CHAPTER THREE

FORMATION

Section 3.01 Generally

The incorporation process usually proceeds as follows:

1. The incorporators or promoters obtain subscriptions from prospective shareholders, choose a corporate name, identify initial directors, cause the articles of incorporation to be drafted and then filed with the Secretary of State.

2. After the articles have been filed, the initial directors – generally named in the articles – hold an organizational meeting. At that meeting, the initial directors accept subscriptions from prospective shareholders and call for payment thereon, authorize the issuance of shares to these subscribers, adopt bylaws, appoint officers and take other steps necessary to start business.

3. Contemporaneous with the organizational meeting, (I) incorporators cease to have any corporate status, (ii) shareholders become owners of the corporation's stock, and (iii) the board of directors ratifies any actions previously taken by the incorporator or the promoter, appoints officers and agents, and authorizes the officers and agents to undertake certain tasks on behalf of the corporation.

4. After the organizational meeting, officers and other corporate agents begin carrying out day-to-day corporate operations under authority conferred upon them by the board of directors.

Section 3.02 The Incorporator

The "incorporator" is a person whose limited role involves filing the articles of incorporation. If initial directors are not included in the articles, the incorporator also has the job of appointing directors and sometimes conducting the organizational meeting. "Their office is to start the corporation and proceed to

perfect its organization." *Coyote Gold & Silver Mining Co. v. Ruble*, 8 Or 285, 292 (1880).

The topic of "promoters" is discussed in Chapter Two.

***A. Qualifications*.**

ORS 60.044 provides that “one or more individuals 18 years of age or older, a domestic or foreign corporation, a partnership or an association may act as incorporators of a corporation by delivering articles of incorporation to the” Secretary of State for filing.

While a corporation may have more than one incorporator, in practice, it usually has only one.

At one time, the incorporator and the promoter were often the same person. The term “promoter” is not a statutory term, but rather, it is a term generally applied to the person or persons who instigate a corporation's formation. *See* Section 2.01 of this book. Since an incorporator's role is now so ministerial, and since an incorporator's involvement is now so transitory, the role of incorporator frequently falls on the corporation's attorney or on another person whose signature on the articles is readily obtained.

Today in Oregon, any entity, including "a domestic or foreign corporation, a partnership or an association" may serve as an incorporator. ORS 60.044. *See also* Official Comment to RMBCA § 2.01. This was not always true. At one time, some states did not permit a corporation to act as an incorporator for another corporation. 1953 *Op Ind Atty Gen* 440; *Denny Hotel Co. v. Schram*, 6 Wash 134, 32 P 1002 (1893). Some states once did not permit a partnership to serve as an incorporator.

If an incorporator is an individual, the incorporator must be 18 years of age or older. ORS 60.044.

ORS 60.044 contains no residency requirement, and without such a requirement, the incorporators can be non-residents. *Hastings v. Anacortes Packing Co.*, 29 Wash 224, 69 P 776 (1902).

At one time, some state statutes specifically provided that an incorporator must have capacity to contract or otherwise impose a qualification requirement on the incorporator. *See for example* Louisiana Rev. Stat. 12:21 (repealed 2015). At least one court held that an incorporator must possess legal capacity. *The Liberty*

Township Draining Association v. Watkins, 72 Ind 459 (1880); 1A FLETCHER CYC CORP §§ 82-84 (Perm Ed 1993). The current Oregon Act is silent on this issue.

Practically, while lack of capacity might be grounds for the Secretary of State to reject the articles – although the Secretary of State's office is unlike to know anything at all about the incorporatorl – once the corporation's articles have been accepted and filed, private suits to challenge the existence of the corporation should prove unsuccessful under ORS 60.051(2).“The question of the forfeiture of corporate powers by a corporation, for irregularities in its organization, can be raised only by the state in a direct proceeding between it and the corporation, and cannot be raised by a third person in a collateral proceeding.” *Murphy v. Wilson*, 37 ND 300, 113 NW 820 (1917).

While an action by the state is possible, it is hard to imagine a scenario where the state would want to set aside the incorporation solely based upon the incapacity of the incorporator. Even the state may be unable to set aside the incorporation, though the original incorporators may have been disqualified at the time of incorporation. *See for example State v. Futch,* 94 Fla 52, 113 So 670 (1927); *State v. Miner,* 233 Mo 312, 135 SW 483 (1911).

***B. Duties*.**

An incorporator's role is short-lived. While the Act never actually states that the office of incorporator ceases to exist, the incorporator only has limited statutory duties all of which end at the latest at the end of the organizational meeting, maybe earlier if initial directors are listed in the articles.

ORS 60.044 provides that the incorporator is to deliver the "articles of incorporation to the office” of the Secretary of State for filing. ORS 60.057(2) provides that, if the initial directors are not named in the articles, the incorporator is to hold an organizational meeting to elect directors and complete the organization of the corporation.

An incorporator may use a written consent in lieu of actually conducting the organizational meeting in person. ORS 60.057(2).

After the organization of the corporation – generally at the conclusion of the organizational meeting – the incorporator has no other duties, statutory or otherwise. For all practical purposes, the position of “incorporator” ceases to exist at this point.

Section 3.03

> From the time of the first meeting of the directors, that is to say, from the time of the organization of the board, "the powers vested in the corporation are exercised by them, or by their officers or agents under their direction" (Hill's Code, § 3225), thus relieving the incorporators of further duty or power in the premises, or, rather, their functions then cease because their duties have been fulfilled and their powers executed. *Nickum v. Burckhardt*, 30 Or 464, 468-9, 47 P 788, 789 (1897).

Section 3.03 Organizational Meeting

After the articles of incorporation have been filed with the Secretary of State's office, the incorporator or the initial directors must take steps to "organize" the corporation – usually at a meeting called the "organizational meeting."

Although the terms "organize" and "organizational" are not defined, they are usually taken to mean accepting subscriptions and the payment for shares, adopting bylaws, electing directors (if initial directors are not named in the articles), appointing officers and agents and taking such other steps as are necessary to permit the corporation to transact legitimate business. *Murdock v. Lamb,* 92 Kan 857, 142 P 961, 962 (1914).

If the names of initial directors are not set out in the articles, the incorporator elects directors and may conduct the organizational meeting and otherwise organize the corporation. ORS 60.057(2).

> **NOTE:** ORS 60.057(1) provides that the organizational meeting shall occur "after incorporation." "[I]ncorporation cannot exist prior to the filing of corporate papers." *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 365, 950 P2d 451, 455 (1997). *See also* ORS 60.051(1).

If, as is more often the case, the names of the initial directors are set forth in the articles, these initial directors conduct the organizational meeting. At this meeting, these directors appoint officers, adopt bylaws, and carry on any other business brought before the meeting. ORS 60.057(1).

Although not specifically set forth in ORS 60.057, a number of other acts must necessarily take place at the organizational meeting, or soon thereafter. The board of directors must authorize the corporation to accept subscriptions from the persons who wish to purchase the corporation's shares, call for the payment of the subscription price of such shares, and authorize the issuance of the corporation's shares upon receipt of such payment.

NOTE: In order to conduct business, a corporation must be owned by someone and it must own something. Before it begins doing business, a corporation must have shareholders and it must possess the assets these shareholders contribute for their shares.

For example, after operating Frank's Franks as a sole proprietorship for several years, Frank decides to incorporate his business. Frank has not necessarily transferred his business to the corporation simply by forming a corporation named "Frank's Franks, Inc." Unless Frank goes through the formalities of contributing his business to the corporation (and in exchange, receiving its stock), there will be doubt as to whether Frank is still conducting the business as a sole proprietorship. The mere existence of the corporation does not mean the corporation owns Frank's Franks, rather than Frank personally.

While not required, it is common for the board of initial directors to authorize a number of other actions at, or soon after, the organizational meeting. These actions include authorization to open bank accounts, authorization of officer and employee compensation, authorization for officers to enter into real and personal property leases, authorization of equipment and inventory purchases, authorization for the officers to apply for government licenses, authorization to retain attorneys and accountants, authorization to conduct business in other states and authorization of such other matters as are necessary for the corporation to begin its business. If "S Corporation" status under the federal tax code is desired, the board should approve adoption of such status and should authorize the filing of the appropriate form with the Internal Revenue Service. Prior acts of the corporation's promoters and attorneys should be ratified, where appropriate.

NOTE: While there is no statutory period after the articles are filed during which the organizational meeting must occur, there are a few older cases which hold that the organizational meeting must occur within a reasonable time. *See* FLETCHER CYC CORP § 3739 (Perm Ed). The incorporator should not engage in any substantial corporate business – directors should be elected within a reasonably short period and the directors should be the persons who authorized corporate acts.

Section 3.04 De Facto Corporations & Corporations by Estoppel

One of the principal reasons for incorporating a business is to provide limited liability to the owners. Case law suggests a tendency for owners to technically "jump the gun", but to still want the benefits of limited liability.

Back at a time when incorporation was a cumbersome process, courts recognized two defenses for owners of a defective corporation: the *"de facto* corporation" defense and the "corporation by estoppel" defense.

Neither of these defenses are viable in Oregon any more. Today, liability for defective corporations is largely governed by ORS 60.054 which makes personally liable "[a]ll persons purporting to act as or on behalf of a corporation, knowing there was no incorporation." *See Silvers v. R&F Capital Corp.*, 123 Or App 35, 858 P2d 895 (1993); *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997).

A. Overview.

Originally, the incorporation process was a cumbersome one. Compliance with many technical requirements was necessary.

For instance, Oregon once required that a corporation accept subscriptions for at least half of its capital stock before it could begin doing business. *Temple Enterprises, Inc. v. Combs*, 164 Or 90, 100 P2d 234 (1940); *Willamette Freighting Co. v. Stannus*, 4 Or 261 (1872). Washington once required a corporation to execute its articles in triplicate. *Kwapil v. Bell Tower Co.*, 55 Wash 583, 104 P 824 (1909). Some states once required copies of the articles to be filed with two or more government offices.

As a consequence, many corporations failed to comply with one or more of these early technical requirements.

Yet, even in early times, courts considered it unfair to impose personal liability on the shareholders when one of these technical requirements was not met. This was particularly true when the shareholders and the third parties with whom the purported corporation dealt both believed that the corporation had existed and that it had been the corporation – not the shareholders – acting. Courts resolved this inequity by developing the concepts of *de jure* corporations, *de facto* corporations, and corporations by estoppel.

> Corporations (using that term to designate organizations merely claiming or alleged to be corporations, as well as those which are in all respect legally constituted) have been divided into three classes,--corporations de jure, corporations de facto, and corporations by estoppel. Corporations de jure have been defined to be those whose legal right to exist cannot be questioned even by the state itself. The expression "de facto corporations" is generally used to denote associations exercising corporate powers under color of a more or less legal organization. One who has contracted with a corporation as such is estopped to deny its existence as a corporation at the date of the contract in any suit arising thereunder, and such a corporation has been, it seems to us with great propriety, designated a "corporation by estoppel." *Brown v. Atlanta Ry. & Power Co.*, 113 Ga 462, 39 SE 71, 73 (1901).

