two[2] of the following officers, namely, the
Chairman, President, Vice Chairman, Secretary or Treasurer. The Board
of Directors may authorize and empower one or more officers or agents of
the Corporation to execute and deliver any and all papers and documents
or to do other acts or things on behalf of the Corporation, including any
required or convenient in dealing with Governmental authorities.

Section 8.02. Deposits. All funds of the corporation shall be deposited
from time to time to the credit of the corporation in such banks, trust
companies or other depositories as the Board of Directors may select.

Section 8.03. Gifts. The Board of Directors may accept on behalf of the
corporation any contribution, gift, bequest, or devise for the general
purposes or for any special purpose of the Corporation.

ARTICLE IX
DUES

Section 9.01. The members may determine from time to time the amount
of annual dues payable to the corporation by the members.

ARTICLE X
SEAL

Section 10.01. The corporate seal shall be circular in form and shall
have inscribed thereon the name of the corporation, the date of its incor-
poration and the words “[Name of State].”

ARTICLE XI
FISCAL YEAR

Section 11.01. The fiscal year of the Corporation shall begin on the first
day of January and end on the last day of December in each year.

ARTICLE XII
AMENDMENTS

Section 12.01. These bylaws may be altered, amended or repealed and
new bylaws may be adopted by a majority of Directors in office at any
regular or special meeting, provided that no such action shall be taken if
it would in any way adversely affect the Corporation’s qualification under
Section 501(c)(3) of the Internal Revenue Code of 1986 (or any successor
provision).

Adopted: