

Memorandum in Opposition

COMMITTEE ON NOT-FOR-PROFIT CORPORATION LAW OF THE BUSINESS LAW SECTION

BLS #5

June 6, 2018

S. 8637

By: Senator Gallivan

A. 10304-A

By: M. of A. Paulin

Senate Committee: Corporations, Authorities
and Commissions

Assembly Committee: Codes

Effective Date: 90th day after it shall
have become a law

AN ACT to amend the Not-for-Profit Corporation Law, in relation to voting requirements of the board of certain corporations.

LAW & SECTION REFERRED TO: Sections 902 and 1002 of the Not-for-Profit Corporation Law.

THE COMMITTEE ON NOT-FOR-PROFIT CORPORATION LAW OF THE BUSINESS LAW SECTION OPPOSES THIS LEGISLATION

The Committee opposes the passage and enactment of this legislation. This bill proposes to add a supermajority voting requirement, two-thirds of the entire board, (i) for the board of a not-for-profit corporation to adopt a plan of merger or consolidation (Section 902 of the Not-for-Profit Corporation Law (the “NPCL”)); and (ii) for the board of a charitable corporation to adopt a plan of dissolution and distribution of assets (Section 1002 of the NPCL).

The Committee believes that the supermajority voting requirement is particularly problematic at a point in time in the life cycle of a not-for-profit where the corporation may be in significant distress and is, as a consequence, considering merger/consolidation or dissolution. It is precisely in such circumstances that a board may not be functioning optimally, and may suffer from lack of engagement and participation among board members. Indeed, even in times where the corporation is not in distress and not contemplating such a fundamental corporate transition, the two-thirds of the entire board supermajority can often be an extremely challenging threshold for many boards to achieve (largely because inactive board members are a common phenomenon, particularly on larger boards). Even the mere presence of a two-thirds of the entire board supermajority for quorum purposes can be a daunting threshold for many boards to achieve. To impose such a demanding supermajority voting requirement when the corporation finds itself in trying circumstances could serve to deprive the corporation of

the governance flexibility, agility and capacity to act in a timely fashion that is necessary in order to meet the challenges that the corporation faces and to make an appropriate transition.

In light of the foregoing, the Committee believes that the applicable voting standards in the relevant provisions of the NPCL should remain unchanged. The Committee is aware of a proposal by Lawyers Alliance for New York that proposes a less drastic change to the voting thresholds applicable to Section 902 and Section 1002 of the NPCL. This proposal would require a supermajority of two-thirds of the directors present at the time of the vote (provided that a quorum is present). The Committee believes that, while not optimal, this alternate supermajority voting threshold is less likely to inhibit the board's ability to act in the corporation's interest and to make an appropriate transition at a time when the corporation is in distress.

The Committee notes that, to our knowledge, there has not been presented a compelling case as to why the changes implemented by the proposed legislation are necessary, what deficits in the statutory framework the proposed legislation is seeking to remedy, and what alternatives were considered before adopting these proposed changes. In addition to the concerns with these proposed changes noted above, the Committee is concerned about the capacity of many entities in the nonprofit sector to properly implement the proposed changes. The Committee is also concerned about the implicit costs such changes would impose on entities in the nonprofit sector, where the resources available to dedicate to such costs are more limited than in the for-profit sector, and where there is often a compelling need to utilize nonprofit resources on other priorities.

For the foregoing reasons, the Committee on Not-For-Profit Corporation Law of the Business Law Section **OPPOSES** this legislation.