In Oregon and in most other states, a person acting for a technically defective corporation had a defense from personal liability – the defense that the corporation was a *de facto* corporation. *Brown v. Webb*, 60 Or 526, 120 P 387 (1912). As discussed below, Oregon no longer recognizes this defense. *Timberline Equipment Co., Inc. v. Davenport*, 267 Or 64, 514 P2d 1109 (1973).

Oregon also once recognized another defense by such persons – an estoppel defense. Case law refers to this defense as the "corporation by estoppel" defense. *Brandtjen & Kluge v. Biggs*, 205 Or 473, 288 P2d 1025 (1955). As discussed below, it is unclear whether this defense survives in Oregon. *Timberline Equipment Co., Inc. v. Davenport*, 267 Or 64, 69 n 1, 514 P2d 1109, 1111 (1973).

For a more thorough discussion of promoter liability for acts on behalf of *de facto* corporations, see Section 2.06 of this book.

***B. De facto corporations*.**

A *de jure* corporation is a corporation which has observed all of the formal requirements of the incorporation process. On the other hand, a *de facto* corporation is one which has *substantially* complied with the statutory requirements of incorporation, but nevertheless, has failed to strictly observe some technical requirement necessary for it to be a *de jure* corporation.

> A corporation *de jure* is one created in strict or substantial conformity to the governing corporation statutes, and whose right to exist and act as such can not be successfully attacked in a direct proceeding by the state.
>
> The *de facto* corporation is so defectively incorporated as not to be *de jure*. (citations omitted) *Kidd v. Hilton of San Juan, Inc.*, 251 F Supp 465, 468 (D PR 1966).

There are three requirements for qualifying as a *de facto* corporation: (i) the promoters must have made a good faith effort to organize a corporation, (ii) the corporation must have made a colorable or apparent attempt to comply with the law,

and (iii) the corporation must have attempted to exercise corporate powers. *Brown v. Webb*, 60 Or 526, 120 P 387 (1912); *Mootz v. Spokane Racing & Fair Ass'n.*, 189 Wash 225, 64 P2d 516 (1937).

If all three of these elements were present, shareholders of the *de facto* corporation were held not be personally liable to third parties for corporate acts. Only the state could successfully attacked a *de facto* corporation.

As the legislature simplified the incorporation process, the need for a *de facto* corporation defense lessened. Arguably, the Model Business Corporation Act abolished this defense.

The Oregon Supreme Court held that Oregon jettisoned the concept of *de facto* corporations when it adopted the Model Corporation Act in 1953. *Timberline Equipment Co., Inc. v. Davenport*, 267 Or 64, 514 P2d 1109 (1973).

Similar Model Act language was adopted in other states and most, but not all, courts have likewise held that this Model Act language eliminates the concept of *de facto* corporations. *American Vending Services, Inc. v. Morse*, 881 P2d 917 (Utah App 1994); *Swindel v. Kelly*, 499 P2d 291 (Alaska 1972); *Robertson v. Levy*, 197 A2d 443 (Del C Ct of App 1964); *but see Harry Rich Corp v. Feinberg*, 518 So2d 377, 379 n 2 (Fla App 1987)(issue still open in Florida).

It would appear the *de facto* corporation defense continues to be unavailable under the 1987 Oregon Act. ORS 60.051(2) provides:

> The Secretary of State's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation.

This 1987 statutory language has not yet been interpreted by the courts, although it is worded much the same as the statute interpreted in *Timberline*. There is little reason to believe that the new statute revives the *de facto* corporation defense.

Note however, ORS 60.054 provides:

> All persons purporting to act as or on behalf of a corporation, knowing there was no incorporation, are jointly and severally liable for all liabilities created while so acting.

Under this statute, a third party may hold such a person liable only if the actor had "actual knowledge" that no incorporation exists; constructive knowledge is not

enough. *Silvers v. R&F Capital Corp.*, 123 Or App 35, 858 P2d 895 (1993); *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997).

Thus ORS 60.051(2), read in conjunction with ORS 60.054, appears to draw a bright line in conjunction with the filing of the articles with the Secretary of State: promoters and purported shareholders – with actual knowledge that the filing has not occurred – are liable for any corporate acts taken before such filing; without such knowledge, officers, directors and shareholders are generally not liable for any corporate acts. After the articles are filed, shareholders are not liable for corporation acts.

C. Corporations by estoppel.

Although the *de facto* corporation defense may no longer exist, a person who believes that he/she is dealing with a corporation, when in truth no corporation exists, may still be estopped from holding the "entity's" owners personally liable. "In general, one who contracts or deals with an entity as a corporation thereby admits that the entity is a corporation and is estopped to deny its incorporation in an action arising out of the contract or course of dealing." *Intern. Sport Divers Ass'n v. Marine Midland Bank,* 25 F Supp2d 101, 109 (WD NY 1998).

> The so-called estoppel that arises to deny corporate capacity does not depend on the presence of the technical elements of equitable estoppel, *viz.*, misrepresentations and change of position in reliance thereon, but on the nature of the relations contemplated, that one who has recognized the organization as a corporation in business dealings should not be allowed to quibble or raise immaterial issues on matters which do not concern him in the slightest degree or affect his substantial rights.
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> As several writers have pointed out, in order to apply the doctrine correctly, the cases must be classified according to who is being charged with estoppel.
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> When a defendant seeks to escape liability to a corporation plaintiff by contending that the plaintiff is not a lawful corporate entity, courts readily apply the doctrine of corporation by estoppel.
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> * * *
>
> On the other hand, when individuals such as the defendants in this case seek to escape liability by contending that the debtor is a corporation, Aero-Fabb Co., rather than the individual who purported to act as a corporation, the courts are more reluctant to estop the plaintiff from attacking the legality of the alleged debtor corporation.
>
> The most appealing explanation of why the plaintiff may be estopped is based upon the intention of the parties. The creditor plaintiff contracted believing it could look for payment only to the corporate entity. The associates, whatever their relationship to the

> supposed corporate entity, believed their only potential liability was the loss of their investment in the supposed corporate entity and that they were not personally liable. *Timberline Equipment Co., Inc. v. Davenport*, 267 Or 64, 70-71, 514 P2d 1109, 1111-12 (1973).

Another court has said:

> Plaintiffs contend that the statute does not pre-empt the field, and rely instead on the common law doctrine that absent valid incorporation, business associates should be treated as partners.
>
> * * * In most jurisdictions, including Indiana, that doctrine has been riddled with exceptions, the best known being the "de facto doctrine." But entirely apart from the de facto doctrine, substantial authority exists in Indiana for the proposition that absent fraud, a creditor who deals with an entity purporting to be a corporation, and relies only on the credit of the supposed corporation, is estopped from holding the shareholders liable as partners. (citations omitted) *Edward Shoes, Inc. v. Orenstein*, 333 F Supp 39, 42 (ND Ind 1971).

Another court has pointed out that the term "corporation by estoppel" is a misnomer.

> "Corporation by estoppel" is actually a misnomer for the result of applying the policy whereby private litigants may, by their agreements, admissions, or conduct, place themselves in a position where they will not be permitted to deny the existence of a corporation. Because estoppel as a doctrine is concerned with the acts of the parties, as opposed to the legality of the corporation itself, we think the better rule is that the corporation by estoppel doctrine may be employed even when the corporation has not achieved *de facto* corporation existence. (footnotes omitted) *Willis v. City of Valdez*, 546 P2d 570, 574 (Alaska 1976).

One Washington case indicates that Washington's adoption of the Revised Model Business Corporation Act (also adopted in Oregon) has eliminated the estoppel defense.

> When the Legislature enacted the WBCA, it considered comments to the legislation which had been prepared by the Corporate Act Revision Committee of the Washington State Bar Association. Those comments are included in the *Senate Journal*, 51st Leg. 2977-3112 (1989), and are indicative of legislative intent. The comment on RCW 23B.02.040 states:
>
> > The combined effect of Proposed sections 2.03 and 2.04 is to abolish in Washington the de facto corporation and the corporation-by-estoppel (or "loose" estoppel) doctrine. The ABA Committee Comment (REVISED MODEL BUSINESS CORPORATION ACT, Official Text 44-46 (1984))concludes from a review of recent cases that the principal equitable consideration running through recent applications of de facto and estoppel doctrines relates to the desire to protect persons who acted with the good faith belief that a corporation existed. Once the equity of that ground is acknowledged, as it is expressly in Proposed section 2.04 (now RCW 23B.02.040), there is no reason not to impose liability on parties who fail to take advantage of the

> simple and inexpensive process of incorporation. (citations omitted) *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 366-7, 950 P2d 451, 456 (1997).

Despite adoption of Model Act language, some courts have held the corporation by estoppel defense still exists. *See Harry Rich Corp v. Feinberg*, 518 So2d 377 (Fla App 1987); *Spurlock v. Santa Fe Pacific Railroad Co.*, 143 Ariz 469, 694 P2d 299 (Ariz App 1984); *Sunman-Dearborn Community School Corp. v. Kral-Zepf-Freitag and Associates*, 167 Ind App 339, 338 NE2d 707 (1975); *Edward Shoes, Inc. v. Orenstein*, 333 F Supp 39, 42 (ND Ind 1971); *Brandtjen & Kluge v. Biggs*, 205 Or 473, 288 P2d 1025 (1955). Other courts have held that similarly-worded statutes have eliminated the corporation by estoppel defense. *See American Vending Services, Inc. v. Morse,* 881 P2d 917 (Utah App 1994); *Cahoon v. Ward*, 231 Ga 872, 875, 204 SE2d 622, 625 (1974).

In *Timberline Equipment Co., Inc. v. Davenport*, 267 Or 64, 69 n 1, 514 P2d 1109, 1111 (1973), the Oregon Supreme Court declined to rule on whether the corporation by estoppel defense is still viable under an earlier version of the Oregon Business Corporation Act. Since then, Oregon has adopted the Revised Act. The Official Comments to RMBCA § 2.04 assumes that the corporation by estoppel defense continues for innocent "shareholders." But whether this defense still exists in Oregon is unknown. *See* FLETCHER CYC CORP § 3890 (Perm Ed).

Section 3.05 Articles of Incorporation

Articles of incorporation are a corporation's most important document. The articles are sometimes referred to as the corporate "charter." The articles constitute a contract between the corporation and the state, between the state and the shareholders, between the corporation and its shareholders, and among the shareholders themselves. *WSB Invs., LLC v. Pronghorn Dev. Co.,* 269 Or App 342, 344 P3d 548, 558 (2015); *Dentel v. Fidelity Savings & Loan Association*, 273 Or 31, 539 P2d 649 (1975); *Haberlach v. Tillamook County Bank*, 134 Or 279, 293 P 927 (1930); *Walden Investment Group v. Pier 67, Inc.*, 29 Wash App 28, 627 P2d 129 (1981). As such, the articles "should be interpreted in accordance with accepted rule of contract construction." *Walden Investment Group v. Pier 67, Inc*., 29 Wash

App 28, 31, 627 P2d 129, 131 (1981); *see also Ferrill v. Nahra*, 795 A2d 1208 (Vt 2002); *Phillips v. National Trappers Ass'n*, 407 NW2d 609 (Iowa App 1987).

