Exhibit "1"

March 31, 2022 Order

Plaintiff/Appellant Michael D. Royal's Notice of Appeal

Michael D. Royal
v.
Free Kindergarten Association of Charleston,
The Attorney General of the State of South Carolina,
and the Charleston County School District

Charleston County Court of Common Pleas Case No. 2018-CP-10-05739
Appellate Case No. 2022-_____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C.A. No.: 2018-CP-10-5739
Michael D. Royal,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**ORDER**
Free Kindergarten Association of Charleston,	)	
	)	
Defendant,	)	
	)	
The Attorney General of the State of South Carolina and The Charleston County School District	)	
	)	
Intervenors	)	
_____	)	

This matter came before me as the Master in Equity for trial on December 15, 2022, and concerns real property located at 34 Pitt Street in Charleston, South Carolina (the "Property"). Present at the hearing were Jeffrey S. Tibbals, Esq., and Evan P. Williams, Esq., for Plaintiff Michael D. Royal ("Royal"); Patrick F. Stringer, Esq., for Defendant Free Kindergarten Association of Charleston ("FKAC"); A. Bright Ariail, Esq., and Warren W. Ariail, Esq., and Mercedes Pinckney Reese, Esq. (General Counsel for the Charleston County School District), all for Intervenor the Charleston County School District ("CCSD"); and Mary Frances Jowers, Assistant Deputy Attorney General, and Kristin Simons, Assistant Attorney General, for the South Carolina Attorney General's Office ("Attorney General" or "AG"). Also attending were Joseph K. Qualey, Esq., Receiver, and William Zachary Smith, Esq., an attorney in the Receiver's law firm. After considering the testimony received and the documentary exhibits admitted into evidence, the Court makes the following findings of fact and conclusions of law.

Pre-Trial Rulings

Prior to the trial, the Court considered several pending Motions. The Court ordered as follows regarding these motions:

- Royal's Motion for Partial Summary Judgment, filed November 18, 2021, is denied.
- CCSD's Motion for Summary Judgment, filed December 5, 2021, is denied.
- On December 3, 2021, CCSD filed a Motion to Strike Plaintiff's Expert Designation and Petition for Expedited Review and Motion for Sanctions and Motion for Protective Order ("CCSD's Motion to Strike Royal"). CCSD's Motion to Strike Royal sought, *inter alia*, to strike Royal's designation of himself as an expert witness and prohibit the testimony of Royal as an expert witness on damages. In addition, on December 13, 2021, CCSD filed a Motion in Limine with Respect to Plaintiff's Alleged Damages Expert Witness Designee Michael D. Royal. Upon consideration of CCSD's motions herein, I held, prior to trial, that Royal as the Plaintiff can testify as a witness, but not as an expert, on the issue of damages.
- On December 6, 2021, CCSD filed a Motion to Strike Plaintiff's Second Expert Designation and Testimony of Pledger M. "Jody" Bishop, III, MAI, SRA, AI-GRS, CRE ("Bishop") and Petition for Expedited Review and Motion for Sanctions and Motion for Protective Order ("CCSD's Motion to Strike Bishop"). CCSD's Motion to Strike Bishop sought, *inter alia,* to strike Bishop's designation as an expert witness, to prohibit the testimony of Bishop as an expert witness on damages and prohibit further oral testimony by Bishop in any deposition, hearing or trial in this matter, specifically excluding any testimony beyond that contained within his deposition testimony taken on November 4, 2021. In addition, on December 13, 2021, CCSD filed a Motion in Limine with Respect to Plaintiff's Alleged Damages Expert Witness Designee Pledger M. "Jody" Bishop, III, MAI, SRA, AI-GRS, CRE. Upon consideration of CCSD's

motions herein, I held, prior to trial, that the Court would not exclude Bishop as a witness and would hold CCSD's motions in abeyance until such time that he was actually called as a witness in this action.

- On December 14, 2021, Royal filed a Motion in Limine to Exclude Defendant CCSD's Expert Witness, Robert J. McGahey, III. This Motion was denied.

- On December 14, 2021, CCSD filed a Motion in Limine with Respect to Expert Witness Designee Michael Robinson, MAI, SRA. There were no objections to this Motion and the Court granted the Motion.

Findings of Fact

FKAC was established as a nonprofit corporation on January 24, 1901. The mission of the FKAC was to provide a free kindergarten education to students whose parents could not afford to pay for a kindergarten program at a time when kindergarten programs cost money. On February 5, 1971, upon petition of a majority of the Board of Directors of the FKAC, the South Carolina Secretary of State certified an amendment to the charter of FKAC pursuant to a Resolution, authorized and certified by a majority of the Board of Directors of FKAC, whereby FKAC resolved that "[i]n the event of dissolution, the residual assets of the Free Kindergarten will be turned over to Charleston School District #20, part of the South Carolina State School System for general use in this said Charleston School District #20." During the 20th century, public schools took on the role of providing kindergarten education to children in S.C.

