



HIGGS & JOHNSON



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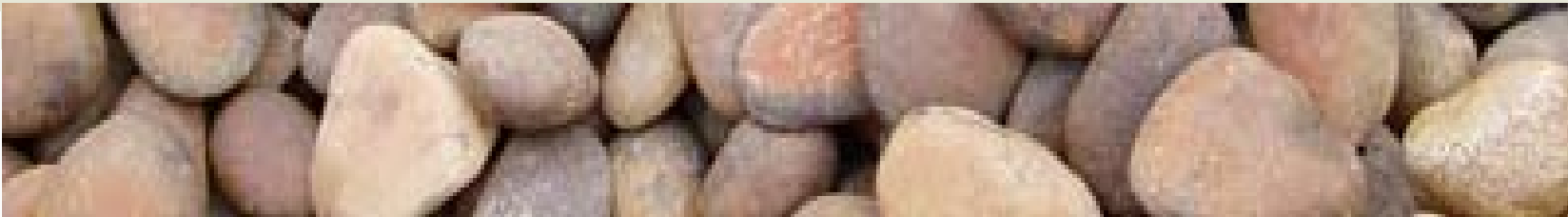
FOUNDATIONS: FORMATION, PRACTICAL USES & AMENDMENTS



BFSB/STEP
Wealth Management & Investment Planning Seminar
March 20, 2007

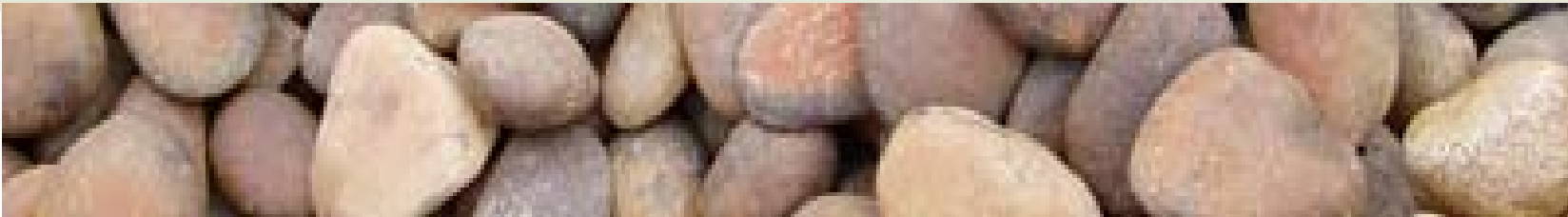
HISTORICAL PERSPECTIVE

- Originated in civil law countries where the Church was a “Divine Foundation”
- The Family Foundation created by Liechtenstein in 1926
- The Foundations Act, 2004 came into force in The Bahamas on October 22, 2004
- The Act provides for the creation of a private foundation



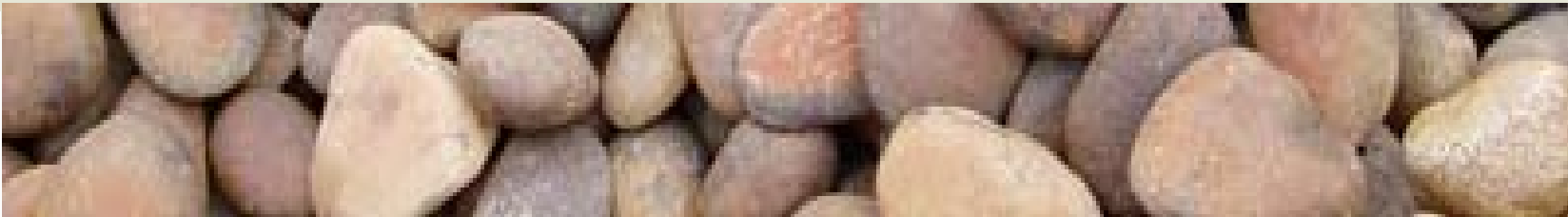
WHAT IS A FOUNDATION?

- A separate legal entity
- Capable of suing and being sued
- Resident and domiciled in the Bahamas
- A hybrid of a company and trust
- A foundation's assets are the property of the foundation



PURPOSES OF A FOUNDATION

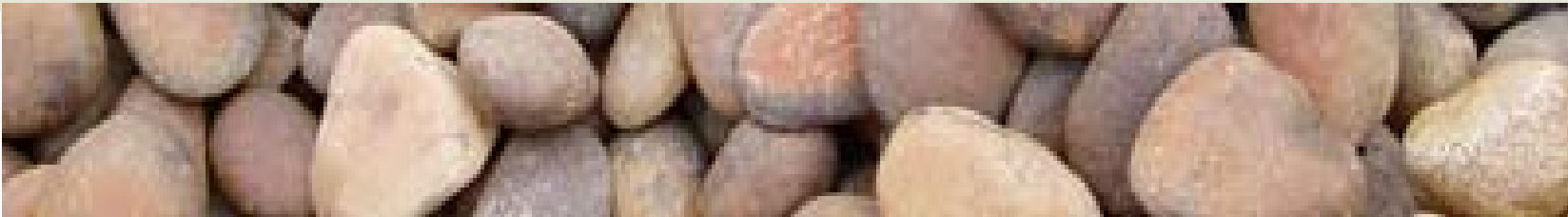
- Main purposes or objects must include the management of its assets
- May buy or sell assets in the course of management of its assets and engage in any other activity not prohibited by law
- Business transactions must be secondary to the main purpose(s)



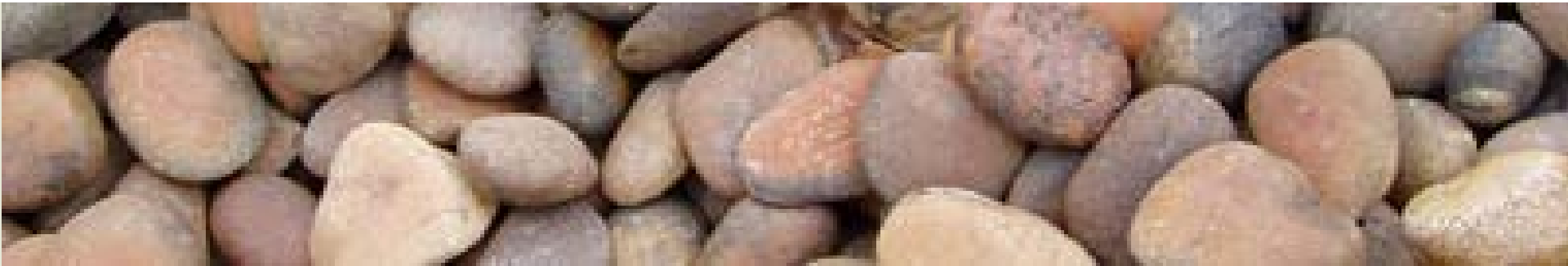
ESTABLISHING A FOUNDATION

In order to establish a Foundation in The Bahamas there must be:

- a foundation charter (or duly executed will);
- registration; and
- the issuance of a Certificate of Registration.



