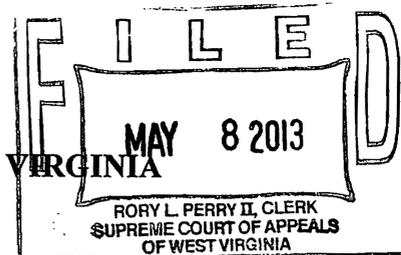


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



UNITED HOSPITAL CENTER, INC., Petitioner Below,

Petitioner,

vs.

Docket No. 13-0120

CHERYL ROMANO,
ASSESSOR OF HARRISON COUNTY,
and CRAIG GRIFFITH,
STATE TAX COMMISSIONER, Respondents Below,

Respondents.

PETITIONER'S BRIEF

Michael S. Garrison (WV Bar No. 7161) (Counsel of Record)
Kelly J. Kimble (WV Bar No. 7184)
Spilman Thomas & Battle, PLLC
48 Donley Street, Suite 800
P.O. Box 615
Morgantown, WV 26507 -0615
(304) 291-7920 / (304) 291-7979 (facsimile)
mgarrison@spilmanlaw.com
kkimble@spilmanlaw.com

Dale W. Steager (WV Bar No. 3581)
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
P.O. Box 273
Charleston, WV 25321-0273
(304) 340-3800 / (304) 340-3801
dsteager@spilmanlaw.com

Counsel for Petitioner, United Hospital Center, Inc.

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court committed reversible error by granting summary judgment in favor of the Respondents where Petitioner demonstrated that questions of material fact exist.

2. The Circuit Court committed reversible error by not holding a *de novo* hearing as required by the Legislature in W. Va. Code § 11-3-25 (relief in circuit court against erroneous assessment; *de novo* hearing required on questions of classification or taxability).

3. The Circuit Court committed reversible error when it concluded as a matter of law that because Petitioner was not using its new hospital facility to treat patients on July 1, 2010, the facility was not exempt from ad valorem property tax under either W. Va. Code § 11-3-9(a)(12) (exempting property used for charitable purposes and not held or leased out for profit), or under Subdivision 11-3-9(a)(17) (exempting property belonging to any hospital not held or leased out for profit).

4. The Circuit Court committed reversible error when it concluded as a matter of law that Petitioner was not using its property located at 327 Medical Park Drive, Bridgeport, West Virginia, for charitable purposes on July 1, 2010, within the meaning of the exemption from property tax provided in W. Va. Code § 11-3-9(a)(12).

5. The Circuit Court committed reversible error when it concluded as a matter of law that although the property located at 327 Medical Park Drive, Bridgeport, West Virginia, belonged to a hospital not held or leased out for profit on July 1, 2010, the property was not exempt from property under W. Va. Code § 11-3-9(a)(17).

6. The Circuit Court committed reversible error to the extent that it construed legislative rule § 110-3-24 (charitable hospitals) in a manner that led to taxability of the subject property, rather than construing it in a manner consistent with the unambiguous language of

W. Va. Code § 11-3-9(a)(12) (charitable use exemption) and W. Va. Code § 11-3-9(a)(17) (charitable hospital exemption).

II. STATEMENT OF THE CASE

A. Statement of Relevant Facts

United Hospital Center, Inc. (hereinafter “UHC” or “Petitioner”) is a nonstock, not-for-profit corporation that is exempt from federal income tax under IRC § 501(c)(3), and from West Virginia business franchise tax and corporation net income tax under W. Va. Code § 11-23-7(b) and § 11-24-5(a).¹ [A.R. 2, 5, 131, 291, 463]. For many years, UHC owned and operated an acute-care hospital located in Clarksburg, West Virginia. [A.R. 2, 291, 463]. That hospital facility was always exempt from ad valorem property taxation. [A.R. 2, 49 (Response of the Honorable Cheryl Romano admitting same)]. In 2001, the Board of Directors of UHC decided to replace its aging, landlocked Clarksburg hospital facility with a new hospital to be located off I-79 at 327 Medical Park Drive, Bridgeport, West Virginia, in order to better serve the residents of Harrison County. [A.R. 2, 49 (admitting same), 291-92].

UHC’s new hospital facility was awarded a certificate of need by the West Virginia Health Care Authority as provided in W. Va. Code § 16-2D-3.² [A.R. 2, 42-43, 342]. Issuance

¹ Should an IRC § 501(c)(3) corporation or organization have income from an unrelated trade or business, as defined in IRC § 513, then its taxable capital for business franchise tax purposes, if any, and its adjusted federal taxable income for corporation net income tax purposes, if any, must be apportioned. Amounts, if any, apportioned to the unrelated trade or business would be subject to the business franchise tax and the corporation net income tax.

² W. Va. Code § 16-2D-3 (certificate of need; new institutional health services defined) reads, in pertinent part:

(a) Except as provided in section four of this article, any new institutional health service may not be acquired, offered or developed within this state except upon application for and receipt of a certificate of need as provided by this article. . .

