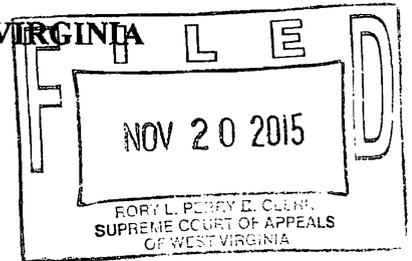


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**LARRY A. HESS, ASSESSOR,
BERKELEY COUNTY, WEST VIRGINIA, and
MARK W. MATKOVICH, STATE TAX COMMISSIONER,
RESPONDENTS BELOW, PETITIONERS,**

vs.

**DOCKET NO. 15-0599
(CIRCUIT COURT CASE NO. 14-AA-4)**

**UNIVERSITY HEALTHCARE FOUNDATION, INC.,
PETITIONER BELOW, RESPONDENT.**

PETITIONER ASSESSOR'S REPLY BRIEF

**Norwood Bentley III, Esquire
Counsel for Petitioner
State Bar No. 4234
400 West Stephen Street, Suite 201
Martinsburg, West Virginia 25401
304-267-5009
nbentley@berkeleywv.org**

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ASSIGNMENTS OF ERROR

- I. The Circuit Court erred by attributing the law's charitable use requirement to the use of the revenues derived by the Respondent's lease of its property rather than to the use of the leased property itself.
- II. The Circuit Court erred by attributing the law's "primary and immediate" charitable requirement to the use of the revenue received as a result of Respondent's lease of its property rather than to the use of the leased property itself.
- III. The Circuit Court erred in finding that the Respondent Foundation's leasing of the suites to for-profit entities does not mean the property is "held or leased out for profit..."
- IV. The Circuit Court erred by interpreting the "exclusive" requirement in the law as a synonym for "immediate and primary."

STATEMENT REGARDING ORAL ARGUMENT and DECISION

The Assessor believes that this case is suitable for a Rule 19 argument and not, as noted in the Petitioner's Initial Brief, a Rule 18 argument. The Circuit Court's ruling is made against the weight of the evidence.

ARGUMENT

Standard of Review

This matter was before the circuit court as an appeal of the Tax Commissioner's taxability ruling which found that the Dorothy McCormack Center was subject to *ad valorem* taxation. The circuit court heard the matter *de novo*. Thus, the appeal by Petitioners to this Court was a result of the circuit court's decision in favor of the taxpayer. Accordingly, the standard of review is, as stated by this Court in *Appalachian Emergency Medical Services, Inc. v. State Tax Com'r*, 218 W.Va. 550, 553, 625 S.E.2d 312, 315 (2005): "In reviewing 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."

- 1. The Circuit Court erred by attributing the law's charitable use requirement to the use of the revenues derived by the Respondent's lease of its property rather than to the use of the leased property itself.**

In order for real property to be exempt from *ad valorem* property taxation, a two-prong test must be met: (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 provided in 110 C.S.R. § 3-19.1; and (2) the property must be used exclusively for charitable purposes and must not be held or leased out for profit as is provided in W.Va. Code § 11-3-9." *Id.*, quoting from Syllabus Point 3, *Wellsburg Unity Apts., Inc. v. Brooke County Comm'n*, 202 W.Va. 283, 503 S.E.2d 851 (1998).

The Petitioner Assessor does not dispute that Respondent is deemed to be a charitable organization as a result its I.R.S designation as a § 501 (c) (3) organization, as was stipulated to by the Petitioners at the circuit court level.

The Assessor does, however, dispute that Respondent meets the second prong of the two-prong test set out by this Court in various opinions related to *ad valorem* tax issues, including the two cases referenced above. The Dorothy McCormack Center, the property in question, “must be used exclusively for charitable purposes”, to meet the first part of the second prong. Respondent urges that it “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.” Respondent’s Brief at page 14. Respondent further asserts that all of its tenants “must improve the patient services available at BMC and the health of Eastern Panhandle residents in general;” that “UHF only rents space to tenants ‘related to health care and the providing of services’ at BMC.” Respondent’s Brief at page 16.