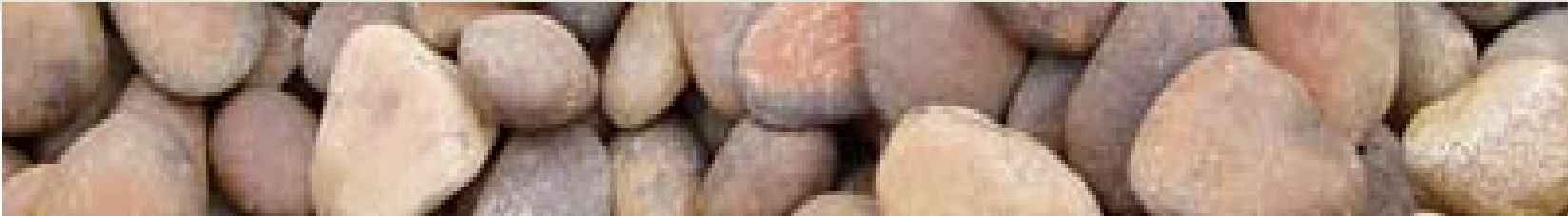
FOUNDATION CHARTER



FOUNDATION CHARTER

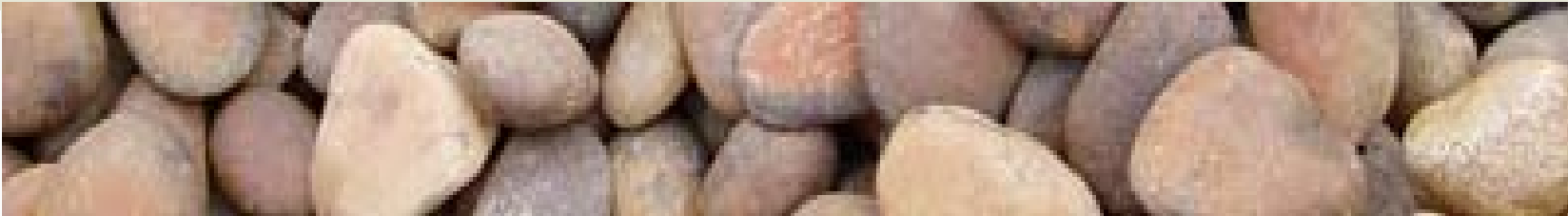
The Foundation Charter is not a public document BUT it must include the following information:

- Name of the Foundation (including the word “Foundation”);
- Purposes or objects of the Foundation;
- Name and address of the Founder;
- Address for service of documents on the Founder in The Bahamas;



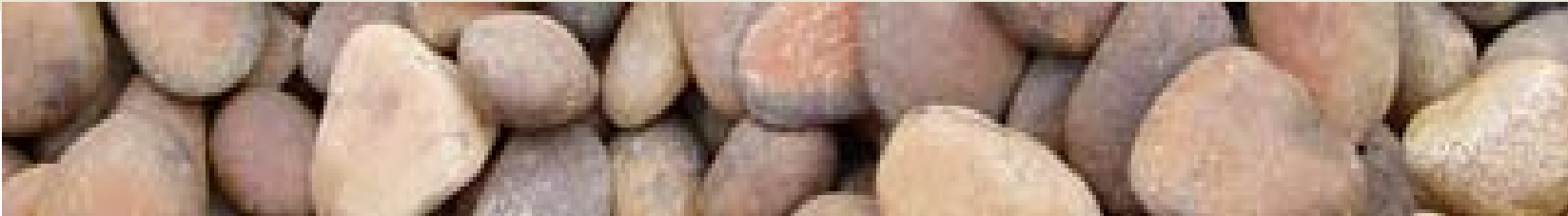
FOUNDATION CHARTER

- Value of the initial assets of the Foundation;
- Names of the Beneficiaries, an indication of the body by which the Beneficiaries can be ascertained or a statement that the Foundation is to benefit the public at large;
- Period for which the Foundation will be established or a statement that the Foundation is established for an indefinite period;

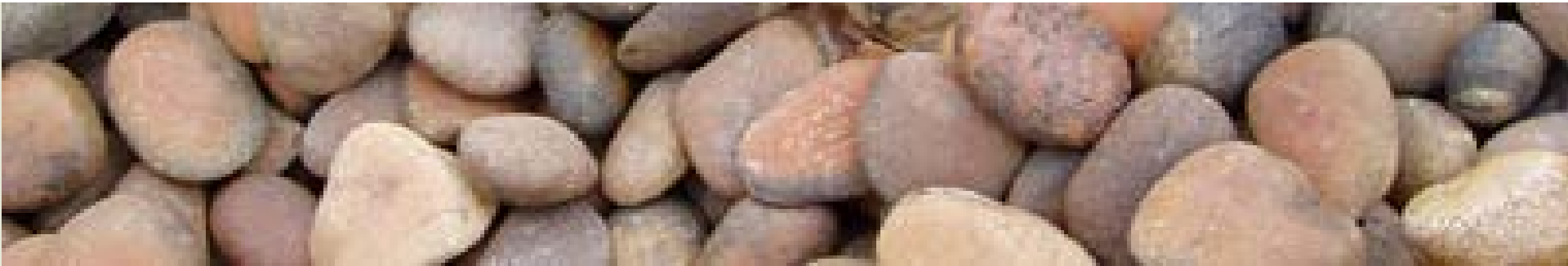


FOUNDATION CHARTER

- Name and address of the Secretary to the Foundation (who must be a licensed financial and corporate services provider or a licensed trust company);
- Address of the registered office of the Foundation (which must be the address of the Secretary);
- Signature of the Founder in the presence of a Notary or the Secretary
- Charter document must permit amendment and procedure in S.50 must be followed

