

March 23, 1948

Honorable Yale McFate
Arizona Corporation Commission
Capitol Bldg.
Phoenix, Arizona

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Dear Sir:

We have your request as follows:

McF

"May we have an opinion from your office as to whether Arizona Humane Society, a corporation, is a legally organized corporation and entitled to do business as such in the State of Arizona."

You enclose the file of the corporation including the original articles of incorporation. You also refer to our opinion regarding this company dated July 22, 1946.

In the opinion of this office referred to above, the conclusion reached was expressed, "In view of these plain rules of law, the error in these articles render them unacceptable", for the reason the articles did not state the time and place where the directors were elected.

A re-examination of the file discloses nothing which causes us to recede from the position formerly adopted.

This corporation was attempted to be created under a special statute, Sec. 53-408. In part this section reads:

"Any number of persons associated together for any purpose where pecuniary profit is not their object may in accordance with the rules elect directors The articles of incorporation shall conform to articles of incorporation in general, as near as may be, and in addition set forth the holding of the election for directors, and the time and place where the same was held."

It is to be noted that the word "shall" is used in referring to the substance of the proposed articles of incorporation, which includes the time and place where the election for directors was held.

"Failure to Comply with Particular Requirements.- It would seem, upon principle, that the nature and character of the informality or defect in attempting to organize a corporation is immaterial, provided, notwithstanding its existence, it is apparent that there was an attempt in good faith to create a corporation and that in like good faith there has been an assumption and exercise of corporate functions. It has been held immaterial that the statutory requirement with which there was a failure to comply was mandatory as distinguished from directory."

This question was discussed in the case of Pacific Railway v. Elmore Packing Co. (Ore.) 120 Pac. Pg. 388, where the court said:

"By the weight of authority an association is a de facto corporation within this rule, when the associates have, in good faith, attempted to organize as a corporation under a valid law for a lawful purpose, and have colorably or apparently complied with the requirements of the law, and afterwards assumed to exercise corporate powers under the law. Gilman v. Druse, 111 Wis. 400, 87 N.W. 557.

(4) The failure to comply with the mandatory requirements of the statute in organizing a corporation will prevent the formation of a corporation de jure. This, however, does not necessarily prevent the formation of a de facto corporation."

It is therefore our opinion that, while the Arizona Humane Society is not a de jure corporation, it has attempted to incorporate and has operated as a corporation and therefore has a de facto existence, and is entitled to do business until such time as its charter is revoked in an action brought for that purpose.

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We return herewith the aforementioned file.
Trusting this answers your inquiry, we are

Very truly yours,

EVO De CONCINI
Attorney General

PERRY M. LING
Chief Assistant
Attorney General

PML:lh
Attached