

RELIGION LAW

Expert Analysis

The Wisdom of Requiring Judicial or Attorney General Approval for Real Property Sales or Transfers

By Barry Black and Christopher Byrnes

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If you are a private party buying or selling a house in New York State, you do not typically require a civil court or a state attorney general to sign off on the sale before you consummate it.

Generally, a property is yours to buy, sell, or rent out to another as you see fit. But New York law treats property owned by a church, mosque, synagogue, temple, or any other house of worship differently.

Section 12(1) of the New York Religious Corporations Law (RCL) prohibits a religious corporation from “sell[ing], mortgag[ing], or



By
Barry
Black



And
Christopher
Byrnes

leas[ing] for a term exceeding five years any of its real property without applying for and obtaining leave of the court or the attorney general therefore pursuant” to certain applicable provisions of the New York Not-for-Profit Corporation Law (NPCL). Why does the law treat such transactions differently?

IRC 501(c)(3) Concerns

To qualify as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code, an organization

must be “organized and operated exclusively for exempt purposes,” such as “religious, charitable, scientific, testing for public safety, literary, or educational purposes,” among others.

Additionally, to maintain tax-exempt status under the same

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section of the Internal Revenue Code, an organization cannot confer a substantial private benefit on anyone, and no part of the net

BARRY BLACK, the Religion Law columnist for the New York Law Journal, is a partner in the religion law firm Nelson Madden Black. CHRISTOPHER BYRNES, a partner at the firm, formerly served as General Counsel of The Heritage Foundation.

earnings of the organization may inure to the benefit of an organizational insider (such as persons having a personal and private interest in the activities of the organization). Violations of these limitations could result in loss of tax-exempt status.

Guidance from the Internal Revenue Service includes some examples of who exactly are insiders for a religious nonprofit organization and what kinds of transactions could be problematic:

Insiders could include the minister, church board members, officers, and in certain circumstances, employees. Examples of prohibited inurement include the payment of dividends, the payment of unreasonable compensation to insiders, and transferring property to insiders for less than fair market value. Internal Revenue Service, *Tax Guide for Churches and Religious Organizations* at 9 (Publication 1828) (2015).

The Internal Revenue Service is therefore uniquely concerned that a religious organization uses its assets and resources, including its real property, primarily for its

tax-exempt purposes and not to benefit private parties.

When federal or state authorities confer tax exemptions on a religious corporation's assets—whether it is exemption from income tax or real property tax—it is because the authorities wish to incentivize the tax-exempt activities themselves and to encourage the beneficiary of the exemptions to dedicate the use of the property to tax-exempt purposes.

Concerns for Church Members

But more than IRS prohibitions are at play here. As New York courts have made clear, separate but related concerns undergird the requirements of RCL §12(1):

The purpose of this requirement is to protect the members of the religious corporation, the real parties in interest, from loss through unwise bargains and from perversion of the use of the property.

Church of God v. Fourth Church of Christ, Scientist, 76 A.D.2d 712, 716 (2d Dep't 1980).

In the *Church of God* case, the membership of the church selling certain property ("seller church") was in decline, and the church decided to sell its

house of worship and move to a smaller property that it also owned. A church in Prospect Plaza (buyer church) offered to buy the property.

Members of the seller church voted unanimously to approve the sale in conformance with the buyer church's offer. Attorneys for the seller church drew up a contract, and the buyer church returned it signed and with a deposit. Neither party sought prior approval from the court for the transaction.

At around the same time, the seller church received an offer from a sister church to merge congregations and separately received an all-cash offer for the property from a different prospective buyer.

After the signed contract from the buyer church had come back, the members of the seller church voted to consolidate with the sister church and to rescind the acceptance of the buyer church's offer. The seller church never signed the contract that the buyer church had returned.

The buyer church brought an action for breach of contract and sought specific performance from the seller church. The trial court awarded the buyer church money damages, and both par-

ties appealed to the Second Department.