The Assessor does not doubt that the provision of transportation by Patient Transportation, housed in suite 2100; the provision of cancer radiation treatment services by Ambergris, LLC, housed in suite 1100; the provision of diagnostic and treatment services by Dr. Robert E. Bowen, MD Ltd. for the multiple illnesses related to Dr. Bowen’s patients, in suite 2400, are all important and improve the services made available by the Berkeley Medical Center..

Patients need transportation, not just for cancer but, for the many other illnesses for which they may be treated. The transportation is provided for a cost to the patient or his/her insurer. Likewise, the provision of cancer radiation treatment and its attendant services is so

important to the residents of the Eastern Panhandle and the entire region. Those services are provided by Ambergris, LLC, at a cost to the patient, not provided by the Berkeley Medical Center but, rather, by this private health care provider. And, as Anthony Zelenka, the hospital's president and chief operating officer, testified regarding Dr. Bowen, on cross examination at the circuit court hearing, "He's great at what he does but because of internal medicine there's a wide assortment of what he does [in addition to the cardiac monitoring] in terms of cardiac, cancer, and a lot of other modalities." He went on to relate that the requirement that Dr. Bowen be present in the suite he leases from Respondent is related only to the cardiac rehabilitation program and not to the other areas of his practice. TR, page 87, line 24 – page 88, line 15. Robert E. Bowen, MD Ltd. is a for-profit business, just as are the other two businesses in question. They are not charitable organizations. They provide their services to their patients and riders at a cost, just like a bus line does or a private practitioner does from leased office space owned by any landlord, or a provider of knee and hip replacement therapy does.

The patients who use the services of Patient Transportation, Ambergris, LLC and Dr. Robert E. Bowen, MD, Ltd. get not one cent of charitable care from their use of the suites which house those providers. Those providers are admittedly in business to make a profit.

2. The Circuit Court erred by attributing the law's "primary and immediate" charitable requirement to the use of the revenue received as a result of Respondent's lease of its property rather than to the use of the leased property itself.

"Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law....but property used for educational, literary,

scientific, religious or charitable purposes....may by law be exempted from taxation....”

W.Va. Const. Art. X, § 1, in pertinent part.

This Court, most recently in *United Hospital Ctr., Inc. v. Romano*, 233 W.Va. 313, 316, 758 S.E.2d 240 (2014), noted, quoting from *State v. Kittle*, 87 W.Va. 526, 533, 105 S.E. 775, 777 (1921), that the “Constitution...does not itself exempt any property from taxation[;] it merely authorizes legislative exemption thereof.”

The West Virginia Legislature enacted W.Va. Code § 11-3-9, which as Respondent points out, in subsection § 11-3-9 (d) provides: “Notwithstanding any other provisions of this section, this section does not exempt from taxation any property owned by, or held in trust for, educational, literary, scientific, religious or other charitable corporations or organizations, including any public or private nonprofit foundation or corporation existing for the support of any college or university located in West Virginia, unless such property, or **the dividends, interest, rents or royalties derived therefrom, is used primarily and immediately for the purposes of the corporations or organizations.**” (Emphasis added.)

This Court, in a much earlier case, *Central Realty Co. v. Martin*, 126 W.Va. 915, 30 S.E.2d 720 (1944), discussed the Legislature’s expansion of the criteria set forth in the West Virginia Constitution for the exemption of property from *ad valorem* taxation, looking at a similar provision of the exemption statute then obtaining as that incorporated into subsection § 11-3-9 (d) and highlighted for emphasis above. Respondent bases part of its case on the highlighted portion of the statute and the further argument that it maintains the right to the exemption it claims by devoting the income from its for-profit tenants in the Dorothy McCormack Center to supporting, financially and otherwise, the charitable mission of the Berkeley Medical Center. In the *Central Realty* case, the exemption statute included a

proviso which the Court described thusly: "...the criteria provided therein for the exemption of property from taxation rests not on the use of the property, as provided by the Constitution, but on (a) the use of income, and (b) the creation of a trust for charitable, religious, educational and cemetery purposes, and the exclusive annual application of the income from such trust to education, religion, charity and cemeteries." *Central Realty*, supra, at W.Va. 925. In that 1944 case, the Court disapproved two of its earlier cases and found the income and trust criteria set out in the exemption statute to be unconstitutional.