The laws of the state under which the corporation is incorporated become part of its articles of incorporation. *DiNicola v. Serv. Emps. Int'l Union Local 503*, 281 Or App 706, n1, 383 P3d 924 (2016); *Howe v. Washington Land Yacht Harbor, Inc.*, 77 Wash2d 73, 459 P2d 798 (1969); *Bellinger v. West Coast Telephone Co.*, 54 Wash2d 576, 343 P2d 189 (1959); *State ex rel Swanson v. Perham*, 30 Wash 2d 368, 191 P2d 689 (1948).

Over time, the importance of the articles as a contract has diminished somewhat, supplanted by statutory provisions, the bylaws and shareholder agreements.

A. History.

As discussed in Chapter One, in the 19th century, corporations were specifically chartered by state legislatures. This practice was subject to abuse and corruption. Eventually, the incorporation process became an administrative function, a process which was more open to the general population.

> Formerly, legislatures having power to grant charters could place such restrictions upon the corporation at the time of its creation as legislative wisdom should suggest; but whatever right or power was then unconditionally conferred became inherent or vested in the corporation. Concessions to corporations are in the nature of grants. So our legislature, acting under this provision of the constitution, has the power to provide by general law to confer such rights and powers on corporations.
>
> The object and effect of the constitutional provision is, not to change the nature or character of the corporate body, but to place all men on an equality in obtaining these privileges, and to disconnect the business of granting charters from the business of legislation.
>
> The legislature, in passing such general law, can undoubtedly place upon corporations such restrictions as the public good may require, and may provide by general law for conferring powers similar to those formerly conferred by acts of special grant. The evidence of the powers of a corporation is now to be found in the general law, and in the articles of incorporation filed by the company, as formerly this was contained in the charter. *Oregon Cascade R. R. Co. v. Bailey,* 3 Or 164, 174 (1869).

State laws under which a corporation is organized becomes part of the corporation's articles. Any limitations set out in these statutes become limitations on any corporation formed pursuant to such laws. *Swanger v. National Juvenile Law Center*, 714 SW2d 170 (Mo App 1986); *Howe v. Washington Land Yacht Harbor, Inc.*, 77 Wash2d 73, 459 P2d 798 (1969); *Bryant Realty Corp. v. Lorberbaum*, 221

Ga 820, 147 SE2d 420 (1966); *Bajdek v. Board of Trustees of the American Legion Pulaski Post No. 357 Trust*, 132 Ind App 116, 173 NE2d 61 (1961); *State ex rel Swanson v. Perham*, 30 Wash 2d 368, 191 P2d 689 (1948).

Early courts interpreted the grant of corporate power quite narrowly, generally holding that a corporation had no powers beyond those specifically set forth in its charter or articles. *Moore v. Los Lugos Gold Mines*, 172 Wash 570, 21 P2d 253 (1933).

> Outside of the powers conferred and the privileges granted to those organizations by the statutes under which they exist, they are in all of the states of the Union which, like Oregon, have the common law as the foundation of the jurisprudence, governed by that common law; and it is the established doctrine of this court, and, with some exceptions, of the states in which that common law prevails, as well as of Great Britain, from which it is derived, that such corporation can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of the legislation which granted that charter. *The City of Spokane v. The Amsterdamsch Trustees Kantoor*, 22 Wash 172, 179, 60 P 141, 143 (1900).

Gradually, this narrow construction of corporate powers gave way. Courts held that certain powers were to be construed as being "incidental" to the powers actually set out in a corporation's articles. *A.M. Castle & Co. v. Public Service Underwriters*, 198 Wash 576, 89 P2d 506 (1939).

B. Corporate purpose.

Initially, a corporation only had such powers as were granted to it by statute and as were set out in its individual articles of incorporation. Early case law narrowly interpreted this grant of corporate power, generally holding that a corporation had no power to act beyond those powers specifically set forth in its articles.

> A corporation may take advantage of the privileges and franchises granted by the general law of incorporation by including in its articles any of these privileges and franchises it may desire to exercise, and to that extent the articles stand as the legislative charter of the company, but it cannot exercise powers or privileges not enumerated therein, and can exercise no power not authorized by the statute, even though enumerated in its articles. *State v. Portland Gen. Elec. Co.*, 52 Or 502, 516-17, 95 P 722, 727-8, 98 P 160 (1908).

See also Caviness v. La Grande Irr. Co., 60 Or 410, 425, 119 P 731, 737 (1911)("The powers of a corporation are defined and limited by its articles. Especially as against a stranger, it cannot go beyond them.")

Over time, case law relaxed this rule. Courts found more and more corporate acts to be "incidental" to the purpose set out in the articles. *A.M. Castle & Co. v. Public Service Underwriters*, 198 Wash 576, 89 P2d 506 (1939).

> The power to purchase lands was incident to corporations at common law. And a corporation may do many things incidentally, although the power is not in the particular instance expressly conferred. (citations omitted) *Kelly v. People's Transportation Co.*, 3 Or 189, 194 (1870).

Simultaneously, corporations greatly expanded the list of "purposes" which were included in their articles. The practice of stating that a corporation was organized "for any lawful purpose" developed. Eventually, this practice became commonplace and was specifically recognized by statute.

Under current law, the articles may, but no longer need, state a purpose. ORS 60.047(2)(c)(A) & 60.047(3). Unless the articles specifically provide for a more limited purpose, all Oregon corporations now are deemed to have the purpose of engaging in any lawful business. ORS 60.074. Effective January 1, 2018, “[a] person may not incorporate a corporation under this chapter for any illegal purpose or with an intent to fraudulently conceal any business activity from another person or a governmental agency.” ORS 60.074(1).

If the corporation elects to become a benefit company, then the corporation “has the purpose of providing a general public benefit.” ORS 60.758(1). In addition, the articles “may identify a specific public benefit.” ORS 60.758(2).

C. Contents of articles: mandatory provisions.

Over time, the number of items which **must** be included in the articles of incorporation has been greatly reduced (although the Legislature added three new items effective January 1, 2018. Today, the articles must include only the seven items described in ORS 60.047(1):

> (a) A corporate name for the corporation that satisfies the requirements of ORS 60.094;
>
> (b) The number of shares the corporation is authorized to issue;
>
> (c) The address, including street and number, and mailing address, if different, of the corporation's initial registered office and the name of the corporation's initial registered agent at the initial registered office;
>
> (d) The name and address of each incorporator;

> (e) A mailing address to which notices, as required by this chapter, may be mailed until the corporation designates an address in the corporation's annual report.;
>
> (f) The initial physical street address, including the number and name of the street, and the mailing address, if different, of the corporation's principal office; and
>
> (g) The name and address of at least one individual who is a director or controlling shareholder of the corporation or an authorized representative with direct knowledge of the operations and business activities of the corporation.

In addition, if the articles authorize more than one class of shares, ORS 60.131(1) requires that the articles describe the classes of shares and set out the number of authorized shares of each such class. Each class must have a distinguishing designation (*e.g.*, common, preferred, Class A common, Class B preferred) and the articles must describe the preferences, limitations, and relative rights of each class. *Id.*; ORS 60.134(2). Together, one or more of these classes must have unlimited voting rights and together, one or more of these classes must be entitled to receive the net assets of the corporation upon dissolution. ORS 60.131(2).

D. Contents of articles: optional provisions.

The articles of incorporation may include provisions not inconsistent with law. ORS 60.047(2). Following are examples of provisions which are commonly included in the articles:

(i) The names and addresses of the initial directors. Effective January 1, 2018, the articles must contain name and address of at least one individual who is a director or controlling shareholder of the corporation or an authorized representative with direct knowledge of the operations and business activities of the corporation. In addition, the articles may also contain the names of the initial directors. ORS 60.047(2)(a). *See* Sections 3.03 and 5.03 of this book.

(ii) Indemnity. The articles may include a provision indemnifying directors and officers consistent with the provisions of ORS 60.387 through 60.414. Unless the articles provide otherwise, a corporation is required to indemnify its officers and directors under certain circumstances. ORS 60.394, 60.401 and 60.414.

(iii) Limiting personal liability. The articles may include a provision eliminating or limiting the personal liability of a director for monetary damages to the corporation or to its shareholders for conduct as a director, except as set forth in ORS 60.047(2)(d).

(iv) A corporate purpose. The articles may include a corporate purpose. This corporate purpose may limit the powers of the corporation (*e.g.*, the corporation exists only to own and manage Blackacre) or, for those nervous about cutting ties with the past, specifically state that the corporation exists for any specific purpose, including "any lawful purpose." If no corporate purpose is set forth, a corporation "has the purpose of engaging in any lawful business." ORS 60.074(1). Effective January 1, 2018, a person may not incorporate a corporation for any illegal purpose or with an intent to fraudulently conceal any business activity from another person or a governmental agency. *Id.*

(v) A par value. A corporation may, but no longer must, assign a par value to its own stock. ORS 60.047(2)(c)(D). Even if a par value is assigned, older case law, which formerly made a shareholder liable for the difference between the par value of the shares and the consideration paid, is no longer applicable. ORS 60.151(1). *See* Sections 3.09 and 10.11 of this book.

(vi) Internal management procedures. The articles may include any lawful provision concerning internal management, the powers of the directors, election procedures, etc. ORS 60.047(c)(B). For instance, cumulative voting for directors may be adopted. ORS 60.251(2).

(vii) Preemptive Rights. Shareholders in corporations which were formed prior to June 15, 1987 have preemptive rights, unless the articles contain a provision specifically providing otherwise (originally or by amendment). Shareholders in corporations formed June 15, 1987 or later do not have preemptive rights, unless the articles specifically provide otherwise. ORS 60.174. The articles can, and should, specifically state whether or not preemptive rights exist in order to minimize later confusion (and legal fees) on this issue. *See* Section 7.07 of this book.

(viii) Terms of any class or series of stock. If a corporation has more than one class or series of stock, the preferences, limitations and relative rights may be set out in the articles. If classes or series exist and such preferences, limitations and relative rights are not set out in the articles, then the directors may determine the preferences, limitations and relative rights without shareholder action. ORS 60.134(1). Preferences, limitations and relative rights appearing in the articles may

only be amended with the shareholder approval of each class affected thereby. ORS 60.437 and 60.441. This is true even for a class of nonvoting shares. *Id.*

(ix) Bylaw amendments. The articles may require shareholder approval of any bylaw amendment. Unless such a limitation appears either in the articles or in the bylaws, either the directors or the shareholders will be entitled to amend the bylaws. ORS 60.461. *See* Section 3.08 of this book.

(x) Shareholder agreements. ORS 60.265 permits non-public corporations to include in their articles provisions related to the governance of the corporation in a manner which is otherwise inconsistent with the provisions of the Oregon Business Corporation Act. Such provisions might include language restricting the power of the board of directors, the exercise or division of voting power by or between the shareholders or directors, weighted voting rights, or director proxies. *See* Section 4.07.

If the corporation elects to be or become a benefit company, the articles must state that corporation is a benefit company. ORS 60.754. The articles may articles "may identify a specific public benefit" as one of its purposes. ORS 60.758(2).

