

A Guide to Sales and Other Dispositions of
Assets Pursuant to Not-for-Profit Corporation Law
§§ 510-511 and Religious Corporations Law § 12



NEW YORK STATE OFFICE

of the

ATTORNEY
GENERAL

Charities Bureau

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**A GUIDE TO SALES AND OTHER DISPOSITIONS OF ASSETS
PURSUANT TO NOT-FOR-PROFIT CORPORATION LAW §§ 510 - 511
AND RELIGIOUS CORPORATIONS LAW § 12**

Introduction

This booklet has been prepared by New York State Attorney General Eric T. Schneiderman's Charities Bureau to assist not-for-profit corporations and religious corporations seeking court approval for sales and other dispositions of assets pursuant to Not-for-Profit Corporation Law ("N-PCL") §§ 510-511 and Religious Corporations Law ("RCL") § 12.

The procedures discussed in this booklet are not intended to serve as a substitute for legal advice from an attorney, but are designed as a guide to help organizations and their attorneys understand the statutory requirements and the procedures used by the Attorney General to review such transactions.

The information contained in this booklet is general in nature. Each transaction is governed by its own facts and is reviewed by the Attorney General on a case-by-case basis. You are encouraged to discuss the proposed transaction in advance with the Attorney General's Charities Bureau.

What Transactions Are Covered

Not-for-Profit Corporations:

The sale, lease, exchange or other disposition of all or substantially all of the assets of a Type B¹ or Type C not-for-profit corporation requires court approval in accordance with the procedures set forth in N-PCL §§ 510-511. (N-PCL § 510(a)(3)). Type D not-for-profit corporations are treated as Type B corporations for purposes of this statute. (N-PCL § 201(c)).

The assets may be real and/or personal property, including intangible property such as bonds, stocks or certificates of deposit.

There is no fixed numerical or arithmetic measure of "all or substantially all." Court approval is required where the asset to be sold represents a large proportion of the corporation's

¹ New York not-for-profit corporations are designated as Type A, B, C or D, depending on the corporation's purposes. Type A includes corporations formed for civic, patriotic, political, social, fraternal, athletic, agricultural and similar purposes; it also includes professional, commercial, industrial or trade associations. Type B includes corporations formed for charitable, educational, religious, scientific, literary or cultural purposes and societies for the prevention of cruelty to children or animals. Type C includes corporations formed for any lawful business purpose to achieve a lawful public or quasi-public objective. Type D corporations may be formed pursuant to "any other law of this state for any business or non-business, or pecuniary or non-pecuniary, purpose or purposes specified by such other law, whether such purpose or purposes are also within types A, B, C above or otherwise." N-PCL § 201(b).

total assets or where the sale of the asset may affect the ability of the corporation to carry out its purposes regardless of the percentage of the corporation's total assets represented by the sale.

Exceptions to Covered Transactions:

Type A not-for-profit corporations

Mortgages (unless a component of the transaction would otherwise come within N-PCL §§ 510-511)

Religious Corporations:

The sale, mortgage or lease for a term exceeding five years of any real property of a religious corporation requires court approval pursuant to N-PCL § 511. (RCL § 12(1)).

Court approval is required even if the religious corporation's real property does not constitute all or substantially all of its assets.

Exceptions to Covered Transactions:

Purchase money mortgages or purchase money security agreements (RCL § 12(1))

Real property acquired as a result of a mortgage foreclosure proceeding or by a deed in lieu of the foreclosure of a mortgage owned by a religious corporation (RCL § 12(10))

The following religious corporations require court approval but do not need to give notice to the Attorney General: Protestant Episcopal Church, Roman Catholic Church, Ruthenian Catholic Church of the Greek Rite, African Methodist Episcopal Zion Church, Presbyterian Church of the General Assembly of the Presbyterian Church U.S.A., United Methodist Church, Reformed Church of the General Synod of the Reformed Church in America. (RCL §§ 2-b(1)(d-1) and 12(2)-(5-c)).

Role of the Attorney General

The N-PCL requires that, upon filing the petition with the court, the Attorney General be given a minimum of 15 days notice before a hearing on the application. N-PCL § 511(b). The procedure preferred by the Charities Bureau and most courts, however, is to submit the petition and proposed order to the Attorney General for review in advance of filing with the court. This enables the Attorney General to review the papers to ensure that all statutory requirements are met, that all necessary documents are included as exhibits, and that any concerns of the Attorney General are resolved before submission to the court.

