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ARTICLES OF INCORPORATION—PROVISIONS CORPORATION MAY TAKE ANY ACTION WHICH UNDER ANY PROVISION OF LAWS OF STATE, OR ARTICLES, OR CODE OF REGULATIONS OF CORPORATION MAY BE TAKEN BY SHAREHOLDERS OR MEMBERS WITHOUT A MEETING UPON WRITTEN CONSENT OF LESS THAN ALL OF SHAREHOLDERS OR MEMBERS ENTITLED TO NOTICE ARE ILLEGAL—CONTRARY TO SECTION 8623-46 G. C.—NOT AUTHORIZED BY SECTION 8623-49 G. C.

SYLLABUS:

Articles of incorporation of a corporation which provide that any action which, under any provision of the laws of the state of Ohio, or articles, or code of regulations of the corporation may be taken by the shareholders or members without a meeting upon the written consent of less than all of the shareholders or members who are entitled to notice of such meeting for such purpose, are illegal in that they are contrary to Section 8623-46, General Code, and are not authorized by Section 8623-49, General Code.

Columbus, Ohio, December 17, 1946

Hon. Edward J. Hummel, Secretary of State
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Amended articles of incorporation have been submitted to this office containing the following provisions:

'Any action which, under any provision of the laws of the state of Ohio, or Articles, or Code of Regulations of the corporation, may be taken at a meeting of the members, may be taken without a meeting if authorized by a writing signed by a majority of the members who would be entitled to notice of a meeting for such purpose. Whenever a certificate in respect to any such action is required by the laws of the state of Ohio to be filed in the office of the Secretary of State, the officers signing the same shall state therein that the action was authorized in the manner aforesaid.'

Section 8623-46 provides:

'Any action which, under any provision of this act, or articles, or regulations, may be taken at a meeting of the shareholders, may be taken without a meeting if authorized by a writing signed by all of the holders of shares who would be entitled to notice of a meeting for such purpose.

Whenever a certificate in respect of any such action is required by this act to be filed in the office of the secretary of state, the officers signing the same shall state therein that the action was authorized in the manner aforesaid.'

Under the provisions of the above section, it would appear that any action which could be taken at a meeting of the shareholders may be taken without a meeting if authorized by the written consent of 100% of the shareholders.

Section 8623-49 provides:

'Notwithstanding any provision of this act requiring for any purpose the vote of a designated proportion of the voting power of a corporation, or of any class or classes of the shares thereof, the articles of a corporation may provide that such action may be taken by the vote of a greater or less proportion of such voting

power of such corporation, or by the vote of any class or classes of the shares thereof than that so required by this act, but, unless expressly permitted by this act, such proportion shall be not less than a majority.

The articles may likewise and subject to the same restriction specify the consent of shareholders required or permitted by this act to take any action by consent.'

The first paragraph of the above section apparently provides that any action of the shareholders may be taken by a greater or less vote than that required by this act if such provision is made a part of the articles of incorporation.

Your attention is directed to the provisions of the second paragraph of Section 8623-49 providing the articles may specify the consent of the shareholders required to take any action by consent. This provision apparently would be in conflict with the provisions of Section 8623-46.

Your opinion is requested on the correct interpretation to be placed on the second paragraph of Section 8623-49, taking into consideration the provisions of Section 8623-46. In other words, may articles of incorporation provide for the taking of any action without a meeting upon the written consent of less than 100% of the shareholders."

Since Sections 8623-46 and 8623-49, General Code, are quoted in full in your request, I shall not repeat them.

The amendment to the articles of incorporation set forth in your request speaks of a meeting of the "members" and of a writing signed by a majority of the "members." Your letter does not state that the amendment is to the articles of incorporation of a corporation not for profit, however, the use of the term "members" would indicate that the amendment is to the articles of a corporation not for profit. This would then raise a question as to whether the provisions of Sections 8623-46 and 8623-49, General Code, set forth in your request, apply to corporations not for profit as well as to corporations for profit. In view of the position which I have taken, it is not necessary to decide this question. There are no other statutes in the Corporation Act containing the same or similar provisions as are found in Sections 8623-46 and 8623-49, General Code, which specifically apply to corporations not for profit, and in the absence of statutory authority permitting shareholders or members to act without a meeting, it is generally held that they must act at a meeting. See

Davies Ohio Corporation Law, Vol. I, page 730. I am, then, for the purpose of this opinion, assuming that Sections 8623-46 and 8623-49, General Code, apply to both corporations for profit and corporations not for profit.

It is to be noted that Section 8623-46, General Code, provides for a writing signed by *all* the holders of shares who are *entitled to a notice of a meeting* which would include both voting and non-voting shares (see Section 8623-44, General Code); while Section 8623-49, General Code, speaks of "a designated proportion of the *voting power of a corporation*, or of any class or classes of shares."

Not only should the difference as to those entitled to notice in the one statute and voting power in the other be noted but also Section 8623-46, General Code, speaks of *all* the holders of shares while Section 8623-49, General Code, speaks of "notwithstanding any provision of this act requiring for any purpose the vote of a *designated proportion* the articles may provide that such action may be taken by a vote of a *greater or less proportion* of such voting power."

It would seem then that Section 8623-49, General Code, applies only to those statutes which require a "designated proportion" of voting power, that is, less than unanimous consent, and would not apply to Section 8623-46, General Code, which requires not a *designated proportion* of voting power but consent of *all* shares entitled to notice of the meeting which includes both voting and non-voting shares.

I have been unable to find any judicial determination of this question but the above conclusion is in harmony with the expression of Mr. Davies in his work on Ohio Corporation Law, Vol. I, page 744, where he says:

"The second paragraph of Section 8623-49, which was added to the section in 1929, provides that the article may 'like-wise and subject to the same restriction specify the consent of shareholders required or permitted by this act to take any action by consent.' Section 8623-46 provides that, 'Any action which, under any provision of this act, or articles, or regulations, may be taken at a meeting of the shareholders, may be taken without a meeting if authorized by a writing signed by all of the holders of shares who would be entitled to notice of a meeting for such purpose.' A question raised by the second paragraph of Section 8623-49 is whether it authorizes action to be taken under Section 8623-46 by a lesser number of the shareholders than

those 'entitled to notice of a meeting' for the purpose in question. Since the first paragraph of Section 8623-49 provides for changing to a 'greater or less proportion' of the voting power the proportion designated by the Act for the taking of specified action at shareholders' meetings, and since the second paragraph provides in similar fashion for action taken by consent, it is clear that the latter paragraph does not apply to action under Section 8623-46, which is permitted to be authorized by 'all the holders of shares who would be entitled to notice of a meeting for such purpose,' rather than by 'a designated proportion of the voting power' or a designated proportion of all the shares or of a class or classes of shares. The second paragraph of Section 8623-49 applies only when the Act permits action to be taken by less than unanimous consent as, for example, a release of pre-emptive rights 'by the vote or written consent of the holders of the shares entitled to such pre-emptive rights,' or the adoption or amendment of regulations 'by the written consent of the holders of shares entitling them to exercise two thirds of the voting power.' "

In specific answer to your question, I am therefore of the opinion that articles of incorporation of a corporation which provide that any action which, under any provision of the laws of the state of Ohio, or articles, or code or regulations of the corporation may be taken by the shareholders or members without a meeting upon the written consent of less than all of the shareholders or members who are entitled to notice of such meeting for such purpose, are illegal in that they are contrary to Section 8623-46, General Code and are not authorized by Section 8623-49, General Code.

Respectfully,

HUGH S. JENKINS
Attorney General