

September 22, 2017

Office of the Attorney General
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To whom it may concern,

We represent a party that has become aware of information suggesting that a Utah nonprofit corporation has transferred millions of dollars of property to one of its trustees in apparent violation of Utah law. We bring this to your attention, as the Utah Attorney General has authority to rectify these violations.

Facts

We believe the following facts are accurate based on the documentary evidence we have gathered and on information and belief. A packet of bates-numbered documents supporting this recitation of facts is attached hereto. Each recitation includes parenthetical citations to the relevant bates-numbered pages of the attached documents.

1. NewVistas Foundation (aka The NewVista Foundation and New Vista Foundation) (“**NV Foundation**”) is a Utah nonprofit corporation formed on March 10, 2015 and recognized as a tax-exempt private foundation by the IRS. (001, 091)
2. Because NV Foundation is a Utah nonprofit corporation, it has no owners, but the three directors/trustees in control of NV Foundation are David R. Hall, Karen V. Hall, and Michael Hall. (007, 114, 126)
3. David and Karen Hall are husband and wife. Michael is their son. (126)
4. Article II.B of NV Foundation’s Articles of Incorporation (“Articles”) provides that it is “organized exclusively for charitable, religious, educational, and scientific purposes, including, for such purposes, the *making of distributions to organizations that qualify as exempt organizations under Section 501(c)(3)*” of the Internal Revenue Code (“IRC”). (113 (emphasis added))

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5. Article II.C of NV Foundation's Articles provides that "No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to, its members, trustees, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set out [herein]." (113)

6. Article II.E of NV Foundation's Articles provides that "the Corporation shall not carry on any other activities not permitted to be carried on" by an entity exempt under IRC § 501(c)(3). (113)

7. Article III.B of NV Foundation's Articles limits NV Foundation's powers such that it may not "engage in any act of self-dealing as defined in [IRC §] 4941(d)" and may not "make any taxable expenditures as defined in [IRC §] 4945(d)." (114)

8. Article X of NV Foundation's Articles provides that upon dissolution, the corporation's assets "shall be distributed for one or more exempt purposes within the meaning of [IRC §] 501(c)(3)" or to another exempt entity. (115)

9. DRH Holdings LLC ("**DRH Holdings**") is a Utah LLC formed on November 23, 2016. (009)

10. David Hall is the sole member of DRH Holdings. (011)

11. In 2016 NV Foundation acquired twelve real properties in Provo, Utah (the "**Provo Properties**"), namely the parcels with the following serial numbers:

35:064:0007; 35:064:0008; 35:064:0009; 35:064:0013; 35:064:0016;
35:064:0017; 35:064:0025; 35:064:0026; 41:038:0001; 41:038:0005;
41:038:0011; 41:038:0046.

(015-026)

12. NV Foundation transferred ownership of the Provo Properties to DRH Holdings by a single quitclaim deed (the "**Utah Transfer**"), which indicates that the deed was executed on December 29, 2016. The deed indicates it was recorded on the same date. (012-014, see also 015-026)

13. Upon information and belief, the Utah Transfer was made gratuitously, without any consideration paid to NV Foundation.

14. Windsorange LLC (“**Windsorange**”) is a Vermont LLC created on December 22, 2016. (027)

15. The sole member of Windsorange is David Hall. (028)

16. In 2015 and 2016, NV Foundation purchased over twenty parcels of real property, representing approximately 1400 acres of land, in the rural Vermont towns of Royalton, Sharon, Strafford and Tunbridge (collectively, the “**Vermont Properties**”). On information and belief, NV Foundation paid over \$6 million for these Vermont properties. (*See, e.g.*, 036, 050-051, 061-062, 068-069).

17. NV Foundation transferred ownership of the Vermont Properties to Windsorange by four Warranty Deeds (the “**Vermont Transfers**”), which indicate that the deeds were executed on December 30, 2016. The deeds indicate they were recorded on the following dates: February 23, 2017 (Royalton); February 24, 2017 (Tunbridge); February 27, 2017 (Strafford); and March 6, 2017 (Sharon). (036-037, 050-052, 061-063, 068-069, 074)

18. Vermont Property Transfer Tax Returns (Form PTT-172) were filed with respect to all four warranty deeds. (032, 042, 053, 064)

19. Line E3 on the first page of each Form PTT-172 asks for a Land Gains exemption number. On each Line E3, NV Foundation entered exemption code “02”. (032, 042, 053, 064)

20. Page 5 of the Instructions for Form PTT-172 explains that a party must file a “Land Gains Tax Return” unless “the transfer falls into one of the exemptions described in the list that follows” and the transferor enters the exemption number on Line E3 of the Form PTT-172. (079)

21. Page 6 of the Instructions for Form PTT-172 indicates that exemption code “02” is used for a “Transfer without consideration, such as a gift.” (080)

22. The exemption code used on the Vermont Property Transfer Tax Returns indicates that the transfers from NV Foundation to Windsorange were gratuitous and not for any consideration.