If, after such a review, the Attorney General has no objection to the relief requested, we will provide written confirmation, usually by means of an endorsement on the proposed order, and will waive statutory notice. The petition can then usually be submitted to the court ex parte without the need for the 15 day waiting period, and without the need for a return date or hearing, depending on the practice of the local court.

Statutory Standard

Under the two-prong test of N-PCL § 511, the court must find 1) that the consideration and the terms of the transaction are fair and reasonable to the corporation and 2) that the purposes of the corporation or the interests of its members will be promoted. (N-PCL § 511(d)) by the transaction.

These statutory standards and other statutory requirements are discussed more fully below.

Board Approval

The transaction must be approved by the corporation's board. A vote of at least 2/3 of the corporation's entire board is required unless the board has 21 or more directors, in which case a vote of a majority of the entire board is sufficient. (N-PCL §§ 509 and 510(a)(2)). A corporation's certificate of incorporation or by-laws may provide for greater quorum or voting requirements. The resolution must specify the terms and conditions of the proposed transaction, including the consideration to be received by the corporation and the eventual disposition to be made of such consideration, and a statement of whether or not dissolution of the corporation is contemplated.

If the transaction involves a sale or transfer to one or more of the corporation's directors or officers, or to another corporation in which one or more of its directors or officers are directors or officers or have directly or indirectly a substantial financial interest, the requirements of N-PCL § 715 must be met. The material facts must be disclosed to the board, and the transaction must be authorized by a vote of a disinterested majority of the board. The Attorney General will require similar disclosures for transactions involving family members of directors, officers, employees or other insiders.

Membership Approval

If a corporation has voting members, the transaction must also be approved by the corporation's membership. The procedure for the membership vote is set forth in N-PCL § 510(a)(1).

First, the board must adopt a resolution recommending the transaction. The resolution must specify the terms and conditions of the proposed transaction, including the consideration to be received by the corporation and the eventual disposition to be made of such consideration, and a statement of whether or not dissolution of the corporation is contemplated.

The board resolution must then be submitted to a vote at an annual or special meeting of members entitled to vote on it. Notice of the meeting must be given to each member and each holder of subvention certificates or bonds of the corporation, whether or not entitled to vote. The members may approve the proposed transaction according to the terms of the board resolution, or authorize the board to modify the terms and conditions of the proposed transaction, by a 2/3 vote. The number of affirmative votes must be at least equal to the quorum. (N-PCL § 613(c)).

The quorum for a membership meeting is a majority (N-PCL § 608(a)) unless the corporation's certificate of incorporation or by-laws provides for a greater or lesser quorum requirement. (N-PCL §§ 608(b) and 615). If the certificate of incorporation or by-laws provide for a lesser quorum, the quorum may be not less than the number entitled to cast one hundred votes or one-tenth of the total number of votes entitled to be cast, whichever is lesser. (N-PCL § 608(b)). For religious corporations, where the RCL provides a different quorum, the RCL governs. In the case of some religious corporations, the quorum is at least six persons. (See, e.g., RCL §§ 134, 164 and 195). The quorum requirement for other religious denominations may be different; consult the applicable article of the RCL.

Voting by proxy is permitted for members of not-for-profit corporations under N-PCL § 609 and for members of Jewish religious corporations under RCL § 207.

If the transaction involves a sale or transfer directly or indirectly to one or more of the corporation's directors or officers or to another corporation in which one or more of its directors or officers are directors or officers, or directly or indirectly have a substantial financial interest, the requirements of N-PCL § 715(a)(2) must be met. The material facts must be disclosed to the members and the transaction must be authorized by a membership vote. The Attorney General will require similar disclosures for transactions involving family members of directors, officers, employees or other insiders.

Fair and Reasonable Consideration: Appraisals

In order to determine whether or not the consideration is fair and reasonable, there must be an appraisal of the asset to be sold. Although the statute does not explicitly require an appraisal, case law establishes that fair market value can be determined by means of an appraisal, and the court, and the Attorney General, will reject the petition if it is not supported by an appraisal.

