



Staff Report

TO: Board of Harbor Commissioners

FROM: Jim Pruett, General Manager

DATE: September 17, 2024

SUBJECT: Formation of Nonprofit Public Benefit Corporation for Ocean Science Education and Research

Executive Summary:

The Board of Harbor Commissioners of the San Mateo County Harbor District (“Board”) requested information of the process and possibilities of forming a California nonprofit public benefit corporation (“public benefit corporation”) to raise funds for facilities and programs that promote ocean science education and research at Pillar Point Harbor.

This report discusses the authorized purposes of a public benefit corporation, which is the typical type of entity established by cities that desire to create nonprofits to raise additional funds for specific authorized purposes. This report also outlines the steps for creating a public benefit corporation but does not detail the ongoing operational or compliance requirements for maintaining one. Please note that, as used in this report, the terms “Secretary of State” and “Attorney General” refer to the California Secretary of State and the California Attorney General.

Background:

Purpose

Under California law, public benefit corporations may be formed by one or more persons for “public or charitable purposes.”¹ “Person” is defined to include, among other entities, a “government or political subdivision, [and an] agency or instrumentality of a government.”² Courts in California have defined “charitable purpose” broadly to include the following: relief of poverty; advancement of education or religion; promotion of health; governmental or municipal purposes; and other purposes beneficial to the community.³

To be tax exempt, an organization must have one or more exempt purposes, stated in its organizing document. A tax-exempt charitable organization under Internal Revenue Code Section 501(c)(3) must be organized and operated exclusively for one of the

¹ [Cal. Corp. Code §§ 5111, 5120](#).

² [Id. § 5065](#).

³ Lynch v. Spilman, 67 Cal. 2d 251, 261 (1967) (citing Rest. 2d Trusts § 368.). See also [Attorney General's Guide for Charities](#) (June 2021), at 1.

SUBJECT: Formation of Nonprofit Public Benefit Corporation for Ocean Science Education and Research

following exempt purposes: charitable, educational, religious, scientific, literary, preventing cruelty to children or animals, or testing for public safety.⁴

To the extent that the Board wishes to form a public benefit corporation to raise funds for facilities and programs that promote ocean science education and research, this may satisfy an educational purpose under federal and state law. This may also extend into water/ocean safety.

Formation

The following list outlines the steps required to form a public benefit corporation. Please note that the listed steps are not necessarily exhaustive. Additional steps may be required depending on the type and structure of the proposed nonprofit corporation and the specific preferences of the incorporator.

1. Determine corporate name. Check with the Secretary of State if a corporate name is available. A preliminary search of corporation names already of record with the Secretary of State may be made online [here](#). A preliminary check of the availability of that name may be submitted to the Secretary of State, by mail or in person, with a Name Availability Inquiry Letter, available online [here](#). You may reserve, for a period of 60 days, the corporate name with the Secretary of State.⁵ This may be done online [here](#).⁶
2. Select an “Incorporator” and an “Agent for Service of Process.” The Incorporator will sign the Articles of Incorporation (“Articles”)⁷ and may appoint initial directors. The Agent for Service of Process will accept legal documents on behalf of the corporation. Also, select a “principal office location,” which will go in the Articles and numerous other official corporate documents.
3. Draft and file the Articles of Incorporation with the Secretary of State. Please note that filing the Articles with the Secretary of State starts the clock running on: (i) the deadline to file for federal tax exempt status retroactive to the date of incorporation (see item 9 below); and (ii) the deadline for the first statutory filing requirement (see item 6 below).

The Articles must include the information and statements identified in Corporations Code Section 5130, including:

- the name of the corporation;
- this statement: “This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized

⁴ [26 C.F.R. § 1.501\(c\)\(3\)-1\(d\)\(1\)\(i\)](#).

⁵ [Cal. Corp. Code § 5122](#).

⁶ The regulations on entity names may be found at [Cal. Code Regs. tit. 2, §§ 21000–09](#).

⁷ See Articles of Incorporation of a Nonprofit Public Benefit Corporation ([Form ARTS-PB-501\(c\)\(3\)](#)).

SUBJECT: Formation of Nonprofit Public Benefit Corporation for Ocean Science Education and Research

under the Nonprofit Public Benefit Corporation Law for (public or charitable [insert one or both]) purposes”;⁸

- the name and California street address of the corporation’s initial Agent for Service of Process;
- the initial street address of the corporation; and
- the initial mailing address of the corporation, if different from the initial street address.

