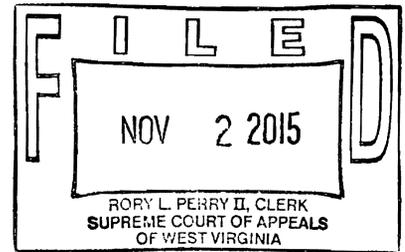


RECORD NO. 15-0597
RECORD NO. 15-0599



IN THE
**SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MARK W. MATKOVICH, STATE TAX COMMISSIONER, and LARRY A. HESS, ASSESSOR, BERKELEY COUNTY, Respondents below,
and
LARRY A. HESS, ASSESSOR, BERKELEY COUNTY, WEST VIRGINIA, and MARK W. MATKOVICH, STATE TAX COMMISSIONER, Respondents below,

Petitioners,

vs.

UNIVERSITY HEALTHCARE FOUNDATION, INC., f/k/a CITY HOSPITAL FOUNDATION, INC., Petitioner below,

Respondent.

ON APPEAL FROM THE BUSINESS COURT OF BERKELEY COUNTY
(CIVIL ACTION NO. 14-AA-4)

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

This case presents a question of fundamental importance to the availability and quality of healthcare in West Virginia: must a charitable hospital system forego the benefit of its charitable *ad valorem* property tax exemption, reducing the funds available to carry out its charitable purposes, in order to offer life-saving treatment modalities that it cannot otherwise provide without the assistance of specialized private care providers?

This case is a taxability appeal involving the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center, a medical building owned by the Respondent, University Healthcare Foundation, Inc. (“UHF” or “Respondent”), and located on the campus of City Hospital, Inc., d/b/a Berkeley Medical Center (“BMC”). (R. at 33-38; 458-59) UHF is a charitable, non-profit, tax-exempt organization under Internal Revenue Code § 501(c)(3), whose charitable purpose is to support BMC by raising funds and providing facilities for the hospital, and to promote medical care and well-being of the community as a whole. (R. at 414-16; 438) UHF and BMC, along with University Healthcare Physicians, Inc. (“UHP”), are part of West Virginia University Hospitals - East, Inc., t/a University Healthcare (“WVUH-E”), a unified healthcare system that operates charitable, non-profit hospitals in the Eastern Panhandle of West Virginia in conjunction with the West Virginia University School of Medicine.¹ (R. at 579-94; 613-624)

A. STIPULATED FACTS²

1. University Healthcare Foundation, Inc. was designated as exempt from federal income taxes pursuant to the Internal Revenue Code § 501(c)(3) in 1984. The designation is currently in effect and has been continuously in effect since 1984.

¹ BMC, UHP, and WVUH-E are also charitable, non-profit, tax-exempt organizations under Internal Revenue Code § 501(c)(3). UHP is the practice plan for the clinical faculty of the West Virginia School of Medicine in the Eastern Panhandle. (R. at 614)

² (See R. at 1158-62)

2. Prior to an amendment of its articles of incorporation on December 23, 2013, the name of University Healthcare Foundation, Inc. was City Hospital Foundation, Inc.

3. Prior to an amendment of its articles of incorporation on October 12, 2004, the name of City Hospital Foundation, Inc. was Gateway Foundation, Inc.

4. City Hospital, Inc. was designated as exempt from federal income taxes pursuant to the Internal Revenue Code § 501(c)(3) in 1940. The designation is currently in effect and has been continuously in effect since 1940.

5. Berkeley Medical Center is a registered trade name of City Hospital, Inc. Consequently, Berkeley Medical Center is currently exempt from federal income taxes pursuant to IRC § 501(c)(3).

6. The Wellness Center at Berkeley Medical Center is a department of City Hospital, Inc. d/b/a Berkeley Medical Center.

7. West Virginia University Hospitals - East, Inc. was designated as exempt from federal income taxes pursuant to the Internal Revenue Code § 501(c)(3) in 2004. The designation is currently in effect and has been continuously in effect since 2004.

8. University Healthcare is a registered trade name of West Virginia University Hospitals - East, Inc.

9. University Healthcare Physicians, Inc. was designated as exempt from federal income taxes pursuant to the Internal Revenue Code § 501(c)(3) on August 28, 2014, and the Internal Revenue Service made the designation retroactive to October 1, 2012. The designation is currently in effect and has been continuously in effect since October 1, 2012.

10. American Cancer Society, Inc. was designated as exempt from federal income taxes pursuant to the Internal Revenue Code § 501(c)(3) many years ago and the designation is

currently in effect.

11. University Healthcare Foundation, Inc. is the owner of that certain improved real property situate in Martinsburg District, of Berkeley County, West Virginia, consisting of 5.71 acres, described as Lot A, Dorothy McCormack Center, assessed on the land books of Berkeley County, West Virginia, as Map 4D, Parcel 1.1, including ten (10) subparcels separately identified by the Assessor of Berkeley County, West Virginia as 1.1.3001 (Suite 1100), 1.1.3002 (Suite 2100), 1.1.3003 (Suite 2400), 1.1.3004 (Suite 3200), 1.1.3005 (Suite 3300), 1.1.3006 (Suite 3500), 1.1.3007 (Suite 2200), 1.1.3008 (Suite 3100), 1.1.3010 (Suite 3650), and 1.1.3013 (Suite 1200).

12. Lot A, Dorothy McCormack Center, assessed as such on the land books of Berkeley County, West Virginia, as Map 4D, Parcel 1.1, including the aforesaid subparcels/Suites thereof, is a "Common interest community" as that term is defined and used in West Virginia Code, Chapter 36B.

13. As of July 1, 2013, the individual Suites, and respective square footages and tenants, of the Dorothy McCormack Center were as follows:

- a. Suite 1100 (4,973 ft.²): Ambergris, LLC;
- b. Suite 1101 (315 ft.²): American Cancer Society;
- c. Suite 1200 (19,100 ft.²): City Hospital, Inc.;
- d. Suite 1300 (1,971 ft.²): City Hospital, Inc.;
- e. Suite 2100 (168 ft.²): Patient Transportation;
- f. Suite 2200 (2,800 ft.²): University Healthcare Physicians, Inc.;
- g. Suite 2310 (4,644 ft.²): West Virginia University Hospitals - East, Inc.;
- h. Suite 2400 (2,200 ft.²): Robert E. Bowen, MD Ltd.;
- i. Suite 2600 (7,420 ft.²): City Hospital, Inc.;
- j. Suite 3100 (3,200 ft.²): University Healthcare Physicians, Inc.;
- k. Suite 3200 (3,450 ft.²): University Healthcare Physicians, Inc.;
- l. Suite 3300 (1,728 ft.²): University Healthcare Physicians, Inc.;
- m. Suite 3500 (1,933 ft.²): University Healthcare Physicians, Inc.;
- n. Suite 3600 (1,292 ft.²): West Virginia University Hospitals - East, Inc.;
- o. Suite 3650 (1,140 ft.²): University Healthcare Physicians, Inc.;

- p. Suite 3650 (183 ft.²): Vacant;
- q. Suite 3700 (2,800 ft.²): University Healthcare Physicians, Inc.; and
- r. Suite 3800 (1,100 ft.²): City Hospital, Inc.

14. The tax year at issue before the Court is the 2014 tax year. The assessment date for the 2014 tax year was July 1, 2013.

15. University Healthcare Foundation, Inc., City Hospital, Inc., West Virginia University Hospitals - East, Inc., and University Healthcare Physicians, Inc. are all separate legal entities.

16. Ambergris, LLC, Patient Transportation, and Robert E. Bowen, MD, Ltd. have not been designated as exempt from federal income taxes pursuant to the Internal Revenue Code § 501(c)(3).

B. ADDITIONAL FINDINGS OF FACT MADE BY THE BUSINESS COURT³

The Dorothy A. McCormack Cancer Treatment & Rehabilitation Center is located on the BMC campus and is an operational extension of the hospital. The McCormack Center must be located on the BMC campus as a result of CMS (Centers for Medicare & Medicaid Services) regulations regarding reimbursement for patient services and West Virginia certificate of need guidelines. (R. at 458-59) If the McCormack Center were not located on the hospital campus, BMC would be unable to offer any of its outpatient treatment modalities. (R. at 465-66)

All of the tenants of the McCormack Center provide healthcare services that directly further UHF's and BMC's shared charitable purpose of improving the quality of healthcare in the Eastern Panhandle and the well-being of its citizens. UHF only leases suites in the McCormack Center to departments of BMC, or to tenants that directly support the hospital's operations: "[i]t all has to be related to health care and the providing of services." (R. at 443) As of July 1, 2013,

³ (See R. at 4-12)

all but three of the suites in the McCormack Center were leased to charitable, non-profit entities.⁴ (R. at 1158-62) The remaining three suites were leased to service providers that are indispensable to the operations of the McCormack Center and, in fact, provide the cancer treatment and rehabilitation services for which the building was built.