In 1967, the South Carolina General Assembly enacted Act 340, 1967 S.C. Acts 340. Act 340 created the Charleston County School District, which encompassed all of Charleston County. Act 340 consolidated the eight existing school districts located in Charleston County (including Charleston County School District #20) into the single and newly created county wide school

district to be known as the Charleston County School District. Act 340 designated the Charleston County School District a body of politic and corporate as provided in Section 21-111 of the Code of Laws of South Carolina, 1962, and vested Charleston County School District "with all of the powers, duties, and assets" of the eight school districts. In addition to being vested with the assets, including real property assets, of the eight school districts, the Charleston County School District was expressly empowered to authorize the purchase or sale of land, the planning and construction of new school facilities, the maintenance and repair of existing buildings and grounds, and the development of long-range planning for physical facilities and the educational program in the county. The eight districts continued their existence as special districts for administrative purposes only as expressly set forth in Act 340 and were labeled "constituent districts", including Charleston County School Constituent District #20, which covers downtown Charleston and encompasses the schools located on the Charleston peninsula. Under Sections 1, 6, 7 and 8 of Act 340, the constituent districts retained their independent boards of trustees and independent administrative authority, subject in certain instances to the approval of the CCSD, over the very distinct and limited functions expressly delegated to the constituent districts in the Act. These limited functions include: (1) employment and assignment of teachers or other professional employees; (2) employment of constituent district personnel; (3) pupil assignments and student discipline; and (4) limited oversight over school bus transportation. Act 340, Sections 6, 7, and 8.

FKAC has not operated as a kindergarten since the early 2000's. Aside from miscellaneous personal property of *de minimis* value, the only known asset of the Free Kindergarten is real property and improvements located at 34 Pitt Street (the Property). The sale of this Property will be the sale of all or substantially all of FKAC's assets.

Plaintiff Royal testified that he first became aware of and interested in the Property at 34 Pitt Street on December 3, 2011, when he was driving along Pitt Street and observed that the Property did not appear to be occupied or in active use. Royal set out to determine who owned and controlled the Property and a staff person at the City of Charleston led him to June Murray Wells ("Wells"). Thereafter, sometime between December 2011 and November 2012, Royal contacted Wells. The first time Royal visited the 34 Pitt Street Property with Wells occurred on November 4, 2012. The November 4, 2012 on site meeting with Wells was the first time Royal ever entered the Property.

Royal testified he believed Wells was the sole person with authority to act on behalf of the Property owner, the FKAC. He testified he relied on the fact that she was the only person with access to the Property and a key to the building. Royal further testified he relied on documents he believed indicated Wells had authority for FKAC. The documents Royal testified he relied upon and introduced into evidence included:

1) a letter dated November 12, 2010 from Mary Frances Jowers, Assistant Attorney General of the State of South Carolina to Wells and addressed to her home at Folly Beach. Royal testified this letter impressed him as evidence the State of South Carolina was standing behind Ms. Wells' authority to do business on behalf of FKAC;

2) an affidavit of Wells signed November 23, 2010 filed in Charleston County Probate Court action 2010-GC-10-0090 that same date in which Wells stated she was "the last living advisory member of the [FKAC] with "capacity" [not authority] to act on behalf of the [FKAC];

3) a Probate Court Order from the Charleston County Probate Court action 2010-GC-10-0090, dated December 7, 2010 ("Probate Court Order"). The Probate Court Order stated Wells was "the last living advisory board member of the [FKAC] with capacity [not authority] to act on

behalf of the [FKAC] . . . [and that] she is the only known person with capacity [not authority] to act on behalf of the [FKAC]. Royal testified he had relied upon the Probate Court Order in his belief that Wells was authorized to act on behalf of FKAC.

In addition, Royal introduced as an exhibit a resolution of the FKAC he believed to contain multiple signatures of Wells, including her signature as Director of the FKAC. However, Royal did not testify that he relied upon this document in his understanding or belief as to Wells authority to act on behalf of FKAC.

The Court notes the affidavit of Wells relates to the status of operations and funding of the FKAC as of November 2010. The affidavit does not address the authority of Wells to sell the last remaining asset of the FKAC. Likewise, the Court notes the Charleston County Probate action and resulting Probate Order concern the equitable deviation of the Marion Stuart Hanckel Trust and not the sale of FKAC's remaining assets or Wells' authority to enter into a contract for the sale of such asset. Finally, the Court notes the resolution of the FKAC relates to the opening of a bank account for the FKAC and the establishment of signatory authority thereunder with Wells signing as the "Director" of the FKAC. There is no indication Wells signed this document as a member of the Board of Directors of FKAC and the resolution does not concern or authorize the sale of the Pitt Street Property as the remaining asset of the FKAC.

On April 23, 2013, Royal and Wells, as "authorized agent" of the FKAC, signed a Real Estate Purchase and Sale Agreement ("Agreement"), drafted by Royal, for the real Property at 34 Pitt Street, Charleston.[1] The purchase price in the Agreement is $315,200. The Agreement stated the closing date was to be April 9, 2018 "or on such prior date chosen by the Seller upon

[1] Royal's drafting of the Agreement included, *inter alia*, the drafting of FKAC's signature block designating Wells as "authorized agent" of the FKAC.

reasonable notice to the purchaser." In the spring of 2013, Wells also received a Notice of Intent to purchase the Property for $400,000.00 from another party other than Royal.