The Court's discussion in *Central Realty* which remains the law in West Virginia is helpful in understanding the dispute represented by the opposing parties before this Court today. The late Judge Lovins wrote for the Court, emphasizing the modification to the general rule of equality and uniformity set out in West Virginia's Constitution by the modifying phrase "...but property used for educational, literary, scientific, religious or charitable purposes...may by law be exempted from taxation..." *Central Realty* at W.Va.

920. He, then, wrote:

The text of the provision which permits the exception is plain and unambiguous, and we may not search for and apply some meaning ascertained from sources outside the Constitution. C & O Ry. Co. v. Miller, Auditor, supra. The constitutional and statutory provisions exempting property from taxation are strictly construed. State v. Kittle, et al., 87 W.Va. 526, 105 S.E. 775. The opinion of this Court in the Kittle case states that construction of a constitutional and statutory provision should be rational. It is to be supposed that judicial action in all its aspects is agreeable to reason, that sagacity and discretion control and direct the judicial process in resolving any question, and hence for practical purposes the rule of strict construction remains unmodified. Consideration of the foregoing principles lead [sic] to the conclusion that the word 'used' in the constitutional provision above quoted means exactly what is there said, and that to bring the real estate within the exemption provision of the Constitution and of any statute enacted pursuant thereto, such property must be 'used for educational, literary, scientific, religious or charitable purposes', otherwise the exemption is inoperative.

Code, 11-3-9, as amended by Chapter 40, Acts of the Legislature of 1933, provides that, '***all property belonging to benevolent associations, not conducted for private profit, ***' shall be exempt. The real estate here in question may be owned by such association,

but the constitutional provision rests exemption on use rather than ownership.
(Emphasis added.)

The real estate here claimed to be exempt from taxation is now being occupied and used by four purely commercial enterprises operated for private profit...Its use in the operation of private business undertakings deprives it of the sheltered position, here claimed, which is accorded to property used for charitable purposes by the beneficent provisions of the Constitution.

Income from property is an incident of ownership, but cannot always be identified with the use of property. We do not mean that the exemption clause of the Constitution should be applied with the same rigor to all property. The physical use of land is a thing apart from the income derived therefrom. The uses of land being many and varied supply the numerous needs of humanity. Land is corporeal, albeit there are incorporeal rights connected therewith, but in this case we are concerned with the use of a tangible and material *res*. There are certain kinds of personal property such as stocks, bonds, evidences of debt, and other intangibles where the income therefrom is sufficiently identical with the use of the property that the use of the income is, in effect, the use of the property. But this does not hold true as to land. The correct rule is stated in the syllabus in the case of State v. Martin, supra: 'Under section 1, Article 10, Constitution, the exemption from taxation depends on its use. To warrant such exemption for a purpose there stated, the use must be primary and immediate, not secondary or remote'.

Then the Court follows that with a comparison of several cases of, then, recent vintage, two of which they disapproved. The Court went on to opine that *In Re Masonic Temple Society*, 90 W.Va. 441, 111 S.E. 637 (1922), *State v. McDowell Lodge*, 96 W.Va. 611, 123 S.E. 561 (1924) and *State v. Martin*, 105 W.Va. 600, 143 S.E. 356 (1928) "taken in composite, state what we believe to be the correct rule: that where real estate is used solely by an organization for educational and charitable purposes and such use is immediate and primary the constitutional exemption from taxation applies, and the statute enacted in pursuance thereof inhibits any assessment for taxation; but real estate is not exempt where owned by a like organization and is leased for private purposes, notwithstanding the application of the income from rentals to charitable and benevolent purposes and upkeep of the premises." *Id.*, at W.Va. 922.