UHF leases Suite 1100 of the McCormack Center to Ambergris, LLC, which provides the radiation oncology services for BMC through a joint venture with the hospital.⁵ Leasing space in the McCormack Center to Ambergris furthers the charitable purposes of UHF and BMC by allowing the hospital to offer radiation oncology to its patients. BMC does not independently provide radiation oncology services, but instead contracts with Ambergris, because it would be extremely difficult for a hospital of its size to afford the extremely high cost of equipment, stay current on best practices and treatments, and attract high quality oncologists. If Ambergris did not offer radiation oncology at BMC, cancer patients living in the Eastern Panhandle would be forced to travel to Winchester, Virginia; Morgantown, West Virginia; or Baltimore, Maryland for their treatments. (R. at 466-68)

Indeed, UHF built the McCormack Center for the specific purpose of helping BMC establish the radiation oncology department run by Ambergris. Prior to the construction of the McCormack Center, BMC was unable to offer radiation oncology services. Dorothy A. McCormack, a breast cancer patient at BMC, and her husband, Leonard McCormack, made a large capital donation to UHF to ensure that cancer patients in the Eastern Panhandle would be

⁴ The vast majority of the suites in the McCormack Center were leased to BMC, UHF, WVUH-E, or the American Cancer Society. With the exception of the suite leased by BMC to house its Wellness Center, the Petitioners do not challenge the tax-exempt status of the suites leased to these entities. One additional small suite, consisting of 183 square feet (slightly smaller than a 14' x 14' room), was vacant.

⁵ The Assessor's brief incorrectly suggests that UHF and Ambergris share a relationship other than tenant and landlord. *See* Pet'r Assessor Br. at 7. The joint venture described by Anthony Zelenka in his trial testimony is between Ambergris and BMC (i.e., the hospital), and *not* between Ambergris and UHF. Both the lease, and Mr. Zelenka's testimony, are truthful and accurate.

able to get their radiation treatments locally. (R. at 528-29) Suite 1100 was specifically designed to house the radiation oncology equipment utilized by Ambergris, which must be encased in six feet of concrete. (R. at 460, 477-78)

UHF leases Suite 2100 of the McCormack Center to Patient Transportation, which transports patients to and from their homes for treatment. Leasing space in the McCormack Center to Patient Transportation primarily and immediately fulfills the charitable purposes of UHF and BMC by enabling patients, who otherwise have no means of travel from their homes, to get to the center for their treatments. (R. at 445-46) Patient Transportation is particularly important to the cancer treatment modalities provided at the McCormack Center because patients cannot skip a radiation or chemotherapy treatment -- “ if mom can’t pick you up or you can’t pick mom up that day she can’t just stay at home [and miss her treatment].” UHF even attempted to relocate Patient Transportation to an off-campus office, but the radiation oncologist objected because he depends on its services to access his patients. (R. at 469-70)

UHF leases Suite 1200 of the McCormack Center to City Hospital, Inc. to house BMC’s Wellness Center. Leasing space in the McCormack Center to BMC for the Wellness Center primarily and immediately fulfills the charitable purposes of UHF and BMC by enabling the hospital to offer cardiac and physical rehabilitation services to its patients, and by enabling members of the general public to improve their health by participating in a hospital-supervised, preventive-health physical fitness program. (R. at 438; 444-45)

BMC’s promotion of physical fitness through the Wellness Center provides a clear community benefit in the form of better healthcare because statistics demonstrate that physical fitness is important to the quality of community health. The Wellness Center is particularly important to the quality of community health in the Eastern Panhandle because West Virginia

residents are some of the most obese in the country (behind only Louisiana and Mississippi), and the health status of Berkeley County residents, in particular, is among the bottom three counties in West Virginia. (R. at 444-45; 449) By providing a safe, non-intimidating environment in which individuals with, or at risk for, health problems can work to improve their health under the supervision of healthcare professionals, the Wellness Center directly supports BMC's charitable mission and provides far more than mere recreational use to its members. (R. at 524-28)

The Wellness Center further supports UHF and BMC's charitable purposes by providing free community outreach programs on nutrition, fitness, and exercise. Among the many programs sponsored by the Wellness Center are the Apple Trample 5K Run and training program, monthly running clinics with Dr. Mark Cucuzzella, presentations to the Berkeley County Chamber of Commerce Women's Network, and local health fairs. (R. at 521-24)

UHF leases Suite 2400 of the McCormack Center to Robert E. Bowen, MD Ltd., whose principal, Dr. Bowen, serves as the director for BMC's cardiac rehabilitation program.⁶ Leasing space in the McCormack Center to Dr. Bowen's office primarily and immediately fulfills the charitable purposes of UHF and BMC because Dr. Bowen, as director of BMC's cardiac rehab program at the Wellness Center, is required to be physically present in the building in order for the hospital to offer that service. (R. at 445) Both CMS reimbursement regulations, and BMC's accrediting body, require Dr. Bowen to be physically on-site the entire time that patients are receiving cardiac rehabilitation. (R. at 464-65) The reason for this requirement is obvious: "this is a post-cardiac patient that you're running on a treadmill or doing lifting or doing whatever they're doing on rehab so you want a physician within proximity to that service in case they

⁶ The Assessor's brief, again, incorrectly suggests that UHF and Dr. Bowen's office share a relationship other than tenant and landlord. *See* Pet'r Assessor Br. at 7-8. The cardiac rehabilitation program directed by Dr. Bowen is operated by BMC at the hospital's Wellness Center, and *not* operated by UHF. Again, both the lease, and Mr. Zelenka's testimony, are truthful and accurate.

code. Simple as that.” (R. at 481) Thus, if UHF did not lease space to Dr. Bowen in the McCormack Center, BMC would not be able to offer cardiac rehabilitation through its Wellness Center: “[i]t is an absolute requirement that he be there.” (R. at 465)

UHF collects rent from each of the tenants in the McCormack Center, other than the American Cancer Society, because the federal Stark Law⁷ requires UHF to enter into arms-length agreements with physicians, at comparable market rates, in order to avoid severe self-referral penalties. (R. at 498-99) UHF also collects rent from the McCormack Center’s tenants to pay for the debt service and upkeep of the building. (R. at 500-503) The rental rates charged today by UHF were set when the McCormack Center was originally put into use, based on averages of such rates in the area and on what it costs to build and maintain the center, and those rates increase solely to account for inflation as reflected by the consumer price index. (R. at 498)

If UHF were to realize any surplus revenue due to rents collected from the McCormack Center’s tenants, that revenue would go back into the organization’s charitable purpose of providing additional healthcare and services to the community. (R. at 442). No revenue would inure to the benefit of any private individuals, but would instead be reinvested in UHF’s facilities or otherwise applied to UHF’s charitable purposes. UHF, however, did not realize any surplus revenue from the McCormack Center in 2013, and in fact operated the facility at a net loss of \$323,583. (R. at 500-503; 505-06; 513-14; 754-55)

As with UHF, if BMC were to realize surplus revenue from its operations, that revenue would be used to further the charitable mission of the organization by replacing equipment, purchasing new technology, improving employee pay, and recruiting quality physicians. (R. at 478-80) BMC did not realize any surplus revenue from the Wellness Center in 2012, but in fact

⁷ See 42 U.S.C. § 1395nn and its interpretive regulations.

operated that department at a net loss of \$55,428. (R. at 506-08; 756)

In filing their respective income tax returns, which are open to public inspection, both UHF and BMC are required to report, as taxable unrelated business income, any income that is not directly related to the charitable mission of the organization and fulfillment of its charitable purpose. UHF has never had to treat the rents collected from the McCormack Center as unrelated business income on its tax returns. Similarly, BMC has never had to treat the revenues collected by its Wellness Center department as unrelated business income. (R. at 508-11)

The operations of both UHF and BMC serve to relieve the burdens on state and local government, not only by making charitable healthcare and preventive healthcare available to the community, but by providing significant well-paid employment in the community and specific logistical support to local law enforcement agencies. (R. at 431; 454-55)

II. SUMMARY OF ARGUMENT

UHF disagrees with each of the assignments of error raised by both Petitioners in this appeal. The Business Court correctly applied the law when it determined that UHF satisfied its burden of demonstrating that the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center falls within the charitable use exemption from *ad valorem* property taxation. The Petitioners cannot dispute that the record evidence (either as expressly stipulated by the parties, as established by uncontroverted facts at trial, or as the logical result of the facts so stipulated and established) demonstrates that the McCormack Center meets the test for charitable exemption from *ad valorem* property taxes in the following ways:

ELEMENTS OF TEST FOR EXEMPTION FROM <i>AD VALOREM</i> TAXATION	MATERIAL FACTS SATISFYING EACH ELEMENT
[1] “the corporation or other entity must be deemed to be a charitable organization under 26 U.S.C. § 501(c)(3) or 501(c)(4) as is	1. UHF owns and operates the Dorothy A. McCormack Cancer Treatment &

<p>provided in 110 C.S.R. § 3-19.1”</p>	<p>Rehabilitation Center; and</p> <p>2. UHF is a charitable, non-profit, income tax exempt organization under Internal Revenue Code Section 501(c)(3).</p>
<p>[2] “the property must be used exclusively for charitable purposes,” which use “must be primary and immediate, not secondary or remote”</p>	<p>1. UHF’s charitable purpose is to directly support BMC’s charitable purpose of improving the health of Eastern Panhandle residents and improving the quality of healthcare services available in the area;</p> <p>2. UHF built the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center for the purpose of providing the necessary on-campus facilities for new and expanded outpatient healthcare services at BMC, particularly radiation oncology and physical/cardiac rehabilitation; and</p> <p>3. As of July 1, 2013, every single tenant of the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center used its suite(s) exclusively to expand the patient services available at BMC, or to house departments of the hospital and its affiliated charitable entities.</p>
<p>[3] the property “must not be held or leased out for profit as is provided in W.Va. Code § 11-3-9.”</p>	<p>1. UHF did not build the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center for the purpose of generating income for private shareholders or individuals (UHF is a charity and has no shareholders or equity partners);</p> <p>2. UHF uses the rents collected from the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center’s tenants solely to pay for the building upkeep and debt service;</p> <p>3. UHF did not generate surplus income from the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center for tax year 2014, and in fact operated that facility at a net loss; and</p> <p>4. Even if UHF had generated surplus income from the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center for tax year 2014 (which it did not), that income would not have inured to the benefit of private shareholders or individuals (again, because</p>

	UHF is a charity, and has no shareholders or equity partners), but would have instead been used by the organization to fund additional charitable health care services for the community.
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Syl. Pts. 1 & 2, *United Hosp. Center, Inc. v. Romano*, 233 W.Va. 313, 758 S.E.2d 240 (2014).

