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OPINION

of

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No. 81-311

JUNE 4, 1981

THE HONORABLE NICHOLAS C. PETRIS, SENATOR, NINTH
SENATORIAL DISTRICT, has requested an opinion on the following question:

Does the priority to purchase surplus school property provided for in section 39363.5, subdivision (b)(2) of the Education Code include nonprofit corporations which were incorporated before December 31, 1979 under the General Nonprofit Corporation Law (Corporations Code, section 9000 *et seq.*) and which have received an advisory notice from the Secretary of State pursuant to section 9912 of the Corporations Code that they are being classified as public benefit corporations under the recently enacted Nonprofit Public Benefit Corporation Law (Corporations Code, section 5110 *et seq.*)?

CONCLUSION

The priority to purchase surplus school property provided for in section 39363.5, subdivision (b)(2) of the Education Code does include nonprofit corporations which were incorporated before December 31, 1979 under the General Nonprofit Corporation Law (Corporations Code, section 9000 *et seq.*) and which have received an advisory notice from the Secretary of State that they are being classified as public benefit corporations under the new Nonprofit Public Benefit Corporation Law (Corporations Code, section 5110 *et seq.*).

ANALYSIS

Section 39360 *et seq.* of the Education Code sets forth procedures for the sale or lease of surplus real property belonging to a school district. Section 39363.5 of that Code sets forth priorities as to such sales. As to the second priority, subdivision (b) provides:

“(b) Second, the property shall be offered for sale or lease with an option to purchase, at fair market value in both of the following ways:

(1) In writing, to the Director of General Services, the Regents of the University of California, the Trustees of the California State University and Colleges, the county and city in which the property is situated, and to any public housing authority in the county in which the property is situated.

(2) By public notice to any public district, public authority, public agency, public corporation, or any other political subdivision in this state, to the federal government, *and to nonprofit charitable corporations existing on December 31, 1979, and organized pursuant to Part 3 (commencing with section 10200) of Division 2 of Title 1 of the Corporations Code then in effect or organized on or after January 1, 1980, as a public benefit corporation under Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code.* . . . (Emphasis added.)

Thus, the priority set forth above extends specifically to nonprofit charitable corporations which were organized prior to and were in existence on December 31, 1979 under the provisions of section 10200 *et seq.* of the Corporations Code.¹ It also extends specifically to “public benefit corporations” organized on and after January 1, 1980 pursuant to section 5110 *et seq.*, the new Public Benefit Corporation Law. The question

¹ All section references will be to the Corporations Code unless otherwise indicated.

presented for resolution herein is whether the priority set forth above also applies to corporations which were incorporated before December 31, 1979 under the General Nonprofit Corporation Law, section 9000 *et seq.*, and which have been advised by the Secretary of State that they are being classified as public benefit corporations under the new law which provides for this type of corporation. We conclude that it does. We reach this conclusion from an analysis of the background and purpose of California's new Nonprofit Corporation Law (§ 5000 *et seq.*) of which the new Public Benefit Corporation Law (§ 5110 *et seq.*) is a component part.

The detailed background with respect to the new Nonprofit Corporation Law is found in the report of the California Law Revision Commission recommending the adoption of such a law. (See Law Revision Commission's Recommendations Relating to Nonprofit Corporations (Nov. 1976) 13 Cal. Law Revision Report.) For our purposes herein it will suffice to note the general background and approach as explained by the commission, and the subsequent action of the Legislature,

“BACKGROUND”

“The General Nonprofit Corporation Law and special provisions in the Corporations Code and other codes authorize and regulate the incorporation and operation of nonprofit corporations. The existing scheme has developed piecemeal with the result that nonprofit corporations have suffered from undefined and poorly articulated statutes governing their organization and operation. The confusion and ambiguity caused by existing law is particularly unsatisfactory in light of the growing importance of nonprofit corporations in recent years.

For these reasons, the California Law Revision Commission was authorized in 1970 to make a study to determine whether the law relating to nonprofit corporations should be revised. The object of the study was a comprehensive revision of the law relating to nonprofit corporations.

The need for a new nonprofit corporation law has now become acute. The enactment of a new General Corporation Law that took effect on January 1, 1977, and the repeal of the old General Corporation Law, insofar as it applies to corporations governed by the new law, have left nonprofit corporations governed for the most part of a body of law that is otherwise repealed.”