The Articles of Incorporation may, but are not required to, set forth the following:

- a further statement limiting the purposes or powers of the corporation;⁹
- the names and addresses of the persons appointed to act as initial directors.¹⁰
- any provision, not in conflict with law, for the management of the activities and for the conduct of the affairs of the corporation.¹¹

The original or a copy of the Articles must be kept at the principal office.¹²

4. Draft the Bylaws. The bylaws must include the information specified in Corporations Code Section 5151, unless such information is contained in the Articles. The original or a copy of the bylaws must be kept at the principal office.¹³
5. Take initial board actions. Hold a noticed meeting of the board to adopt the bylaws, formalize the appointment of the directors and appoint the officers (at a minimum, a President, a Chief Financial Officer, and a Secretary). You will want all the officers present at the meeting, especially the Secretary, who will take minutes. Alternatively, the initial board actions may be taken by unanimous written consent of the directors. Agenda items for the first meeting also typically include adopting a conflict-of-interest policy, establishing a bank account, setting the accounting year, planning a budget for the first year, and adopting procedures for safekeeping of minutes, bylaws, and other corporate records.
6. File a Statement of Information (Form SI-100). File this Form with the Secretary of State within 90 days after the filing of the Articles.¹⁴ The form will ask for information including: (1) the names and complete business or residence

⁸ If the purposes include “public” purposes, the Articles shall include a further description of the corporation’s purposes. [Cal. Corp. Code § 5130\(b\)\(1\)](#).

⁹ [Id. § 5131](#).

¹⁰ [Id. § 5132\(c\)\(1\)](#).

¹¹ [Id. § 5132\(c\)\(5\)](#).

¹² [Id. § 5160](#).

¹³ [Id.](#)

¹⁴ [Id. § 6210\(a\)](#). The Statement of Information also must be filed biennially thereafter during the applicable filing period. *Id.*

SUBJECT: Formation of Nonprofit Public Benefit Corporation for Ocean Science Education and Research

addresses of its Chief Executive Officer, Secretary, and Chief Financial Officer; (2) the street address of its principal office in California, if any; and (3) the Agent of Service of Process. Information and instructions regarding the Form SI-100 and its filing are available [here](#).

7. Apply for an Employer Identification Number (EIN). Apply to the IRS for the corporation's EIN (Form SS-4). Information and instructions on how to apply online or by phone are available [here](#).
8. Register with the Attorney General's Registry of Charitable Trusts. Complete the registration within 30 days of initially receiving/accurring assets (Form CT-1). The Attorney General will request that any missing document be submitted later when it becomes available. Registration information and instructions are available [here](#). The Form CT-1 is available [here](#).
9. File applications for tax exemptions with the IRS. To be recognized as exempt from federal income tax, file Form 1023 or Form 1023-EZ with the IRS as appropriate. Instructions for Form 1023-EZ are available [here](#).
10. File applications for tax exemptions with the California Franchise Tax Board (FTB). To be exempt from the California franchise tax, file Form 3500 with the FTB, available [here](#). Form 3500A may be used to obtain recognition of exemption from FTB if the corporation has already been recognized as exempt by the IRS. Form 3500A is available [here](#).

Legal Implications:

The Board must consider certain legal implications when forming a public benefit corporation.

1. Applicability of Public Laws

First, the Board should be aware that public laws such as the Brown Act, the Public Records Act, and the Political Reform Act may apply to a public benefit corporation serving a governmental function, depending on the facts. This means that the Board may not circumvent its statutory obligations by delegating administrative responsibilities to a public benefit corporation.¹⁵

Under the Brown Act, the governing board of a nonprofit corporation may be a "legislative body" subject to open meeting requirements. In part, the Brown Act defines "legislative body" as "[a] board, commission, committee, or other multimember body that governs a private corporation, limited liability company, or other entity that . . . [i]s

¹⁵ See, e.g., [81 Ops. Cal. Atty. Gen. 281](#) (1998).

SUBJECT: Formation of Nonprofit Public Benefit Corporation for Ocean Science Education and Research

created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected governing body”¹⁶

Next, while private corporations such as nonprofits generally are not subject to the Public Records Act, “[a]n entity that is a legislative body of a local agency pursuant to subdivision (c) or (d) of Section 54952” is subject to the Public Records Act.¹⁷ This includes a public benefit corporation “created” by a legislative body under a lawful delegation of authority, as would be the case here.