III. STATEMENT REGARDING ORAL ARGUMENT

UHF believes this case is suitable for Rule 20 argument because it gives the Court an opportunity to confirm how the charitable exemption from *ad valorem* property taxation operates to reflect the fundamental importance of this State’s charitable healthcare system to the public, while reducing the burdens of state and local government. *See* W.Va. R. App. P. 20.

IV. ARGUMENT

Although expressed in terms of multiple assignments of error, the Petitioners simply disagree with the Business Court’s determination that the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center falls within the charitable use exemption set forth in W.Va. Code § 11-3-9, as interpreted by the Tax Commissioner’s legislative rules and this Court’s prior decisions. However, as the Business Court correctly found, UHF has proven, by clear and convincing evidence, that the McCormack Center should be exempt from *ad valorem* property taxation: (a) UHF owns the McCormack Center and is a charitable, non-profit, income tax exempt organization under Section 501(c)(3) of the Internal Revenue Code; (b) UHF uses the McCormack Center for the exclusive purpose of providing necessary on-campus facilities for patient services provided at BMC, a charitable hospital, or to house departments of the hospital and its affiliated charitable entities; and (c) UHF does not hold or lease out the McCormack Center’s suites for the purpose of making a profit. The Petitioners’ arguments to the contrary misinterpret the relevant legal authorities, focus on irrelevant (or incorrect) facts, and ultimately

fail to rationally apply the clear terms of the charitable use exemption to the realities of providing top-quality healthcare services at a regional charitable hospital.

A. THE BUSINESS COURT’S DECISION IS REVIEWED DEFERENTIALLY FOR ABUSE OF DISCRETION, WITH UNDERLYING FINDINGS OF FACT REVIEWED FOR CLEAR ERROR AND QUESTIONS OF LAW REVIEWED *DE NOVO*.

The Tax Commissioner misstates the standard of review applicable to the Business Court’s decision by asserting that “factual findings made by the Tax Department or any other administrative agency receive deference.” Pet’r Tax Comm’r Br. at 12. Taxability cases filed pursuant to W.Va. Code § 11-3-24a are not adjudicated before the Tax Department or any other administrative agency, but are instead tried *de novo* to the circuit court or, in this case, the Business Court. *See* W.Va. Code § 11-3-24a (“the taxpayer may apply to the circuit court ... for review of the question of classification or taxability in the same fashion as is provided ... in section twenty-five of this article.”); W.Va. Code § 11-3-25(c) (“If ... a question of classification or taxability is presented, the matter shall be heard *de novo* by the circuit court.”). The Court cannot defer to the factual findings of the Tax Department because there was no administrative hearing and, therefore, no administrative record. Instead, the correct standard of review is the traditional abuse of discretion standard applicable to circuit court orders:

In reviewing the challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

Appalachian Emergency Medical Services, Inc. v. State Tax Com’r, 218 W.Va. 550, 553, 625 S.E.2d 312, 315 (2005) (quoting Syl. Pt. 2, *Walker v. West Virginia Ethics Com’n*, 201 W.Va. 108, 492 S.E.2d 167 (1997)) (applying abuse of discretion standard to review of circuit court’s

decision in taxability case filed pursuant to W.Va. Code § 11-3-24a).

“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” W.Va. R. Civ. P. 52(a). “In plain terms, [an appellate court] should not overrule a circuit court’s finding or conclusion as to whether the burden of persuasion has been met unless the evidence is so one-sided that it may be said that a reasonable factfinder could not have gone the way of the circuit court.” *Brown v. Gobble*, 196 W.Va. 559, 565, 474 S.E.2d 489, 495 (1996).

B. THE BUSINESS COURT CORRECTLY DETERMINED THAT THE DOROTHY A. MCCORMACK CANCER TREATMENT & REHABILITATION CENTER, CONSISTING OF ITS SUITES AND COMMON PARTS, SATISFIES EACH ELEMENT OF THE APPLICABLE LEGAL TEST FOR CHARITABLE EXEMPTION FROM 2014 *AD VALOREM* PROPERTY TAXES.

The West Virginia Constitution authorizes the Legislature, by general enactment, to exempt from *ad valorem* property taxation “property used for educational, literary, scientific, religious or charitable purposes.” W.Va. Const. Art. X, § 1. *See also Appalachian Emergency Med. Serv., Inc. v. State Tax Comm’r*, 218 W.Va. 550, 554, 625 S.E.2d 312, 316 (2005). In the exercise of its constitutional authority, the Legislature enacted West Virginia Code § 11-3-9, which exempts from taxation “[p]roperty used for charitable purposes and not held or leased out for profit,” and authorizes the Tax Commissioner to issue rules used to determine whether the property of a charitable organization is exempt. *See* W.Va. Code § 11-3-9. *See also* W.Va. Code R. § 110-3-19. Specifically, real property is exempt from taxation if: (1) the owner of the property is recognized as exempt from federal income taxation under either Section 501(c)(3) or 501(c)(4) of the Internal Revenue Code; (2) the property is used for charitable purposes; and (3) the property is not held or leased out for profit. *Id.*

1. The Parties Stipulated That the Respondent Owns the Dorothy A. McCormack Cancer Treatment & Rehabilitation, and That the Respondent Is a Charitable 501(c)(3) Organization.

The Petitioners do not dispute that the first prong of the charitable exemption test has been met: the parties stipulated that UHF owns the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center, and that UHF is recognized as tax-exempt and charitable under Section 501(c)(3) of the Internal Revenue Code. (R. at 1158, 1160) The Tax Commissioner argued below that the Petitioners did not stipulate to the non-profit or charitable status of UHF, BMC, UHP, or WVUH-E, but only to the fact that those entities are tax-exempt under IRC § 501(c)(3). However, the inescapable conclusion to be drawn from the parties' stipulations is that these organizations are tax-exempt under IRC 501(c)(3) *precisely because* they are both charitable and non-profit. These organizations do not fall under any other exempt purpose listed in the federal tax statute, and all 501(c)(3) organizations are by definition non-profit. *See* I.R.C. § 501(c)(3). Thus, in Syllabus Point 1 of *Wellsburg Unity Apartments, Inc. v. County Commission of Brooke County*, 202 W.Va. 550, 625 S.E.2d 851 (1998), the Court held that “[w]hen a corporation is granted tax exempt status under Section 501(c)(3) of the Internal Revenue Code of 1986, that corporation is deemed to be a charitable organization.” The first prong of the charitable exemption test is clearly satisfied.

2. The Business Court Correctly Determined That the Respondent Uses All Parts of the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center for the Exclusive Charitable Purpose of Supporting the Operations of Berkeley Medical Center, a Charitable Hospital.

The record in this case is replete with either expressly-stipulated or undisputed proof that, as of July 1, 2013, UHF only rented suites in the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center to tenants that expand the patient services available at Berkeley Medical Center, or to house departments of the hospital and its affiliated charitable entities. In other

words, the entirety of the McCormack Center was being used to provide essential support to the hospital in furtherance of UHF's charitable purpose. The evidence and stipulations established that UHF used the McCormack Center in the following manner:

- a. UHF leased four suites directly to BMC (a charitable hospital and part of the University Healthcare system) to provide space for its outpatient treatment and testing services (suites 1300 & 2600), for its Wellness Center (suite 1200), and for its diabetes education program (suite 3800);
- b. UHF leased seven suites to UHP (a charitable 501(c)(3) and part of the University Healthcare system) to provide space for a variety of medical specialties such as behavioral health (suite 3500), endocrinology (suite 3100), ear, nose and throat (suite 3200), gastroenterology (suite 3700), pulmonology (suite 3300), surgery (suite 2200) and urology (suite 3650);
- c. UHF leased one specially-outfitted suite to Ambergris, LLC to provide cancer radiation treatment for BMC's patients (suite 1100);
- d. UHF leased one suite to Robert E. Bowen, MD Ltd., so that Dr. Bowen, its principal and the director of BMC's cardiac rehabilitation program, can be on-site as required by CMS cardiac rehab regulations (suite 2400);
- e. UHF leased one very small suite (168 square feet -- an approximately 13' x 13' room) to Patient Transportation, the function of which is to assure that patients unable, or without the means, to travel will still be able to get to their required radiation and chemotherapy treatments at the McCormack Center (suite 2100);
- f. UHF provided one small suite (315 square foot -- slightly smaller than an 18' x 18' room), rent-free, to the American Cancer Society for an office (suite 1101); and
- g. UHF leased two suites to WVUH-E (a charitable 501(c)(3) and part of the University Healthcare system) for the administrative offices of that entity and of UHF (suites 2310 and 3600).⁸

(R. at 460-64; 470-75; 625-745; 1160-61) The evidence further established that there is a direct operational connection between UHF's charitable purpose and the tenants that lease space in the McCormack Center, all of whom must improve the patient services available at BMC and the health of Eastern Panhandle residents in general. Indeed, the operational connection between UHF's tenants and the hospital is deliberate:

⁸ As of July 1, 2013, suite 3650, consisting of only 183 square feet (slightly smaller than a 14' x 14' room), was vacant.

Is it all related to health care, yes. Do we have anyone in there that's a non-health care related business, a nail tech salon in the south end of the county or anything like that in the building that we have that is still partially empty, absolutely not. It all has to be related to health care and the providing of services.