On April 23, 2013, Royal recorded a Memorandum of Purchase and Sale Agreement at the Charleston County Register of Deeds Office. This Memorandum stated that the parties entered into an agreement for the purchase and sale of the Pitt Street Property. The Memorandum did not include the sales price nor was it enrolled in the name of nor otherwise provided to the Attorney General of South Carolina or Charleston County School District.

Royal testified about his activity related to the Property from April 2013 to March 2018. He communicated with Wells, and in 2015, he began to communicate more with her son, Bill Wells.[2] During this time, Royal noticed that the Property appeared to be taxable by Charleston County, and he took steps to make sure the Property remained tax-exempt. Wells used the building on the Property for storage, and Royal offered to assist with packing and moving. At one point, he began using the Property as his mailing address, but when he realized that the closing would not occur as soon as he thought, he stopped using it as his mailing address. He communicated in writing with Wells that he desired to close on the Property. Throughout this time, FKAC was never ready to close.

By March 2018, FKAC retained Patrick Stringer as its closing attorney, and Royal had retained Treadwell Josey. Prior to the proposed closing date, by letter of April 4, 2018, Stringer provided notice to the Attorney General's Office of the proposed sale, including a copy of the Purchase and Sale Agreement, as required by S.C. Code Ann. § 33-31-1202(f). This was the first

[2] "Wells" continues to refer to June Murray Wells. Bill Wells is referred to in this Order as "Bill Wells."

notice the Attorney General received of the sale. Thereafter, Royal and Wells executed two addenda extending the closing date.

After receiving notice of the proposed sale in April 2018, the Attorney General inquired about the sale and was provided the 2012 appraisal of Michael Robinson, MAI, SRI, of Charleston Appraisal Services,[3] which valued the Property at $315,200 as of December 19, 2012. The Attorney General contacted Robinson who completed another appraisal at the request of the Attorney General. He determined the fair market value of the Property as of June 7, 2018, was $522,500. At trial, he explained his opinion that the building had no value, and he took the cost of demolition into consideration in valuing the Property. Despite its location in the downtown Charleston area, he did not believe that the building would be classified as a historic structure. He testified that the highest and best use of the Property would be residential. Regarding how long an appraisal can be considered valid, he stated that lending institutions don't like to use anything more than six months old, though sometimes other users will go up to a year, and sometimes a little more time can be acceptable.

FKAC was never in a position to close as it would not agree to close without the Attorney General's consent. By letter of May 11, 2018, FKAC notified Royal that it would not close on the Property. Royal filed this complaint against FKAC on December 4, 2018, alleging claims for specific performance and breach of the Agreement. FKAC filed an answer on January 7, 2019. The Attorney General moved to intervene on January 28, 2019, and the CCSD moved to intervene on February 7, 2019. A Form 4 Order was entered on June 7, 2019, granting both motions to intervene. The Form Orders were followed by formal Orders entered on July 10, 2019, granting the AG's Motion, and August 22, 2019, granting CCSD's Motion. On June 24, 2019, CCSD filed

[3] At the trial, Mr. Robinson was qualified as an expert in the area of real estate appraising.

its Answer, Counterclaim and Crossclaim. FKAC filed its Reply to Crossclaim and its Reply to Request for Declaratory Judgment of School District both on July 1, 2019. The AG filed its Answer to Royal's Complaint, and Answer/Reply to CCSD's Request for Declaratory Judgment on July 25, 2019, and Royal filed Plaintiff's Reply to Intervenor Charleston County School District's Counterclaim on August 16, 2019.

Application of Facts and Conclusions of Law

Motion for Nonsuit

Following the testimony of Royal, as Plaintiff's final witness in Plaintiff's case in chief, the Attorney General moved for a nonsuit pursuant to Rule 41(b) of the SCRCP. Rule 41(b) SCRCP allows a defendant to move for dismissal of any action on the ground that, upon the facts and the law, Plaintiff has shown no right to relief.

As this is a motion for nonsuit in a nonjury action, the Court does not consider the evidence in the light most favorable to Royal in ruling upon the Attorney General's Rule 41(b) motion. See *Johnson v. J.P. Stephens & Co., Inc.,* 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992) (holding that in ruling upon a Rule 41(b) motion, it is not an error for the trial judge to fail to consider the evidence in the light most favorable to the non-moving party.) Instead, Rule 41(b) of the S. C. Rules of Civil Procedure allows the trial judge as the trier of fact to weigh the evidence, determine the facts and render a judgment against the Plaintiff if justified.

As the trier of fact in this non-jury action, I have weighed the evidence presented by the Plaintiff, determined the facts, and hereby find that based upon the facts and the law, the Plaintiff has shown no right to relief. Accordingly, I grant the Attorney General's motion for nonsuit. The court's findings of fact and conclusions of law are detailed below as required when ruling upon the merits. Rule 52 (a), SCRCP.

