

HOUSE BILL REPORT

ESB 6188

As Reported by House Committee On:
Judiciary

Title: An act relating to the Washington nonprofit corporation act.

Brief Description: Authorizing electronic notice and other communications within the Washington nonprofit corporation act.

Sponsors: Senators Esser, Kline and Johnson.

Brief History:

Committee Activity:

Judiciary: 2/27/04 [DPA].

Brief Summary of Engrossed Bill
(As Amended by House Committee)

- Amends the Washington Nonprofit Corporation Act to authorize filings, notices, consents, and other forms of communication between members and directors to be made by electronic transmission.
- Authorizes elections of officers and directors, and votes on proposals, to be conducted by electronic transmission, and allows electronic proxy appointments.
- Amends the Nonprofit Miscellaneous and Mutual Corporations Act to allow a cooperative organized under that chapter to elect to avail itself of certain rights granted under the Cooperative Associations Act.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended. Signed by 9 members: Representatives Lantz, Chair; Moeller, Vice Chair; Carrell, Ranking Minority Member; McMahan, Assistant Ranking Minority Member; Campbell, Flannigan, Kirby, Lovick and Newhouse.

Staff: Edie Adams (786-7180).

Background:

The Washington Nonprofit Corporation Act (WNCA) provides rules and requirements on the organization and operation of nonprofit corporations, and the relationship between members, directors, and officers of the nonprofit corporation.

There are many provisions of the WNCA that require notices or other communications to be given between members and directors. For example, meetings of members require that notice be provided either by mail or personal delivery. Action may be taken by members or directors without having a meeting under certain circumstances as long as the action is evidenced by written consent of the members or directors. In addition, members and directors may waive specified notice requirements by written consent.

Proxy appointments for purposes of voting by members may be authorized by the articles of incorporation or bylaws and must be executed in writing. Elections of officers or directors of a nonprofit corporation may be conducted by mail if authorized by the bylaws.

A nonprofit corporation must maintain a registered office and registered agent in the state. A registered agent may be an individual, or a domestic or foreign corporation or nonprofit corporation, whose business office is identical with the nonprofit corporation's registered office.

In 2002 the Legislature passed HB 2313, which authorized nonprofit corporations to electronically file required documents with the Office of the Secretary of State in accordance with rules adopted by the Secretary of State. In addition, the Legislature passed SHB 2301, which authorized the use of electronic communications under the Washington Business Corporation Act for certain notices, consents and other communications between shareholders and directors, and for required filings with the Office of the Secretary of State. The Washington State Bar Association proposes that the Legislature adopt similar changes with respect to the WNCA.

Cooperative associations may be organized under two chapters of law: Chapter 23.86, which is exclusive to cooperative associations; and Chapter 24.06, which relates to a range of nonprofit and mutual benefit organizations, including cooperatives. Cooperatives that organize under Chapter 24.06 are not entitled to some of the rights and powers provided to cooperatives organized under Chapter 23.86 relating to: individual liability of cooperative members; naming conventions; and the apportionment and distribution of earnings to members.

Summary of Amended Bill:

The WNCA is amended to authorize filings, notices, consents, and other forms of communication between members and directors to be made by electronic transmission. Amendments are also made to provisions relating to registered offices and registered

agents, and to proxy appointments. The Nonprofit Miscellaneous and Mutual Corporation Act is amended to grant certain powers to cooperative associations.

Notice by electronic transmission is authorized under the WNCA if the electronic transmission complies with specified requirements. "Electronic transmission" means an electronic communication not directly involving the physical transfer of a tangible record, and that may be retained, retrieved, and reviewed, and directly reproduced in a tangible medium. References to "written" notice are changed to notice in the form of a "record," which is defined as any information in a tangible medium or in an electronic transmission.

Notice by electronic transmission is authorized if the member or director consents to electronically transmitted notice and designates an address, location, or system for delivery of the electronic transmission. Notice may include material that the WNCA requires or permits to be included with the notice. Electronically transmitted notice may be provided by posting the notice on an electronic network and delivering a separate record of the posting and how to obtain access to the posting.

A member or director may revoke consent to receive notice by electronic transmission by delivering a revocation that is in the form of a record. In addition, the consent of a member or director is automatically revoked if the nonprofit corporation is unable to electronically transmit two consecutive notices, and this inability becomes known to the secretary or other person responsible for sending the notice. Inadvertent failure to treat this inability as a revocation does not invalidate any meeting or other action.

Notice of meetings of members may be transmitted by facsimile transmission or electronic transmission, in addition to mail or personal delivery. Notice by facsimile transmission, personal delivery, or telegraph is effective when received. Notice in an electronic transmission is effective when it is transmitted to an electronic transmission address, location or system designated by the recipient, or when posted to a network and a separate record of the posting has been delivered to the recipient. Notice of the initial organizational meeting of directors may also be provided by facsimile transmission.

References throughout the WNCA to "document" are replaced with references to "record." References to "written" and "signed" in provisions relating to notices, consents, and waivers are removed and replaced with the requirement that they be in the form of a "record" that is "executed." "Execute" is defined as follows: for written records, if the record is signed; for electronic transmissions, if it is transmitted with sufficient information to determine the sender's identity; and for records to be filed with the Office of the Secretary of State, if they comply with filing rules adopted by the Secretary of State.

Elections of directors or officers, and votes on proposals, may be conducted by electronic transmission if authorized by the bylaws, and if the nonprofit corporation has designated

an electronic address to which the ballot may be transmitted. Proxy appointments may be made by electronic transmission.

Amendments are made to provisions relating to records filed with the Office of the Secretary of State to allow the records to be filed through electronic transmission.

The types of entities that may serve as the registered agent of a nonprofit corporation are expanded to include a domestic or foreign limited liability company whose business office is identical with the corporation's registered office.

The Nonprofit Miscellaneous and Mutual Corporations Act is amended to allow a cooperative organized under that chapter to elect to avail itself of certain rights and powers granted to cooperative associations under the Cooperative Associations Act relating to the following matters:

- limiting member liability for debts of the association;
- apportionment of earnings and distribution of dividends; and
- for consumer cooperatives, allowing use of the words "corporation," "incorporated," or "limited" in their names.

Amended Bill Compared to Original Bill:

The amended bill added the provision allowing cooperatives organized under the Nonprofit Miscellaneous and Mutual Corporations Act to elect to avail itself of certain rights under the Cooperative Associations Act.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: This bill allows a nonprofit corporation to make cost-effective use of electronic communications for conducting its business. The ability to conduct business by electronic communications is especially helpful to small nonprofit corporations. In addition, this bill validates a practice that is already being used by nonprofits. The bill has been reviewed by the Attorney General's Office and the Secretary of State's Office. The amendment brings into conformance two statutes dealing with cooperative associations.

Testimony Against: None.

Persons Testifying: Judith Andrews, Washington State Bar Association; and Susie Tracy, REI.

Persons Signed In To Testify But Not Testifying: None.