Central Realty, supra, went on to advise: "The legislative department has the power to provide by statute the details for tax exemption. The basic condition on which real estate is to be

exempted from taxation is fixed by the constitutional provision, which provides that it shall be used for certain purposes, and, in accordance with our decided cases, we believe that the use should be 'primary and immediate'." *Id.*, at W.Va. 925.

The Court, then, overruled that part of *Prichard v. County Court*, 109 W.Va. 479, 155 S.E. 542 (1930) which approved the legislative expansion of the constitutional "use" requirement to use of the income from the property and, further, found that the offending second proviso in W.Va. Code § 11-3-9 was unconstitutional. "We therefore overrule that part of Prichard v. County Court, supra, which holds the second proviso of Code, 11-3-9, as amended, constitutional, and now hold that such proviso is unconstitutional and without effect." *Central Realty* at 126 W.Va. 925.

While the proviso in the current rendition of § 11-3-9 is different, the effect of today's language in subsection (d) is the same as that which the Court, in 1944, considered and found offensive to the Constitution. This Court should guard the constitutionality of W.Va. Code § 11-3-9 (d) no less zealously.

The "primary and immediate" use of the property, contrary to the circuit court and to the Respondent herein, cannot be either related directly to the income derived from the leasing of the property or to the furtherance of the Respondent Foundation's or the hospital's charitable mission. For, as *Central Realty supra*, made absolutely clear, "income from property is an incident of ownership, but...the use of real estate and the income therefrom are not identical." *Central Realty* at W.Va. 925.

3. The Circuit Court erred in finding that the Respondent Foundation's leasing of its suites to for-profit entities does not mean the property is "held or leased out for profit..." and

4. The Circuit Court erred by interpreting the “exclusive” requirement in the law as a synonym for “immediate and primary”.

The Respondent Foundation misinterprets this Court’s recent opinions in exemption cases to buttress its argument. It argues that the actual physical use of the suites in question does not matter; that, as long as the taxpayer’s charitable purposes are being served by the rental of its property, its entitlement to the requested exemption is clear. Respondent asserts that *Appalachian Emergency Medical Services, Inc. v. State Tax Commissioner*, 218 W.Va. 550, 625 S.E.2d 312 (2005) and *Wellsburg Unity Apartments, Inc. v. County Commission of Brooke County*, supra., support its argument.

In *Wellsburg*, the entity owns and operates an apartment complex in Wellsburg, in Brooke County, West Virginia. Unity Housing was organized and operated for the charitable purpose of making its housing available to elderly and low income individuals who need such assistance. The federal government through the Department of Housing and Urban Development (HUD), contracts with entities such as Unity Housing to provide charitable assistance. All such entities operate on a break-even basis. The entity makes no profit and Unity Housing enjoys the I.R.S. charitable organization designation of § 501 (c) (3). HUD pays approximately 80% of the total monthly contract rent and the tenants pay the balance. *Wellsburg* at W.Va. 287.

From 1984 until November, 1994, the exemption was allowed by the Brooke County Assessor. The Assessor determined to end the exemption effective July 1, 1995. Unity Housing sought a taxability ruling from the State Tax Commissioner. The Commissioner concluded the property was not exempt from *ad valorem* taxation. The ruling was appealed to the circuit court which found that the property was used for charitable purposes and was

not held or leased out for profit and was, therefore, entitled to the exemption. The Tax Commissioner appealed to this Court.

This Court set out the definition of “charity” provided in the legislative regulations: “[A] gift to be applied consistently with the existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, to assist them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself if it is so described as to show that it is charitable. Any gift not inconsistent with existing laws which is promotive of science or tends to the education, enlightenment, benefit or amelioration of the condition of mankind or the diffusion of useful knowledge, or is for the public convenience is a charity. 110 .C.S.R. 3-2.10 (1989).”

110 C.S.R. § 3-19.1 (1989) provides that “Charities must be operated on a not-for-profit basis, must directly benefit society, must be for the benefit of an indefinite number of people, and must be exempt from federal income taxes under 26 U.S.C. § 501 (c) (3) or 501 (c) (4). Moreover, in order for the property to be exempt, the primary and immediate use of the property must be for one or more exempt purposes.”