E. Filing Requirements.

A corporation begins to exist when its articles are filed with the Secretary of State's office, unless a delayed effective date is specified in the articles. ORS 60.051(1); *Rodway v. Arrow Light Truck Parts, Inc.*, 96 Or App 232, 235, n 2, 772 P2d 1349, 1351 (1989); *Equipto Division Aurora Equipment Co. v. Yarmouth*, 134 Wash 2d 356, 950 P2d 451 (1997).

The articles must be delivered to the Secretary of State's office, together with the appropriate fee. ORS 60.004(9). In late 2017, that fee was $100. ORS 56.140(1)(a).

The current fee schedule for the Oregon Corporation Division can be found at http://sos.oregon.gov/business/Pages/default.aspx.

Documents, including the articles of incorporation, may be filed with the Secretary of State by electronic facsimile. ORS 56.016. Persons filing documents by fax generally pay the filing fee by credit card. A credit card number and the card's expiration date should be included in the cover letter which accompanies the document being filed. The fax number for filing documents is currently 503-378-4381.

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Certain documents, including the articles of incorporation, may be efiled through the Secretary of State's Central Business Registry, which can be found at http://sos.oregon.gov/business/Pages/default.aspx.

The Secretary of State Corporation Division's physical address is: Public Service Building 255 Capitol Street NE Suite 151 Salem, Oregon 97301.

Section 3.06 Constitutional Limits on Statutory Changes

Early case law held the articles of incorporation to be a contract between the state and the corporation. Since one party to a contract cannot unilaterally change a contract, these early cases held that the state could not unilaterally change the rules for an existing corporation.

Oregon and other states have responded to these cases by including in their statutes (or constitutions) authority for retroactively changing the rules for corporations created under existing law. Oregon has done so in the most recent Act in ORS 60.957.

This rule traces its roots to *Dartmouth College v. Woodward*, 17 US 518 (4 Wheat 518)(1819) in which the United States Supreme Court held that the charter of Dartmouth College, granted in 1769, was a contract between the corporation and the state which could not be unilaterally changed by the state of New Hampshire. The United States Constitution prohibited laws which impaired contracts.

Following this case, the Oregon Supreme Court held that the corporate statutes in effect at the time a corporation was created constitute a contract between the state and the corporation which could not be unilaterally changed by the state.

> Under this statute the defendant was organized as a corporation, and has since then conducted its affairs using the corporate name there specified. The substance of the situation is that through this statute the state offered certain corporate privileges and immunities to those who accepted its terms, which offer was accepted in this instance by the filing of articles of incorporation and organization of the defendant.
>
> From *Dartmouth College v. Woodward*, 4 Wheat 518, 4 L Ed 629, down to the present time the principle has been maintained that such an offer and acceptance constitute a contract between the state and the corporation, the obligation of which cannot be impaired by any subsequent legislation. It is a compact which is within the protection of section 10, art. 1 of the national Constitution forbidding any state to pass any law impairing the obligation of contracts, and section 21, art. 1, of our state Constitution, containing the same prohibition. *Lorntsen v. Union Fishermen's Co-op Packing Co.*, 71 Or 540, 544, 143 P 621, 622 (1914).

See also DiNicola v. Serv. Emps. Int'l Union Local 503, 281 Or App 706, 383 P3d 924 (2016).

Several Oregon cases have held that the legislature may not retroactively increase the personal liability of shareholders. *See for example Hibernia Securities Co. v. Pirie*, 149 Or 434, 41 P2d 431 (1935); *Schramm v. Done*, 135 Or 16, 293 P 931 (1930); *Haberlach v. Tillamook County Bank*, 134 Or 279, 293 P 927 (1930); *Norris Safe & Lock Co. v. Weaver*, 81 Or 670, 160 P 807 (1916).

Justice Story's concurring opinion in *Dartmouth College* indicated a state could retroactively change the rules if it reserved such authority in the corporate statutes. Such a reservation placed a corporation created under that statute on notice of the state's authority to later change the rules. Thus, a retroactive change would not constitute a breach of contract.

> In his concurring opinion in [the *Dartmouth College* case], Mr. Justice Storytook occasion to say:
>
> > "If the legislature mean [sic] to claim such an authority, it must be reserved in the grant."'
>
> Following the decision of the *Dartmouth College* case, and acting upon the suggestion of Justice Story, many, if not most, of the states of the Union in course of time incorporated in their constitutions, or else enacted by statute, provisions reserving to the state, through its legislature, the right to alter, amend, or repeal laws which granted corporate charters or authorized the creation of corporations under general laws. That practice was followed in this state in 1889 by the framing and ratification of our constitution, which included Art. XII, § 1, *supra*. *State ex rel Swanson v. Perham*, 30 Wash 2d 368, 191 P2d 689, 692-3 (1948).

As a consequence, many states have enacted statutory or constitutional provisions which give the state the right to subsequently alter, amend, or repeal corporate laws. The effect of these provisions is to give the state the right to unilaterally change its contract with corporations created under such statutes.

The wording of the reservation clause may determine the outcome. Article XI, Section 2 of the original Oregon Constitution contained corporate reservation language, but the language was repealed in 1906 and Oregon was without a reservation provision until 1915. King, *The Oregon Business Corporation Act: Its Effect Upon Present Statutes and Upon the Rights of Stockholders in Existing Corporations*, 33 OR L REV 106 (1954). A reservation clause was adopted by statute in 1915, 1953 and 1967.

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The reservation provision now in effect was adopted in 1967. ORS 60.954 provides that all or part of the Oregon Business Corporation Act "may be amended or repealed at any time and all domestic and foreign corporations subject to the chapter are governed by the amendment or repeal." ORS 60.957 provides the Act:

> applies to all domestic corporations in existence on June 15, 1987, that were incorporated under any general statute of this state providing for incorporation of corporations for profit if power to amend or repeal the statute under which the corporation was incorporated was reserved.

Despite such savings clauses, some courts have held certain rights still may not to be changed by the passage of a new statute. For example, one court held that a corporation's method of voting for directors could not be changed simply by the passage of a statute requiring cumulative voting, unless the corporation's articles provided otherwise. *State ex rel Swanson v. Perham*, 30 Wash 2d 368, 191 P2d 689 (1948). Yet the same court held that once a corporation amends its articles to take advantage of a significant benefit available by the new statute, its amended articles would be deemed to have adopted all of the provisions of the new statute. *Golconda Mining Corp. v. Hecla Mining Co.*, 80 Wash 2d 372, 494 P2d 1365 (1972).

For a discussion of the effect of a statutory change on the bylaws of a homeowner association, *see Goodsell v. Eagle-Air Estates Homeowners Ass'n*, 249 Or App 639, 278 P3d 133 (2012).

Section 3.07 Amendment of the Articles of Incorporation

A. Old rule - unanimous consent.

The articles of incorporation have been described as a contract between the state and the corporation, the state and the shareholders, the corporation and the shareholders, and among the shareholders. *Dentel v. Fidelity Savings and Loan Association*, 273 Or 31, 539 P2d 649 (1975); *Haberlach v. Tillamook County Bank*,134 Or 279, 293 P 927 (1930); *Scott v. Anderson Newspapers, Inc.*, 477 NE2d 553 (Ind App 1985); *Walden Investment Group v. Pier 67, Inc.*, 29 Wash App 28, 627 P2d 129 (1981); *Stroh v. Blackhawk Holding Corp.*, 48 Ill 2d 471, 272 NE2d 1 (1971).

Since the articles were considered a contract, early cases held they could only be changed by unanimous consent of the shareholders.

> At common law, unanimous shareholder consent was a prerequisite to fundamental changes in the corporation. This made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to cooperate. To meet the situation, legislatures authorized the making of changes by majority vote. This, however, opened the door to victimization of the minority. To solve the dilemma, statutes permitting a dissenting minority to recover the appraised value of its shares, were widely adopted. *Rigel Corp. v. Cutchall,* 245 Neb 118, 125, 511 NW2d 519, 523-24 (1994) (quoting *Voeller v. Neilston Co.*, 311 US 531 (1941)).

As a contract, the articles were considered to be a vested property right which could not be unilaterally taken away from an individual shareholder, even by majority vote of the shareholders. *See McConnell v. Owyhee Ditch Co.*, 132 Or 128, 283 P 755 (1930). A unanimous vote was required to amend. *Martin Orchard Co. v. Fruit Growers' Canning Co.*, 203 Wis 97, 233 NW 603 (1930).

A existing corporation can change to become a benefit company by amending its articles to state that the corporation is a benefit corporation. ORS 60.754(2)(a).

B. New rule - majority vote & fairness.

In 1953, Oregon adopted the Model Act which eliminated the vested rights doctrine. *See current* ORS 60.431(2). Instead, the new statute provided a detailed procedure for amending the articles. Superimposed on these statutory procedures, Oregon courts have required a degree of fairness when the majority amends the articles over the objection of the minority.

> Whether a corporation can amend its articles or its bylaws and thereby change the rights of its members has been the subject of numerous judicial opinions and writings. For many years state statutes have provided that a corporation is authorized to amend its articles. Also for many years, statutes, articles, or bylaws have provided that the corporation could amend its bylaws. Despite this universal authorization, the courts have held that certain rights granted members or stockholders by the articles or the bylaws cannot be eliminated through the amendment of articles or bylaws.
>
> Some years ago when a court held that a right granted by the articles or bylaws could not be taken away by an amendment, the court stated that the right could not be taken because it was a "vested right," a "property right," or a "contract right." This court used that terminology.
>
> The "vested rights" terminology has been attacked as being confusing and meaningless. A corporation scholar has stated: "Vestedness" is the legal conclusion rather than the reason." Latty, *Fairness - The Focal Point in Preferred Stock Arrearage Elimination,* 29 VA L Rev 1,4 (1942). Section 58 of the Model Business

> Corporation Act has, in essence, swept away the "vested rights" doctrine. That section was adopted [in Oregon].
>
> * * *
>
> The Model Act swept away the vested rights doctrine by providing in detail what amendments a corporation can make to its articles.
>
> * * *
>
> However, even with the decline of the "vested rights" approach, the courts have not held that a member of a corporation can be deprived, by amendment, of all rights created in the articles or bylaws. No definitive terminology has been developed. The courts and the writers have turned to the more indefinite tests of "fairness," "good faith," "reasonableness," and lack of "constructive fraud." (footnotes and citations omitted) *Dentel v. Fidelity Savings and Loan Association*, 273 Or 31, 33-36, 539 P2d 649, 651 (1975).

In *McCallum v. Gray*, 273 Or 617, 542 P2d 1025 (1975), the court upheld an amendment to the articles which eliminated preemptive rights over the objection of the minority shareholders. The court noted there was no allegation the amendment was procured by fraud or other wrongful conduct. The court held that amendments to the articles – as were other acts imposed on the minority shareholders by the majority – are now governed by the concept of "fairness," rather than the doctrine of vested contract rights.

NOTE: Modifying preemptive rights may trigger the right to dissent. ORS 60.554(1)(d)(A); *Waters v. Double L, Inc.,* 114 Idaho 256, 755 P2d 1294 (Idaho App 1987).

While the theory of vested rights is no longer viable, other theories have been use to limit the right of controlling shareholder to amend the articles over the objection of the minority.