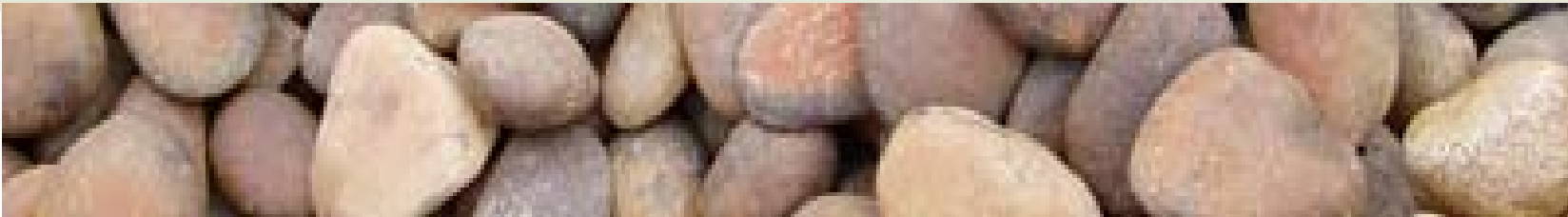


ADDITIONAL CONSIDERATIONS IN PREPARING FOUNDATION DOCUMENTS



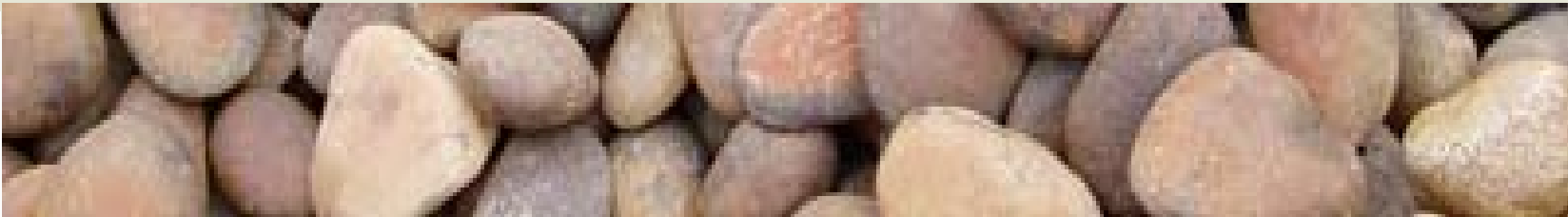
ADDITIONAL CONSIDERATIONS

- Will a Foundation Council or other supervisory body be appointed prior to registration? What powers will the Council be given?
- Will a Protector be appointed? Powers of the Protector?
- Rights and powers to be reserved to the Founder?
- Who will exercise the Founder's powers in the event of his death or incapacity?

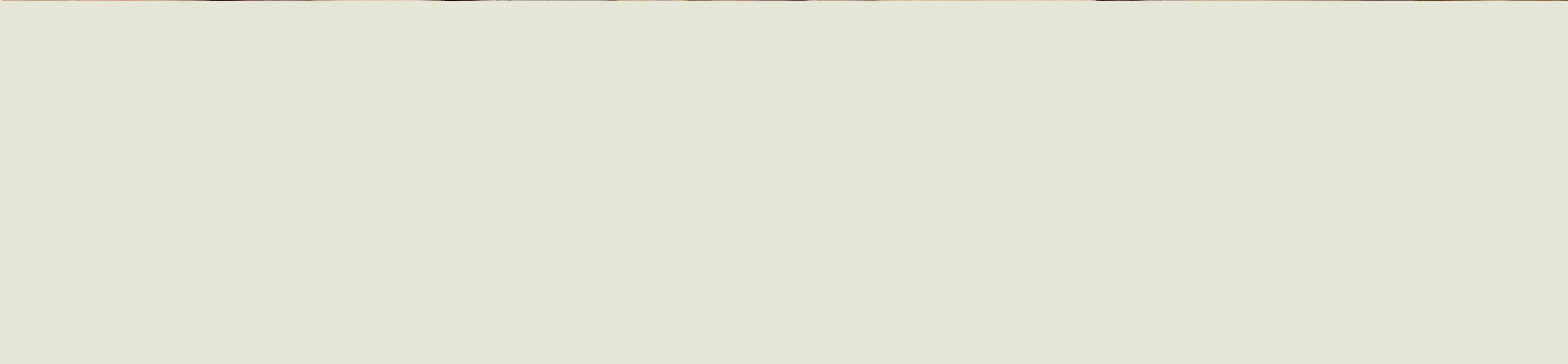
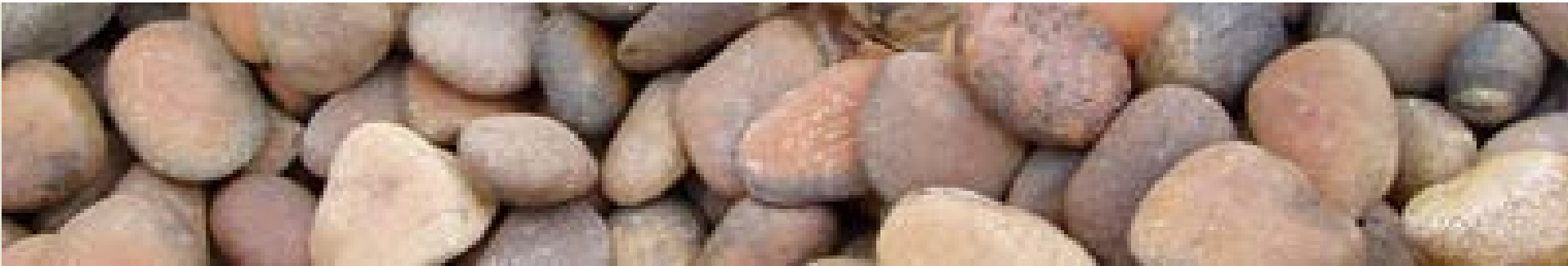


ADDITIONAL CONSIDERATIONS

- How are the assets of the Foundation to be distributed during the Founder's lifetime? At specified intervals or at the discretion of the Foundation Council?
- How are the assets of the Foundation to be distributed after the Founder's lifetime?
- If the Foundation is wound up, to whom will the assets be paid if there are no Beneficiaries or the remaining Beneficiary refuses to accept the transfer of the Foundation assets?