The primary and immediate use of the apartments built and operated by Unity Housing was to relieve the impoverished state of its tenants; it was to benefit and ameliorate the condition of the poor elderly and low income people who need such assistance. Unity Housing contracted with HUD in such a way as to preclude the making of profit. It delivered its services directly to its tenants as a non-profit organization.

In the instant case, the owner of the Dorothy McCormack Center leases the three suites to three different for-profit entities which provide their services to the public for a cost. The primary and immediate use of each of those suites is for the purpose of making a profit by selling respectively, transportation to and from Berkeley Medical Center; radiation therapy treatments; and diagnosis and treatment of many modalities, ranging from cardiac and cancer related illnesses to sore throat and cosmetic surgery.

Respondent states, at page 20 of its Respondent's Brief, that the Court in *Wellsburg* concluded that Unity Housing was exempt from *ad valorem* property taxation by looking solely to the tax-exempt status of Unity Housing and the use that Unity Housing made of its apartment building, which is true enough. Then, however, Respondent went ahead to confuse the issue by writing, "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."

Of course, they did. Unity Housing's tenants were the recipients of the gift, of the charity provided by the federal government in conjunction with a non-profit provider. The difference between the beneficiaries of charity in *Wellsburg* and the tenants and /or patients and riders in the case at Bar is that, in the former, the gift of charity is made directly by the owner of the property to the beneficiaries and, in the latter, it is only the illusion of a gift of charity which exists for the patients of Ambergris, LLC, Robert E. Bowen, MD, Ltd., and for those who avail themselves of the services provided by Patient Transportation. There is no charitable benefit flowing to an indefinite number of people who seek the services of Respondent's tenants in the three suites in question.

Respondent reiterated the agreed stipulation regarding the establishment of the Dorothy McCormack Center as a Chapter 36B common interest community. Respondent's Brief at page 3. Susan Snowden, chair of the board of University Healthcare Foundation, testified on behalf of Respondent in the circuit court in that regard. When asked, "Another stipulated fact in this case is that the McCormack Center has been organized for ownership purposes in the [sic] separate condominium units. Can you explain that status to the Court and do you know why that was done?" Ms. Snowden responded that, "To be honest, I don't know that anyone on the Board at this point knows why that was done....I can tell you the status of it now. The status of it now is that one of those units had been sold to I believe it was Grant Memorial Hospital, it was a rural health clinic. They don't even exist anymore. So, perhaps three years ago with that vacancy and we thought we could put it to better use for cancer treatment and when I say we I mean our Foundation Board. We started looking into how we could purchase that and it was a long arduous process to determine to whom to pay the funds because they didn't exist anymore and we had to go through numerous state boards in order to get that accomplished. I'm happy to say that University Healthcare Foundation owns every condominium that had been set up back in the day when that facility was built." Tr.at page 30, lines 6 – 24 and page 31, lines 1 - 2. So, there can be no doubt that the Respondent is the title owner of each of the several suites which comprise the Dorothy McCormack Center. The entire building is one unit for taxation purposes. The Assessor has, using disputed discretion, considered each suite, on a case-by-case basis, in determining the taxability of each separate suite based on its use. As a result, much of the building has been exempted from *ad valorem* taxes in Berkeley County because the Assessor has agreed with the Respondent that particular suites do serve a charitable purpose. The law, however, does

address the requirement that the exemption is eligible only to property which is used **exclusively** for charitable purposes and which is not held or leased out for profit. Syllabus Point 2 of *United Hospital Center*, supra. provides: “In order for real property to be exempt from ad valorem property taxation, a two-prong test must be met: (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 provided in 110 C.S.R. § 3-19.1; and (2) the property **must be used exclusively for charitable purposes** and must not be held or leased out for profit as is provided in W.Va. Code § 11-3-9.”, quoting from Syl. Pt. 3, *Wellsburg*, supra. (Emphasis added.) This requirement of exclusivity would seem to limit the Assessor’s discretion and his consequent ability to split the tax ticket, so to speak, of properties which are not in actuality common interest communities.