“PROPOSED NONPROFIT CORPORATION LAW”

“General Approach”

“Nonprofit corporations generally are governed by the old General Corporation Law with the exception of a handful of key provisions in the General Nonprofit Corporation Law. Other statutes authorize corporations of a special nature. Under this scheme, nonprofit corporations are governed to a large extent by a law designed primarily for business corporations and which cannot be applied to nonprofit corporations without creating ambiguity and difficult problems of interpretation. In place of this scheme, the Commission recommends the adoption of a complete and self contained nonprofit corporation law. The new statute should follow the new General Corporation Law to the extent practicable but should be tailored to the particular needs and practices of nonprofit corporations.” (Law Revision Rep., pp. 2223–2224.)

Accordingly, the goal of the commission was to propose a new *single* nonprofit corporation law which would *replace* the fragmented, ambiguous and even repealed laws which governed nonprofit corporations. As finally adopted by the Legislature (Stats. 1978, ch. 567) the proposal for a single nonprofit corporation law involved into one with three individual components. Thus, the Legislative Counsel’s Digest stated:

“Existing law provides for the organization of nonprofit corporations, and except as to matters specifically provided for under such law, the General Corporation Law as in effect on December 31, 1976, applies to such corporations.

This bill would enact a new, comprehensive Public Benefit Corporation Law and a separate Mutual Benefit Corporation Law and Religious Corporation Law which would govern such corporations to the exclusion of the General Corporation Law”

The new laws were to become operative on January 1, 1980, except that section 9912 was to become operative January 1, 1979. Section 9912 is one of a number of “transition provisions” (§ 9910 *et seq.*) and as amended by Statutes of 1979, chapter 724, also operative on January 1, 1980, reads as follows:

“(a) Each corporation which is subject (pursuant to the terms of the prior non-profit law or some other specific statutory provision) to the prior

nonprofit law shall, on and after January 1, 1980, be subject to the new public benefit corporation law, and the new mutual benefit corporation law, or the new religious corporation law based on the following:

(1) Any corporation of a type designated by statute as being subject to the new public benefit corporation law, the new mutual benefit corporation law, or the new religious corporation law, shall be subject to such law.

(2) Any corporation organized primarily or exclusively for religious purposes shall be subject to the new religious corporation law.

(3) Any corporation which does not come within paragraphs 1 or 2 of this subdivision but which has received an exemption under Section 2370 *Id* of the Revenue and Taxation Code, shall be subject to the new public benefit corporation law.

(4) Any corporation which does not come within paragraphs 1, 2 or 3 of this subdivision and all of the assets of which are irrevocably dedicated to charitable or public purposes and which according to its articles or bylaws must upon dissolution distribute its assets to a person or persons carrying on a similar purpose of purposes shall be subject to the new public benefit corporation law.

(5) Any corporation which does not come within paragraphs 1, 2, 3 or 4 of this subdivision and which permits distribution of assets to its members upon dissolution shall be subject to the new mutual benefit corporation law.

(6) Any corporation not otherwise described in this subdivision shall be subject to the mutual benefit corporation law

“(b) Prior to January 1, 1980, the Secretary of State’s Office shall send a nonbinding, advisory notice to each corporation covered by subdivision (a) indicating the type of corporation it is, based on the rules set forth in subdivision (a) of this section.

“(c) Notwithstanding subdivision (a), assets held by a mutual benefit corporation in charitable trust shall be administered in compliance with the provisions of the trust and in accordance with any standards applicable pursuant to section 7238.

“(d) A corporation may petition the superior court of the proper county to determine its status as a public benefit, mutual benefit or religious corporation in accordance with subdivision (a). Notice of the proceeding shall be given as the court may direct. Any member may intervene. Notice of the proceeding shall be served on the Attorney General who may intervene. A certified copy of any final judgment in any such proceeding shall be filed with the Secretary of State.

“(e) The Secretary of State may, in carrying out any obligation arising under this article, require any information necessary on existing corporations from the Franchise Tax Board or any other state agency.”²

It is seen that the general purpose and approach of section 9912 was to take nonprofit corporations which were in existence on December 31, 1979, and reclassify them as one of the three types of corporations provided for under the new Nonprofit Corporation Law, section 5000 *et seq.* Under subdivision (b) of section 9912, it was made the duty of the Secretary of State to send advisory notices with respect to such reclassification.

With this background, we return to the question presented for resolution herein, that is, whether corporations which were incorporated before December 31, 1979 under the prior General Nonprofit Corporation Law (§ 9000 *et seq.*) as opposed to the prior law relating to the incorporation of nonprofit corporations for charitable purposes (§ 10200 *et seq.*) are included in the priority set forth in section 39363.5, subdivision (b)(2) of the Education Code.