1. Authority of June Murray Wells

The Court finds that Wells had some authority but not absolute authority to act on behalf of the FKAC. To the extent Wells had some authority to act on behalf of FKAC, it was not statutory authority. Instead, it arose because of her sole remaining position as somebody with knowledge about the FKAC. Furthermore, the extent of Wells limited authority does not constitute actual, implied or apparent authority to enter into the Agreement on behalf of the FKAC for the sale of the Pitt Street Property. Whatever authority Wells had to sign the Agreement on behalf of FKAC, due to FKAC's non-profit status as a public benefit corporation, her authority is subordinate to the public interest.

2. **Notice to Attorney General and Authority of Attorney General**

Pursuant to Section 33-31-1202(f), "[a] public benefit or religious corporation must give written notice to the Attorney General twenty days before it sells, leases, exchanges, or otherwise disposes of all, or substantially all, of its property if the transaction is not in the usual and regular course of its activities unless the Attorney General has given the corporation a written waiver of this subsection." I find that the Attorney General received proper notice of the proposed sale on April 4, 2018, when counsel for the FKAC provided written notice to the Attorney General's Office. This was the first notice provided to the Attorney General and it was the first time the Office was made aware of the Agreement.

Section 33-31-141 governs notice under the South Carolina Nonprofit Corporation Act and applies to the written notice requirement of section 33-31-1202(f). Section 33-31-141(b) states as follows: "Notice may be communicated in person; by telephone, telegraph, teletype, facsimile transmission (FAX), or other form of wire or wireless communication; or by mail or private carrier. If these forms of personal notice are impracticable, notice may be communicated

by a newspaper of general circulation in the area where published; or by radio, television, or other form of public broadcast communications."

Royal argues that adequate notice was provided when a Memorandum of Purchase and Sale Agreement, which did not include the sale price or the contract itself, was filed with the Charleston County Register of Deeds on April 23, 2013. I find that this did not provide notice, as the Attorney General was not aware of the proposed sale until April 4, 2018. Moreover, this filing did not provide effective or statutory notice to the Attorney General because it did not meet the requirements of section 33-31-141(b). Also, CCSD was not listed on the 2013 document recorded with the Charleston County Register of Deeds nor was the document sent to the CCSD or the Attorney General at the time of the filing.

As stated in the Order granting the Attorney General's Motion to Intervene, filed July 10, 2019, "[t]he AG's role in supervising public charities and charitable trusts is well established in South Carolina." S.C. Code Ann § 1-7-130 provides "The Attorney General shall enforce the due application of funds given or appropriated to public charities within the State, prevent breaches of trust in the administration thereof . . ." S.C. Code § 62-7-405 governs charitable trusts and provides in relevant part: "(a) A charitable trust may be created for the . . . advancement of education . . . or other purposes, the achievement of which purposes is beneficial to the community . . . (c) The settlor of a charitable trust, the trustee and the Attorney General, among others may maintain a proceeding to enforce the trust." "The Attorney General is the proper party to protect the interests of the public at large in the matter of administering or enforcing charitable trusts." *Epworth Children's Home v. Beasley*, 365 S.C. 157, 616 S.E.2d 710 (2005). *Watson v. Wall*, 229 S.C. 500, 93 S.E.2d 918 (1956).

Regarding section 33-31-1202(f), "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Chem–Nuclear Sys., LLC v. S.C. Bd. of Health and Envtl. Control*, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (2007). "The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act." *Duvall v. S.C. Budget and Control Bd*., 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008); see *State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) ("In seeking the intention of the legislature, we must presume that it intended by its action to accomplish something and not to do a futile thing."). The legislature intended S.C. Code Ann. § 33-31-1202(f) to have a purpose, and the logical conclusion is that this purpose was to notify the Attorney General and provide him with an opportunity to be heard. An interpretation that does not allow the Attorney General to be heard would render the statute meaningless and would be contrary to rules of statutory interpretation.

There are several South Carolina cases discussing the AG's role in protecting the interests of the public at large in matters involving the sale of all, or substantially all, of the assets of a nonprofit corporation. In *South Carolina Dept. of Mental Health v. McMaster*, 372 S.C. 175, 642 S.E.2d 552 (2007), the Supreme Court accepted in its original jurisdiction an action as to whether certain property owned by the Department of Mental Health was held in trust, and whether and under what conditions it could be sold. The subsequent circuit court action seeking approval of the sale was *South Carolina Department of Mental Health, as Trustee, v. Alan Wilson, Attorney General, et al.*, 2011-CP-40-00875. In this action, the Department sought court approval of the sale of the property impressed with a charitable trust that had been the subject of the Supreme Court action of 2007. The Court approved the sale of the property after expert testimony from an

appraiser which showed that the sale price was consistent with his opinion about the value of the property.