23. Since the Utah Transfer occurred at about the same time as the Vermont Transfers and was between similar parties, it is highly likely that the Utah Transfer was also gratuitous and not for any consideration.

Discussion

A. **Gratuitous Transfers by a Utah Nonprofit Corporation to a Private Party Violate Utah Law**

The Utah Supreme Court has referred to property owned by nonprofit entities as a “gift to the community.” *Utah County Board of Equalization v. Intermountain Health Care*, 709 P.2d 265, 269 (Utah 1985). Property owned by a nonprofit corporation is dedicated to public purposes and cannot be transferred in a way to benefit private parties. The Utah Revised Nonprofit Corporation Act (“Act”) supports this concept in three ways: (1) prohibiting “conflicting interest” transactions; (2) prohibiting distributions to private parties; and (3) prohibiting acts that would run counter to federal laws governing private foundations.

First, the Act prohibits “conflicting interest” transactions, which “means a contract, transaction, or other financial relationship” between a nonprofit corporation and (a) a director of the nonprofit corporation; (b) a party related to a director; or (c) an entity in which a director of the nonprofit corporation: (i) is a director or officer; or (ii) has a financial interest. UCA § 16-6a-825(1).

Here, the Utah Transfer and the Vermont Transfers appear to be gratuitous transfers by NV Foundation to DRH Holdings and Windsororange, respectively. Such transfers constitute conflicting interest transactions, because David Hall is a trustee of NV Foundation and is also the sole member of both DRH Holdings and Windsororange, which are for-profit companies.

UCA § 16-6a-825(4)(b) outlines ways a conflicting interest transaction may be approved or ratified by a nonprofit corporation. These approval methods are not applicable here. NV Foundation has no disinterested directors to the transactions in question. David Hall is the recipient of the transfers and he, his wife, and his child are the sole trustees of NV Foundation. Further, the transfers are inconsistent with NV Foundation’s Articles, as described more particularly in Part B, and the gratuitous transfers cannot be considered fair to NV Foundation.

Second, the Act prohibits most distributions from nonprofit corporations. UCA §§ 16-6a-1301, 1302¹ (“[A] nonprofit corporation may not make a distribution” except generally to qualified parties, including other nonprofit corporations and governmental entities).

¹ UCA § 1302 was amended after the events at issue occurred, but the amendment is immaterial to the analysis here.

The Utah Transfer and the Vermont Transfers are distributions to nonqualified for-profit parties. Thus, the transfers are in breach of the Act's prohibition against distributions by a Nonprofit Corporation to private parties.

Third, UCA § 16-6a-116 prohibits transactions that violate the federal private foundation rules. We explain more fully in Part B how the transactions would violate IRC §§ 4941 and 4945. NV Foundation applied to be a private foundation before making the transfers at issue here, but was not recognized by the IRS as a private foundation until after the transfers were made. UCA § 16-6a-116 should be interpreted to apply to nonprofit corporations that have applied to become private foundations and whose articles forbid violating the private foundation rules.

In summary, as a matter of common law and through at least three separate statutory provisions, Utah law provides that the assets of nonprofit entities are community assets that cannot be transferred for the benefit of the individuals that control the nonprofit. The Utah Transfer and the Vermont Transfers appear to have violated these prohibitions.

B. The Transfers Exceed the Powers Authorized by NV Foundation's Articles

The Utah Transfer and the Vermont Transfers were *ultra vires* acts that exceeded the authority of NV Foundation's trustees for three separate reasons.

First, as described in the statement of facts, Articles II.B, C, and E of NV Foundation's Articles provide that foundation assets may only be distributed to exempt entities or otherwise used for exempt purposes. A gratuitous distribution to *any* nonexempt private party is thus *ultra vires*.

