

WILLIAM B. CHANDLER III
CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

P.O. Box 581
GEORGETOWN, DE 19947
TELEPHONE (302) 856-5424
FACSIMILE (302) 856-5251

Submitted: November 5, 2004
Decided: November 23, 2004

James D. Griffin
Griffin & Hackett, P.A.
P.O. Box 612
Georgetown, DE 19947

Marsha Kramarck
Deputy Attorney General
Civil Division
Carvel State Building
820 N. French Street
Wilmington, DE 19801

Re: *In re The Potter Estate Charity Trust*
Civil Action No. 287-S

Dear Counsel:

On September 15, 2004, the Court approved the sale of the last remaining tract of land (approximately 41 acres) held by the Potter Estate Charity Trust ("Trust"). This unimproved parcel, located adjacent to the Milford city limits, is zoned agricultural and was used for farming. The Court approved a final sale price of \$55,000 per acre. The winning bidder for the property was Country Life Homes, Inc.

The Order entered on September 15 also authorized the payment of certain expenses and fees in connection with the sale, but it deferred ruling on the Trustee's (Mellon Bank) fee for handling the Trust's affairs in connection with the sale. Mellon

seeks a fee of \$67,650, representing a “buyer broker’s commission of 3%.”¹ Goldberg estimates that Mellon employees devoted about fifty hours to negotiating the termination of a 99-year lease that burdened the 41-acre tract in question.² In addition, he testified that he and other Mellon employees spent about sixty hours in connection with the “marketing process,”³ and another thirty hours “in consultation with outside legal counsel, travel time, attending the Chancery Court hearing . . . and preparing for the settlement and sale of the property.”⁴ Goldberg offered no testimony as to the hourly rate charged by Mellon employees. Instead he asks the Court to apply a 3% commission “rate” to the gross sale proceeds. Mellon justifies its request based on its low historic fee returns on the Trust over the years (in this instance, 1% of the land’s assigned market value over the past 42 years of \$197 per year yields an annual fee of \$2.00), as well as the savings to the Trust as a result of Mellon’s willingness to accept a 3% commission whereas unimproved land sales typically incur a real estate broker’s commission in the range of 7% to 10%.

The State of Delaware, through the Attorney General, opposes Mellon’s request for a \$67,650 commission. The Attorney General insists that a fee of \$2,000 would be reasonable. This view is based on the alleged failure of the Trustee to monitor the Trust assets, the failure to manage the Trust assets properly, and the failure to document the time and expenses the Trustee incurred in arranging and advertising the auction sale. In

¹ Aff. of Jerry Goldberg, an officer of Mellon, dated Oct. 22, 2004.

² *Id.* at ¶ 8.

³ *Id.* at ¶ 12.

⁴ *Id.* at ¶ 13.

the absence of such documentation, the Attorney General recommends denying Mellon any fee, or limiting it to \$2,000.

After carefully considering the Trustee's position, and the Attorney General's views, the Court concludes that a reasonable Trustee's fee is \$7,000. The reason for this conclusion is simple. Mellon had arranged, without notice or advertising, to sell the 41-acre tract for \$17,500 per acre. Mellon, as Trustee, petitioned this Court to approve a sale on those terms, \$17,500 per acre (for a total of \$717,500) for 41± acres of farmland. Because this Court was skeptical about the sales price, it ordered a new appraisal. When that appraisal reflected a slightly lower appraised value, the Court rejected both appraisals, and directed Mellon to conduct a *public* sale of the property, with advertising that solicited interested bidders. Mellon did so. And as a result, a high bid of \$55,000 per acre was tendered, or more than *three times* the sales price that Mellon had originally recommended to the Court. Considered in that light, Mellon's request for 3% of the newer, higher sale price is an example of overreaching. To award Mellon its requested fee would be to grant it a windfall, an excessive fee unrelated to its efforts. By pointing to the 7% to 10% fee typically charged by a real estate broker, Mellon would have the Court believe that Mellon is responsible for the increased sale price. Mellon had asked the Court to approve a sale to Country Life Homes (the ultimate winning bidder) for a low-ball offer of \$17,500 per acre. Had the Court agreed to the sale as the Trustee originally proposed, the Trust would not have had the opportunity to gain an additional \$1.7 million (\$2,409,000-\$717,500).

In light of all the circumstances, the Court awards Mellon a fee of \$7,000 (140 hours x \$50 = \$7,000).⁵ The Trustee's advertising costs have been approved as a separate award in the September 15, 2004 Order.

Counsel shall confer and agree upon a form of Order.

Very truly yours,

/s/ William B. Chandler III

William B. Chandler III

WBCIII:meg

⁵ Mellon bore the burden of proving the reasonableness of its fee request. Goldberg's affidavit describes the time spent by Mellon employees in general terms, with no supporting time records. Nor does Goldberg's affidavit specify the hourly rates applicable to the various employees involved with the Trust. Because the Court has accepted the 140-hour calculation, it is not unfair for the Court to establish \$50 as a reasonable hourly rate, especially given the Trustee's performance regarding the subject property.