This Court, in *Appalachian Emergency Medical Services v. State Tax Commissioner*, 218 W.Va. 550, 625 S.E.2d 312 (2005), said that, “The resolution of this case is governed by this Court’s holdings in Wellsburg Unity Apts., Inc. v. County Com’n of Brooke Co., supra. In Syllabus Point 2 of *Wellsburg*, we held that ‘real property that is used exclusively for charitable purposes and is not held or leased out for profit is exempt from ad valorem real property taxation. W.Va. Code § 11-3-9 (1990).’ We further held in Syllabus Point 3 that,

In order for real property to be exempt from ad valorem property taxation, a two-prong test must be met: (1) the corporation or other entity must be deemed to be a charitable organization under 26 U.S.C. § 501 (c) (3) or 502 (c) (4) as is provided in 110 C.S.R. § 3-19.1; and (2) the property must be used exclusively for charitable purposes and must not be held or leased out for profit as is provided in W.Va. Code § 11-3-9. *Appalachian Emergency Medical Services* at W.Va. 554.

This Court relied upon the well set rules which have governed exemption in *ad valorem* taxation cases through the decades. In *Appalachian Emergency Medical Services (AEMS)*, supra., the gift of charity was not provided to the beneficiaries directly by the taxpayer or

owner of the property. In that case, AEMS began leasing a newly purchased building to the West Virginia Emergency Medical Services Technical Support Network (TSN). Both AEMS and TSN were charitable organizations. TSN's mission was to provide support services to county-level based emergency services organizations. It "is funded through federal and State grants, but AEMS receives no such support." *Appalachian Emergency Medical Services*, supra, at W.Va. 552. The Court found that AEMS was a charitable organization, designated as such by the I.R.S. The Court further found "that the property at issue is used exclusively for charitable purposes. The evidence shows that TSN is a charitable and nonprofit corporation under the Internal Revenue Code § 501 (c) (3), and that its purpose and mission is to provide a variety of support services to the State's health care industry, including county-level emergency service organizations." *Id.* at W.Va. 555. The Court went on to clarify that the tenant was using the property for charitable purposes "in that TSN uses it to further its mission of assisting emergency services organizations to relieve human suffering." *Id.* at W.Va. 555. The Court likewise found that the property was not being leased out for profit but, rather, "the lease payments, either in whole or substantial part, are being used to make AEMS' monthly mortgage payments. Further, any portion of the lease payment not used to make the mortgage payments is placed in escrow to pay for building maintenance or repair." *Id.* at W.Va. 556.

Respondent argues that W.Va. Code § 11-3-9 (a) (12) does not require that the three suites in question herein be used "exclusively for charitable purposes". They may, it asserts, be used for purposes which are ancillary to the stated purpose. It cites W.Va. C.S.R. § 110-3-2.48.1 in support of its argument. That rule provides: "Whenever 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.” Respondent argues that it “uses the McCormack Center exclusively for charitable purposes by providing on-campus space to tenants that expand the patient services available to BMC.”

Respondent’s Brief at page 30.

In other words, the Foundation uses the McCormack Center exclusively for charitable purposes by providing on-campus space to three for-profit healthcare related business entities which charge their patients and/or riders for their services, not at a discount and not for free and not through the hospital’s charitable mechanisms. Those businesses are not charitable. They provide no charity, no gift applied consistently with existing laws, for the benefit of an indefinite number of persons. Unlike at Berkeley Medical Center, if a patient cannot afford the cost of Dr. Bowen’s cosmetic surgery or any of his other modalities, that patient cannot count on Dr. Bowen to provide the treatment he/she seeks. If a patient has no insurance and no assets, will Ambergris, LLC provide services because the law requires that the Limited Liability Company not turn him/her away? Clearly, the answer is No.