In *Sisters of Charity v. Alan Wilson, Attorney General of South Carolina*, *et al.*, No. 2016-CP-40-00087, Providence Hospital, a nonprofit, sought to sell substantially all of its assets outside the ordinary course of business and obtained a contemporaneous appraisal which it provided to the AG along with notice of the sale as required by section 33-31-1202(f). The AG advised the parties it required court approval of the sale at the proposed price, although the price fell within the range of values in the appraisal. The *Sisters of Charity* court stated as follows: "The Attorney General is a party to this matter in his *parens patriae* capacity in accordance with his common law and statutory authority to protect the public interest and to enforce the due application of those funds given or appropriated to any charitable trust, and to protect the interests of the public at large in the matter of administering or enforcing charitable trusts." See Order of January 27, 2016, in *Sisters of Charity*, *supra* (citing *S.C. Dept. Mental Health v. McMaster,* 372 S.C. 175, 642S.E.2d 552 (2007); *Epworth Children's Home, supra*: *Furman University v. McLeod*, 238 S.C. 475, 120 S.E.2d 865 (1961); and S.C. Code Ann. §§ 1-7-130 and 62-7-405(c)).

The Plaintiff contends that the Attorney General's authority pursuant to section 33-31-1202(f) is "detrimental to the public benefit" and means that "the public will never be able to rely upon or attempt to enforce any real estate contract entered into with a nonprofit corporation." I disagree. I find that the Attorney General is protecting the public interest and has the authority to do so. I also note that the statute only applies to the sale, lease, exchange, or other disposal of "all, or substantially all, of its property if the transaction is not in the usual and regular course of its activities[.]" Accordingly, notice is only required in these limited situations, not all transactions involving a nonprofit. Further, the notice must be given 20 days before a sale, unless the Attorney

General has given the corporation a written waiver. This indicates that the nonprofit can either get a waiver or provide sufficient information, and this needs to be done only 20 days prior to any sale. Contrary to the Plaintiff's contention, the statute does not hurt the public or nonprofits, but rather helps ensure that charitable assets stay within the charitable stream and protects the interest of the public.

There have been several actions involving the sale of assets of a nonprofit which involved the Attorney General. In *Sloan Brothers v. Resurrected Treasure Ministries*, the Attorney General was named as a party in a foreclosure action because, as the Plaintiff explained in the Complaint filed on October 14, 2020, the party being foreclosed upon was a nonprofit and the action involved the sale of all, or substantially all, of its assets. *See Sloan Brothers v. Resurrected Treasure Ministries,* 2020-CP-23-04725, Complaint, paragraph 10.

Courts have approved the sale of assets of a nonprofit in other instances that did not specifically relate to notice pursuant to section 33-31-1202(f). Although these actions were not specifically related to the statute at issue in the present case, they show the importance of notice to the Attorney General and court approval in connection with a nonprofit sale of assets. The cases also show that the Attorney General is the appropriate party to protect the public interest in connection with the sale of nonprofit assets. These cases include the following:

- *Calhoun County Museum and Cultural Museum v. St. Matthew's Parish Episcopal Church and Alan M. Wilson, Attorney General of South Carolina*, 2010-ES-09-00029. This Plaintiff requested the Court confirm whether a Museum and Church had authority to sell their interests in a tract of land. In its Order for Declaratory Judgment regarding the Sale of Real and Personal Property, filed January 25, 2021, the Probate Court found that the nonprofit could sell certain property and ordered that the proceeds be "held in Trust for the benefit of the Church [and] shall be used to further the purposes of the Church's said trust."

- *Baptist Foundation of South Carolina, as Trustee, v. Baptist Foundation of South Carolina, et al.*, 2014-GC-26-22, 2013-ES-26-00279, In its Order

Construing Will and Codicil, Declaration of Endowment, Modification of Trust, and Authorization to Sell Real Property, filed April 1, 2014, the Court found that the nonprofit was able to sell certain real estate "subject to Court approval of the ultimate sales price[.]"

- In its Order Approving Purchase and Sale Agreement and Authorizing and Directing Sale of Real Property, filed September 30, 2019, in the above Baptist Foundation case, the Court reviewed a proposed real property transaction where there were two contracts under consideration. Regarding one contract, the court stated that it "cannot find support for the acceptance and approval of the [contract] where there is no appraisal or evidence that can support such a low purchase price." In the case, the proposed price of $120,000.00 was less than two appraisals finding the fair market value at $195,000 and $197,000. The Court approved another sale at a higher price. The Court noted that it had accepted and approved prior sales of Trust real property at 88% of fair market value and 125% of fair market value.

Regarding the sale of nonprofit assets, the Attorney General is concerned with whether the fair market value of the assets is maintained in the "charity stream" - so that the full value of the assets continues to be perpetually dedicated for charitable purposes. Ensuring that a proper valuation of the assets is accomplished is vitally important to protect this interest. An undervaluation, as would be the case involving a sale for less than fair market value, provides a benefit to private interests to the detriment of the public. For example, a sale following an undervaluation of a non-profit's assets results in a "gift" to the buyer of the difference between market value and the consideration based on an improper valuation. Such a "gift" to a private individual or for-profit entity may also constitute illegal "private inurement" under federal tax laws, for which the IRS assesses severe penalties and possible revocation of the entity's federal tax exemption. *See* John W. Vinson, *The Charity Oversight Authority of the Texas Attorney General*, 35 St. Mary's L.K. 243 (2004) (discussing the importance of valuation in the Attorney General's review of a nonprofit conversion/sale).

For these reasons, I find that the Attorney General received the required notice, and he had a right to be heard and object to the sale of the nonprofit's assets at issue in this action.