The appraisal should be full and rendered by an appraiser who is completely independent of both buyer and seller. The appraisal cannot be provided by a broker involved in the sale of the property. The Attorney General may require that the appraisal be performed by a board certified appraiser, especially if the property to be sold is commercial real property or a business. If the asset is real property, the appraisal should be based on at least three comparable sales, unless a different valuation method is more appropriate.

If the transaction is not an arm's length transaction (i.e., if it involves a sale or transfer to a director, officer, employee or other person with some connection to the petitioner corporation), the Attorney General may require two appraisals.

An appraisal is not necessary where a solvent religious corporation seeks to convey real property to another religious corporation or to a membership, educational, municipal or not-for-profit corporation for nominal consideration. (RCL § 12(8)).

An appraisal is not necessary for religious corporation mortgages from institutional lenders.

Use of Proceeds

The use of the proceeds must be consistent with the corporation's purposes. Sale proceeds cannot be used for the benefit of a director, officer, employee, member or other interested party.

Where the property to be sold is a religious corporation's house of worship or a not-for-profit corporation's main premises and as of the date of the sale the corporation has not yet entered into a contract to purchase or lease new premises, the Attorney General will require that the sale proceeds be placed in escrow to ensure that funds will be available to obtain new premises so that the corporation can continue to carry out its corporate purposes.

Option Contracts

Option contracts require court approval at the time the option is exercised. The Charities Bureau discourages the use of option or other contingent contracts by not-for-profit and religious corporations, especially if they may be exercised over a long term.

Requirements for the Verified Petition

The verified petition must set forth the following required statements and information:

The name of the corporation. (N-PLC § 511(a)(1)). The name should appear exactly as it does in the certificate of incorporation.

The law under or by which it was incorporated (i.e., Not-for-Profit Corporation Law, Religious Corporations Law, an act of the legislature, etc.). (N-PCL § 511(a)(1)). A copy of the certificate of incorporation and all amendments thereto, and a certified copy of the corporation's complete by-laws, should be attached as an exhibit.

The names of its directors and principal officers, and their places of residence. (N-PCL § 511(a)(2)).

The activities of the corporation. (N-PCL § 511(a)(3)). This should include a description of the purposes for which it was formed and its activities.

A description of the assets to be sold, leased, exchanged, or otherwise disposed of (or mortgaged if a religious corporation), or a statement that it is proposed to sell,

lease, exchange or otherwise dispose of (or mortgage if a religious corporation) all or substantially all of the corporate assets more fully described in a schedule attached to the petition. (N-PCL § 511(a)(4)). A copy of the contract, lease, proposed deed or mortgage commitment should be attached as an exhibit. If the contract has been assigned, or is to be assigned at or prior to closing, a copy of the assignment agreement should also be attached as an exhibit.

A statement of the fair value of such assets. (N-PCL § 511(a)(4)). A copy of the appraisal should be attached as an exhibit.

A statement of the amount of the corporation's debts and liabilities and how secured. (N-PCL § 511(a)(4)). In addition, a copy of the most recent annual financial report (i.e., IRS Form 990 or 990-PF) or audited financial statements should be attached as an exhibit. If the corporation does not file a 990 or 990-PF and does not have annual financial reports, it should prepare a schedule certified by its Treasurer of all assets, liabilities, income and expenses of the corporation and attach it as an exhibit. In certain circumstances, the Attorney General may decide that financial statements certified by an independent accountant are required.

The consideration to be received by the corporation. (N-PCL § 511(a)(5)). If the consideration is less than the appraised value of the assets, include a documented explanation.

The disposition to be made of the proceeds. (N-PCL § 511(a)(5)). This should include a full description of the proposed use of the proceeds. If the corporation is purchasing or leasing new premises, a copy of the contract or lease should be attached as an exhibit.

A statement as to whether or not the dissolution of the corporation is contemplated. (N-PCL § 511(a)(5)). In certain circumstances, the Attorney General will require that the proceeds be placed in escrow if the corporation plans to dissolve. In addition, if the corporation plans to dissolve after the sale, the legal doctrine of *quasi cy pres* requires that the net proceeds be distributed under the plan of dissolution to organizations engaged in substantially similar activities. (N-PCL § 1005(a)(3)(A)).

