

ATTORNEY WRITES

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INCORPORATION

Where a lake does not have a lake association, riparian property owners often wonder, "Should we form a lake association?" Even where a lake association exists, members often wonder, "Should we incorporate?" This month's **Attorney Writes** column will be devoted to these issues.

For most all lakes, it is generally beneficial to have a lake association. While not legally required by the government, lake associations serve many useful purposes, even on "quiet" lakes. Associations can perform the following functions:

- A. Exchange of lake information;
- B. Promote social interaction;
- C. Lobbying of government officials;
- D. Historical preservation;
- E. Serve as a vehicle for litigation if necessary;
- F. Aquatic weed control;

If your lake has a lake association or you intend to create one, formal incorporation almost always is prudent. Again, just as there is no requirement to form a lake association, there is also no legal requirement to incorporate a lake association. Under almost all circumstances, it is lawful to have a group gathering of people acting in concert regarding lake matters without formally incorporating. In fact, that is guaranteed by the rights of association, petitioning and grievance of the First Amendment to the United States Constitution. Nevertheless, there are many very good reasons for taking that extra step and incorporating your lake association.

The most common reason voiced for incorporating a lake association is protection against liability. While incorporating a lake association can help add additional insulation against liability (and added insulation from liability alone can normally justify incorporation), incorporation alone does not completely insulate members or officers of a nonprofit corporation from liability. While most passive members of an incorporated association will usually be insulated from liability, the officers or directors of the corporation and even those members who participate in the activity giving rise to potential liability can still be sued if their individual actions are determined to be negligent. Therefore, while incorporation helps insulate from liability, its protection is not absolute. While liability for offices, directors and members of nonprofit corporations in Michigan is relatively rare, it does happen on occasion. Following are some measures which can be taken to enhance the shield against liability once a lake association is incorporated:

1. Update the by-laws periodically.
2. Make sure that the by-laws contain a director and officer indemnification provision.

3. Properly file all annual reports.
4. Follow the law in all matters!
5. Act as a corporation—that is, follow all corporate formalities, procedures and policies.
6. Carry adequate liability insurance, as well as director and officer “errors and omissions” insurance.
7. If in doubt, consult with your legal counsel.

Apart from liability concerns, there are many other reasons for a lake association to incorporate. Incorporation often make it easier to open a bank account and also gives some protection to your lake association name, so that it will not be usurped by others for commercial or other reasons. Incorporation tends to give a group added weight and formality, which often helps in its dealings with local government, businesses and the general public. Finally, incorporation often helps regarding internal discipline. Members tend to be more respectful and motivated if formal corporate procedures are followed (for instance, annual meetings, rules of order, election of officers, etc.).

Can a lake association force riparian property owners to join? Normally, no. In Michigan, there are two types of lake associations—strong and weak. “Strong” lake associations are relatively rare. These associations are created pursuant to deed restrictions which require all riparian members to join one association. Except for artificial lakes created by a developer with comprehensive deed restrictions, few strong lake associations exist. All other groups are “weak” lake associations and membership is only voluntary. In fact, a few lakes even have competing lake associations and there really is no “official” lake association in the eyes of the law.

Can a lake association force its members to contribute dues? Not unless the lake association is a “strong” lake association and such dues are mandated by the deed restrictions. Once again, the payment of dues is almost always voluntary. Mandatory payments by riparian property owners for weed control purposes can be required pursuant to the creation of a special assessment district or a statutory lake board, but such monies are collected and disbursed by the local government, not any lake association.

Are my lake association dues deductible on my income tax? Not under current tax laws.

Is incorporation difficult to achieve? No. While some lake associations have incorporated without the benefit of legal counsel, it is normally not recommended. In a nutshell, the steps for incorporation generally are as follows:

1. Hold an initial meeting of incorporators.
2. File Articles of Incorporation under the proposed name with the Michigan Department of Consumer and Industry Services.
3. Obtain federal employer identification number.
4. Adopt Bylaws.
5. General meeting of members.
6. Elect Directors and Officers.