After finding there was a valid contract between the buyer church and the seller church, the Second Department declined to compel the sale of the property to the buyer church because the sale did not comply with the requirements of RCL §12

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that the transaction serve the purposes of the seller church or the interest of its members:

It clearly appears that conveyance of defendant's church edifice would now be highly detrimental to the purpose of the corporation and the interests of its members.

Sale is now unanimously opposed by defendant's membership because the congregation has merged with another congregation that sold its church as part of the consolidation. Specific performance of this contract would leave the combined congregation of two churches without a house of worship.

Church of God, 76 A.D.2d at 717. The Court of Appeals affirmed this determination, holding that the Second Department's "factual finding that the contemplated sale would not promote the purposes of the respondent religious corporation or the interests of the members of its congregation is supported by the weight of the evidence." *Church of God v. Fourth Church of Christ, Scientist*, 54 N.Y.2d 742, 744 (1981).

The parties in that matter would have certainly been better off had they in the first instance sought court approval as required by RCL 12. The process of obtaining judicial or attorney general approval would have readily made it clear whether the sale would hurt or benefit the seller church. In other words, this is one statutory requirement that does what it is supposed to do.

Applying for and Obtaining Leave of the Court or the Attorney General

A house of worship that wishes to sell, convey, or transfer its real property must submit a verified petition either to the court where the corporation has its office or principal place of worship (NPCL §511) or to the New

York Attorney General (NPCL §511-a) seeking leave for the transaction.

As a substantive matter, the petition must set forth, among other things:

- The consideration that the religious corporation will receive for the sale or conveyance and how it proposes to use the consideration;
- That the consideration and the terms of the sale, lease, exchange, or other disposition of the assets of the corporation are fair and reasonable to the corporation; and
- That the consideration and the terms of the sale, lease, exchange, or other disposition of the assets will promote the purposes of the corporation or the interests of its members, and a concise statement of the reasons why.

The petitioning church must provide a comprehensive statement that clearly explains how the proceeds will be used in furtherance of the corporation's religious and charitable purposes. For example, the corporate resolutions approving the transaction should reflect consideration of the programs, activities, initiatives,

and other needs of the corporation for which the proceeds are to be used.

If a portion of the proceeds will be used to pay specific liabilities of the corporation, such as mortgage loans or other liens, or judgments, or repayments of loans from board members, officers, members of the corporation, or other related parties, such use of the proceeds should also be detailed in the corporate resolution.

The religious corporation must secure an independent appraisal of the real property that is the subject of the transaction. Either the corporation or the corporation's attorney should retain the independent appraiser. The corporation should pay the appraiser's fee. An appraisal prepared for the purchaser or for the purchaser's attorney is not acceptable.

The Court of Appeals has provided at least one example of what does *not* suffice for a showing of best interest:

where a property transfer was at least in part “plainly designed to advance one side of [a] factional dispute [within a congregation],” and “no showing of best interest was made.” See Barry Black and Jonathan Robert Nelson, “Congregations Transferring Real Estate: When Is Court Approval Needed?” *New York Law Journal* (Mar. 1, 2018).

Aside from these substantive showings, New York law also requires the petitioner to show that the transaction was either recommended or authorized by vote of the directors of the corporation's governing board in accordance with law, at a meeting duly called and held.

The petitioner must also show that the members of the corporation consented to the transaction by way of a resolution adopted at a meeting of members duly called and held, with a statement of the vote thereon. All resolutions must include the substantive

showings mentioned above.

Depending on the form of church government, the sale or transfer may involve both the church and the higher religious body to which it belongs, if any. If the corporation's denomination requires the consent or approval of a governing or advisory body, such as a consistory, synod, or bishop's council, the petition must affirm that such consent was provided, and a copy of the consent must be attached as an exhibit.

Conclusion

In church, worshippers and their clergy understand that they are in God's house. But in New York, even God's house may not be sold or transferred without the approval of a judge or attorney general. As a long line of case law has shown, this requirement often proves beneficial for a congregation and its members. Thus, the law is both smart and practical. Perhaps even divine.