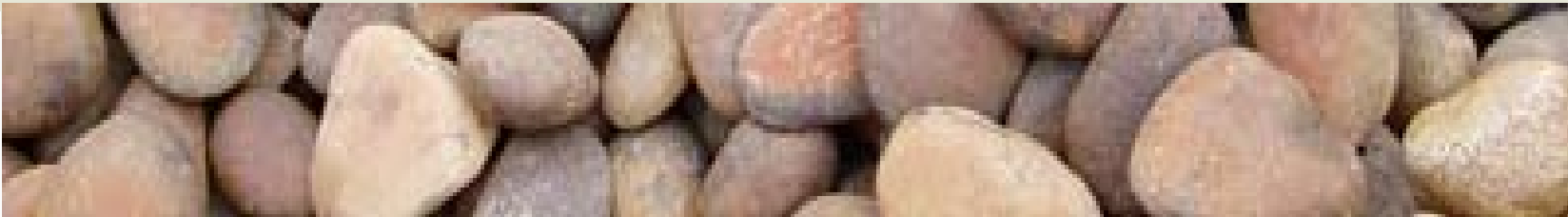


REGISTRATION OF A FOUNDATION



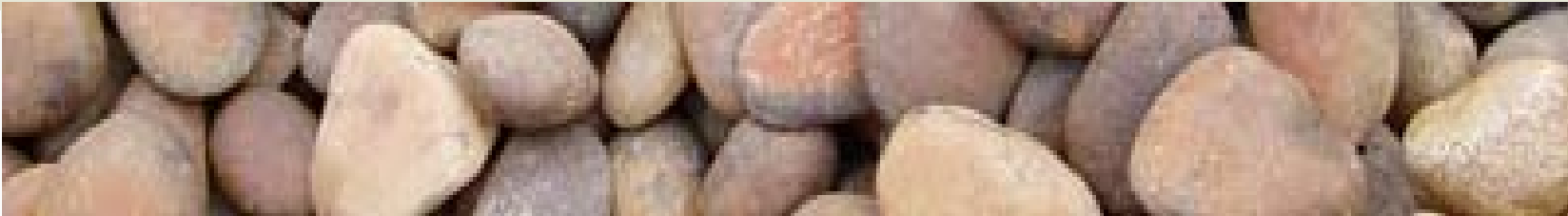
REGISTRATION OF A FOUNDATION

- A statement signed by the Secretary of the Foundation or the Attorney engaged in the formation of the Foundation containing certain particulars extracted from the Charter - including name of Foundation, date of registration, Founder's name and address;
- A list of names and addresses of the first officers of the Foundation (Secretary is an officer); and



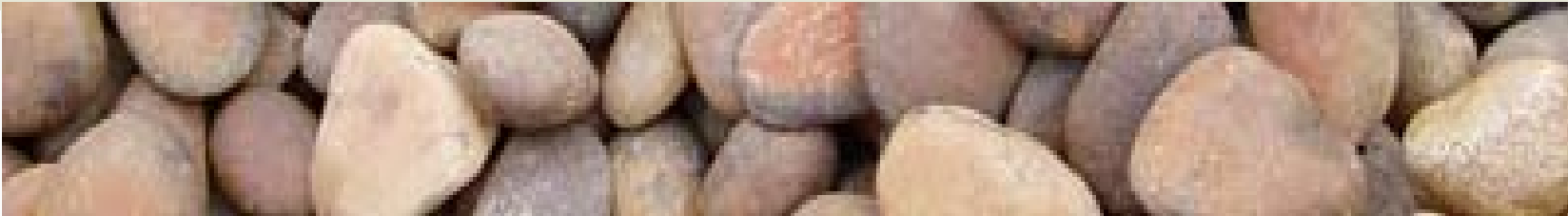
REGISTRATION OF A FOUNDATION

- A statutory declaration by either the Secretary or the Attorney engaged for compliance with all the relevant statutory provisions of the Act.
- Registration fee: \$125-\$500 depending on the calendar quarter in which the Foundation is registered



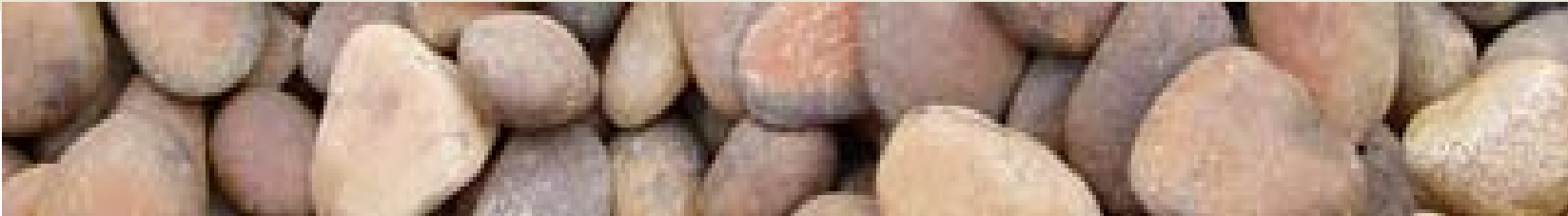
REGISTRATION OF A FOUNDATION

- A Certificate of Registration issued by the Registrar is conclusive evidence that the Foundation is registered under the Act.
- From the date of registration, the Foundation is a legal person capable of performing all the functions of a foundation.



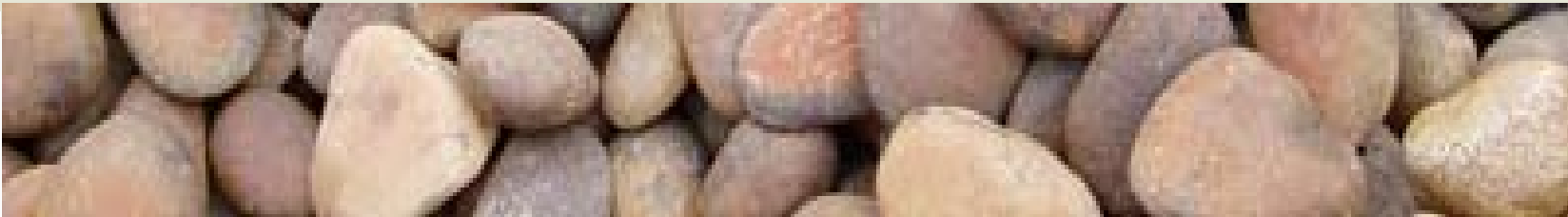
FUNDING A FOUNDATION

- Initial assets should be assigned immediately following the registration of the Foundation
- Value of the initial assets must be at least B/US\$10,000.00 or the equivalent in any other currency
- Can consist of cash, shares or other assets
- If the initial assets are in a form other than cash e.g. shares – current value should be stated in the assignment document



FOUNDER

Role of Founder in administration depends on the powers which are reserved to him in the Charter or whether he is a member of the Council