(R. at 443) Thus, in as much as UHF's charitable purpose is to support BMC, and UHF only rents space to tenants "related to health care and the providing of services" at BMC, the Business Court correctly concluded that UHF uses the McCormack Center exclusively to further its charitable purpose, and that the second prong of the charitable exemption test had been met.

3. The Business Court Correctly Determined That the Respondent Does Not Hold or Lease out Any Portion of the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center for the Purpose of Making a Profit.

By any sense of the phrase, the Business Court correctly concluded that the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center is "not held or leased out for profit" by UHF. This is true as to both UHF's functional purpose for holding the McCormack Center and the immediate financial consequences of leasing it. The undisputed evidence at trial established:

- a. UHF did not construct the McCormack Center for the purpose of making a profit, but rather to provide BMC with the necessary on-campus facilities to expand the patient services available at the hospital, particularly cancer treatment modalities that were previously unavailable in the Eastern Panhandle;
- b. UHF does not charge the McCormack Center's tenants rent for the purpose of making a profit, but rather to pay for the building upkeep and debt service, and because 42 U.S.C. § 1395nn and its interpretive regulations, also known as the Stark Law, requires UHF to charge market rent in order to avoid severe self-referral penalties;
- c. the rental rates that UHF charges for the McCormack Center's suites are not designed to generate a profit, but were set at the time the building went into use, based on averages in the area and what it costs to build and maintain the building, and only increase to account for inflation;
- d. for purposes of federal income taxes, UHF has never had to treat any of the rent from the McCormack Center as taxable business income unrelated to UHF's charitable purposes;
- e. UHF did not generate any surplus revenue from the rents it actually collected from the McCormack Center's tenants, but rather operated that facility at a net

loss of \$323,583 for the 2014 tax year; and

- f. even if UHF were to ever realize surplus revenues from the rents it collects from the McCormack Center's tenants, that revenue would not inure to the benefit of any private individuals or shareholders but would instead be reinvested in UHF's facilities or distributed out to the hospitals based on their needs.

(R. at 442; 498-99; 500-03; 505-06; 508-11; 513-14; 529; 754-56) *See also* 42 U.S.C. § 1395nn.

The Petitioners submitted no evidence challenging any of the above facts.⁹ Thus, the Business Court correctly concluded that UHF does not hold or lease out the McCormack Center for profit, and that the third and final prong of the charitable exemption test had been met.

C. WEST VIRGINIA LAW SPECIFICALLY ALLOWS THE RESPONDENT TO LEASE THE DOROTHY A. MCCORMACK CANCER TREATMENT & REHABILITATION CENTER WITHOUT AFFECTING ITS TAX STATUS.

The Tax Commissioner argues that UHF uses the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center “as rental property” and, therefore, UHF must be leasing the McCormack Center “for profit.” *See* Pet'r Tax Comm'r Br. at 21-28. Indeed, the Tax Commissioner's brief persistently refers to UHF as “a landlord of an office building,” and argues that its use of the building cannot be charitable. *Id.* The Tax Commissioner's argument, however, is contradicted by the charitable use statute itself, the legislative rules interpreting the statute, as well as by recent rulings of this Court that upheld tax exemptions for properties leased in furtherance of the owners' charitable purposes.

First, W.Va. Code § 11-3-9(d) specifically states that a charitable organization may rent

⁹ The Petitioner Tax Commissioner attempts to discredit the Business Court's finding that UHF operated the McCormack Center at a loss for the relevant tax year by pointing to the amount of rental income and expenses reported on UHF's Form 990 for tax years 2010-2012, which show a surplus of revenues over expenses. *See* Pet'r Tax Comm'r Br. at 7. However, as explained by Kathleen Quinones (Vice President of Finance for University Healthcare) in her trial testimony, the rental revenue and expenses reported on UHF's Form 990 is not restricted to just the McCormack Center, but instead includes all of UHF's properties. (R. at 501; 512-13) As was clearly stated by Susan Snowden (Chairman of the Board for UHF) in her testimony, “[t]he Foundation owns other buildings. The Foundation owns other real estate.” (R. at 434) The Business Court correctly found that the numbers cited by the Tax Commissioner are irrelevant because the only building at issue in this case is the McCormack Center, and UHF presented testimony and financial documents specific to that building that showed an operational loss for the 2014 tax year. (R. at 503; 505-06; 754-55)

tax-exempt property. “Notwithstanding any other provisions of this section, this section does not exempt from taxation any property owned by . . . charitable corporations or organizations . . . unless such property, or the . . . rents . . . derived therefrom, is used primarily and immediately for the purposes of the corporations or organizations.” W.Va. Code § 11-3-9(d) (emphasis added). In other words, W.Va. Code § 11-3-9(d) allows UHF to rent the McCormack Center’s suites, so long as UHF’s purpose for renting the property is charitable and “the rents derived therefrom” are used primarily and immediately for UHF’s charitable purposes (such as paying for the building upkeep and debt service).

Second, the Petitioners do not address the reasoning of two recent cases in which this Court upheld charitable tax exemptions for leased properties. See *Appalachian Emergency Med. Servs., Inc. v. State Tax Comm’r*, 218 W.Va. 550, 625 S.E.2d 312 (2005) (property leased to a charitable nonprofit was exempt from tax); *Wellsburg Unity Apartments, Inc. v. County Commission of Brooke County*, 202 W.Va. 283, 503 S.E.2d 851 (1998) (apartment building leased by charitable nonprofit to elderly or low income individuals was exempt from tax). As this Court recently explained, the properties at issue in *AEMS* and *Wellsburg* were being used for charitable purposes, notwithstanding the fact that they were being “used as rental property,” because the owners’ purposes for renting those properties were charitable. See *United Hosp. Center, Inc. v. Romano*, 233 W.Va. 313, 319, 758 S.E.2d 240, 246 (2014) (the *Wellsburg* property was being rented “for purposes of relieving poverty” and the *AEMS* property was being rented “to further the corporate mission of assisting emergency services organizations to relieve human suffering.”). Indeed, footnote seven of *AEMS* directly addresses and rejects the Petitioners’ arguments:

“[t]he Tax Commissioner appears to reason in its order that

property that is leased, regardless of whether or not it makes a profit, cannot be tax exempt. . . . The Tax Commissioner's analysis is incorrect. The dispositive question is whether the property is being leased by the charitable organization *for profit*, and not simply whether it is being leased."

Appalachian Emergency Med. Servs., Inc., 218 W.Va. at 553 n.7, 625 S.E.2d at 315 n.7 (emphasis in original). Leasing real property in furtherance of the landlord's charitable purpose is clearly a legitimate, tax-exempt charitable use under West Virginia law.

Finally, even assuming *arguendo* that the rent collected by UHF from the McCormack Center's tenants were to exceed the costs of debt service and upkeep, under the Tax Commissioner's own legislative rules this fact alone would not defeat the tax-exempt status of the McCormack Center. "Realization of a surplus, or of positive net earnings, may not constitute a disqualifying private gain. So long as any such surplus or earnings are used in furtherance of the charitable activities of the organization, no disqualifying gain can be said to inure to the benefit of any private person." W.Va. Code R. § 110-3-19.5. As stated at trial by UHF's board chair, "not-for-profit doesn't mean you don't make any money. All that money then goes back into the charitable use of providing additional health care and services for the community." (R. at 442) Even if UHF had realized surplus revenue from leasing the McCormack Center for the 2014 tax year (which it did not), the property would still be tax-exempt so long as UHF used the surplus to further its charitable purpose and not for the inurement of any private person.

D. LEASING SUITES IN THE DOROTHY A. MCCORMACK CANCER TREATMENT & REHABILITATION CENTER TO THREE TENANTS THAT ARE TAXABLE ENTITIES, BUT WHO PROVIDE SERVICES VITAL TO BERKELEY MEDICAL CENTER'S ABILITY TO OFFER CANCER TREATMENT & REHABILITATION SERVICES, DOES NOT CHANGE THE FACT THAT RESPONDENT'S SOLE PURPOSE FOR LEASING SUITES TO THOSE THREE TENANTS IS EXCLUSIVELY CHARITABLE.

The Petitioners argue that the Dorothy A. McCormack Cancer Treatment &

Rehabilitation Center “is not used exclusively for charitable purposes” because three of UHF’s tenants are not themselves exempt from federal income taxes. *See* Pet’r Assessor Br. at 12-17; Pet’r Tax Comm’r Br. at 12-21. The Petitioners’ argument, however, misconstrues the charitable tax-exemption standard by looking at the financial interest of the tenant rather than the charitable purpose and use of the landlord.

The fact that UHF leases suites in the McCormack Center to three taxable entities does not mean that UHF is using those suites for a non-charitable purpose. This is so because the determinative inquiry *is not* the federal income tax status of the tenant but, instead, whether the act of leasing to a particular tenant furthers the charitable goals of the owner of the property. In *Wellsburg Unity Apartments, Inc. v. County Comm’n of Brooke County*, Unity Housing constructed, owned, and operated an apartment building for the purpose of providing charity housing to elderly or low income individuals who needed such assistance. 202 W.Va. 283, 285, 503 S.E.2d 851, 853 (1998). Looking solely to the tax-exempt status of Unity Housing and the use that Unity Housing made of its apartment building (i.e., providing apartments for the purpose of relieving poverty), the Court concluded that Unity Housing was exempt from *ad valorem* property taxation. 503 S.E.2d at 857. Significant to this Court’s analysis, Unity Housing charged its tenants rent, *see id.* at 853, and Unity Housing’s tenants clearly used their apartments *solely* for their own personal and private benefit.