For instance, an Indiana decision held that even if the articles do not divide the corporation's shares into voting groups, the court could find that the shareholders intended to be treated as distinct groups. As such, separate approval by the affected group may be required. *Scott v. Anderson Newspapers, Inc.*, 477 NE2d 553 (Ind App 1985).

Another court held that the fiduciary duty of the majority shareholders may limit their ability to amend the articles to the disadvantage of the minority. *Hay v. Big Bend Land Co.*, 32 Wash 2d 887, 204 P2d 488 (1949).

A more detailed discussion of the majority's fiduciary duty to minority shareholders is set forth in Section 7.10 of this book.

C. Current law - majority rule & fairness.

Under current law, the articles may be amended by majority vote. ORS 60.431(2) provides that a shareholder "does not have a vested property right resulting from any provision in the articles of incorporation. . . ." A majority of the shareholders may amend the articles over the objections of a minority of shareholders, unless the articles provide otherwise. ORS 60.437(5). All shareholders need not agree in order to change this "contract" among the shareholders.

The Comment to Revised Model Act § 10.01, the section from which ORS 60.431 is taken, states that:

> Section 10.01(b) restates explicitly the policy embodied in earlier versions of the Model Act and in all modern state corporation statutes, that a shareholder "does not have a vested property right" in any provision of the articles of incorporation. Corporations and their shareholders are also subject to amendments of the governing statute by the state under section 1.02.
>
> Section 10.01(b) should be construed liberally and without qualification or restriction to achieve the fundamental purpose of this chapter of permitting corporate adjustment and change by majority vote. Section 10.01(b) rejects decisions by a few courts that have applied a "vested rights" or "property right" doctrine to restrict or invalidate amendments to articles of incorporation because they modified particular rights conferred on shareholders by the original articles of incorporation. These holdings are rejected because their effect often is to create a tyranny of the minority: the individual consent of each shareholder becomes necessary to adopt any important change, and each shareholder, no matter how small his holding, can prevent the change.*See also Roberts v. Triquint Semiconductor, Inc*., 358 Or 413, 423 n 6, 364 P3d 328 (2015).

Even though a majority can vote to amend the articles of incorporation,"fairness" is still required by case law.

D. Mechanics.

The steps necessary to amend the articles of incorporation are set forth in ORS 60.431 through 60.457.

In general, a board of directors must recommend the approval of any amendments to the articles and then refer the proposed amendment to the shareholders for their approval. ORS 60.437. The shareholders must then approve the amendment. They may approve the amendment at an annual meeting, at a special meeting, or by unanimous written consent. A simple majority of shareholders must vote in the affirmative to amend, unless the articles require approval by a supermajority. ORS 60.437(5).

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If the articles provide for voting groups, the shareholders of a class affected by the proposed change are entitled to vote as separate voting groups on that amendment. ORS 60.441.

ORS 60.434 provides that certain housekeeping amendments may be made by the directors alone, unless the articles provide otherwise. These amendments include certain technical changes to the corporate name, the deletion of the names and addresses of the initial directors, the deletion of the name of the initial registered agent and the corporation's mailing address, and certain other narrowly define matters. Until the date a corporation first issues shares, the board of directors (or if there are not yet any directors, then the incorporator) may also amend the articles without shareholder approval. ORS 60.444.

NOTE: An amendment to the articles that materially and adversely affects rights of a dissenting shareholder may trigger the right to dissent. ORS 60.554(1)(d). *See* Section 8.06 of this book.

Articles of amendment must be filed with the Secretary of State's office. ORS 60.447. As of December 2017, the filing fee was $100.

Information about current filing fees can be found online at http://sos.oregon.gov/business/Pages/default.aspx.

Section 3.08 Bylaws

The bylaws are permanent rules adopted by a corporation to govern its management and internal affairs.

> A by-law of a private corporation is a permanent rule of action adopted by the shareholders, in accordance with which the corporate affairs are to be conducted. *Griffith v. Klamath Water Assn.*, 68 Or 402, 405, 137 P 226, 227 (1913).

The bylaws are a contract between the corporation and its shareholders, and among the shareholders themselves. *Roberts v. Triquint Semiconductor, Inc.,* 358 Or 413, 418, 364 P3d 328 (2015); *Dentel v. Fidelity Savings and Loan Association*, 273 Or 31, 539 P2d 649 (1975); *McConnell v. Owyhee Ditch Co.*, 132 Or 128, 283 P 755 (1930); *Garvey v. Seattle Tennis Club*, 60 Wash App 930, 808 P2d 1155 (1991); *McKee v. Williams,* 741 P2d 978 (Utah App 1987).

As discussed below, the Oregon Business Corporation Act offers little guidance as to the contents of a corporation's bylaws. Other than the few matters

required by the Act, corporations have great discretion as to their internal rules. The bylaws may not violate the corporation's articles, existing law or public policy. *State ex rel Brewster v. Ostrander*, 212 Or 177, 318 P2d 284 (1957); *McConnell v. Owyhee Ditch Co.*, 132 Or 128, 283 P 755 (1930); *Anthony v. Hillsboro Gold Mining Co.*, 58 Or 258, 113 P 442, 114 P 95 (1911).

> A bylaw of a corporation may not conflict with the articles of incorporation and, if a conflict exists, the bylaw is void. *Sabre Farms, Inc. v. Jordan*, 78 Or App 323, 331, 717 P2d 156, 161 (1986).

Another court has stated the rule as follows:

> It is a general rule that a corporation may enact any bylaw for its internal management so long as such bylaws are not contrary to its charter, a controlling statute, its articles of incorporation, or violative of any general law or public policy. *Booker v. First Federal Savings and Loan Association*, 215 Ga 277, 280, 110 SE2d 360, 361 (1959).

See also Swanger v. National Juvenile Law Center, 714 SW2d 170 (Mo App 1986); *McMillan v. Gold Kist, Inc.,* 577 SE2d 482 (SC App 2003); *Stuberfield v. Long Island City Savings & Loan Ass'n*, 235 NYS2d 908, 37 Misc2d 811 (1962).

The bylaws are a corporation's internal rules which are intended to be relatively permanent in nature.

> By-laws being continuing or permanent rules in accordance with which the corporate affairs on all occasions to which their provisions relate are to be conducted, they must not be in conflict with the charter; and when, by their terms, they do so conflict, the charter prevails. They must be reasonable, and "must not interfere with the vested and substantial rights of the stockholders; and they must not be contrary to public policy or the established law of the land." They cannot modify the articles of incorporation in any of the particulars required by statute to be stated in the articles of incorporation. A by-law which limits or regulates the corporate powers which the charter confers on the directors may be disregarded by them. No by-law is valid which either enlarges or restricts the rights and powers conferred by the charter or governing statue. When the charter gives the stockholders the power to elect the directors, the corporation cannot, by a by-law, take away this power. A by-law restricting the right of members of a church to vote as authorized by statute was void. A by-law, if divisible, may be good in part, though invalid in another part. So, a provision inserted in the articles of association, which is in conflict with the requirements of the enabling statute, cannot be applied either as a part of the charter or as a by-law. (citations omitted) *State v. Anderson*, 31 Ind App 34, 67 NE 207, 211 (1902).

Bylaws must be general, that is, they must be directed at affecting all shareholders of each class in a similar manner. The bylaws are not a proper place to single out a particular shareholder for special treatment. *Griffith v. Klamath Water Assn.*, 68 Or 402, 137 P 226 (1913).

> That resolution is in no sense a by-law. It is directed especially against the interests of a single stockholder.
>
> * * *
>
> I think that any by-law enacted under this section of the Code to be reasonable ought to be general; that is, it ought to affect every delinquent subscriber and all delinquent stock alike, and it ought not to be directed against the stock or interests of a particular stockholder. These are essential requisites to a valid by-law. *Budd v. Multnomah Street Railway Co.*, 15 Or 413, 418, 15 P 659, 662 (1887).

Bylaws should be distinguished from corporate resolutions which are more temporary and administrative in nature.

> A resolution is not a bylaw; it is an informal enactment of a temporary nature providing for the disposition of a certain administrative business of the corporation. In contrast, bylaws are the laws adopted by the corporation for the regulation of its actions and the rights and duties of its members. (citations omitted) *Brennan v. Minneapolis Society for the Blind, Inc.,* 282 NW2d 515, 523 (Minn 1979).

Bylaws exist to regulate internal corporate action. Shareholders, officers and directors are generally presumed to have knowledge of the provisions of the bylaws. *State ex rel Carriger v. Campbell Food Markets, Inc.*, 60 Wash 2d 478, 374 P2d 435 (1962); *Gwin v. Thunderbird Motor Hotels, Inc.*, 216 Ga 652, 658, 119 SE2d 14, 18 (1961) *Schroeder v. Meridian Improvement Club*, 36 Wash 925, 221 P2d 544 (1950).

Outside parties are not presumed to know the terms of the bylaws, however, and bylaws are generally not the proper place to regulate the dealings of the corporation with outside parties. *Fresh & Fancy Produce, Inc. v. Brantley*, 190 Ga App 128, 378 SE2d 379 (1989). In fact, even though the bylaws may require a particular officer to sign contracts, a contract signed by a different officer is still valid, as long as the outside party did not know of the bylaw provision before the contract was signed. *Doehler v. Lansdon*, 135 Or 87, 298 P 200 (1931); *Kelley, Glover & Vale v. Heitman*, 220 Ind 625, 44 NE2d 982, 985 (1942). However, if an outside party enters into a contract with the corporation with knowledge of terms of the corporation's bylaws, the outside party may be bound by those terms. *Burgin v. Pendleton Country Club*, 208 Or 241, 300 P2d 444 (1956).

***A. Content of bylaws - mandatory provisions*.**

The Oregon Business Corporation Act offers little guidance as to the topics which must be included in the bylaws. The Act only requires the bylaws to address the following:

(i) The time, or method for fixing the time, of the annual shareholders meeting. ORS 60.201(1).

(ii) The number of directors or a variable range of directors, unless the articles sets out the number of directors. ORS 60.307(1).

(iii) A description of corporate officers. An Oregon corporation must have at least three officers: a president, a secretary and a chairperson. ORS 60.371(1) & 60.209. If the corporation's shares are publicly traded, it must also have one or more election inspectors. ORS 60.223. The secretary is required to have the responsibility for preparing minutes and authenticating corporate records. ORS 60.371(3). The chairperson must preside at each meeting of the shareholders and has certain other duties at the shareholder meeting which are set out in ORS 60.209.

The bylaws may permit an officer to appoint another officer. ORS 60.371(2).

NOTE: It is good practice to describe the express authority of each officer in the bylaws.

***B. Content of bylaws - recommended provisions*.**

Although not required by statute, the bylaws can and should contain the following:

(i)The place of annual shareholder meeting. ORS 60.201(2).

(ii)The manner of fixing the record date for shareholder voting purposes. ORS 60.221(1).

(iii) Provisions related to managing corporate business and regulating corporate affairs. ORS 60.061(2); *Jacobson v. Moskowitz*, 27 NY2d 67, 313 NYS2d 684, 261 NE2d 613 (1970); *Burt v. Irvine Co.*, 224 Cal App 2d 50, 36 Cal Rptr 270 (1964). These provisions may not be inconsistent with the articles or with the general statutes.