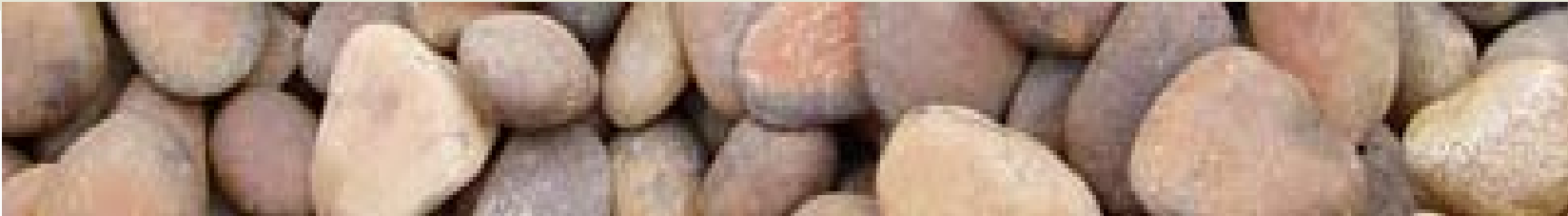


OFFICERS OF THE FOUNDATION



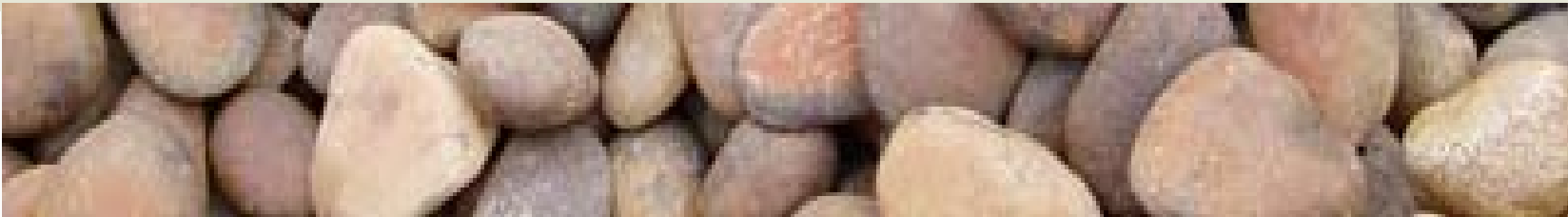
OFFICERS OF THE FOUNDATION

- Prior to registration, the Founder must appoint at least one person to be an officer of the Foundation – initial officer can be the Secretary
- An officer may be a legal or natural person
- Officers are the governing body of the Foundation in the absence of a Council
- The duties of the Officers are primarily administrative in nature but where no Council in place become fiduciary



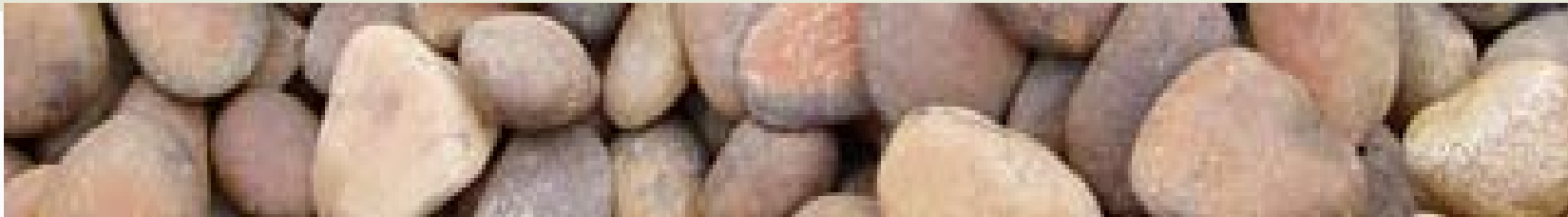
OFFICERS OF THE FOUNDATION

- Officers of the Foundation must act in accordance with the Charter or the Articles of the Foundation
- Reasonable care and skill should be exercised by an Officer in carrying out his duties
- Certain persons cannot serve as Officers of a Foundation e.g. undischarged bankrupts



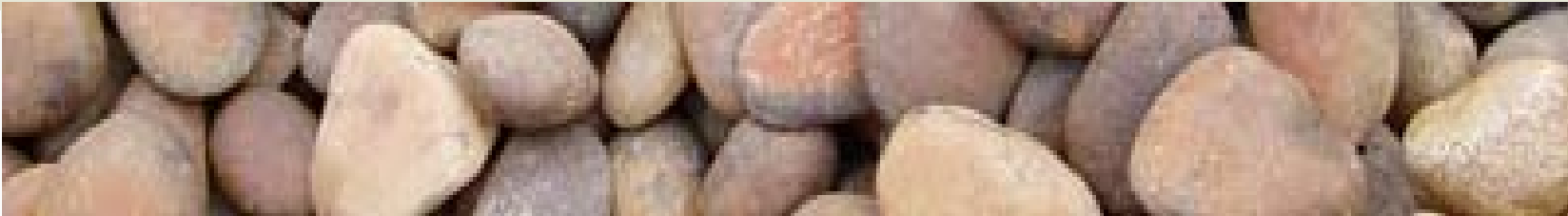
SECRETARY OF THE FOUNDATION

- A secretary must be appointed in respect of the Foundation and such person will also be an officer of the Foundation.
- Registered office of the Foundation must be at the office of the Secretary
- Must be a licensed trust company or financial and corporate services provider



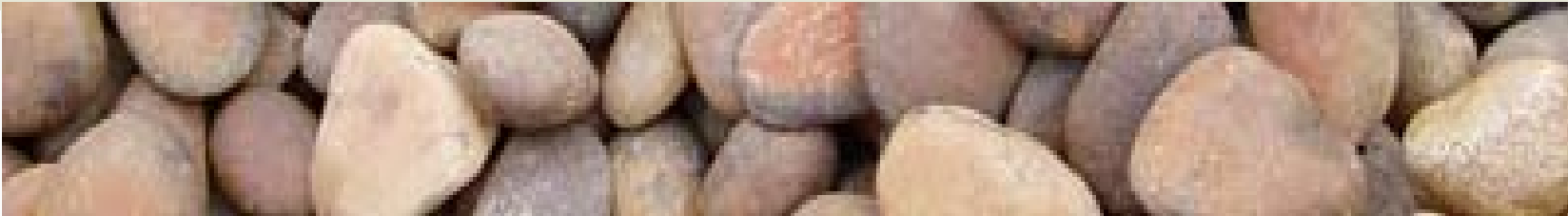
FOUNDATION COUNCIL

- The appointment of a Council is optional
- If you wish to have a Council – this must be provided for in the Charter
- May be comprised of (i) two or more natural persons, (ii) a legal person and one or more natural persons or (iii) a legal person by itself.