Second, the Articles prohibit any activity that would be an act of self-dealing pursuant to IRC § 4941. The Utah Transfer and the Vermont Transfers would both be acts of self-dealing *even if full consideration was paid for the properties*. The transfers are to entities owned by David Hall, who is both a trustee of and a substantial contributor to NV Foundation. *See* IRC § 4941(d)(1)(A) and (E) (defining "self-dealing" to include any "direct or indirect . . . sale or exchange . . . of property between a private foundation and a disqualified person," or "transfer to . . . a disqualified person of the . . . assets of a private foundation"; § 4946(a)(1)(A), (B), (F) (defining "disqualified person" to include substantial contributors, foundation managers, and entities owned by substantial contributors and foundation managers).

Third, the Articles prohibit any activity that would be a taxable expenditure pursuant to IRC § 4945. The Utah Transfer and Vermont

Transfers would be taxable expenditures pursuant to IRC § 4945(d)(4) and (5), because they are transfers to non-exempt organizations and are for non-exempt purposes.

While it is the province of the IRS to enforce the IRC, we cite these provisions to show that, due to the Act's incorporation of IRC standards, the transfers were beyond the power of NV Foundation's directors to make and they violated Utah law.

In summary, the Utah Transfer and the Vermont Transfers were *ultra vires* acts that exceeded the authority of NV Foundation's trustees pursuant to Utah Law and the governing Articles of NV Foundation.

C. The Attorney General Has Authority to Investigate and Seek a Remedy

You are no doubt more familiar with the powers of the Attorney General's Office than we are, but we note that UCA § 16-6a-304(2)(c) provides that a "nonprofit corporation's power to act may be challenged . . . in a proceeding by the attorney general under Section 16-6a-1414."

D. The Proper Remedy is Rescission of the Gratuitous Transfers

Here, the only proper remedy is to hold the Utah Transfer and the Vermont Transfers void.

The properties held by NV Foundation are community assets dedicated to the public good. These assets should be returned to NV Foundation. It is not possible for David Hall, DRH Holdings, and/or Windsorange to simply make NV Foundation whole by paying monies to NV Foundation. Because NV Foundation is a private foundation under federal law, allowing Hall or LLCs he owns to pay for the properties would be a "direct or indirect . . . sale or exchange . . . of property between a private foundation and a disqualified person," in clear violation of IRC § 4941. This would by definition also violate UCA § 16-6a-116 and the Articles of NV Foundation.

It is within the power of the State to render the Utah Transfer and the Vermont Transfers void. UCA § 16-6a-304(2)(c) provides that a court may "set aside" *ultra vires* acts. In addition, UCA § 16-6a-825(2) provides that upon the finding of a conflicting interest transaction, a court may "rule that the conflicting interest transaction is void" or "set aside the conflict of interest transaction."

Voiding a transaction in circumstances such as these is supported by precedent. In *International Cultural Exchange Schools, Inc. v. Madsen*, 504 P.2d 39 (Utah 1972), the Utah Supreme Court described an entity that was “incorporated . . . under the Utah Nonprofit Corporations Act . . . whose articles provided . . . that ‘no part of the earnings’ could ‘inure to the benefit of any shareholder or individual’.” When the insiders formed a new, for-profit corporation and “purported to transfer all [of the nonprofit’s] assets . . . to the new corporation,” the Court noted that the “transfer appeared to the trial court to be void as being violative of Title 16-6, U.C.A.1953 (supra) under which plaintiff was organized.” *Id.*

In addition to the remedy discussed above, the Attorney General may believe it is fitting to impose such fines, penalties, or other sanctions as may seem appropriate. It may be warranted to ask for State and/or judicial supervision of the activities of NV Foundation for some period of time to ensure future compliance with Utah law.

Thank you for your attention to this matter. Our desire is that your office investigate this matter further, confirm that the transfers at issue were made gratuitously, direct that DRH Holdings and Windsorange restore the Provo Properties and the Vermont Properties to NV Foundation, and (if necessary or otherwise appropriate) initiate judicial proceedings to obtain an order rendering the transfers void and imposing such other sanctions as may be warranted by the investigation. If possible, we request that your office keep us apprised of continuing developments. We may be able to assist in providing additional information.

As some of the property at issue is located in Vermont, we understand that the Attorney General of Vermont is also being apprised of these facts.

Very truly yours,

RAY QUINNEY & NEBEKER P.C.



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