3. The Agreement is contrary to public policy and therefore void.

I find that the sales price is less than fair market value and is contrary to public policy. The Attorney General had a reasonable basis to object to the sale, and he did so appropriately. Given these facts, the proposed sale under the terms of the 2013 Agreement is denied.

The fair market value is the price that a seller is willing to accept, and a buyer is willing to pay on the open market and in an arm's-length transaction; it is the point at which supply and demand intersect. *Black's Law Dictionary* 11th ed. 2019. In the Agreement signed April 23, 2013, the sale price was $315,200. Royal testified that this was consistent with the appraisal of Mr. Robinson of December 19, 2012. Significantly, the parties did not give notice to the AG until April 2018, and FKAC did not indicate any willingness to close until that time. In fact, once notice was provided to the AG and he declined to consent, then FKAC declined to proceed with the sale. Accordingly, there was never a willing seller, authorized by law, in connection with the Agreement.

Regarding fair market value, Robinson testified that the "shelf life" of an appraisal could vary depending on the needs of a client. He explained that lending institutions do not like to use anything more than six months old, though sometimes other users will go up to a year or a bit longer. Here, the Agreement was signed approximately four months after the appraisal. However, per the terms of the Agreement, the closing date to be April 9, 2018, or on "such prior date chosen by the Seller upon reasonable notice to the Purchaser." I find that the sale price of $315,200 was not fair market value by the time the Seller began to take steps to proceed with closing, such as hiring counsel. I also note there was testimony that Wells received another offer of $400,000 to purchase the Property around the same time as the Royal offer, significantly more than the Agreement price. Further, by the time the Attorney General received notice and the

parties were moving toward closing, the original appraisal was five years old. By the time the parties were seeking to schedule the closing, the same appraiser determined the fair market value was $522,500.00 - **a 65% increase over the 2013 sales price!**

In the present case, the FKAC is a nonprofit corporation registered with the South Carolina Secretary of State. The Nonprofit Corporation Act explains that a "corporation" means a public benefit, mutual benefit, or religious corporation. This means that the entity cannot provide a private benefit. However, selling an asset for less than fair market value provides a private benefit to the buyer. In the present case, Royal, a private citizen, would receive as a benefit the difference in the fair market value and the purchase price. This benefit is a loss to the FKAC and ultimately a loss to the public, as it prevents the assets from remaining in the "charity stream."

In *American Campaign Academy v. Commissioner*, 92 T.C. 1053 (1989), the U.S. Tax Court provided a definition of private benefit: "nonincidental benefits conferred on disinterested persons that serve private interests." In the present case, the sale of the Property for less than fair market value would provide a nonincidental benefit to Michael Royal, a disinterested person, and thus serve his private interest rather than any public interest of FKAC. The Tax Court noted that a nonprofit's conferral of benefits on disinterested persons may cause it to serve a private interest rather than a public one, as required by section 1.501(c)(3) of the Internal Revenue Code.[4] See also *Anclote Psychiatric Ctr., Inc. v. Comm'r*, 76 T.C.M. (CCH) 175 (T.C. 1998), *aff'd sub nom*, *Anclote Psychiatric v. Comr. of IRS*, 190 F.3d 541 (11th Cir. 1999), (finding that a sale for less than fair market value resulted in a "prohibited inurement"). The fact that the contract is less than fair market value is an indicator that the sale itself is against public policy, as value would be lost to the public.

[4] The authority governing 501(c)(3) organizations provides guidance about nonprofits. The FKAC is not a 501(c)(3) entity at this time.

In addition to the fact that the sale price was below fair market value, I find the totality of the circumstances indicates that the Agreement was void as against public policy. Another area of concern for the Court is the unequal bargaining position of the parties to the Agreement, especially related to real estate. Royal has a law degree and is a licensed attorney in New York State. He holds a JD and MBA from the University of Virginia and a Masters in Real Estate Finance from the University of Cambridge. Wells, born in 1934, was a College of Charleston graduate. She taught kindergarten for 40 years at the FKAC, and she was the Director of The Confederate Museum in Charleston for 40 years. Royal's real estate and educational background appeared to put him in an unequal bargaining position to Ms. Wells.

The Court notes several unusual provisions in the contract. First, paragraph 6 provides that if the seller were unable to provide documentation of Wells' authority to sell the Property, the parties agreed to petition the Court to establish her authority, with purchaser bearing any court costs. This indicates that Plaintiff had questions as to her authority at the time he authored the Agreement, as the language would not be needed if her authority was clear.

Another unusual provision, in paragraph 7 of the Agreement, states that if the "Purchaser, in his sole discretion, determines that a purchase of the Property is not suitable for himself financially, he shall not have any obligation to close the Agreement, and the Agreement shall terminate." This allows the Purchaser to get out of the contract, but there is no comparable provision for the seller. Royal, author of the Agreement, admitted that this was "almost like an option" but said "it is not exactly the same." He agreed it created a great deal of discretion for himself as the purchaser.

Other provisions noted in the testimony included the following: (1) pursuant to paragraph 4, the seller was to convey title by limited warranty deed, rather than general warranty deed; and

(2) pursuant to paragraph 5, should title to the property be defective, the Seller would not be in default of the Agreement.