The Petitioners argue that the cases of *Central Realty Co. v. Martin*, 126 W.Va. 915, 30 S.E.2d 720 (1944) and *State v. McDowell Lodge, No. 112, A.F. & A.M.*, 96 W.Va. 611, 123 S.E. 561 (1924) demonstrate that UHF does not use the McCormack Center exclusively for charitable

purposes.¹⁰ In *Central Realty*, the Court determined that real property owned by the Odd Fellows fraternal organization, and rented to a chain hotel corporation for use as a hotel and store room, was not exempt from taxation. 30 S.E.2d at 722. The *Central Realty* case is factually distinguishable from this case because the Odd Fellows clearly were not organized for the purpose of providing material support to chain hotel corporations, and were thus only leasing the property to a chain hotel for the purpose of generating revenue. The *McDowell Lodge* case, which denied tax exemption to a Masonic lodge that was partially rented “as offices to various persons, and . . . for a printing office,” is factually distinguishable for the same reason -- providing space to the lodge’s tenants did not further the charitable goals of the Masons. 123 S.E.2d at 562. By way of example, if UHF leased a suite in the McCormack Center to house Macy’s Corporation’s accounting department, UHF would obviously not be using the entire building exclusively in furtherance of its charitable purpose of supporting the operations of Berkeley Medical Center, regardless of how UHF uses the rent it collects from Macy’s. However, that is clearly not the case here: “[d]o we have anyone in there that’s a non-health care related business, a nail tech salon . . . or anything like that . . . absolutely not. It all has to be related to health care and the providing of services.” (R. at 443)

Adopting the Petitioners’ view would clearly be inapposite to the *Wellsburg* case. Private citizens obviously cannot be charitable, non-profit entities. If Unity Housing’s tenants were

¹⁰ The Tax Commissioner also argues that this Court should apply *Maplewood Community, Inc. v. Craig*, 216 W.Va. 273, 607 S.E.2d 379 (2004). Pet’r Tax Comm’r Br. at 20. The *Maplewood* Court, however, did *not* hold that leasing property to taxable tenants (in that case, elderly individuals needing housing) cannot satisfy the charitable use prong of the exemption test. Instead, the building in *Maplewood* was deemed to be taxable because “[b]y restricting residency to only those prospective residents who can demonstrate sufficient financial means,” the landlord violated W.Va. Code R. § 110-3-19.3, which prevents a charity from “limit[ing] the class of beneficiaries in such a way as to violate the definition of a charity.” 607 S.E.2d at 388, 390. The property in *Maplewood* was also taxable because its residents were required to “pay a substantial deposit prior to moving into their independent living unit,” *id.* at 384, in violation of W.Va. Code R. § 110-3-26.2, which prohibits deposits of “a substantial amount of money which can be equated to a prepayment of rent.” *Id.* at 388. The *Maplewood* case turned on issues that are simply not a factor in this case, and the Business Court properly rejected it.

required to themselves be charitable and non-profit, the *Wellsburg* Court could not have upheld Unity Housing's tax exemption; indeed, providing charitable housing to private (i.e., non-charitable) individuals *was* Unity Housing's charitable purpose, and the exclusive use of the apartment building in question.¹¹ *Cf. United Hosp. Center, Inc. v. Romano*, 233 W.Va. 313, 319, 758 S.E.2d 240, 246 (2014) (renting the *Wellsburg* property to elderly or low income individuals was charitable "for purposes of relieving poverty and for other purposes which are beneficial to the community."). Thus, the legally significant analysis is whether a charitable organization leases its property merely to generate financial support for its charitable purposes (in which case the property is not exempt), or whether it leases the property to a tenant which functionally and substantially contributes to the conduct of the owner's charitable purpose (in which latter case, it is exempt).

As found by the Business Court from the stipulations and evidence, UHF does not lease suites in the McCormack Center merely to generate revenue, but rather to provide the functional and operational means for Berkeley Medical Center to expand patient services in furtherance of its charitable purpose. Accordingly, the Business Court correctly concluded that UHF's purpose for leasing suites in the McCormack Center, including the three suites leased to taxable entities, was exclusively charitable, and therefore met the exclusive use prong of the exemption test.

¹¹ The Tax Commissioner attempts to minimize the significance of *Wellsburg* by asserting that the parties had stipulated that the apartments were being used exclusively for charitable purposes. Pet'r Tax Comm'r Br. at 14-15. The *Wellsburg* Court listed all of the parties' stipulations in its opinion, and none of those stipulations state that the apartments were being used exclusively for charity. Instead, the parties stipulated that Wellsburg Unity Apartments, Inc. (i.e., the charitable organization that owned the apartment building) "is organized and operated exclusively for charitable purposes." *See Wellsburg*, 202 W.Va. at 287-88, 503 S.E.2d at 855-56 (listing all stipulations agreed upon by the parties). The *Wellsburg* Court's statement that "the parties stipulated that the apartments are used 'exclusively for charitable purposes'" was a legal conclusion that the Court drew from the parties' actual stipulations.

E. LEASING A SUITE IN THE DOROTHY A. MCCORMACK CANCER TREATMENT & REHABILITATION CENTER TO BERKELEY MEDICAL CENTER FOR ITS WELLNESS CENTER DEPARTMENT OBVIOUSLY FURTHERS RESPONDENT’S CHARITABLE MISSION TO SUPPORT BMC.

Despite the fact that the Petitioners stipulated that the Wellness Center is a department of Berkeley Medical Center, and that BMC is tax-exempt and charitable, (R. at 1159) the Petitioners nonetheless argue that the suite leased by UHF to BMC for the Wellness Center is taxable. It should be beyond question that leasing a suite to Berkeley Medical Center, which it then uses to house one of its departments, is an exclusive charitable use under even the Petitioners’ view of the law. Although the Petitioners wish to compare the Wellness Center to “Gold’s Gym” or a similar for-profit business, the uncontroverted testimony at trial demonstrates that the Wellness Center is not a taxable commercial business run by the hospital, but instead a department of the hospital that provides charitable care to patients, hospital-supervised fitness programs to the public, and free healthcare outreach programs to the community.

First, the Tax Commissioner’s brief mischaracterizes the record relating to the size and layout of the Wellness Center. It is true that the leased space of the Wellness Center is 19,100 square feet, and that approximately 800 square feet of that facility is devoted to use by the cardiac rehabilitation program. (R. at 487) It is also true, however, that the remaining space in the Wellness Center is not simply an exercise room reserved for the general public. The Wellness Center includes a childcare center, a pool, a sauna and locker rooms, as well as office space for the staff. Moreover, the areas of the Wellness Center used by the general public are shared with BMC’s physical rehabilitation department. (R. at 524-25; 849)

Second, the Petitioners stress that UHF is the only party before the Court, yet they ask this Court (as they asked the Business Court) to adjudicate whether Berkeley Medical Center -- a

non-party -- is engaged in a taxable or non-taxable activity as it relates to the Wellness Center. That question is not properly before the Court in this case, and it need not be seriously considered: the Petitioners stipulated that BMC is a charitable hospital under Internal Revenue Code § 501(c)(3), and stipulated that the Wellness Center is one the hospital's operational departments. (R. at 1159) Additionally, although not controlling on issues of state law but certainly persuasive, the unrebutted testimony at trial established that BMC has never been required to treat the dues paid by members of the Wellness Center as federally taxable business income unrelated to its charitable mission.¹² (R. at 508-11)

Third, even looking beyond the parties' stipulations, the record clearly shows that leasing a suite in the McCormack Center to Berkeley Medical Center, for its Wellness Center department, furthers the charitable purposes of both UHF and BMC by enabling the hospital to offer cardiac and physical rehabilitation services of high therapeutic value to its patients, by enabling the general public to participate in preventive healthcare fitness programs, and by allowing BMC to offer free community outreach programs benefitting public health. (R. at 438; 444-45; 521-24) Rehabilitating patients, helping individual members of the public reduce their health risks through physical fitness, and encouraging the general public to live a healthier lifestyle clearly furthers Berkeley Medical Center's charitable purposes by "relieving their bodies from disease, suffering or constraint," and, thus, directly benefits community health and reduces burdens on government. *See Romano*, 233 W.Va. at 319, 758 S.E.2d at 246 (defining "charity"). The Wellness Center is particularly important to the quality of health in the Eastern Panhandle because West Virginia in general, and Berkeley County in particular, has one of the

¹² Income generated by a charitable nonprofit is taxed as unrelated business income if the Internal Revenue Service determines that the income is generated through a business activity that is unrelated to the organization's charitable purpose. *See* I.R.C. § 501(b); IRC §§ 511-513.

most obese and least healthy populations in the country. (R. at 444-45; 449) Moreover, unlike a Gold's Gym (which has its roots in bodybuilding and is generally marketed toward already-healthy individuals), the Wellness Center targets individuals at high risk of disease or serious health condition (e.g., pre and post heart attack victims, stroke victims, or patients in need of weight reduction), and provides a non-threatening environment in which those individuals can work to ameliorate or prevent their health problems under the supervision of health care professionals. (R. at 525-528) Leasing space in the McCormack Center to the hospital, for the use of a department of the hospital, that offers treatment to hospital patients and preventive healthcare to the public at large, obviously furthers UHF's charitable purpose of supporting BMC's efforts to "reliev[e] bodies from disease, suffering or constraint," while "lessening the burdens of government," and is therefore fully consistent with the requirements for tax-exemption.

