

now have the same power and authority in the matter of requiring the construction of partition fences that they would have if the proposed act here in question were enacted.

Respectfully,  
 GILBERT BETTMAN,  
*Attorney General.*

158.

CORPORATION—FOR PROFIT BUT WITH PURPOSE CLAUSE IN ARTICLES INDICATING NOT FOR PROFIT—ARTICLES OF INCORPORATION AMENDABLE.

SYLLABUS:

*When articles of a corporation have been filed in the office of the Secretary of State, purporting to be a corporation for profit, but which contain a purpose clause which clearly sets forth a purpose which is not only evidently that of a corporation not for profit, but which precludes the exercise of any purpose for profit and which corporation has, pursuant to such organization, acted solely as a corporation not for profit, its articles may be amended to eliminate such contradictory statements and set forth that it is, in fact, a corporation not for profit.*

COLUMBUS, OHIO, March 6, 1929.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your letter of recent date which is as follows:

“Some time ago, there was submitted on behalf of The Cincinnati Symphony Orchestra Association Company, an amendment seeking to change the Company from one for profit to one not for profit. The amendment was returned for the reason that in the opinion of the Secretary of State the amendment effected a substantial change of purpose, within the meaning of the General Corporation Act.

The proposed amendment has been resubmitted by attorneys for the orchestra company with a letter, which you will find herewith. The attorneys contend that while nominally a corporation for profit the submitted company is actually a not for profit corporation and that for such reason the amendment should be accepted and filed.

For your information the original of the proposed amendment is enclosed. This, you will please return together with the original letter and two copies of your opinion.”

Attached to your communication is a letter from the counsel for The Cincinnati Symphony Orchestra Association Company, which reads as follows:

“I am returning herewith certificate of amendment to the Articles of Incorporation of The Cincinnati Symphony Orchestra Association Company.

I realize that ordinarily a corporation for profit cannot be turned into a corporation not for profit by amendment. The circumstances in this case, however, are peculiar. I assume that the objection is made on the ground

that such a change is prohibited by Section 8623-14 of the General Code, which says that 'The purpose or purposes for which the corporation was formed shall not be substantially changed.' In this case an examination of the previous articles will show that while technically for profit, the corporation was never actually formed for such a purpose. The purpose clause in the articles themselves says 'Third. Said corporation is formed for the purpose of the promotion of the art of music by the organization, encouragement and support of an orchestra in the City of Cincinnati, Ohio, which shall give concerts in said city and elsewhere, at which artists to be employed by said company will also perform; and to which a reasonable admission fee is to be charged *for the purpose of maintaining said orchestra and defraying the expenses of said orchestra and concerts.*'

You will see that the only purpose of the company is the maintenance of an orchestra, and that this sole source of income is limited to a fee sufficient to pay the cost of maintenance and expense. Furthermore, immediately upon the organization of the company the stockholders by agreement among themselves, which formed one of the terms and conditions upon which subscriptions to its stock were originally made, and upon which said stock was issued, waived their rights to receive any dividends that might be declared and donated same to the corporation to be used in furtherance of the objects for which it was formed. Said agreement provided further that the stock should not be transferred except to persons approved by the directors, and that upon the death of any stockholder the share owned by him should revert to the company and be reissued as the directors should order. This agreement was set forth in full on the face of all certificates of stock ever issued by the company and has continued in effect until the present. Of course, as a practical matter, no profit has ever been made and a very large deficit has been made up in every year of the company's operation.

Under the circumstances we feel that there is no substantial change of purpose, and that the amendment is therefore entirely lawful. The difficulty with forming a new corporation, as you suggest, is that we have a very substantial bequest amounting to nearly one million dollars left to this company as an endowment for the orchestra, the legality of which might be questioned if the old company were dissolved.

After considering all the circumstances, I hope that you will consider that it is proper to file the enclosed amendment."

Section 8623-14, General Code, being part of the General Corporation Act, 112 Ohio Laws, 14, provides for amendments of articles of incorporation and is, in part, as follows:

"A corporation may amend its articles in any respect; provided, however, that only such provisions shall be included or omitted by amendment as it would be lawful to include in or omit from original articles made at the time of making such amendment, but the purpose or purposes for which the corporation was formed shall not be substantially changed unless it is otherwise provided in the articles. \* \* \* "

Unquestionably, under ordinary circumstances, any amendment of the articles of incorporation of a corporation changing such corporation from a corporation for profit to one not for profit would be such a substantial change as would not be permitted under Section 8623-14, General Code, supra.

It appears that the purpose clause of The Cincinnati Symphony Orchestra Association Company, as originally filed, does not set forth a purpose which could possibly be

for profit, as it is expressly provided that the only source of revenue shall be a reasonable admission fee for concerts and there is placed in the articles a limitation upon this admission fee which would prevent such fee being in an amount in excess of actual costs of maintaining the orchestra and defraying expenses. As a matter of fact, every large symphony orchestra of America is maintained at a very substantial loss each year, notwithstanding the fact that the entire season's concerts may be given before capacity houses in each and every performance throughout the year. Of course, this fact would have no bearing on the question you submit from a legal standpoint, if The Cincinnati Symphony Orchestra Association had been properly organized as a corporation for profit, and set forth a purpose contemplating the conduct of activities for profit.

The company in question was, however, organized for a purpose not for profit as set forth in its purpose clause. In substantiation of this intention, all the stockholders agreed to waive their rights to receive dividends and further agreed to donate same to the corporation in the event that profits were made.

Section 8623-14, General Code, *supra*, expressly states that a corporation may amend its articles in any respect with two exceptions: First, that the amendment shall include or omit only such provisions as would be lawful to include in or omit from original articles made at the time of making such amendment. In this case, it would not only have been lawful in view of the purpose clause to incorporate as a corporation not for profit, but such incorporation would have been entirely consistent with the purpose set forth, under the law then existing as well as under the present law. I have considerable doubt as to the propriety of organizing a corporation not for profit, and then, by merely labelling it a corporation for profit, filing such articles as a corporation for profit.

The second limitation set forth in said Section 8623-14, General Code, is that no amendments shall be filed substantially, changing the purpose or purposes for which a corporation was formed unless it is otherwise provided in the articles. It does not appear to me that there is here sought any change in the real purpose for which this corporation was formed. Certainly, there is no change sought as to the purpose of promoting the art of music, by maintaining the Cincinnati Symphony Orchestra, giving concerts, etc.; certainly, there is no change in the purpose for which this corporation was organized with respect to profits, for the reason that it was very apparently organized as a corporation not for profit and so provided in its purpose clause.

In the case of *State ex rel. vs. Kerns, Auditor*, 104 O. S. 550, it was held that an independent agricultural society, which was organized as a corporation for profit but which had, in fact, acted as a corporation not for profit, was entitled to aid from the county auditor under a section of the law providing for such aid being given to similar organizations not for profit. In this case, the court looked to the actual purposes for which the society was organized and activities which had been carried on subsequent to the organization, rather than to the fact that this society had been erroneously organized as a corporation for profit.

I am, therefore, of the opinion that when articles of a corporation have been filed in the office of the Secretary of State, purporting to be a corporation for profit, but which contain a purpose clause which clearly sets forth a purpose which is not only evidently that of a corporation not for profit, but which precludes the exercise of any purpose for profit and which corporation has, pursuant to such organization, acted solely as a corporation not for profit, its articles may be amended to eliminate such contradictory statements and set forth that it is, in fact, a corporation not for profit.

Respectfully,

GILBERT BETTMAN,

Attorney General.