We will first examine the evolution of the pertinent language of section 39363.5, subdivision (b)(2) of the Education Code, and then proceed to the provisions of the two nonprofit laws just cited and their treatment under the new Nonprofit Corporation

² It is to be noted that with respect to subdivision (a)(3), section 23701d of the Revenue and Taxation Code provides an exemption from taxation for:

“Corporations, community chests of trusts, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involves the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation (except as otherwise provided in Section 23704.5), and which does not participate in, or intervene in (including the publishing or distribution of statements), any political campaign on behalf of any candidate for public office”

Assets must also be irrevocably dedicated to such purposes. The purposes of these organizations could be denominated “public benefit” purposes.

Law. At this juncture, however, we do point out an interesting and significant point. Prior to 1980 most charitable corporations were incorporated pursuant to the *General* Nonprofit Corporation Law (§ 9000 *et seq.*) instead of the special statute provided for in section 10200 *et seq.* (See Law Revision Rep., p. 2281 recommending that this “rarely used” special statute be repealed.) The reason was that the special statutes contained certain restrictions which could be avoided by incorporating under the General Nonprofit Corporation Law. (*Id.*, at pp. 2281–2282.)

Prior to the enactment of the new Nonprofit Corporation Law in 1978, subdivision (b)(2) of section 39363.5 of the Education Code read “and to nonprofit charitable corporations organized pursuant to Part 3 (commencing with section 10200) of Division 2 of Title 1 of the Corporation Code.”

This language was first amended in 1978 to read:

“and to nonprofit charitable corporations existing on December 31, 1979, and organized pursuant to Part 3 (commencing with Section 10200) of Division 2 of Title 1 of the Corporations Code then in effect or organized after January 1, 1980, *for charitable or eleemosynary purposes* under Part 2 (commencing with section 5110) of Division 2 of Title 1 of the Corporations Code.” (Stats. 1978, ch. 1305, § 23, p. 4279 operative January 1, 1980, emphasis added.)

Thereafter in 1980, it was amended to read as it presently reads by substituting the words “as a public benefit corporation” for the words “for charitable or eleemosynary purposes.” (Stats. 1980, ch. 1155, § 31, p. 665; Stats. 1980, ch. 1157, § 1.5, p. 685.)

It is thus seen that the evolution of the language went from an enumeration of qualified purchasers which (1) included virtually *no* charitable corporations, since virtually none existed under section 10200 to (2) an inclusion of at least new charitable corporations,³ and arguably also those incorporated under section 9000 *et seq.* to (3) “public benefit corporations” organized after January 1, 1980 and possibly also those deemed to be so under the provision of section 9912 *et seq.* Accordingly, the Education Code provision evolved into a *more expansive group of eligible corporations*, including not only those incorporated for charitable purposes, but those incorporated *for any public purposes*.

³ We note that a “public benefit corporation” may be incorporated for any public or charitable purposes.” “Public purposes” is not defined in the act.

With this in mind we return to the old law. Section 9000 *et seq.*, the General Nonprofit Corporation Law provided that a nonprofit corporation could be formed for “any lawful purposes . . . such as religious, charitable, social, educational, or cemetery purposes, or for rendering services” so long as there were no distribution of profits or gains to members except upon dissolution (prior § 9200). Distribution of assets at any time would not have been permitted as to a nonprofit corporation formed solely for charitable purposes, or as to assets dedicated to such purposes (prior § 9801).

An examination of section 9912, subdivisions (3), (4) and (5), *supra*, discloses that those nonprofit corporations formed pursuant to section 9000 for charitable or other public purposes (other than religious) and whose assets are irrevocably dedicated to such purpose are to be classified as and be subject to the new “public benefit corporation law.” (See also specific provision re prior nonprofit charitable corporations to be so reclassified in present § 10200.) Those remaining are to be classified under the new “mutual benefit corporation law.” (See also, e.g., §§ 12000 and 12200 relating to Chambers of Commerce and similar organizations and to cooperative corporations to be reclassified under appropriate circumstances as mutual benefit corporations.)

Accordingly, as a general proposition,⁴ The legislative scheme has been to enact a new Nonprofit Corporation Law which is broken down into three subclasses, that is, a new Nonprofit Public Benefit Corporation Law (§ 5110 *et seq.*), a new Nonprofit Mutual Benefit Corporation Law (§ 7110 *et seq.*) and a new Nonprofit Religious Corporations Law (§ 9910) and to reclassify nonprofit corporations formed under prior law as one of these three types according to their purposes and structure.