F. RENTING THE DOROTHY MCCORMACK CANCER TREATMENT & REHABILITATION CENTER TO HEALTHCARE PROVIDERS FOR PATIENT SERVICES AT BERKELEY MEDICAL CENTER IS FUNDAMENTALLY DIFFERENT FROM RENTING THE BOY SCOUT RESERVATION IN FAYETTE COUNTY TO ESPN FOR THE "X-GAMES."

The Tax Commissioner argued below that UHF would need a Constitutional Amendment akin to the recent Boy Scout Amendment in order for the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center to be tax exempt, suggesting that renting the McCormack Center to tenants that further the charitable healthcare operations of Berkeley Medical Center is the same taxable use of real property as renting the Boy Scouts' Summit Bechtel Reserve to ESPN for the "X-Games." (R. at 164) Although the Tax Commissioner has apparently recognized the fallacy in this argument and abandoned it before this Court, it clearly illustrates why UHF's use of the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center meets

the legal test for exemption: the Boy Scouts specifically intend to rent the Bechtel Summit Reserve to non-youth groups for the sole purpose of generating revenue, whereas UHF rents the McCormack Center to healthcare providers for the sole purpose of furthering BMC's efforts to expand the patient services available at the hospital.

The purpose of the Boy Scout Amendment is well documented in the news and reflected in the Tax Commissioner's exhibits. The Boy Scouts wish to rent out the Summit Bechtel Reserve for non-youth events that do not further the Boy Scouts' nonprofit purpose, such as "concerts, extreme sports competitions and corporate retreats and outings." The Boy Scouts specifically hope to "host events as big as the X Games," an extreme sports competition sponsored by ESPN.¹³ (R. at 1164-68) The sole purpose of renting the Bechtel Summit Reserve to these groups, for these events, is to generate revenue for the Boy Scouts.

The Boy Scouts correctly recognized that renting the Summit Bechtel Reserve for non-youth events, solely for the purpose of generating revenue, would be inconsistent with the holdings in *McDowell Lodge* and *Central Realty*. The Boy Scouts therefore sought a Constitutional Amendment permitting them "to generate revenue for the benefit of the non-profit organization" by renting the Summit Bechtel Reserve, "whether or not such property is used for the nonprofit organization's nonprofit purpose." (R. at 1164-68) The proposed uses of the Summit Bechtel Reserve that spurred the Boy Scout Amendment are clearly distinguishable from the actual uses of the McCormack Center, and perfectly illustrates the difference between a taxable use of a charity's property and a non-taxable one.

¹³ The Boy Scouts would also like to host the "Dew Tour," an extreme sports competition sponsored by Mountain Dew and NBC Sports. See Mark Hrywna, *West Virginia Ballot Item Targets BSA's Land Use*, The NonProfit Times, October 28, 2014, available at <http://www.thenonprofitimes.com/news-articles/west-virginia-ballot-item-targets-bsas-land-use/> (quoting Gary Hartley, director of community and government relations for the National Scout Reserve, that the Boy Scouts wish to host the "X-Games" or the "Dew Tour" at Summit Bechtel).

G. THE BUSINESS COURT DID NOT ALTER OR EXPAND THE LEGAL TEST FOR CHARITABLE TAX EXEMPTIONS, OR CREATE A NEW EXEMPTION.

The Petitioners argue that the Business Court reached its decision by confusing the requirements for charitable tax exemptions, or by conflating two different tax exemptions to create a new exemption. The Business Court’s decision, however, is based entirely on the correct application of W.Va. Code § 11-3-9(a)(12) and W.Va. Code R. § 110-3-19 to the facts.

1. The Business Court Correctly Applied the Charitable Tax Exemption in W.Va. Code § 11-3-9(a)(12), as Implemented by the Tax Commissioner's Legislative Rules in W.Va. Code R. § 110-3-19, by Finding That the Respondent's Primary and Immediate Use of the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center Is Exclusively Charitable.

The Assessor argues that the Business Court erred as a matter of law “by interpreting the ‘exclusive’ requirement in the law as a synonym for ‘immediate and primary.’” Pet’r Assessor Br. at 3, 16-17. The Business Court, however, correctly applied the plain language of the charitable tax exemption in W.Va. Code § 11-3-9(a)(12), as implemented by W.Va. Code R. 110-3-19, when it found that UHF’s primary and immediate use of the Dorothy A. McCormack Center -- to provide on-campus facilities to patient services at BMC -- is an exclusively charitable use of that property.

“When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” Syl. Pt. 4, *Perito v. County of Brooke*, 215 W.Va. 178, 597 S.E.2d 311 (2004). “A statute or an administrative rule, may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.” *Id.* at Syl. Pt. 5.

First, West Virginia Code § 11-3-9(a)(12) exempts from taxation “[p]roperty used for charitable purposes and not held or leased out for profit.” The plain, unambiguous language of W.Va. Code § 11-3-9(a)(12) does not state that the property “must be used exclusively for

charitable purposes” to be exempt. Other tax exemptions in the same statute, however, *do* require exclusive use, demonstrating that the Legislature did not intend to impose the same requirement on charities.¹⁴ “In the absence of such a requirement being imposed by the Legislature, we may neither create nor enforce one.” *Lucas v. Fairbanks Capital Corp.*, 217 W.Va. 479, 489, 618 S.E.2d 488, 498 (2005).

Second, the Legislature further empowered the Tax Commissioner to issue rules “to effect the intent of this section.” W.Va. Code § 11-3-9(e). Pursuant to the rule issued by the Tax Commissioner:

[w]henver property is required to be ‘used’ for stated purposes in order to qualify for exemption under W.Va. Code § 11-3-9, the stated purpose must be *the primary and immediate use* of the property, and not a secondary or remote use. The property *may be used for purposes which are ancillary to the stated purpose*, but the ancillary purpose must further the stated, primary use.

W.Va. Code R. § 110-3-2.48.1 (emphasis added). More specifically, “in order for the property [of a charitable organization] to be exempt, the primary and immediate use of the property must be for one or more exempt purposes.” W.Va. Code R. § 110-3-19.1. Given that neither the tax exemption statute itself, nor the Tax Commissioner’s legislative rules, impose an “exclusive use” requirement for charitable tax exemptions under W.Va. Code § 11-3-9(a)(12), the Business Court correctly concluded that the degree of charitable use required under the *Wellsburg* and *Romano* cases is not a higher standard than the one required by statute. (R. at 13-15) *See also Jones v. West Virginia State Bd. of Educ.*, 218 W.Va. 52, 57, 622 S.E.2d 289, 294 (2005) (“[I]t is

¹⁴ *See, e.g.*, W.Va. Code § 11-3-9(a)(5) (“property used exclusively for divine worship”); W.Va. Code § 11-3-9(7) (indebtedness used to build “church buildings used exclusively for divine worship”); W.Va. Code § 11-3-9(a)(15) (real estate and buildings “used exclusively by any college or university society as a literary hall, or as a dormitory or clubroom”); W.Va. Code § 11-3-9(a)(20) (property “used exclusively for the safekeeping” of fire engines and implements for extinguishing fires); W.Va. Code § 11-3-9(a)(28) (personal property “employed exclusively in agriculture”).

not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature purposely omitted.*”). Indeed, by the Tax Commissioner’s own legislative rules, UHF could use portions of the McCormack Center for “ancillary purposes” that further its charitable mission without losing its tax exemption for the property. Thus, the Business Court correctly recognized that UHF’s primary and immediate purpose for leasing the McCormack Center is exclusively charitable.

2. The Business Court Did Not Confuse the Respondent's Primary and Immediate Use of the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center with the Use of the Rent Collected from Its Tenants.

Three of the Assessor’s assignments of error assert that the Business Court conflated the manner in which UHF uses the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center with the manner in which UHF uses the rents it collects from its tenants. *See* Pet’r Assessor Br. at 3 (Assignments of Error I-III). The Assessor does not appear to have actually addressed these assignments of error in the argument section of his brief, which should therefore mean such assignments are deemed waived. *See* W.Va. R. App. P. 10(c)(7) (“The brief must contain an argument . . . under headings that correspond with the assignments of error.”); *State v. LaRock*, 196 W.Va. 294, 302, 470 S.E.2d 613, 621 (1996) (issues mentioned only in passing but not supported with pertinent authority are not considered on appeal). However, as a response to the Assessor’s assertions, these purported errors have never been the basis for UHF’s requested tax exemption, and were not the basis for any part of the Business Court’s decision. Obviously, leasing property solely to generate income is a “secondary or remote” use, and not a primary or immediate use, per the Tax Commissioner’s legislative rules and the *McDowell Lodge* and *Central Realty* cases. *See* W.Va. Code R. § 110-3-2; *Central Realty*, 30 S.E.2d at 724 (“Income

from property is an incident of ownership, but cannot always be identified with the use of property.”); Syl. Pt. 1, *McDowell Lodge*, 123 S.E. at 561. UHF argued below, and the Business Court found, that UHF uses the McCormack Center exclusively for charitable purposes by providing on-campus space to tenants that expand the patient services available at BMC. (R. at 24) This aspect of the Business Court’s ruling goes to the second prong of the charitable exemption test, governing use. UHF further demonstrated, and the Business Court again found, that UHF had no profit-making motive in building or leasing the McCormack Center, and actually operated that facility at a net loss for the relevant tax year. (R. at 26-27) Additionally, the Business Court found that, had UHF hypothetically generated excess revenues from its rentals, that revenue would have been used to further UHF’s charitable mission rather than distributed as profits to private persons or entities. (R. at 27) These findings go to the third prong of the charitable exemption test, governing profit-making. The Business Court in no way confused these two separate substantive standards.