> It is a general rule that a corporation may enact any bylaw for its internal management so long as such bylaws are not contrary to its charter, a controlling statute, its articles of incorporation, or violative of any general law or public policy. Subject to the above qualifications, a corporation may adopt bylaws regulating the calling and conduct of

> corporate meetings and election of its officers. *Booker v. First Federal Savings and Loan Association*, 215 Ga 277, 280, 110 SE2d 360, 361 (1959).

See also Sabre Farms, Inc. v. Jordan, 78 Or App 323, 717 P2d 156 (1986); *State ex rel Brewster v. Ostrander*, 212 Or 177, 318 P2d 284 (1957).

> **Note:** Corporations should adopt bylaw provisions which establish procedures for conducting shareholder meetings. The Corporate Governance Committee of the American Bar Association publishes a Handbook for the Conduct of Shareholders' Meetings which contain model rules for that purpose, which can be purchased through the ABA Web Store and other sources. A corporation may want to incorporate some of these rules into its bylaws or incorporate the Handbook by reference.

Since the directors have greater access to the bylaws than to the statutes, it is common practice to set out statutory requirements in the bylaws. In addition, there are a substantial number of statutory procedures and rights which may be limited or expanded by means of the bylaws.

C. Emergency bylaws.

The directors may adopt bylaws which are effective only in case of an emergency, unless the articles provide otherwise. ORS 60.064. An emergency exists "if a quorum of the corporation's directors cannot be assembled because of some catastrophic event." ORS 60.064(4).

Directors, officers, agents and employees are not liable for actions taken in good faith and in accordance with the emergency bylaws. ORS 60.064(3).

D. Amendment.

Under the current Act, a board may amend the bylaws without shareholder approval, unless the articles provide otherwise or unless the shareholders, in amending or repealing a particular bylaw provision, expressly provide that the board may not amend or repeal that bylaw provision. ORS 60.461(1). There can be circumstances were an amendment by the directors may be invalid where the amendment was in breach of the directors' fiduciary duty or had an inequitable purpose or inequitable effect. *Roberts v. Triquint Semiconductor, Inc.,* 358 Or 413, 419, 364 P3d 328 (2015).

Shareholders may also amend the bylaws, even though the directors likewise possess that power. ORS 60.461(2).

Special rules exist for amending bylaw provisions dealing with quorums. ORS 60.464.

Some courts hold that the bylaws may also be amended by custom, usage, acquiescence, or waiver. *St. Yves v. Mid State Bank,* 50 Wash App 95, 748 P2d 633 (1987); *Johnson v. Busby*, 278 F Supp 235 (ND Ga 1967); *The Mutual Fire Insurance Company of Montgomery County v. Farquhar*, 86 Md 668, 39 A 527 (1898). There is authority to the contrary. *Powers v. Marine Engineers' Beneficial Ass'n., No. 35*, 52 Cal App 551, 199 P 353 (1921); *District Grand Lodge No. 4 v. Cohn*, 20 Ill App 335 (1886).

At common law, shareholders had the sole power to adopt and amend bylaws as this right was deemed an incident of the ownership of the corporation's shares. *Rogers v. Hill*, 289 US 582 (1933). However, courts soon recognized the right of directors to adopt and amend the bylaws. *State v. Day*, 189 Ind 243, 123 NE 402 (1919); *Gray v. National Benefit Association*, 111 Ind 531, 11 NE 477 (1887).

While courts once required unanimous shareholder approval to amend bylaws, Oregon has long permitted non-unanimous bylaw amendments as long as the change is fair to all shareholders. *Dentel v. Fidelity Savings and Loan Association*, 273 Or 31, 539 P2d 649 (1975).

The old concept of shareholders having a “vested right” in the provisions of the bylaws no longer applies.

> this Court has held that where a corporation's by-laws put all on notice that the by-laws may be amended at any time, no vested rights can arise that would contractually prohibit an amendment. *Kidsco Inc. v. Dinsmore*, 674 A.2d 483, 492 (Del Ch 1995).

See also Roberts v. Triquint Semiconductor, Inc., 358 Or 413, 423 n 6, 364 P3d 328 (2015).

In one case, a bylaw provision required a 100% quorum at shareholder meetings. Although a statute required that any increase in the quorum requirements appear in the articles, a shareholder argued that the bylaw provision constituted a voting agreement. The shareholder argued that, as such, the quorum requirement was a voting agreement which required unanimous consent to change. The Oregon Supreme Court disagreed, holding that since the Oregon Business Corporation Act contained specific provisions regarding shareholder voting agreements, the bylaws did not operate as a voting agreement as against any shareholder who acquired

his/her stock subsequent to the adoption of the bylaws. *Jones v. Wallace,* 291 Or 11, 628 P2d 388 (1981).

At least with respect to the amendment of the bylaws for a nonprofit corporation, to be enforceable, a bylaw provision must be fair and reasonable. *Central Kansas Credit Union v. Mutual Gaur. Corp.,* 102 F3d 1097 (10th Cir 1996); *Boatmen's First Nat. Bank of West Plains v. Southern Missouri Dist. Council of the Assemblies of God,* 806 SW2d 706 (Mo App 1991); *Brennan v. Minneapolis Society for the Blind, Inc.,* 282 NW2d 515, 523 (Minn 1979).

Section 3.09 Par Value

Under Oregon law, par value is no longer important, other than as a historical footnote.

At one time, corporations were required to obtain a minimum amount of consideration for each of its shares of stock transferred to shareholders. This minimum amount was called the "par value" of the share. A corporation generally could not sell one of its shares for less than its par value (although it was not uncommon for a portion of the payment to be deferred).

Par value is not related to the market value of the stock long after the date of incorporation. *Arkota Industries, Inc. v. Naekel,* 274 Ark 173, 623 SW2d 194 (1981).

The par value of all issued shares constituted the "stated capital" of a corporation. Thus, if a corporation had one million shares of $2 par value stock outstanding, its stated capital was $2 million.

The par value and the market value of a share were not same. The par value of a share was an "arbitrary amount" set by the corporation. *Gulf Oil Corp. v. State Tax Commission,* 65 AD2d 157, 411 NYS 2d 698, 699 (1978). "Par value and actual value of issued stock are not synonymous and there is often a wide disparity between them." *New York v. Latrobe,* 279 US 421, 426 (1929). *See also Arkota Industries, Inc. V. Naekel,* 623 SW2d 194 (Ark 1981).

At one time, a shareholder was liable to the corporation, and ultimately to corporate creditors, for the difference between the par value of the shares purchased by the shareholder and any lesser amount actually paid for those shares.

McAllister v. American Hospital Ass'n, 62 Or 530, 125 P 286 (1912); *Eubanks v. Allstate Insurance Co.,* 441 F2d 7 (5th Cir 1971).

Over time, both corporations and the public placed less emphasis on par value and stated capital. In 1912, New York became the first state to permit "no par value" stock to be issued. *No-Par Stock and Its Effects on Washington Law,* 2 WASH L REV 33 (1926).

Although a corporation may still assign a par value to its shares, Oregon no longer requires it. ORS 60.047(2)(c)(D). Shareholders are now liable only for the consideration for which their shares were authorized, not the difference between the par value of the share and any lesser amount of consideration paid. ORS 60.151(1).

Note: Article XI, Section 3 of the Oregon Constitution also provides that the liability of stockholder is limited to their unpaid subscriptions. The liability of stockholders is limited to their unpaid subscriptions. However, Article XI, Section 3 also provides that stockholders of state banks are liable to depositors for an amount equal to double the par value of the shares, except if the bank is covered by federal deposit insurance. ORS 60.147(3) provides that the board's determination as to the adequacy of the of the consideration received for shares is conclusive, provided the determination is made in good faith. The business judgment rule applies to that determination. *In the Matter of Delk Toad Associates, Ltd.,* 37 BR 354 (ND Ga 1984); *Garbe v. Excel Mold, Inc.,* 397 NE2d 296 (Ind App 1979); *Smith v. Schmitt,* 112 Or 687, 699, 231 P 176 (1924).

A more detailed discussion of shareholder liability for unpaid subscriptions appears in Section 10.11 of the book.

A more detailed discussion of par value appears in Art, *Corporate Shares and Distributions in a System Beyond Par Value: Financial Provisions of Oregon's New Corporation Act,* 24 WILL L REV 203 (1988).

Section 3.10 Stock Certificates

Stock need not be represented by certificates. ORS 60.161(1). But most corporations do issue stock certificates. A stock certificate represents a shareholder's ownership interest of property right in the corporation. *Seiden v. Southland Chenilles', Inc.,* 195 F2d 899 (5th Cir 1952).

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The "certificate" is not the share itself, it only represents the share. *Henry Arnold Richardson v. John Shaw,* 209 US 365 (1908); *Phansalkar v. Anderson Weinroth & Co., LP,* 175 F Supp2d 635 (SDNY 2001). "Stock certificates are not the property at issue but are only symbols representing the underlying shares of stock." *Lucas v. Lucas,* 946 F2d 1318, 1323 (8th Cir 1991).

> A stock certificate is a written acknowledgment by the corporation of the interest of the shareholder in the corporate property, and occupies a position similar to other muniments of title. *Markle v. Burgess,* 176 Ind 25, 95 NE 308, 309 (1911). XX XX

A stock certificate is authentic evidence of title to the stock and of its holder's underlying property interest in the corporation. *Johnson v. Busby,* 278 F Supp 235 (ND Ga 1967). But a shareholder's status does not depend on the issuance of a stock certificate "since the certificate is merely evidence of ownership." *Cabintaxi Corp. v. C.I.R.,* 63 F3d 614, 618 (7th Cir 1995).

A. Shareholder has rights even if certificates not delivered.

At common law, a person whose subscription was accepted acquired all of the rights of a shareholder, even though the corporation never actually issued a stock certificate. *Babbitt v. Pacco Investors Corp.*, 246 Or 261, 425 P2d 489 (1967); *Child v. Idaho Hewer Mines*, 155 Wash 280, 284 P 80 (1930). "One who has subscribed and paid for corporate stock is entitled to all the rights and responsibilities of ownership, whether the stock certificates have been issued to him or not." *Haas v. Koskey*, 138 Ga App 448, 226 SE2d 279, 283 (1976). Once a subscription is accepted, the subscriber possesses all the rights of a shareholder, even if the subscriber has not yet paid for the shares. *Pfeifer v. DME Liquidating, Inc.*, 91 Or App 47, 753 P2d 1389 (1988), *appeal after remand*, 101 Or App 106, 753 P2d 266 (1990).

The Oregon Court of Appeals has said that a subscriber becomes a shareholder "once the corporation accepts payment in exchange for consideration for the authorized shares." *Yeoman v. Public Safety Center, Inc.,* 241 Or App 255, 262, 250 P3d 411 (2011). *Yeoman* arose in the context of a subscription promising shares for future services. The court held that even though certificates were never issued, the subscriber became a shareholder once the services were performed.

> There can be no question that an actual subscription is not always necessary in order to establish a stockholder's status as that of a subscriber.