With this general legislative purpose or scheme in mind we again return to section 39363.5 of the Education Code.

The fundamental rule of statutory construction is to attempt to ascertain the intent of the Legislature and give effect to that intent. (*Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230.) Furthermore, “[i]t is well settled that a specific provision should be construed with reference to “the entire statutory system of which it is a part, in such a way that the various elements of the overall scheme are harmonized.” (*Bowland v. Municipal Court* (1976) 18 Cal. 3d 479, 489.) Furthermore, a statute should not be given a literal interpretation if to do so would be contrary to the manifest intent of the legislation. (*Younger v. Superior Court* (MACK) (1978) 21 Cal. 3d 102, 113.)

⁴ We do not attempt to set forth or analyze the transition sections contained in section 9910 *et seq.* and which in some instances will permit or require corporations to operate under the old law for certain purposes.

It could be urged that nonprofit corporations which were in existence in 1979 cannot be said to have been “organized” on or after January 1, 1980 as public benefit corporations. However, in our view, such a strict or literal reading of the Education Code would be contrary to the manifest intention of the Legislature both in enacting the new Nonprofit Corporation Law and in amending section 39363.5 of the Education Code. To distinguish between public benefit corporations actually incorporated on or after January 1, 1980 and those reclassified as such at such time would be contrary to the general legislative scheme to have a new statutory structure for nonprofit corporations *which will phase out the old structure or old statutory scheme*. Furthermore, to make such a distinction would be contrary to the apparent or manifest purpose of section 39363.5, subdivision (b)(2), as finally amended in 1980, to conform the Education Code provisions to such new statutory structure. Also, we see nothing in those amendments which would indicate any purpose to make such a distinction. Nor can we discern any rational reason for making such a distinction which could require different treatment of nonprofit corporations which have been formed for exactly the same public or charitable purposes merely because of the date of their incorporation. Finally, to say that such a distinction should exist would be even more irrational when one recalls that there were virtually no nonprofit charitable corporations formed under the provisions of section 10200 *et seq.* which would be “grandfathered” under section 39363.5. Accordingly, to construe section 39363.5 to exclude public benefit corporations incorporated before January 1, 1980 under section 9000 *et seq.* would mean that virtually all nonprofit corporations formed for charitable or other public purposes which existed on January 1, 1980 would be excluded from the benefits of the priority provisions. Only those incorporated under the new law could qualify.

To draw a distinction merely because of the date incorporated also gives rise to an additional problem. Since no reasonable basis would appear to exist for such a classification, then to construe section 39363.5 in such manner would present serious problems under the equal protection clause of both the federal and state constitutions.⁵ Where there are two possible constructions of a statute, one constitutional and the other unconstitutional, the constitutional construction should be given to the statute. (*San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal. 3d 937, 942.) Although the work “organized” would usually mean formed or established, it is not unreasonable to say that where nonprofit corporations are reclassified as “public benefit corporations” effective January 1, 1980, they are on such date and thereafter “organized” under the Nonprofit Public Benefit Law in that the provisions of that law will generally govern their organization and administration in the future. As stated in section 9911 subdivision (a) of

⁵ Corporations are “persons” within the meaning of such clauses. (*Grosjean v. American Press Co.* (1936) 297 U.S. 233, 244; *National General Corp. v. Dutch Inns of America, Inc.* (1971) 15 Cal. App. 3d 490, 495, fn. 3.)

the transition provisions:

“(a) The new public benefit corporation law applies to all corporations which are incorporated on or after January 1, 1980, under Part 2 of this division or which are expressly governed by Part 2 pursuant to a particular provision of this division, Division 3 (commencing with Section 12000) or other specific statutory provision.”

As noted, the corporations at issue herein are governed by the new law pursuant to section 9912, *supra*, “of this division.”

For the foregoing reasons it is concluded that the priority to purchase surplus school property provided for in section 39363.5, subdivision (b)(2) of the Education Code does include nonprofit corporations which were incorporated before December 31, 1979 under the old General Nonprofit Corporation Law (§ 9000 *et seq.*) and which have received an advisory notice from the Secretary of State pursuant to section 9912 that they are being reclassified as public benefit corporations under the new Nonprofit Public Benefit Corporation Law.⁶

⁶ We note that Assembly Bill No. 1516 as introduced March 24, 1981 to amend numerous provisions of the new Nonprofit Corporation Law proposes also to amend the pertinent language of section 39363.5, subdivision (b)(2) of the Education Code to clarify the problem considered herein. The proposed language is “and to nonprofit public benefit corporations organized under of subject to Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code.”