3. The Business Court Did Not Conflate the Legislative Rules Governing Charitable Hospitals with the More General Charitable Rules Applicable to the Respondent.

The Tax Commissioner argues that the Business Court based its decision in part on the charitable hospital rules found in W.Va. Code R. § 110-3-24, effectively creating “a new exemption” that does not exist under the law. Pet’r. Tax Comm’r Br. at 28-31. The Business Court’s analysis, however, necessarily included portions of the charitable hospital rules because the Petitioners’ arguments have continually sought to put the operations of the hospital at issue. By way of example, the charitable hospital rules are clearly germane to the validity of the Petitioners’ argument that the Wellness Center -- a department *of the hospital* -- is nothing more

than a taxable business venture.¹⁵ Moreover, the clear implication from the Tax Commissioner's legislative rules is that the more narrow rules governing charitable hospitals are to be applied in the context of the more general rules governing all charitable organizations, given that both are part of the same regulatory scheme and that the charitable hospital rules contain no fewer than seven (7) express cross-references to W.Va. Code § 11-3-9, commonly governing both sets of exemptions. Indeed, there is nothing "new" about analyzing the charitable hospital rules in the context of a tax exemption claimed under W.Va. Code § 11-3-9(a)(12); in *Romano*, this Court extensively analyzed the charitable hospital rules to determine that the subject property met the requirements for charitable exemption under W.Va. Code § 11-3-9(a)(12) and W.Va. Code R. § 110-3-19. *See Romano*, 233 W.Va. at 318-23, 758 S.E.2d at 245-50 (analyzing charitable hospital rules to determine that property was exempt under "more generic" charitable exemption in W.Va. Code § 11-3-9(a)(12)). Most important, however, is the simple fact that the ultimate issue, as to the tax-exempt status of the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center, was determined by the Business Court on the basis of W.Va. Code § 11-3-9(a)(12), W.Va. Code R. § 110-3-19, and this Court's decisional law -- not on the basis of the charitable hospital rules.

H. THE PETITIONERS DO NOT RATIONALLY CONSTRUE THE CHARITABLE USE EXEMPTION IN LIGHT OF THE REGULATORY AND ECONOMIC REALITIES FACING REGIONAL CHARITY HOSPITAL SYSTEMS.

The Petitioners seek to deny UHF a charitable tax exemption for the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center by "offensively apply[ing] the rule of

¹⁵ Similarly, the Tax Commissioner's arguments that UHF and WVUH-E are merely "business ventures," and not charitable, also implicates the charitable hospital rules. The joint operating agreement between UHF, WVUH-E, and the WVU School of Medicine specifies that WVUH-E and UHF are the coordinating operational parents of Berkeley Medical Center. (R. at 613-24) A non-profit that operates a charitable hospital is, of course, subject to the charitable hospital rules. *See* W.Va. Code R. § 110-3-24.7.2.3.

strict construction with regard to the extension of tax exemptions” while “overlook[ing] the corollary requirement that such construction must be rational.” *United Hosp. Center, Inc. v. Romano*, 233 W.Va. 313, 322, 758 S.E.2d 240, 249 (2014). The Petitioners “do not challenge the benefits that [UHF] confers on this state’s citizens Instead, they seek to benefit from [factors] over which [UHF] appears to have had little control.” *Romano*, 233 W.Va. at 321-22. In this case, UHF has little control over the federal laws and market forces that affect charitable healthcare, but the Petitioners seek to capitalize on these factors to deny a tax exemption to property that is clearly used to benefit the operations of a charitable hospital.

“A constitutional provision authorizing legislative exemption of property from taxation is strictly construed and nothing can be exempted that does not fall within its terms; but rational construction within the terms used is required as well as permitted.” Syl. Pt. 3, *United Hosp. Center, Inc. v. Romano*, 233 W.Va. 313, 758 S.E.2d 240 (2014). As explained in *State v. Kittle*:

The only arbitrary requirement of the rule of strict construction, however, is that its subject matter must be within the terms, as well as the spirit, of the provision under construction. It does not require assignment to terms actually used, of the most restricted meaning of which they are susceptible, nor any particular meaning. So long as the court stays within the terms used, it may give effect to the spirit, purpose, and intent of the makers of the instrument. The rule permits, and other law requires, rational interpretation within the terms actually used.

87 W.Va. 526, 529-30, 105 S.E. 775, 776 (1921). Accordingly, the proper inquiry is not whether the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center meets “the most restricted meaning” of the terms of the charitable use exemption, but rather whether granting the exemption will “give effect to the spirit, purpose, and intent” of granting exemptions to charitable entities.

1. The Respondent Does Not Hold or Lease the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center "For Profit" under Any Rational Construction of That Term.

The Petitioners argue that UHF leases the Dorothy A. McCormack “for profit” because “[t]he rents paid by the tenants of the office building to the Foundation confer a very clear benefit upon the Foundation which constitutes a ‘profit’ to the Foundation in the plain meaning of the word.” Tax Com’r Br. at 28. In effect, the Petitioners argue circuitously that any leasing arrangement which provides some form of “benefit” to the charitable owner of the property constitutes a lease “for profit,” even if leasing to the tenant directly furthers the owners’ charitable functions and no actual profitmaking occurs. This is obviously an absurd construction of the statute, it is clearly at odds with W.Va. Code § 11-3-9(d) and cases upholding charitable exemptions for leased properties, and it ignores the fact that UHF leases the McCormack Center on a break-even [at best] basis for purposes other than generating profits.

First, the term used in the context of the charitable use exemption is not simply “profit,” but “*for profit.*” W.Va. Code § 11-3-9(12) (“Property used for charitable purposes and not held or leased out *for profit.*”). The difference is subtle, but important in the context of this case: “profit” is a noun, whereas “for profit” is an adjective meaning “existing or done for the purpose of making a profit.” Merriam-Webster Dictionary, available online at <http://www.merriam-webster.com/dictionary/for%20profit>. Cf. Black’s Law Dictionary 291 (abr. 8th ed. 2005) (defining a for-profit corporation as organized “for the purpose of making a profit”). In connection with W.Va. Code § 11-3-9(12), the term “for profit” is thus used to denote whether the charitable organization “holds or leases” its real property *for the purpose of* making a profit.

Second, the Petitioners’ definition of “profit” is so restrictive in connection to the charitable tax exemption as to be absurd. Obviously, leasing property in exchange for payment

of rent confers a “benefit” on the landlord. If this were the appropriate definition of the term “profit,” it would nullify the language of W.Va. Code § 11-3-9(d), and the properties at issue in *Wellsburg* and *AEMS* would not have been tax-exempt because both were leased to tenants in exchange for payment of rent. The most appropriate definition of the term “profit” is not the most restrictive definition that the Tax Commissioner could locate in a dictionary, but instead the ordinary meaning typically attributed to it: “[t]he excess of revenue over expenditures.” Black’s Law Dictionary 1013 (abr. 8th ed. 2005). See also Merriam-Webster Dictionary, available online at <http://www.merriam-webster.com/dictionary/profit> (defining profit as “money that is made in a business, through investing, etc., after all the costs and expenses are paid”). Indeed, this plain and ordinary definition of the term “profit” is expressly addressed in the Tax Commissioner’s own legislative rules:

The term “non-profit” and the term “not-for-profit” mean used with a view to producing no profit on total aggregate operations other than that which is used or held for current or planned future use in furtherance of the charitable organization. Charities and others operating property not used for profit are not precluded from exacting charges upon beneficiaries for services rendered, nor are they precluded from deriving profits from total aggregate operations or from individual beneficiaries on a case by case basis so long as total aggregate operations produce no significant economic benefit or inurement to private individuals or entities apart from those which are necessarily incorporated into the operation of the charitable entity.

W.Va. Code R. § 110-3-2.40. See also W.Va. Code R. § 110-3-19.5 (“Realization of a surplus, or of positive net earnings, may not constitute a disqualifying private gain. So long as any such surplus or earnings are used in furtherance of the charitable activities of the organization, no disqualifying gain can be said to inure to the benefit of any private person.”)¹⁶ Accordingly,

¹⁶ Likewise, the legislative rule addressing property tax exemptions for charitable hospitals like BMC states: “[a]s long as any surplus of the [charitable hospital] is used to continue its charitable activities, no

under the Tax Commissioner's own rules the term "for profit" clearly focuses on whether the Petitioner leases the Dorothy McCormack Cancer Treatment & Rehabilitation Center with the intent of producing "positive net earnings" that "inure to the benefit of any private person."

2. The Fact That Related, but Entirely Separate, Charitable Entities Pay Competitive Wages to Highly Skilled and Well-Educated Physicians and Executives Is Irrelevant to Whether the Respondent's Property Should Be Tax Exempt.

The Tax Commissioner uses his brief to cite revenue and compensation figures gleaned UHF's Form 990 tax returns, as well as from various documents discussing the operations of University Healthcare Physicians, Inc., and Berkeley Medical Center. Although entirely irrelevant to whether UHF uses the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center for charitable purposes, or holds or leases that property for profit, the Tax Commissioner uses these figures to suggest that the University Healthcare hospital system is not actually charitable because it generates significant revenues and pays significant wages to its top employees. The Tax Commissioner's suggestion, however, is an obvious red herring.

"Payment of reasonable salaries or wages to administrative staff and employees of a charitable organization will not constitute disqualifying private gain if such salaries or wages closely approximate typical pay rates for comparable positions and are not for the purpose of siphoning-off earnings of the organization." W.Va. Code R. § 110-3-19.4.