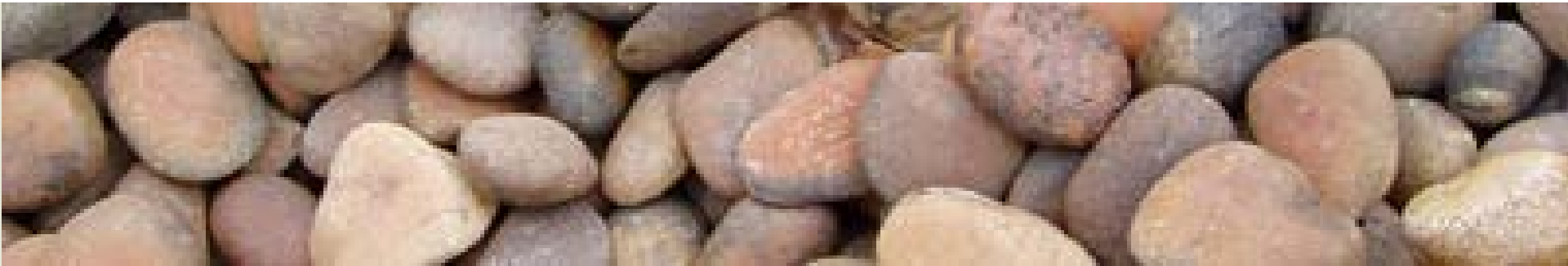


FOUNDATION COUNCIL

- The function of the Council is to ensure compliance by the Foundation and the Officers with the provisions of the Charter and Articles
- Role of Council is similar to that of Directors
- The Council should also supervise the management of the Foundation by the Officers
- Officers and auditors (and related parties) of the Foundation are not eligible to be appointed as members of the Foundation Council

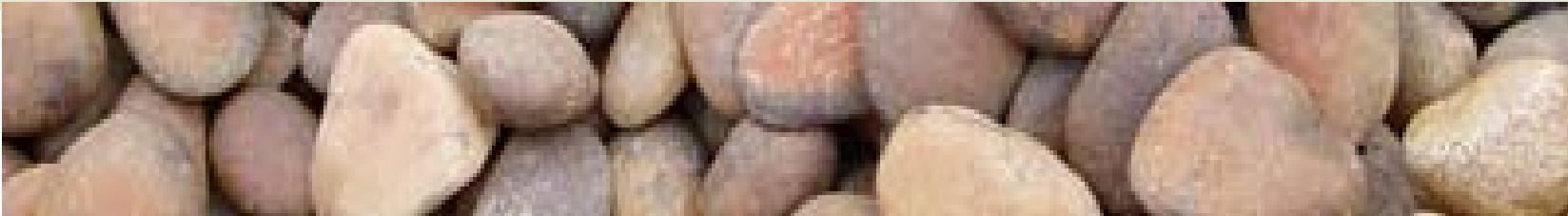


ADMINISTRATIVE MATTERS



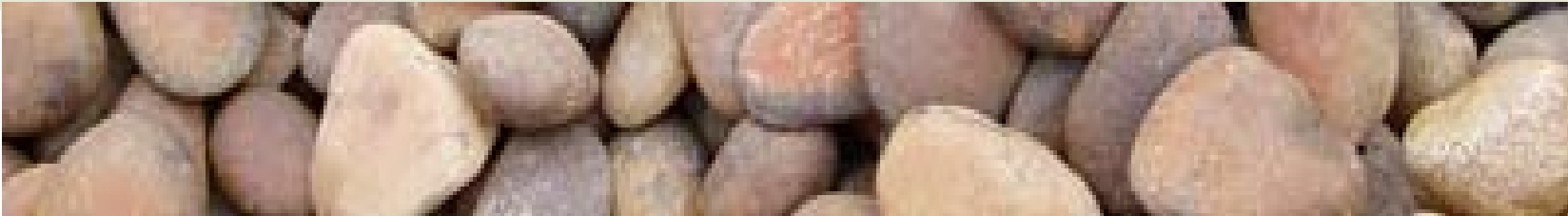
DOCUMENTS TO BE KEPT AT THE REGISTERED OFFICE:

- Accurate copies of all documents filed at the Registry
- Accurate copies of the Charter and Articles (if any)
- These documents must be kept open to inspection during business hours by the Founder, Officers, Foundation Council or supervisory person



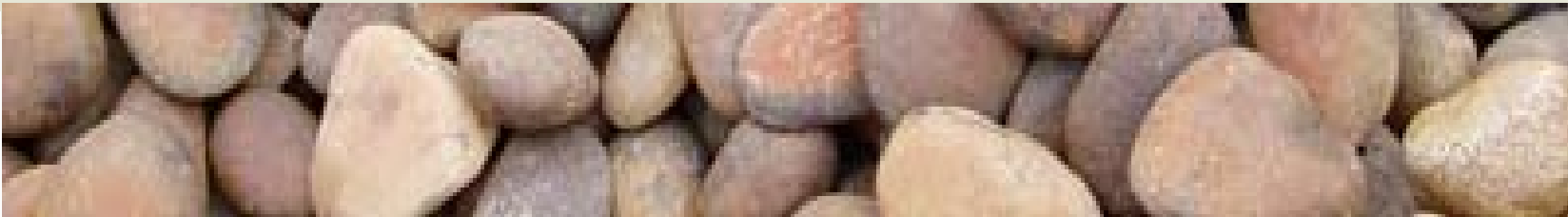
MEETINGS

- Foundation is required to hold at least one officer's meeting in each year
- Founder and the Foundation Council members are entitled to be notified of the meeting of officers, to attend and be heard but not to vote



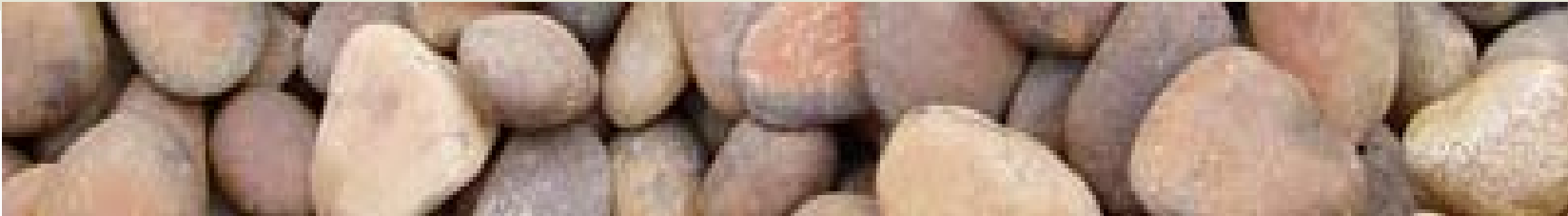
MEETINGS

- Meetings of the Officers or Foundation Council must be held but written resolutions can be substituted
- Notice of Foundation Council meetings must be served on the Founder and Foundation Council members unless the Charter otherwise provides