A statement that the consideration and the terms of the sale, lease exchange or other disposition (or mortgage if a religious corporation) of the assets of the corporation are fair and reasonable to the corporation, and a concise statement of the reasons therefor. (N-PCL § 511(a)(6)).

A statement that the purposes of the corporation or the interests of its members will be promoted by the transaction, and a concise statement of the reasons therefor. (N-PCL § 511(a)(6)).

A statement that the transaction has been recommended or authorized by vote of the directors in accordance with law, at a meeting duly called and held, as shown in a schedule annexed to the petition setting forth a copy of the resolution granting such authority with a statement of the vote thereon. (N-PCL § 511(a)(7)). Include the total number of directors, the number of directors present at the meeting, the vote pro and con, and what constitutes a quorum. The board resolution should be attached as an exhibit. (See also Board Approval above for voting requirements).

Where the consent of the members is required by law, a statement that such consent has been given, as shown in a schedule annexed to the petition setting forth a copy of such consent, if in writing, or of a resolution giving such consent, adopted at a meeting of members duly called and held, with a statement of the vote thereon. (N-PCL § 511(a)(8)). Include the total number of members, the number of members present at the meeting, the vote pro and con, and what constitutes a quorum. The membership resolution should be attached as an exhibit. (See also Membership Approval above for voting procedures and requirements and for required contents of the resolution).

A prayer for leave to sell, lease, exchange or otherwise dispose of all or substantially all the assets of the corporation as set forth in the petition, or in the case of a religious corporation to sell, mortgage or lease real property. (N-PCL § 511(a)(9)).

The caption should include the name of the corporation as it appears in the certificate of incorporation. The caption should also set forth what the application is for and the applicable statute. Do not list the Attorney General as a respondent.

The petition must be verified.

Venue

The petition must be filed in the supreme court of the judicial district or county court of the county where the corporation has its office or principal place of carrying out the purposes for which it was formed, even if the asset to be sold is located elsewhere. (N-PCL §§ 510(a)(3) and 511(a)).

Notice to Interested Persons

The court in its discretion may direct that notice of the application be given to any interested person, such as a member, officer or creditor of the corporation. (N-PCL § 511(b)). The notice shall specify the time and place, fixed by the court, for a hearing upon the application. Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted.

In certain circumstances, the Attorney General may ask the court to give notice to interested parties (including tenants or other occupants of the premises) and/or hold an

evidentiary hearing. For example, if there is a membership dispute, a dispute as to who constitutes a duly authorized board or a question about the adequacy of the consideration, the Attorney General may ask the court to hold an evidentiary hearing to resolve the dispute.

Notice to Creditors

If the corporation is insolvent or if its assets are insufficient to liquidate its debts and liabilities in full, all creditors of the corporation must be served with a notice of the time and place of the hearing. (N-PCL § 511(c)). In such circumstances, notice to creditors is required by statute, and the petition cannot be approved by the court *ex parte*.

Requirements for the Order

A copy of the proposed order should be submitted to the Attorney General with the verified petition.

The order should set forth the terms of the transaction and the consideration. (N-PCL § 511(d)). For sales, include the sale price, the purchaser and the address of the property. For leases, include the amount of rent, the term of the lease, the lessee and the address of the property. For mortgages, include the amount of the loan, the interest rate, the length of the mortgage and the address of the property.

The order must also set forth the use of the proceeds to be received by the corporation. (N-PCL § 511(d)). If all or part of the proceeds are to be placed in escrow, this shall be set forth in the order. Funds in escrow may only be released by further order of the court on notice to the Attorney General.

In addition, the Attorney General requires that the order contain the following statements: that a copy of the signed court order shall be served on the Attorney General, and that the Attorney General shall receive written notice that the transaction has been completed (i.e., upon closing), if the transaction has been abandoned, or if it is still pending 90 days after court approval.

Attorney General Registration

If the corporation is required to register with the Attorney General pursuant to Executive Law Article 7-A or Estates, Powers and Trusts Law § 8-1.4, the Attorney General will check to ensure that the corporation is registered and that its annual financial reports are up to date before completing the review of the transaction.

If the corporation is not registered, or if its reports are delinquent, it will be required to register and file all required annual financial reports before the Attorney General's review can be completed.