> "Any agreement by which a person shows an intention to become a stockholder is sufficient to bind both him and the corporation. When one accepts or assumes the position and duties, and claims the rights and privileges and emoluments, of a stockholder, and the corporation accepts or acquiesces therein, such person is estopped to deny that he is a subscriber, even though there may have been something irregular or defective in the form or manner of his subscription, or there may have been no formal subscription at all." *Davies v. Ball*, 64 Wash 292, 116 P 833, 835 (1922)(quoting Cook on Stock & Stockholders).

If a subscriber pays for the stock but, despite demand, the corporation refuses to deliver a certificate, the subscriber may elect one of three remedies:

> (1) He may, is some jurisdictions, maintain a suit in equity for specific performance, and compel delivery of the stock; (2) he may treat the executory agreement as subsisting and recover the damages occasioned by the breach; or (3) he may rescind the contract and maintain an action in *assumpsit* for the recovery of the sum paid as money had and received. *Watkins v. Record Photographing Abstract Co.*, 76 Or 421, 426, 149 P 478, 480 (1915).

More recently, the Oregon Court of Appeals has said the subscriber could "obtain injunctive relief such that the corporation's records reflect that share ownership." *Yeoman v. Public Safety Center, Inc.,* 241 Or App 255, 267, 250 P3d 411 (2011).

A subscriber's obligation to pay for the accepted subscription attaches even if the subscriber's name is not entered on the transfer ledger or even if a certificate is not issued. *Shiffer, Trustee v. Okenbrook*, 75 Ind App 149, 130 NE 241, 244 (1921).

***B. Uncertificated shares*.**

Under the current Act, a board of directors may cause the corporation to issue some or all of the corporation's shares without certificates, unless the articles or bylaws provide otherwise. ORS 60.164. A corporation may issue certificates for some classes of shares, but not for others. ORS 60.164(1).

If a corporation chooses not to issue certificates, it is required to send shareholders a written statement containing information which would otherwise appear on the certificate. ORS 60.164(2).

***C. Form & content of the certificate*.**

If a corporation issues certificates (as most corporation do), ORS 60.161(2) requires that the certificate state on its face:

> (a) The name of the issuing corporation and that the corporation is organized under the law of this state;

(b) The name of the person to whom the share is issued; and

(c) The number and class of shares and the designation of the series, if any, the certificate represents.

In addition, "[e]ach share certificate must be signed by two officers designated in the bylaws or by the board of directors." ORS 60.161(4). "Each certificate may bear the corporate seal or a facsimile of the corporate seal." *Id*. The same person can hold both offices and sign the certificate twice in each capacity.

If a corporation issues a fractional share, it may issue script entitling the holder to receive a full share if the holder surrenders enough scrip to equal a full share. ORS 60.141. Any such scrip must be conspicuously labeled "script" and must contain the information required by ORS 60.161(2). ORS 60.141(2).

If the shareholders enter into an agreement permitted by ORS 60.265 – an agreement which is otherwise inconsistent with the Oregon Business Corporation Act – its share certificates must conspicuously note the existence of the agreement on either the front or back of the certificate. ORS 60.265(3). *See* Section 4.07 of this book for a discussion of such agreements.

***D. Classes or series*.**

If a corporation is authorized to issue shares of more than one class or series, any certificate representing such shares must summarize, on its front or back, the designations, relative rights, preferences, and limitations applicable to each class and the variations in rights, preferences, and limitations determined for each series. Alternatively, each certificate may state conspicuously on its front or back that the corporation will furnish the shareholder this information on request and without charge. ORS 60.161(3).

E. Treasury shares.

"Treasury shares" are shares which have been re-acquired by the corporation and held in a state of suspended animation – that is, the shares do not confer on the corporation the right to vote the shares, receive dividends or any of the other rights normally associated with shares – until resold by the corporation. *Kisrchenbaun v. Commissioner of Internal Revenue*, 155 F2d 23 (2nd Cir 1946).

In the past, corporations made a distinction between shares which were authorized but never issued and treasury shares which were authorized, issued and then re-acquired. This distinction has been abandoned by the Revised Model

Business Corporation Act and the current Oregon Business Corporation Act. Shares re-acquired by an Oregon corporation now simply disappear into the category of authorized, but unissued, shares. The concept of “treasury shares” no longer exists under the current Act.

F. Restrictions on transfer.

“The validity of a restriction on the transfer of stock is determined according to the law of the state of incorporation.” *Timberland Bancshares, Inc. v. Garrison (In re Lee)*, 2011 Bankr LEXIS 4387 (WD Ar 2011) (which contains a good analysis of stock restrictions under Oregon law).

ORS 60.167 permits restrictions on the transfer of stock certificates. If stock certificates are issued, the restriction should appear conspicuously on the front or back of the certificate. If the corporation issues shares without certificates, the restriction must be contained in the statement required by ORS 60.164(2).

***G. Miscellaneous*.**

Stock certificates are the subject of Article Eight of the Uniform Commercial Code. ORS 78.1010, *et seq*. Analysis of Article Eight is beyond the scope of this book.

Subscriptions for stock and stock certificates are also discussed in Section 7.02 of this book.

Section 3.11 Principal Office

ORS 60.001(25) states that"principal office" means:

> the physical street address of the office, in or out of this state, where the principal executive offices of a domestic or foreign corporation are located and designated in the annual report or in the application for authority to transact business in this state.

Under a prior version of the Oregon Business Corporation Act, the terms "principal office" and "principal place of business" were held to be virtually synonymous. *State ex rel Willamette National Lumber Co. v. Circuit Court for Multnomah County*, 187 Or 591, 211 P2d 994 (1949). But other courts find a distinction, stating the “principal office” is “the head office, the place where the principal officers generally transact business, and the place to which reports are made and from which orders emanate.”*J. C. Penney Ins. Co. v. State Bd. of*

Equalization, 157 Cal Rptr 1, 94 Cal App3d 685 (1979); *Caceres v. United States Shipping Board Emergency Fleet Corp.,* 299 F 968, 970 (EDNY1924).

"Principal office" refers to the most important or main office of an organization. *Western Sales & Service, Inc. v. Ford Motor Co.*, 576 NE2d 631 (Ind App 1991). It is not necessarily the same place was the principal office in the venue rules. *American Family Ins. Co. v. Ford Motor Co.*, 857 N.E.2d 971 (Ind 2006). In some cases, a corporation may have more than one "principal office." *In re Missouri Pacific Railroad Co.,* 998 SW2d 212 (Tex 1999); *Union Pac. R.R. v. Stouffer,* 420 SW3d 233 (Tex App 2014).

ORS 60.771(5) requires a corporation to keep a number of specified records at its principal office. These records include: copies of its articles (including all amendments), its bylaws (including all amendments), resolutions of its board of directors related to the creation of classes or series of stock, minutes of all shareholder meetings, all written communications to shareholders generally within the past three years, a list of the names and business addresses of current officers and directors, and a copy of the most recent annual report filed with the Secretary of State.

If no other place is stated in, or fixed in accordance with, the bylaws, the annual shareholder meeting is required to be held at the principal office. ORS 60.201(2). The same holds true for special shareholder meetings. ORS 60.204(3). Beginning two days after notice of any shareholder meeting, a shareholders' list must be available for inspection by shareholders at the principal office or place of the meeting. ORS 60.224(2).

Section 3.12 Corporate Seal

Today, corporate seals are permitted, but are not required.

Since earliest times, corporations have used seals to indicate that the corporation intended to be bound by the signatures of its officers and agents on a contract. *Altschul v. Casey*, 45 Or 182, 76 P 1083 (1904); *Guthrie v. Imbrie*, 12 Or 182, 6 P 664 (1885); *Eagle Woolen Mills Co. v. Monteith*, 2 Or 277 (1868).

Originally, corporations had a right to acquire and use a seal under common law. *Bank of United States v. Dandridge*, 25 US 64, 67 (1827). By statute, every

state now gives a corporation the power to own and use a seal. FLETCHER CYC CORP § 2462 (Perm Ed).

ORS 60.077(2)(b), which is taken from § 3.02(2) of the Revised Model Corporation Act, permits a corporation to use a corporate seal. A corporation may alter the form of its seal at will.

At one time, many states required a corporation to use a corporate seal in connection with the execution of certain documents. *Oldfield v. Angeles Brewing & Malting Co.*, 77 Wash 158, 137 P 469 (1913); *Ellison v. Branstrator*, 153 Ind 146, 54 NE 433 (1899); *Lowe v. Morris*, 13 Ga 147 (which includes a discussion of the history of seals). A 1927 opinion of the Oregon Attorney General states that "in the absence of a statutory requirement, a corporate seal is not essential either to corporate existence or to the transaction of corporate business." 13 *Op Or Atty Gen* 295, 296 (1927). *See also Thayer v. Nehalem Mill Co.*, 31 Or 437, 51 P 202 (1897).

One Attorney General opinion notes that the corporate statutes then in effect granted authority for a corporation to have and use a seal, "but does not make the use of such seal mandatory." 13 *Op Or Atty Gen* 295, 296 (1927). *See also Beauchamp v. Jordan*, 176 Or 320, 157 P2d 504 (1945).

In executing a document, if an officer uses the corporate seal, there is a rebuttable presumption that the officer had authority to sign the document on behalf of the corporation. *Hamilton v. Hamilton Mammoth Mines*, 110 Or 546, 223 P 926 (1924).

ORS 60.004(8)(a) provides that a document filed with the Secretary of State "may, but is not required to contain" the corporate seal. Likewise, ORS 60.161(4) permits, but does not require, that share certificates issued by the corporation bear the corporate seal or its facsimile.

Today, use of a corporate seal is permissive, not mandatory, and its use has become uncommon, particularly in closely-held corporations.

Section 3.13 Classes or Series of Shares

Corporations may have more than one class of stock, absent a statute prohibiting such practice. *Feero v. Housley*, 205 Or 404, 288 P2d 1052 (1955); *Walden Investment Group v. Pier 67, Inc.*, 29 Wash App 28, 627 P2d 129 (1981). Oregon does not prohibit such practice.

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In fact, ORS 60.131 specifically provides that a business corporation may authorize one or more classes of stock in its articles. Together, one or more classes must have unlimited voting rights and the right to receive the net assets of the corporation after dissolution. ORS 60.131(2).

ORS 60.131(3) sets forth examples of attributes which classes may possess. Examples include shares which have no voting rights, shares which are convertible or redeemable, and shares which have a preference to distributions or upon dissolution. The examples listed in the statute are not intended to be an exhaustive. ORS 60.131(4).

If there are two or more classes or series of shares, the preferences, limitations and relative rights of each may be set out in the articles. If such classes or series exist, and if such differences are not set out in the articles, the board of directors may determine the preferences, limitations and relative rights without shareholder action. ORS 60.134(1). In such case, the terms of the class or series must be filed with the Secretary of State's office before such shares are issued. ORS 60.134(4).

Preferences, limitations and relative rights which appear in the articles can only be amended with the shareholder approval of each class affected thereby. ORS 60.437 and 60.441.

If a corporation issues shares of more than one class or series, all stock certificates issued must conspicuously state on the front or back that the corporation will furnish the shareholder, upon request, "the designations, relative rights, preferences and limitations applicable to each class, the variations in rights, preferences and limitations determined for each series and the authority of the board of directors to determine variations for future series." ORS 60.161(3). Alternatively, this information may actually appear on the certificate, in full or in a summarized fashion. ORS 60.161(3).