But, even so, this Court’s Syllabus Point 2 in *Appalachian Emergency Medical Services*, supra, sets out the second prong of the Court’s two-prong test for exemption from *ad valorem* taxation by stating clearly and unambiguously, “the property **must be used exclusively for charitable purposes** and must not be held or leased out for profit as is provided in W.Va. Code § 11-3-9.” And, this Court repeated that language in Syllabus Point 2 of its 2014 case, *United Hospital*, supra. The Court’s language is an admonition that the property must be used exclusively for charitable purposes. That means that it is W.Va.

C.S.R. § 110-3-2.48.2 which applies and not § 110-3-2.48.1 as Respondent argues.

“Whenever property is required to be ‘used exclusively’ for stated purposes in order to qualify for exemption under West Virginia Code § 11-3-9, the stated purpose must be primary and immediate, and not a secondary or remote use. **The property may not be used for purposes which are ancillary to the stated purpose.**” (Emphasis added.)

Further, the Court clearly indicated that it understands that the language in the two Syllabus Points discussed above, which represents the chief points in the Court’s discussion and reasoning, differs from the language in West Virginia Code § 11-3-9 (a) (12). “Because there is no dispute as to the Hospital’s qualification as a charitable organization pursuant to federal law, we proceed to examine whether the second prong of the test adopted in *Wellsburg* has been established. This **second prong derives from** the language of West Virginia Code § 11-3-9 (a) (12), which extends tax exemption to ‘property used for charitable purposes and not held or leased out for profit.’” *United Hospital Center at W.Va.* 318. (Emphasis added.) The Court very clearly is aware that the language in § 11-3-9 (a) (12) is not the same as the language in its Syllabus Points in the cases referenced above. The language in the case law **derives** from the statute but, is not the same. The requirement that the property must be used exclusively for charitable purposes precludes the use for purposes which are ancillary to the stated purpose and, thus, precludes the ancillary use to which the Respondent puts the property, the provision of more on-campus space to tenants that expand patient services to Berkeley Medical Center.

CONCLUSION

The guiding light in exemption of *ad valorem* taxation for charitable organizations has been and continues to be the use put to the real property which is the object of the request for exemption. It is the primary and immediate use of the property, not the secondary or remote use which determines entitlement to the exemption. The Respondent's decision to further its mission purposes at Berkeley Medical Center is laudable. The decision to lease the three suites to for-profit businesses, albeit healthcare related businesses, changes the circumstances. The use of the property must be a charitable use. There is no doubt that the three suites in question herein are not being used in a manner which serves a charitable purpose. The first prong of the *Wellsburg* two prong test is met by the Respondent. The second prong of the test is not met. The property is not used exclusively for charitable purposes. Accordingly, the Assessor respectfully requests the Court reverse the circuit court's decision and affirm the taxability ruling of the State Tax Commissioner.

LARRY A. HESS, ASSESSOR

By Counsel



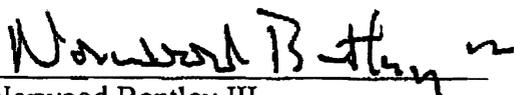
Norwood Bentley III, Esquire
State Bar No. 4234
Berkeley County Council
400 West Stephen Street, Suite 201
Martinsburg, West Virginia 25401
304-267-5009
nbentley@berkeleywv.org

CERTIFICATE OF SERVICE

I, Norwood Bentley III, do hereby certify that I have served a true and actual copy of the foregoing PETITIONER ASSESSOR'S REPLY BRIEF upon the following, by electronic mail and by placing the same in the United States mail, postage pre-paid, and directed as indicated hereinbelow, on this the 20th day of November, 2015.

Michael E. Caryl, Esquire
J. Tyler Mayhew, Esquire
Bowles Rice LLP
Post Office Drawer 1419
Martinsburg, West Virginia 25402-1419
mcaryl@bowlesrice.com
tmayhew@bowlesrice.com

L. Wayne Williams, Esquire
Assistant Attorney General
Office of the Attorney General
State Capitol, Building 1, Room W-435
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
l.wayne.williams@wvago.gov



Norwood Bentley III