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OPINION

AN AGE-OLD ADAGE

Buyer Beware When Purchasing Real Estate From Nonprofits

Massachusetts Appeals Court Negates Unauthorized Sale Of Charitable Assets

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SPECIAL TO BANKER & TRADESMAN

In the recent case of *First Bostonview Management, LLC v. Bostonview Corporation*, the Massachusetts Appeals Court affirmed a Superior Court decision that voided the alleged sale of a local charity's real estate because the sale had not been given advance approval by the charity's board of directors. In doing so, the Appeals Court upheld longstanding precedent that restricts the authority of a charity's officers and requires specific approval of the charity's board of directors in advance of any "extraordinary transactions" that could threaten to deprive the charity of its "very essence."



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The plaintiff company was the prospective buyer of "substantially all" of the Beacon Hill real estate held by the defendant company, a charitable corporation that serves as the business arm of a local church. Two of the charity's officers entered into a written purchase-and-sale agreement contemplating that the real estate would be sold to the plaintiff for the not-so-modest sum of \$30 million. In what the Appeals Court described as a "shady" arrangement that highlighted the need for intimate board knowledge (and rendered

the buyer a less-than-sympathetic plaintiff), the plaintiff made substantial cash payments to the two officers in advance of the scheduled closing and, for good measure, purchased a \$94,000 Mercedes Benz for the church secretary. (One of the two charitable officers later pleaded guilty to federal charges of defrauding the church by various means unrelated to the *Bostonview* transaction.)

After multiple delays and modifications to the agreement, the planned real estate closing never went forward, and the plaintiff filed suit in Superior Court, seeking to force the sale. The Superior Court granted summary judgment to the defendant charity, mainly because the charity's board had not sufficiently authorized the purchase-and-sale agreement; the court found that the transaction went far beyond the commonplace managerial transactions in which charitable officers have some authority to engage without explicit board consent.

Search For Specificity

The plaintiff then took its case to the Appeals Court, arguing that the equities and a host of evidence were in its favor. For instance, there was evidence that the charity's board may have given its two officers the general authority to enter into purchase-and-sale agreements like the one in question. There also was some evidence that the board may have ratified the agreement, either in certain writings disputed

by the charity, or through the board's silence after learning of the agreement.

The Appeals Court rejected all of the plaintiff's claims and found that the sale was clearly void at its inception. While the court suggested that allegations of general authorization and ratification might be relevant in a case not involving charitable assets, because of the quasi-public nature of charities, and the fiduciary responsibilities of their directors and officers, such defenses are not available to the prospective purchaser of \$30 million in charitable assets. Relying on the 1984 Massachusetts Supreme Judicial Court case of *Boston Athletic Association v. International Marathons, Inc.*, 392 Mass. 356 (1984), the Appeals Court was firm in its view that, in order for an "extraordinary transaction" – one that "divests" a charity of its "very essence" – to be valid, there must be concrete proof that the charity's board "specifically authorized" the transaction in advance.

While the court offered no bright-line test for determining how this standard might be applied in other cases, it found the standard easily met in the *Bostonview* case, where the officers planned to sell "substantially all" of the charity's real estate, the charity had the "specific object of holding title to properties and collecting the income therefrom and turning over the entire amount thereof, less expenses" to its affiliated church, and there was no evidence of specific advance consent by

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the board, all despite the substantial experience of the plaintiff company's principal and the longstanding *Boston Athletic Association* precedent.

In the end, this is a case of more than just "buyer beware." It is a case of "buyer beware, and if the seller is a charitable corporation, buyer confirm the charitable board's advance written consent" (or "if it sounds too good to be true, then it probably is").

Indeed, the Appeals Court plainly stated that, regardless of what circumstances may suggest that a charitable officer has the authority to sell a "major" charitable asset, "the requirement of specific authorization is presumed, and the burden is on the purchaser to inquire as to the authority conferred before entering into the transaction." Therefore, anyone poised to purchase any debatably major asset from any charitable corporation would be well-advised both

to insist upon the corporation's delivery of its board's explicit prior written consent to the transaction and to satisfy itself that the written consent is authentic. ■

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