First, although the Tax Commissioner cites compensation figures paid to University Healthcare's top physicians and executives, none of those salaries were actually paid by UHF. Rather, those salaries are set and paid by West Virginia University Hospitals - East, Inc. and/or University Healthcare Physicians, Inc. -- neither of which are parties to this case, and neither of

disqualifying gain can be said to inure to the benefit of any private individual. *For the purpose of these regulations, surplus is the excess of net earnings over the expenditures incurred producing the net earnings.*" W.Va. Code R. § 110-3-24.1.4 (emphasis added).

which own or operate the McCormack Center. Moreover, these entities are undisputedly charitable, and the salaries they pay to their top employees are monitored by the Internal Revenue Service; in fact, the salaries that the Tax Commissioner cites for UHP were taken *from UHP's application for charitable tax exemption*, which the IRS reviewed and approved. (R. at 611-12; 995-96)

Second, it is no secret that hospitals -- even charitable hospitals -- generate significant revenue from their operations. It is also no secret that healthcare workers, particularly highly skilled physicians and highly educated hospital executives, are typically well-compensated and work very, very hard. Indeed, for a regional hospital like Berkeley Medical Center to attract and retain top medical and administrative talent, its pay scale must be competitive with other nearby hospitals as well as the Federal Government:

The third is that we're very competitive as, again, most industries are for the employment and payment of our people so we've got to be very competitive with what the [Martinsburg VA Medical Center] pays. Can't match their benefits, sorry, Your Honor, but we can match their wages. If you're military past then it can't match the benefits but we can try and match what Hagerstown pays and what Winchester pays so we've got to be price competitive and that's part of our people human resources philosophy too.

I mentioned these employed physicians. The employed physicians come in under demanding what's called MGMA practice. Everybody knows what everybody else is making from a physician's standpoint. So to get the top skilled quality physicians you usually have to pay a fairly decent premium to bring them but I'm not bringing in an average physician, I'm only bringing in the best so in order to pay them appropriately you have to have the dollars to do that so that's basically what the net income is used for

(R. at 479-80) University Healthcare's top employees (who are not employed or paid by the Respondent) are not "siphoning-off earnings of the[ir] organization[s]" for profit, but are simply being compensated at a level that is competitive with other nearby medical institutions.

3. The Petitioners Ignore the Practical and Legal Reasons for Leasing Suites in the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center to Ambergris, Dr. Bowen, and Patient Transportation -- Those Entities Must Be Located in That Building in Order for Berkeley Medical Center to Offer Cancer Treatment and Rehabilitation to Its Patients.

The Petitioners' focus on the federal income tax status of Ambergris, Dr. Bowen, and Patient Transportation ignores not only applicable case law, but also the reasons why UHF leases space to those entities, and the realities of providing quality healthcare in the Eastern Panhandle of West Virginia. If UHF did not lease space in the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center to these entities, Berkeley Medical Center simply could not offer cancer treatment and cardiac rehab programs -- treatment modalities that were previously unavailable at BMC and which are the entire reason for why the center was built in the first place.

First, Ambergris provides Berkeley Medical Center's radiation oncology services; due to the high cost of providing this service, a hospital of BMC's size would likely be unable to offer radiation oncology services without contracting with a private, for-profit entity. (R. at 466-68) Indeed, the McCormack Center was built, and specially outfitted, for the purpose of providing radiation oncology at BMC -- a service that was previously unavailable in the Eastern Panhandle and for which its citizens were forced to travel to other hospitals in other states. (R. at 443-44; 460; 477-78; 528-29) Per CMS reimbursement regulations and West Virginia certificate of need guidelines, Ambergris *must* be located on-site at the McCormack Center in order for BMC to offer these services. (R. at 458-59) *See also* 42 C.F.R. § 413.65 (eff. July 16, 2012) (for an outpatient department to receive provider-based status for Medicare Part B reimbursements, the department must be on campus, meaning "the physical area immediately adjacent to the provider's main buildings, other areas and structures that are not strictly contiguous to the main buildings but are located within 250 yards of the main buildings, and any other areas determined

on an individual case basis, by the CMS regional office, to be part of the provider's campus."); W.Va. Code § 16-2D-6 (cost impact of proposed treatment considered under multiple factors of certificate of need review). Thus, if UHF did not lease space in the McCormack Center to Ambergris, BMC would be unable to offer radiation oncology in the Eastern Panhandle -- a fact which neither Petitioner disputes.

Second, CMS regulations governing Medicare Part B reimbursement for cardiac rehabilitation services require that the UHF lease space to Dr. Bowen. As the director of the cardiac rehab program offered through the Wellness Center, Dr. Bowen must be physically present in the McCormack Center whenever cardiac rehab is being performed. (R. at 420; 445) *See also* 42 C.F.R. § 410.49(b)(3)(i)-(ii) (eff. Jan. 1, 2010) (cardiac rehab conducted in a hospital outpatient setting requires that the physician conducting the program be "immediately available and accessible for medical consultations and emergencies at all times when items and services are being furnished"). Again, if UHF did not lease space to Dr. Bowen, BMC would be unable to offer cardiac rehab in the Eastern Panhandle: "[i]t is an absolute requirement that he be there." (R. at 465)

Third, Patient Transportation performs a vital role in the operations of the cancer treatment programs at the McCormack Center. Radiation and chemotherapy treatments are on a regimented schedule, and the timing and regularity of those treatments are *not* optional -- "if mom can't pick you up or you can't pick mom up that day she can't just stay at home. You don't want her to." Indeed, BMC attempted to relocate Patient Transportation to an office outside of the hospital campus but the radiation oncologist objected because he depends on their services to access his patients. (R. at 469-70) If UHF did not lease space to Patient Transportation (a space

which, in any event, is roughly the size of a janitor's closet), the function of BMC's cancer treatment departments would be severely impacted.

I. AFFIRMING THE BUSINESS COURT'S RULING WILL NOT CHANGE THE LEGAL TEST FOR CHARITABLE USE EXEMPTIONS, WILL NOT ALTER OR OVERRULE ANY OF THIS COURT'S PRIOR DECISIONS, AND WILL NOT EXPAND CHARITABLE USE EXEMPTIONS TO PROPERTIES THAT DO NOT FALL WITHIN THE LETTER, SPIRIT, AND INTENT OF THE CHARITABLE TAX EXEMPTION STATUTE OR THE TAX COMMISSIONER'S RULES.

At bottom, this case is simply an application of the *Wellsburg*, *AEMS*, and *Romano* cases to a different, but analogous, set of facts. It is not, as the Tax Commissioner suggests, "a bobsled ride down the slippery slope" toward tax exemptions for non-charitable uses. Indeed, neither Petitioner questions the fact that UHF's use of the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center assists Berkeley Medical Center in relieving human suffering and reducing the burdens of government -- the underlying policy purposes for granting charitable tax exemptions. *See Romano*, 233 W.Va. at 322, 758 S.E.2d at 249 ("Given the inarguable benefits that inure to society from the provision of charitable services, such as those provided by the Hospital we find it doubtful that the constitutional framers sought to deny tax exemption where such laudable eleemosynary purposes are being achieved."). Moreover, the facts of this case, like those in *Romano*, are unique to healthcare, are not generally applicable to other types of charitable organizations, and are largely driven by factors over which UHF has no control, such as federal law (specifically, Medicare and Stark law regulations), and the economics of modern healthcare. A rational construction of the charitable use tax exemption clearly warrants affirming the Business Court's decision in favor of UHF.

V. CONCLUSION

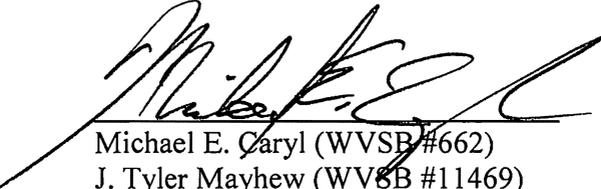
The realities of this country's healthcare system are that a medium-sized charitable hospital like Berkeley Medical Center cannot achieve its charitable purposes without obtaining

certain services (such as radiation oncology) without the cooperation of private, for-profit entities. The Respondent leases space to Ambergris, Dr. Bowen, and Patient Transportation in order to satisfy Federal law, to meet State certificate of need guidelines, and to improve patient access to care. The fact that these three tenants are for-profit, private businesses is not legally relevant and does not, in any manner, disqualify the Dorothy A. McCormack Cancer Treatment & Rehabilitation Center (much less any of its individual suites) from being exempt from *ad valorem* property taxes. Indeed, as the Business Court correctly determined, the McCormack Center property fully satisfies the legal test for charitable tax exemption under this state's existing law. For the reasons set forth above, the Respondent requests that the Court affirm the Business Court's decision.¹⁷

Respectfully submitted this 2nd day of November 2015.

**UNIVERSITY HEALTHCARE
FOUNDATION, INC., f/k/a CITY
HOSPITAL FOUNDATION, INC.
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¹⁷ If the Court decides not to affirm the Business Court's decision in full, it should nonetheless affirm in part as to each of the individual suites that the Court determines meets the test for charitable tax exemptions. As the Assessor's administrative practices involving the subject property demonstrate, condominiums in a common interest community are separately assessed for *ad valorem* property tax purposes. W.Va. Code §§ 36A-7-1; 36B-1-103; 36B-1-105. See also *Pope Properties/Charleston Ltd. Liability Co. v. Robinson*, 230 W.Va. 382, 386-87, 738 S.E.2d 546, 550-51 (2013).

CERTIFICATE OF SERVICE

I certify that I served a true copy of the foregoing BRIEF OF RESPONDENT upon counsel for the Petitioners by electronic mail and by first class United States mail, postage prepaid, at the following addresses:

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on the 2nd day of November 2015.



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