Buying and Selling Not-for-Profit Real Estate in New York: Approval Requirements, Authority and Tax Structuring

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Real estate transactions involving not-for-profit organizations ("NFPs") in New York are subject to statutory approval requirements that generally do not apply to traditional commercial transactions. Depending on the nature of the organization and the assets involved, a proposed sale, acquisition, mortgage, or long-term lease may require approval from the New York Attorney General, the courts, or both.

These transactions are governed primarily by the New York Not-for-Profit Corporation Law ("N-PCL") §§ 510–511, the Religious Corporations Law ("RCL") § 12, and the supervisory authority of the New York Attorney General's Charities Bureau. For charitable entities, dispositions involving "all or substantially all" assets typically require Attorney General or court approval, and the review is substantive, focusing on valuation, process, and consistency with the organization's charitable mission.

On the acquisition side, transfers involving qualifying NFPs may benefit from exemptions from New York State and New York City transfer taxes and may be structured as part-sale/part-gift ("bargain sale") transactions. Failure to comply with applicable authority and approval requirements can create enforceability concerns and, in some circumstances, render a transaction void or voidable.

I. Statutory Framework

A. Core Statutes

- N-PCL § 510 – Authorization of dispositions of all or substantially all assets
- N-PCL § 511 – Court approval of such dispositions
- N-PCL § 511-a – Attorney General administrative approval process
- RCL § 12 – Approval requirements for religious corporations

B. Regulatory Oversight

The Charities Bureau of the New York Attorney General exercises supervisory authority over charitable NFPs and reviews proposed transactions to ensure:

- Fairness of consideration; and
- Consistency with the organization's charitable purposes.

II. When Is Approval Required for a Not-for-Profit Real Estate Transaction?

A. Charitable vs. Non-Charitable NFPs

- Charitable corporations (N-PCL Type B or D): Subject to approval requirements under §§ 510–511.
- Non-charitable corporations (Type A): Generally exempt from Attorney General approval for asset dispositions.

B. "All or Substantially All Assets" (N-PCL § 510)

Approval is required where the transaction involves all or substantially all of the NFP's assets. This is a fact-intensive determination guided by:

- Quantitative analysis (percentage of assets or revenue).
- Qualitative analysis (importance to mission).

In practice, a not-for-profit organization whose primary asset is a single parcel of real estate will often meet this threshold, making early evaluation of approval requirements an important part of transaction planning.

C. Religious Corporations (RCL § 12)

Religious corporations must obtain approval for:

- Any sale, mortgage, or lease exceeding five years.
- Approval is required regardless of whether the asset constitutes "substantially all" assets.

Additional ecclesiastical approvals may also be required.

III. Internal Corporate Authorization

A. Board Approval (N-PCL § 510)

- Typically requires two-thirds vote of the entire board, unless otherwise permitted by statute or certificate of incorporation.
- Must be properly noticed and documented.

B. Member Approval

- Required where the corporation has members with voting rights.
- Approval thresholds governed by statute and governing documents.

C. Fiduciary Standards

Directors must satisfy fiduciary duties of care and loyalty, including:

- Demonstrating an informed decision-making process
- Avoiding conflicts of interest (see N-PCL § 715)
- Ensuring no impermissible private inurement or private benefit

Failure to comply with these requirements can undermine approval and expose directors to liability.

IV. Attorney General and Court Approval Pathways

A. Attorney General Approval (N-PCL § 511-a)

An administrative approval process is available where:

- The NFP is solvent
- No significant controversy is anticipated

For many transactions, the administrative process can provide a more efficient approval pathway than court proceedings, provided the submission materials adequately address valuation, process, and the proposed use of proceeds.

Submission Requirements:

- Verified petition (mirroring § 511 requirements)
- Contract of sale
- Independent appraisal (effectively required under Charities Bureau guidance)
- Description of marketing efforts
- Board and member resolutions
- Proposed use of proceeds

B. Court Approval (N-PCL § 511)

Judicial approval is required where:

- The Attorney General declines administrative approval.
- Insolvency or creditor issues are present.
- The transaction raises complexity or public interest concerns.

Standard of Review:

The court must determine that:

1. The consideration is fair and reasonable; and
2. The purposes of the corporation or the interests of its members will be promoted.

The Attorney General appears in such proceedings as a statutory party.