A public benefit corporation also may be subject to the Political Reform Act, which, among other things, requires covered agencies to adopt a conflict-of-interest policy and covered “public officials” to disclose their economic interests.¹⁸ The Fair Political Practices Commission (FPPC) considers four factors (the “Siegel” test) to determine whether a nonprofit corporation is a “local government agency” and thus subject to the Political Reform Act.¹⁹ Board members of nonprofit corporations that satisfy this test may be required to file statements of economic interest (FPPC Form 700). In certain cases, a public benefit corporation also may be considered a “state actor” under federal law.²⁰

2. Potential Legal Conflicts

The Board also must consider potential legal conflicts. In particular, the Board must determine whether labor agreements or other constraints prevent the Board from shifting responsibilities to a private entity.

¹⁶ [Cal. Gov’t Code § 54952\(c\)](#).

¹⁷ [Cal. Gov’t Code § 7920.510\(j\)](#).

¹⁸ See Cal. Fair Political Practices Comm’n, [About the Political Reform Act](#) (last visited July 26, 2024). The Political Reform Act is codified at [Cal. Gov’t Code §§ 81000–91014](#).

¹⁹ The four *Siegel* factors are:

- (i) Whether the impetus for formation of the corporation originated with a government agency;
- (ii) Whether it is substantially funded by, or its primary source of funds is, a government agency;
- (iii) Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and
- (iv) Whether the [c]orporation is treated as a public entity by other statutory provisions.

In re *Siegel*, [3 FPPC Ops. 62](#) (1977), at 3–4. Nonprofit corporations still may be subject to the Political Reform Act even if they do not meet all four criteria, and thus a fact-specific analysis is required. In re *Carter*, [FPPC Advice Letter A-02-202](#) (2002), at 4.

²⁰ *Gibson v. Hurleyville Fire Co.* No. 1, 1 F. Supp. 2d 329, 331 (S.D.N.Y. 1998).

SUBJECT: Formation of Nonprofit Public Benefit Corporation for Ocean Science Education and Research

Policy Implications:

The Board also may wish to consider certain policy matters when forming the public benefit corporation. These include policy matters related to: (1) mission and resources; (2) revenue sources; and (3) facilities.

1. Mission and Resources

First, the Board may deliberate on policy questions related to the mission and resources of both the Harbor District and the public benefit corporation. These include:

- What kind of resources (e.g., how much staff time) does the Board intend to dedicate to the public benefit corporation?
- Does the mission of the public benefit corporation have the potential to attract a dedicated base of donors and volunteers (who may assume some responsibilities of staff)?
- Can the mission be accomplished more efficiently by a private organization?
- Do any aspects of the mission necessitate Board control over program design or implementation?
- Are there any existing nonprofit organizations in the community capable of accomplishing or contributing to the mission? If so, what is the relationship among the existing nonprofits, the city, and the community?
- Would partnering with an existing nonprofit benefit the mission in a unique way or relieve the Board from costs involved in the formation and management of a new nonprofit organization?

2. Revenue Sources

Next, the Board should consider the policy implications of different revenue sources for the public benefit corporation. These implications may fit into at least three categories: board funding, private donations, and alternative funding.

a. Board Funding

First, if the Board provides funding to the public benefit corporation, it must determine:

- How much funding is reasonable?
- How will the Board accomplish adequate control over and access to the granted funds?

b. Private Donations

SUBJECT: Formation of Nonprofit Public Benefit Corporation for Ocean Science Education and Research

Second, the Board should consider the extent to which private donations may be able to fund the public benefit corporation.²¹ The greater the amount of private donations, the more the Board may expand ocean science education and research without relying on public funds. A public benefit corporation also may be adept at bringing in and sustaining private donations and volunteers.

c. Alternative Funding

Third, the Board should consider whether the project qualifies for alternative funding, such as tax-exempt revenue bonds, business improvement district (BID) assessments, or grants.

3. Facilities

The Board also may wish to consider certain approaches to the construction of facilities for ocean science education and research, including lease-backs. In one scenario, a lease-back would allow the Board to lease undeveloped land to a developer, who would be responsible for constructing a public facility, which would be leased back to a Board-created public benefit corporation, upon completion of the facility.

In *Los Angeles County v. Nesvig*,²² the California Court of Appeal analyzed just such an arrangement where the County ground-leased property to a developer as part of a public construction project. The developer constructed a facility and then leased it back to the County for 30 years, with a concurrent sublease allowing a nonprofit to manage and operate the facility on behalf of the County. The court found the arrangement permissible in that it allowed the Board to avoid the debt limitation provisions of the California Constitution that require two-thirds voter approval.²³

²¹ Charitable donations to a governmental unit that are made for a public purpose are tax-deductible under the Internal Revenue Code at [26 U.S.C. § 170\(c\)\(1\)](#).

²² 231 Cal. App. 2d 603 (1965).

²³ *Id.* at 613; see also [70 Ops. Cal. Atty. Gen. 57](#) (1987), n. 2.