"Determining whether a contract is void as against public policy is generally a question of law for the Court." *Palmetto Mortuary Transp., Inc. v. Knight Sys., Inc.*, 424 S.C. 444, 459, 818 S.E.2d 724, 733 (2018). In the present case, the contract is void because it is against public policy. Most significantly, the fact that a nonprofit is selling property for significantly less than fair market value is a sufficient reason to find that the contract cannot be enforced. The above aspects of the contract also provide additional reasons for the court to find the contract is against public policy. Even if any one individual factor would not be sufficient, the totality of the circumstances indicate that the contract is against public policy. See 30 S.C. Jur. *Contracts* § 4 ("As a general rule, agreements or contracts against established public policy are also illegal and will not be enforced.").

While two private individuals may agree to a price that is less than fair market value and may have unusual provisions in their contract, the situation is different for a nonprofit. This is why notice to the Attorney General is important and required by statute. "Freedom of contract is subordinate to public policy, and agreements that are contrary to public policy are illegal." *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 728 S.E.2d 477 (2012). While private parties are free to contract as they desire, when the public interest is involved, such as here in the sale of all of a nonprofit's remaining assets, public policy trumps the freedom of contract.

Our Supreme Court has recognized "the general rule that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the constitution." *W & N Const. Co. v. Williams*, 322 S.C. 448, 450, 472 S.E.2d 622, 623 (1996). The Court explained as follows in *Wiggins v. Postal Telegraph Co.*, 130 S.C. 292, 125 S.E. 568 (1924): "We know of no principle

of law based upon comity or interstate commerce transactions, which would require a state court to recognize the validity of a contract which under its laws is declared to be against public policy, immoral and void." The Court explained in *Berkebile v. Outen*, 311 S.C. 50, 54, 426 S.E.2d 760, 762 (1993), as follows: "South Carolina law is well established on this point. The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution."

Because the Agreement violates public policy, it is contrary to law. As explained in *Hinnant v. S. Ry. Co.*, 113 S.C. 19, 100 S.E. 709, 709 (1919), "[n]either the conductor, the engineer, nor the defendant itself can make a contract in violation of law, or waive the requirements of the law." Similarly in the present case, the parties cannot make a contract in violation of law. In *Ricks v. Ficken*, 280 S.C. 294, 295, 312 S.E.2d 715, 715–16 (1984), the Court found that a contract entered into pursuant to an unconstitutional statue was "repugnant to public policy and void."

The Residual Assets of FKAC Shall Inure to Charleston County School District Upon Its Dissolution

In 1967, the South Carolina General Assembly enacted Act 340, 1967 S.C. Acts 340. Act 340 created the Charleston County School District (CCSD), which encompassed all of Charleston County. *Id.* Act 340 consolidated the eight school districts into the single and newly created county wide school district known as the Charleston County School District. *Id.* The Supreme Court of South Carolina has expressly declared that, except as to Section 11 therein[5], Act 340 is

[5] Section 11 of Act 340 provides as follows: SECTION 11. Not to assume bonded indebtedness of present school districts—The Charleston County School District shall not assume any bonded indebtedness incurred prior to July 1, 1968, by any of the present school districts. The bonded debt of the present school districts incurred prior to July 1, 1968 shall remain the obligations of the respective constituent districts after July 1, 1968 which shall continue to be taxed accordingly.

constitutional and legally valid in all respects. *Smythe v. Stroman*, 251 S.C. 277, 162 S.E. 2d 168 (S.C. 1968). Act 340 designated the Charleston County School District a body of politic and corporate as provided in Section 21-111 of the Code of Laws of South Carolina, 1962, and vested CCSD "with all of the powers, duties, and assets" of the eight school districts. *Id.*

In addition to being vested with the assets, including real property assets, of the eight school districts, the Charleston County School District was expressly empowered to authorize the purchase or sale of land, the planning and construction of new school facilities, the maintenance and repair of existing buildings and grounds, and the development of long-range planning for physical facilities and the educational program in the county. *Id., Section 5. (10).*

The eight districts continued their existence as special districts for administrative purposes only as set forth in Act 340 and were labeled "constituent districts." *Id., Section 1.* Charleston County School District #20 is one of the eight constituent school districts and it encompasses the schools located on the Charleston peninsula. Under Section 1 of Act 340, the constituent districts retained their independent boards of trustees and independent administrative authority, subject in certain instances to the approval of the CCSD, over the very distinct and limited functions expressly delegated to the constituent districts in the Act. This very limited and specific authority reserved to the eight Constituent School Districts is expressly set forth in Sections 6, 7 and 8 of Act 340 and includes: (1) employment and assignment of teachers or other professional

---

The *Smythe* Court held that South Carolina case law and Section 21-114.3 of the Code of Laws of South Carolina, 1962 [now codified as §59-17-70 of the 1976 Code] invalidated the provisions of Section 11 of Act 340 on the grounds that a consolidated school district which succeeds to all of the assets and properties of the constituent districts must likewise assume their bonded debt. Thus, the *Smythe* Court ordered that the outstanding bonded debt of the existing eight school districts of Charleston County shall be assumed on July 1, 1968, by the newly formed Charleston County School District. The *Smythe* Court declared Act 340 to be valid in all respects after the striking of Section 11.