V. How the Attorney General and Courts Evaluate Transactions

Both the Attorney General and the courts apply a substantive, rather than ministerial, review. The focus is not simply whether procedural requirements have been satisfied, but whether the transaction is fair, appropriately documented, and consistent with the organization's purposes.

A. Fair Market Value

- Independent appraisal is critical.
- Marketing process must demonstrate exposure to the market.
- Related-party transactions receive heightened scrutiny.

B. Mission Consistency

- The transaction must further or be consistent with the NFP’s charitable purposes.
- Below-market dispositions require robust justification.

C. Process Integrity

- Adequate board deliberation and documentation
- Absence of conflicts or self-dealing
- Transparency of transaction terms

VI. Transaction Structuring and Contract Considerations

A. Conditionality

Agreements must include:

- Express condition precedent for Attorney General or court approval
- Cooperation covenants for preparation of submission materials

B. Timing

- Approval timelines typically range from 60 to 120+ days, depending on complexity.
- Parties should incorporate appropriate outside dates and extension mechanics.

C. Risk Allocation

Key negotiated provisions include:

- Termination rights if approval is denied or materially delayed.
- Allocation of costs associated with the approval process.
- Interim operating covenants.

VII. Tax Considerations

A. Transfer Taxes

1. New York State Real Estate Transfer Tax (Tax Law § 1405)

Transfers to or from qualifying NFPs may be exempt where:

- The entity is organized and operated exclusively for charitable purposes; and
- No pecuniary gain or profit inures to private individuals

2. New York City Real Property Transfer Tax (Administrative Code § 11-2106)

A parallel exemption may apply at the city level under similar standards.

Important:

Transfer tax exemptions are not automatic and generally require:

- Proper structuring of consideration
- Supporting affidavits and exemption claims

Mixed-use or partially commercial arrangements may limit or eliminate available exemptions, making transaction structure an important consideration early in the process.

B. Property Tax Exemption

Eligibility for exemption under Real Property Tax Law § 420-a depends on:

- Ownership by a qualifying NFP; and
- Exclusive use for exempt purposes

Post-closing compliance is critical to maintain exemption.

VIII. Selling Real Estate to a Not-for-Profit: Structuring Considerations

A. Bargain Sale / Part-Sale, Part-Gift

Where property is transferred for less than fair market value:

- The transaction may be bifurcated into:
  - Sale component (cash consideration)
  - Charitable contribution component (FMV minus purchase price)

Federal Tax Considerations:

- Governed by IRC § 1011(b) and related regulations
- Allocation of basis between sale and gift components required
- Charitable deduction subject to substantiation and limitation rules

B. Transfer Tax Implications

- If structured properly, the entire transfer may qualify for exemption
- Careful attention must be paid to:
  - Whether consideration is deemed paid
  - Whether the transferee qualifies as an exempt organization

C. Below-Market Transfers by NFPs

Where an NFP is the transferor:

- Below-market transfers are presumptively suspect
- Must demonstrate:
  - Advancement of charitable purposes
  - Absence of private benefit
- Frequently require enhanced Attorney General scrutiny

IX. Title, Enforceability, and Financing Considerations

A. Title Risk

Failure to comply with N-PCL §§ 510–511 or RCL § 12 can result in:

- Transactions being void or voidable
- Title defects unacceptable to title insurers

As a result, buyers, lenders, and title insurers often review approval requirements and corporate authority as part of their transaction diligence.

B. Legal Opinions

Lenders and counterparties often require opinions addressing:

- Due authorization
- Enforceability
- Compliance with statutory approval requirements

C. Financing Constraints

- Mortgage financing may itself require Attorney General or court approval (particularly for religious corporations).
- Lenders must diligence approval status as a condition to closing.

X. Practical Considerations for Not-for-Profit Real Estate Transactions

1. Engage regulatory counsel early to determine approval pathway.
2. Commission an appraisal at the outset to anchor valuation.
3. Document board process meticulously.
4. Align transaction structure with tax exemption requirements.
5. Build realistic timelines into transaction documents.

Key Takeaways

- NFP real estate transactions in New York are governed by a highly structured statutory regime.
- Attorney General or court approval is often a central transaction requirement.
- The review is substantive, focusing on value, process and mission alignment.
- Transfers to NFPs can unlock significant tax efficiencies and creative structuring opportunities.
- Strict compliance with authority and approval requirements is essential to preserve enforceability and insurability of title.

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