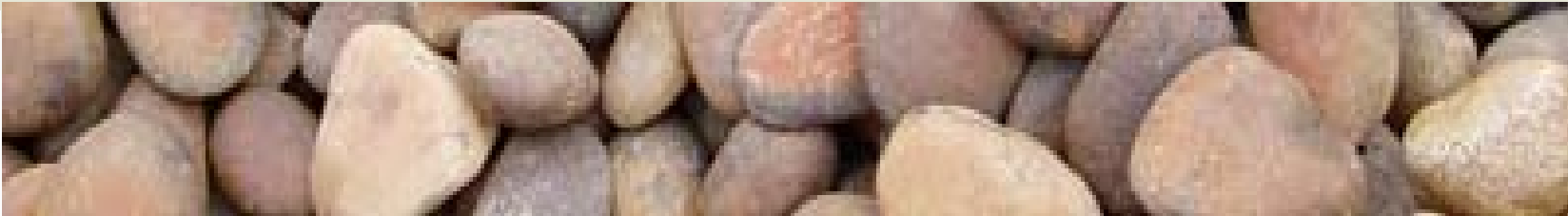
FINANCIAL MATTERS & ACCOUNTS

- Foundation is required to keep proper books of account at the registered office or such other place as the officers think fit of (i) all sums received, expended and distributed, (ii) all sales and purchases, (iii) all assets and liabilities
- Unless waived by the Foundation Council in writing, the Officers must lay the accounts before the Foundation at least once annually



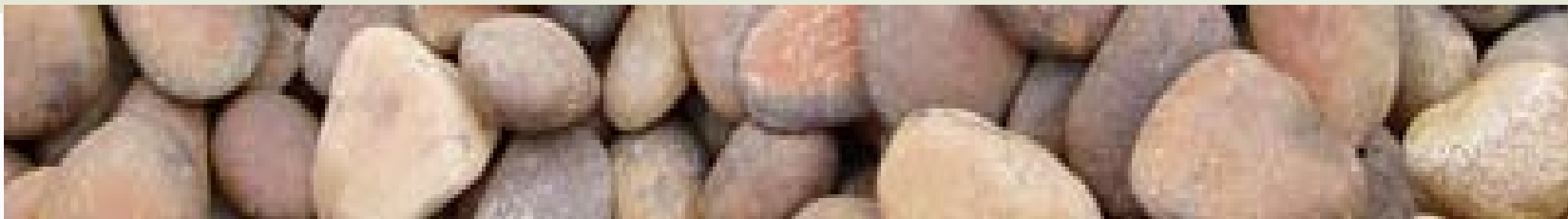
FINANCIAL MATTERS & ACCOUNTS

- Even if the requirement to lay the accounts before the Foundation is waived, the accounts must still be kept
- Officers must sign balance sheet of Foundation
- An Officer who fails to take reasonable steps to secure compliance by the Foundation with the requirement to keep accounts is personally in default



RIGHT OF BENEFICIARIES TO RECEIVE INFORMATION:

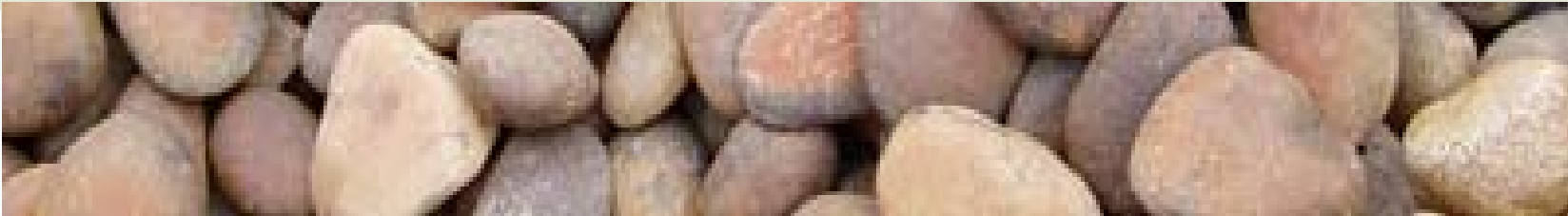
- Section 41(1) of the Act:
 - mandates that the Officers notify all of the vested Beneficiaries of their interest
 - provides that all vested Beneficiaries are entitled to receive certain information regarding the Foundation on request e.g. in respect of the fulfillment of its objects, to inspect copies of the Charter, Articles, audits, minutes of meetings of the Foundation Council and Officers



USE OF NOMINEE FOUNDERS

Clients may wish to use a nominee for greater confidentiality

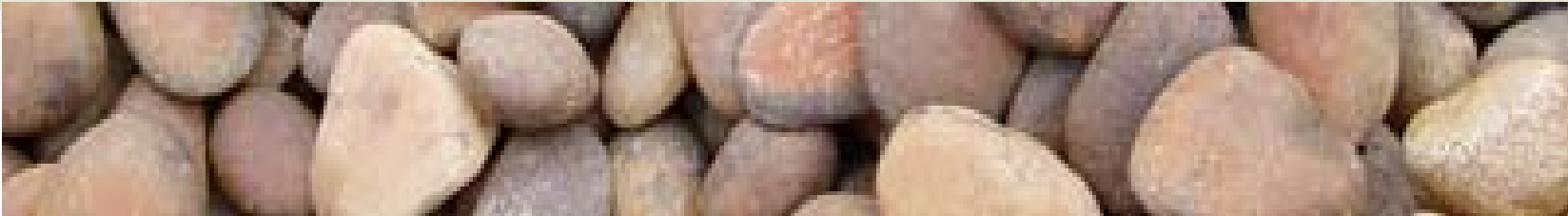
- s.9(2) of the Act (as amended) provides that the rights of a Founder may be assigned
- Once the rights of a Founder have been assigned, the assignee exercises such rights



PARTICULARS TO BE CONTAINED IN LETTERS FROM THE FOUNDATION:

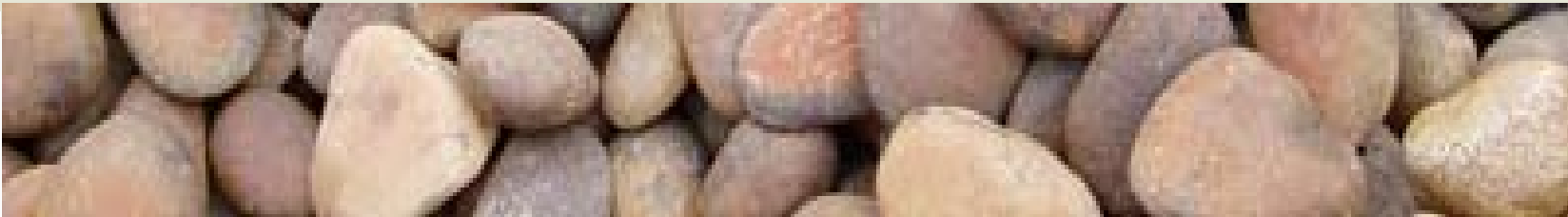
The following must be contained in all business letters, order forms, receipts for goods and services:

- Legal name of the Foundation
- Place of registration of the Foundation
- Foundation's registration number
- Address of the registered office



LETTERS OF WISHES/DIRECTIONS:

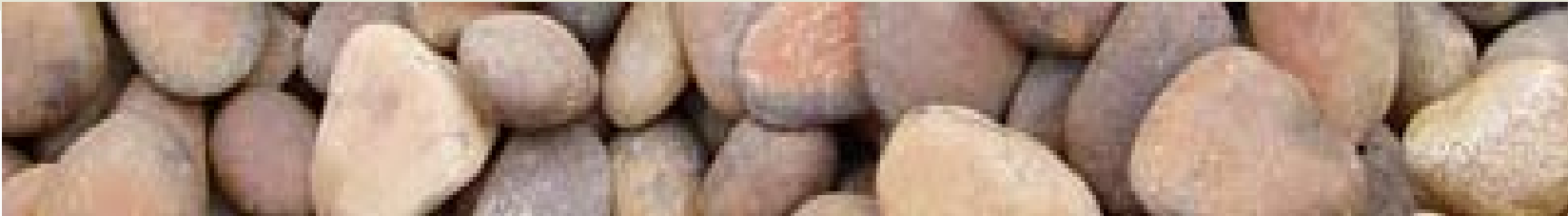
- Where distribution provisions are discretionary- Founder can give non-binding letter of wishes as per a trust
- Charter can provide for Founder to give directions to Council/Officers example re: Beneficiaries and shares of Foundation assets, investments



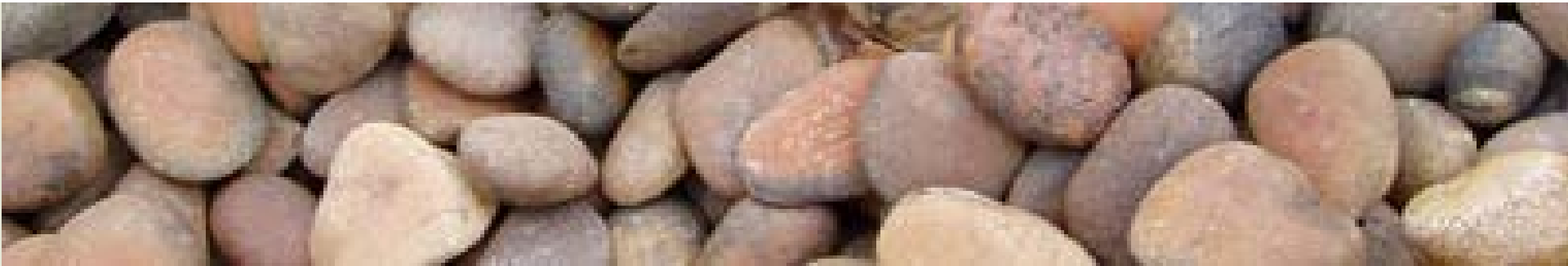
WINDING UP

A Foundation can be liquidated for the following reasons:

- Period for which it was established expires
- Unanimous resolution of officers
- Unable to pay its debts
- By Court order
- Regulations have been drafted for winding up but are not yet enforced

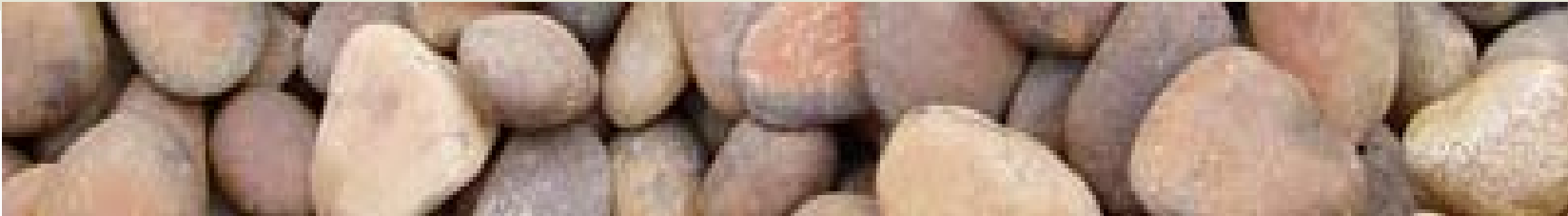


PROPOSALS FOR CHANGE



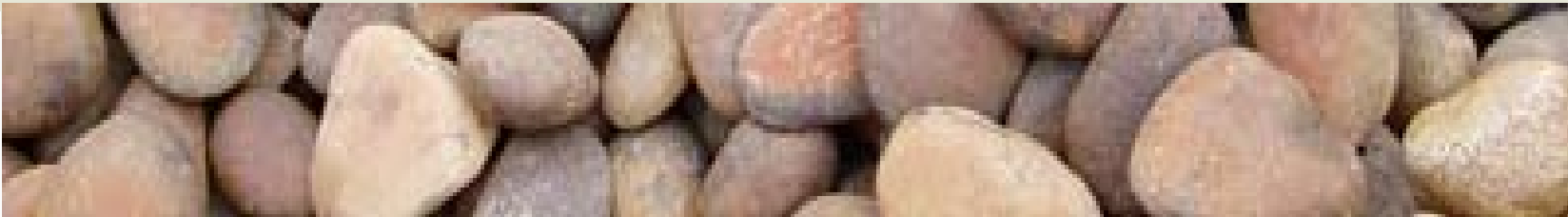
PROPOSALS FOR CHANGE

- Appointment of Foundation Agent with responsibilities similar to those of a Registered Agent of an IBC
- Making Foundation Council mandatory in the event that a Foundation Agent but no Officer is appointed
- Foundation Agent can be excused from all liability except fraud



PROPOSALS FOR CHANGE

- Clarifying that initial assets can be transferred to a Foundation after registration
- Limiting a beneficiary's access to information and documents to those relating to his own vested interest
- Simplifying accounts for the Foundation
- Names of founder and Foundation Council not of public record





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QUESTIONS?



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