employees; (2) employment of constituent district personnel; (3) pupil assignments and student discipline; and (4) limited oversight over school bus transportation.[6]

In summary, pursuant to Act 340, all fiscal and administrative powers and duties, as well as all assets held by the eight school districts were absorbed by and vested in the CCSD, saving only those narrow administrative functions for the constituent districts cited above. See e.g., *Stewart v. Charleston County School District,* 386 S.C. 373, 688 S.E. 2d 579 (Ct. App. 2009*)* and Act 340. None of these limited functions reserved to the eight Constituent School Districts retain or grant property rights to the constituent school districts. Instead, all assets of the constituent school districts, including all real and personal property, pass to and become the property of the Charleston County School District.

Therefore, with respect to the issue before this Court, Act 340 divests Charleston County School District #20 of any ownership in the residual assets of Free Kindergarten. Instead, upon dissolution, the residual assets of Free Kindergarten shall pass to the Charleston County School District pursuant to Act 340. The Receiver, upon conclusion of this matter, shall be authorized to provide the residual funds to the CCSD and shall see that the funds are used by the School District for their original intended benefit – for the use and benefit of the children of Charleston County who attend its kindergarten schools.

[6] Since Act 340's enactment, the powers of the constituent districts have been reduced; ultimately, in 2007 Sections 6 and 8 of the Act were deleted, and the CCSD Board was vested with complete power to employ and assign teachers and personnel for the efficient operations of schools as well as the complete control over the appointment of principals. *Act No. 131, 2007 S.C. Acts 1390-91.*

Attorney's Fees

Both CCSD and FKAC asked for an award of attorney's fees in this action. "The general rule is that attorney's fees are not recoverable unless authorized by contract or statute." *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 238, 616 S.E2d 431, 434 (Ct. App. 2005). "In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees." *Id.*

As to CCSD, Royal moved to strike CCSD's request for attorney's fees. I find that there is no contract or statutory basis, including any equitable basis under the South Carolina Declaratory Judgment Act, to award attorney's fees to CCSD. Accordingly, I grant the motion to strike the request for attorney's fees.

As to FKAC, counsel submitted an attorney's fee affidavit, with billing records of counsel attached. As stated in his affidavit, Patrick F. Stringer, Esq., was counsel to FKAC in this action. To date, the legal fees and costs for FKAC are $46,956.79 which this court finds reasonable. FKAC was required to defend this action and incur attorney's fees as a result of its refusal to close without the consent of the Attorney General- a point repeatedly made by FKAC's counsel and which position has prevailed herein. I find that counsel for FKAC provided competent representation throughout this matter, is well-known by this court which finds him highly qualified and that his services meet the criteria of the 6-prong test set forth in *Baron Data Systems v. Loter*, 297 S.C. 382, 377 S.E. 2d 296 (1989). Accordingly, Mr. Stringer is entitled to be paid his fees by his client from the proceeds of the sale of 34 Pitt Street.

I further find the Receiver, Joseph K. Qualey, shall be paid his Receiver's fees from the proceeds of the sale of the Property, as stated in accordance with this Court's Order of Appointment filed February 22, 2021.

Sale of Property

I authorize the Receiver to market and sell the Property, for a price that must be approved by the Court after notice to the Attorney General pursuant to section 33-31-1202(f). I note that bond will need to be posted by Plaintiff if there is an appeal of this action on his behalf. As ordered in the Order Appointing the Receiver, the Receiver cannot sell the Receivership Property without the express approval of this Court. As also noted in that order, the sale, any contract for sale, and any closing statement shall be subject to express approval by this Court; and the sale of the Receivership Property shall be free and clear of all liens and encumbrances. Upon receipt of the proceeds of the sale of the Property, the Receiver shall deposit all funds in his firm's trust account for distribution as indicated herein.

Dissolution of FKAC

Upon sale of the Property, the Receiver shall execute and file documents necessary with the South Carolina Secretary of State for the dissolution of FKAC. Upon completion of the dissolution of FKAC, the Receiver shall provide a final report and accounting to the Court for approval prior to discharge of the receiver pursuant to the terms of the Order Appointing Receiver for Defendant Free Kindergarten Association of Charleston.

Proceeds of the Sale of the Property

Upon dissolution of the FKAC and approval of the final report and accounting by the Court, the Receiver shall pay the residual proceeds of the sale of the Property, less all deductions from the sales proceeds as allowed herein, to the Charleston County School District as the proper

and lawful recipient of the residual assets of FKAC. Further, the Receiver shall be authorized to see that the funds are used by the School District for their original intended benefit – for the support and benefit of the children of Charleston County who attend its kindergarten schools.

AND IT IS SO ORDERED this _____ day of March, 2022.

_____
Mikell R. Scarborough
Master-In-Equity

Charleston, South Carolina

Charleston Common Pleas

Case Caption: Michael D Royal VS Free Kindergarten Association Of Charleston , defendant, et al

Case Number: 2018CP1005739

Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062