If the purchaser is required to register, its registration and reports must also be current before the Attorney General's review can be completed.

Certain corporations, such as religious corporations, are exempt from registration.

Government Agency Approvals

If other government agency approvals are required for the proposed transaction (i.e., NYS Department of Health, Public Health Council, Dormitory Authority, HUD, etc.), the Attorney General will require that such approvals be obtained before the Attorney General review is completed. A copy of each government agency approval should be attached as an exhibit.

Conclusion

If you have any questions about the information contained in this booklet or about the procedures for obtaining Attorney General review and court approval of a transaction you may contact the Attorney General's Charities Bureau or any of the Attorney General's regional offices for assistance. A current list of regional office addresses and telephone numbers is included with this booklet.

Following is a list of the offices of the Attorney General and the counties covered by each:

ALBANY

New York State Attorney General
Charities Bureau
The Capitol
Albany, NY 12224-0341
518-473-5049
Counties: Albany, Columbia, Fulton, Green, Hamilton, Montgomery, Rensselaer, Saratoga, Schenectady, Schoharie, Warren and Washington [note: Sullivan and Ulster for trusts and estates matters only]

BINGHAMTON

New York State Attorney General
Binghamton Regional Office
44 Hawley Street, 17th Floor
Binghamton, NY 13901-4433
607-721-8771
Counties: Broome, Chemung, Chenango, Delaware, Otsego, Schuyler, Tioga and Tompkins

BUFFALO

New York State Attorney General
Buffalo Regional Office
Main Place Tower - Suite 300A
Buffalo, NY 14202
716-853-8400
Counties: Allegheny, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans and Wyoming

NASSAU [not for trusts & estates matters]

New York State Attorney General
Nassau Regional Office
200 Old Country Road, Suite 240
Mineola, NY 11501-4241
516-248-3302
Counties: Nassau [note: trusts and estates matters are handled by NYC]

NEW YORK CITY

New York State Attorney General
Charities Bureau
Trusts & Estates Section
120 Broadway, 3rd Floor
New York, NY 10271-0332
212-416-8401
Counties: Bronx, Kings, New York, Queens and Richmond [note: NYC also handles Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester – trusts and estates matters only]

PLATTSBURGH

New York State Attorney General
Plattsburgh Regional Office
43 Durkee Street, Suite 700
Plattsburgh, NY 12901-2958
518-562-3288
Counties: Clinton, Essex and Franklin

POUGHKEEPSIE [not for trusts & estates matters]

New York State Attorney General
Poughkeepsie Regional Office
One Civic Center Plaza - Suite 401
Poughkeepsie, NY 12601-3157
845-485-3900
Counties: Dutchess, Orange, Sullivan and Ulster [note: Dutchess and Orange County trusts and estates matters are handled by NYC; Sullivan and Ulster County trusts and estates matters are handled by Albany]

ROCHESTER

New York State Attorney General
Rochester Regional Office
144 Exchange Boulevard
Rochester, NY 14614-2176
716-546-7430
Counties: Livingston, Monroe, Ontario, Seneca, Steuben, Wayne and Yates

SUFFOLK [not for trusts & estates matters]

New York State Attorney General
Suffolk Regional Office
300 Motor Parkway
Hauppauge, NY 11788-5127
631-231-2424
Counties: Suffolk [note: trusts and estates matters are handled by NYC]

SYRACUSE

New York State Attorney General
Syracuse Regional Office
615 Erie Blvd. West, Suite 102
Syracuse, NY 13204
315-448-4800
Counties: Cayuga, Cortland, Madison, Onondaga and Oswego

UTICA

New York State Attorney General
Utica Regional Office
207 Genesee Street, Room 508
Utica, NY 13501-2812
315-793-2225
Counties: Herkimer and Oneida

WATERTOWN

New York State Attorney General
Watertown Regional Office
Dulles State Office Building
317 Washington Street
Watertown, NY 13601-3744
315-785-2444
Counties: Jefferson, Lewis and St. Lawrence

WESTCHESTER [not for trusts & estates matters]

New York State Attorney General
Westchester Regional Office
101 East Post Road
White Plains, NY 10601-5008
914-422-8755
Counties: Putnam, Rockland and Westchester [note: trusts and estates matters are handled by NYC]