Effective January 1, 2018, a "corporation may not issue a document that entitles an unidentified individual or entity that possesses the document to a share in the corporation." ORS 60.131(1)(b).

Section 3.14 Name

Every corporation must have a name, *Glass v. The Tipton, Tetersburg, and Berlin Turnpike Co.*, 32 Ind 376 (1869), and that name must be unique to that corporation in its state of incorporation. *United States v. D.K.G. Appaloosas, Inc.*, 630 F Supp 1540 (ED Tex 1986).

A corporation's name must appear in its articles. ORS 60.047(1)(a). The name must contain one or more of the following words, or an abbreviation of such word or words: corporation, incorporation, company or limited. ORS 60.094(1). The name must be written in the alphabet used to write the English language, but it may include numbers and incidental punctuation. ORS 60.094(3).

Corporations created pursuant to Chapter 60 are specifically prohibited from using the word "cooperative" in their name. ORS 60.094(2). Early case law held this provision did not have retroactive effect on corporations formed prior to enactment of this prohibition. *Lorntsen v. Union Fisherman's Co.*, 71 Or 540, 143 P 621 (1914).

Corporations may not adopt a name "that imply in any way that the business is an agency of the state, or any of its political subdivisions, without proof of authorization to register such a name." OAR 160-010-0014(2).

***A. Reserving a name*.**

Prior to incorporation, a person may reserve a corporate name with the Secretary of State's office for a 120-day period. ORS 60.097(2). The application must contain the name and address of the applicant and the proposed name. ORS 60.097(1). There is a filing fee to reserve a corporate name. The current fee can be found online at http://sos.oregon.gov/business/Pages/default.aspx

Using proper procedures, a person who has reserved a corporate name may transfer it to another person. ORS 60.097(3).

Merely reserving a corporate name does not always confer upon the registrant the exclusive right to use the name once the corporation is formed. *Elite Personnel, Inc. v. Elite Personnel Services, Inc.*, 259 Ga 192, 378 SE2d 117 (1989). For instance, merely reserving a name does not give the registrant the right to incorporate under a name previously used by another business.

> Persons, desiring to incorporate under a name they have previously used as the name of an organization not incorporated, are not barred from so doing because of the fact that others had incorporated under that name subsequent to the time they began to use it as the name of an unincorporated organization. If they were the first to use the

> name and to become known by it, they cannot be denied the right to incorporate under that name because others have adopted their name, and preceded them in incorporating under it. Any damage resulting to the plaintiff from such incorporation is chargeable to their folly in choosing a name already in use. *Umpqua Broccoli Exchange v. Um-qua Valley Broccoli Growers*, 117 Or 678, 686, 245 P 324, 327 (1926).

See also Lawyers Title Ins. Co. v. Lawyers Title Ins. Corp., 109 F2d 35 (DC Cir 1939).

As discussed briefly below, common law principles of unfair competition and unfair trade practices apply.

B. Assumed business name.

A corporation may file for an assumed business name pursuant to ORS Chapter 648 in the same manner as may a natural person. Thus, after appropriately filing for an assumed business name, ABC, Inc. can operate a restaurant called Frank's Franks and hold itself out to the world using this assumed name. A corporation may even register its corporate name, without the corporate designation, as its assumed business name. *Op Or Atty Gen No.* 5668 (3-11-85). Thus, Frank's Franks, Inc. may do business under the assumed business name of "Frank's Franks."

A 2011 change to ORS Chapter 648 permits a registrant to apply for reactivation of an administratively canceled assume business name within 5-years of the cancellation.

OAR 160-010-0014(1) provides: “An entity identifier, except for “company” and abbreviations thereof, cannot be used with an assumed business name, unless all the registrants on the assumed business name are entities identified in the name.”

“The use of "Inc." as part of the name for [a subsidiary] confirms that it has an independent legal existence and is not merely a division of [the parent]. *Maier v. Pacific Heritage Homes, Inc.*, 72 F Supp2d 1184 (D Or 1999).

Corporations may also obtain federal and state trademarks and service marks for their products and services. A discussion of this topic is beyond the scope of this book.

C. Name must be distinguishable.

ORS 60.094(4) requires that each corporate name sought to be used "shall be distinguishable upon the records of the [Secretary of State's] office from any other corporate name" and other business names previously filed or reserved. The Secretary of State has adopted guidelines regarding distinguishablity of names. OAR 160-010-0010 through 160-010-0013.

The language of ORS 60.094(4) is drawn from § 102(a)(1) of the Delaware General Corporation Law. Comment to RMBCA § 4.01. In interpreting § 102(a)(1), the Delaware Supreme Court declined to reverse a state agency determination that "Transamerica Airlines, Inc." is distinguishable from "Trans-Americas Airlines, Inc." stating that the agency "has only one statutory duty: to ensure, in the exercise of his discretion, that a new corporate name can be distinguished on" its records "from those names previously registered" and that the agency has no duty "to determine whether similar corporate names already registered carry with them property rights on which other parties may not infringe." *Trans-Americas Airlines, Inc. v. Kenton*, 491 A2d 1139, 1142-3 (Del 1985).

A discussion of this topic appears in Guilbert, *Corporate Names and Assumed Business Names: "Deceptively Similar" Creates a Likelihood of Confusion*, 62 OR L REV 151 (1983); *Business Name Availability in Oregon*, 14 WILL L REV 239 (1978).

D. Unfair competition & unfair trade practices.

A corporation cannot adopt a name which is so similar to the business name of another that the public is deceived. Justice Holmes long ago stated:

> Whatever might have been the doubts some years ago, we think that now it is pretty well settled that the plaintiff, merely on the strength of having been first in the field, may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom. *Federal Securities Co. v. Federal Securities Corp.*, 129 Or 375, 382, 276 P 1100, 1102 (1929) (quoting from *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass 85, 53 NE 141, 142 (1899)).

Even though the general rule is that the first to file a business name with the Secretary of State is the person with first rights to that name, this is not always true. The issue is intertwined with the law of unfair competition. *Armed Forces Service Co. v. Petree*, 211 Ga 867, 89 SE2d 486 (1955); *Olympia Brewing Co. v. Northwest Brewing Co.*, 178 Wash 533, 538, 35 P2d 104, 107 (1934).

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Under Oregon law, "[t]he test of unfair competition is whether it is probable that an ordinary buyer in the ordinary course of business will be deceived into believing that the product of one party is actually that of another." *Dial Temporary Help Service, Inc. v. Shrock*, 946 F Supp 847, 857 (D Or 1996). *See also Classic Instruments, Inc. v. VDO-Argo Instruments, Inc.*, 73 Or App 732, 700 P2d 677 (1985).

Most courts have followed this rule, holding that a corporation may not adopt a name that serves as an artifice to deceive the public.

> No inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself. Unfair competition is a question of fact. The question to be determined in every case is whether or not, as a matter of fact, the name or mark used by defendant has previously come to indicate and designate plaintiff's goods, or, to state it another way, whether defendant, as a matter of fact, is by his conduct passing off his goods as plaintiff's goods, or his business as plaintiff's business. The universal test question is whether the public is likely to be deceived. *Olympia Brewing Co. v. Northwest Brewing Co.*, 178 Wash 533, 538, 35 P2d 104, 107 (1934).

Most courts have applied a "likelihood of confusion" test to determine whether the public is confused by the similarity in names. *Ernst Hardware Co. v. Ernst Home Center, Inc.*, 134 Or App 560, 895 P2d 1363 (1995); *Frostig v. Saga Enterprises, Inc.*, 272 Or 565, 539 P2d 154 (1975); *Interstellar Starship Services v. Epix, Inc.,* 125 F Supp 2d 1269 (D Or 2001).

> The appropriate legal test for these claims is the "likelihood of confusion" test. To determine whether a likelihood of confusion exists as to the two yard signs, a number of elements must be examined including: the strength or distinctiveness of the trademark at issue; similarity or overall impression created by the designs; similarity of product; identity of retail outlets and purchasers; identity of advertising media used; defendant's intent; and actual confusion. The weight to be accorded to individual factors varies with the circumstances of the case. (citations omitted) *Ackerman Security Systems, Inc. v. Design Security Systems, Inc.*, 201 Ga App 805, 806, 412 SE2d 588, 589 (1991).

When two names are so similar as to deceive the public, a court of equity has the power to intervene.

> When a person or business corporation has assumed the name of some other firm or corporation in the same line of business, or has adopted a name which so closely resembles that of a business rival, previously established, that the business of the latter is liable to be diverted and the public deceived on account of it, it has always been recognized as within the power or jurisdiction of a court of equity to restrain such person or new company from conducting business under the name assumed, to the detriment of the older company. *Computing Cheese Cutter Co. v. Dunn*, 45 Ind App

20, 88 NE 93, 94 (1909)(quoting from *Plant Seed Co. v. Michel Plant, Co.*, 37 Mo App 313 (1889)).

***E. Foreign corporations*.**

Sometimes a foreign corporation seeks authority to do business in Oregon, but its name is not distinguishable from the name of an existing Oregon corporation. In such case, the foreign corporation is required to state on its application for authority to transact business in Oregon that its name is: "(name under which incorporated), a corporation of (place of incorporation)." ORS 60.717(3). Both the name and place then become the name of the foreign corporation in Oregon.

Once a foreign corporation applies for authority to do business under its Oregon name (*e.g.:* name & place), it may file for an assumed business name under a different name. Thus, a corporation whose name in Oregon is "Frank's Franks, a corporation of Florida" could do business in Oregon under the assumed business name "Florida Frank's Franks" or any other available name, subject to laws related to federal trademarks/service marks, unfair competition, unfair trade practices, and the like.

Foreign corporations doing business in Oregon only through interstate commerce may not need to apply for authority to do business in Oregon. *Enco, Inc. v. Russell Co.,* 210 Or 324, 311 P2d 737 (1957); *International Shoe Co. v. Washington*, 326 US 310 (1945). In such situations, the foreign corporation need not apply for an assumed business name for its corporate name since its “real and true name” for purposes of ORS 648.005 (the Oregon assumed business name statute) is its corporate name. *Kelly v. Olinger Travel Homes, Inc.*, 200 Or App 635, 117 P3d 282 (2005).

***F. Changing corporate name*.**

Amending a corporation's articles of incorporation to change its name does not change any rights or liabilities of the corporation. For instance, it "does not abate a proceeding brought by or against the corporation in its former name.” ORS 60.457. The mere fact that a corporation has changed its name does not mean that a new corporation comes into existence, nor does it effect the legal existence or nature of the corporation. *In re VHA diagnostic Services, Inc.*, 65 Ohio St3d 210, 602 NE2d 647 (1992); *Goodwyne v. Moore*, 170 Ga App 305, 316 SE2d 601 (1984). A name change "has no effect on the corporation's property, rights, or

liabilities." *Alley v. Miramon*, 614 F Supp 1372, 1384 (5th Cir 1980). *See also Lindenborg v. M & L Builders & Brokers, Inc.*, 158 Ind App 311, 302 NE2d 816 (1973).