(b) For purposes of this article, a proposed "new institutional health service" includes:

(1) The construction, development, acquisition or other establishment of a new health care facility or health maintenance organization;

...

(3) Any obligation for a capital expenditure incurred by or on behalf of a health care facility, except as exempted in section four of this article, or health maintenance organization in excess of the expenditure

of the certificate of need was contested and the contest was finally resolved by the courts in the spring of 2006.³ [A.R. 2, 42-43, 342]. Site work for the new facility began in the fall of 2006. [A.R. 2, 42-43]. Actual construction of the new facility began in the spring of 2007, and was financed, in part, by a low-interest loan made to UHC that was sponsored by the West Virginia Hospital Finance Authority pursuant to W. Va. Code §§ 16-29A-2 and 16-29A-6.⁴ [A.R. 2, 43, 157, 343]. Construction was delayed by a shortage of steel, and actual construction transcended several July 1st assessment days because of size of the construction project. [A.R. 2, 343]. The new hospital facility was scheduled to open prior to July 1, 2010, but due to a water line break in the building that caused significant damage and required remediation of certain portions of the construction, completion was delayed. [A.R. 153-54, 156, 343]. Because of this delay, the new

minimum or any obligation for a capital expenditure incurred by any person to acquire a health care facility. An obligation for a capital expenditure is considered to be incurred by or on behalf of a health care facility:

(A) When a contract, enforceable under state law, is entered into by or on behalf of the health care facility for the construction, acquisition, lease or financing of a capital asset;

(B) When the governing board of the health care facility takes formal action to commit its own funds for a construction project undertaken by the health care facility as its own contractor; or

(C) In the case of donated property, on the date on which the gift is completed under state law...

(Emphasis added.)

³ This Court decided *Fairmont General Hospital, Inc. v. United Hospital Center, Inc.*, 218 W. Va. 360, 624 S.E.2d 797 (2005), by reversing the order of the Circuit Court of Marion County, West Virginia, and remanding the case to the circuit court, which dismissed Fairmont General Hospital's appeal in April of 2006.

⁴ W. Va. Code § 16-29A-2 (declaration of policy and responsibility; purpose and intent of article; findings) reads:

It is hereby declared to be the public policy of the state of West Virginia and a responsibility of the state of West Virginia, for the benefit of the people of the state and the improvement of their health, welfare and living conditions, to provide hospitals with appropriate means at reasonable cost to maintain, expand, enlarge and establish health care, hospital and other related facilities and to provide hospitals with the ability to refinance indebtedness. This article shall provide a method to enable hospitals to provide or maintain at reasonable cost pursuant to reasonable terms the facilities, structures and services needed to accomplish the purposes of this article, all to the public benefit and good, to the extent and in the manner provided in this article.

The Legislature finds and hereby declares that the responsibility of the state as outlined above cannot be effectively met without the hospital loan program as provided for in this article.

facility was 95 percent complete on July 1, 2010, the assessment day of 2011 ad valorem property taxes. [A.R. 3, 43, 153-54, 292, 343].

The West Virginia Department of Health and Human Resources issued a license to UHC to operate the new facility as a hospital on October 3, 2010. [A.R. 2, 227, 231-37, 252-53, 343]. On that day, UHC began moving patients from its Clarksburg facility to the new hospital facility and began admitting new patients there. [A.R. 2, 44, 131, 154, 231, 282-83, 464]. While it is true that patients were not admitted or treated at the new facility until October 3, 2010, after the facility was issued its Certificate of Occupancy on August 23, 2010, some UHC employees and at least one of its operations were moved to the new facility prior to the July 1, 2010 assessment date. [A.R. 154, 343-44, 465]. For example, in March of 2010, UHC personnel began providing security for the facility. [*Id.*] In April of 2010, UHC's housekeeping staff began working at the facility, cleaning and preparing it to receive patients. Employees were also working at the new facility prior to July 1, 2010, learning how to operate and maintain the environmental equipment to maintain a comfortable and safe environment. [*Id.*] Also prior to July 1, 2010, UHC moved its information technology department, or data center, to the new facility. [*Id.*] Upon relocation, the data center supported operations at UHC's Clarksburg hospital facility. [*Id.*]

In its commercial property report for tax year 2011, which was filed timely with the Assessor of Harrison County ("Assessor"), UHC reported the cost of building materials and other tangible personal property incorporated into the new hospital facility as of July 1, 2010, or on the ground at the construction site on that date, at a cost of \$108,006,015.80. [A.R. 3, 23-25, 132, 292, 344, 465]. The Assessor determined that this tangible personal property had an assessed value of \$62,895,013 and that the land had an assessed value of \$1,219,260.00. [*Id.*]

In summary, while UHC's new facility was not being used to treat patients on July 1, 2010, because the facility was then in the final stage of construction and not yet issued its Certificate of Occupancy,⁵ parts of the new facility were being used on July 1, 2010 by UHC. Support functions were performed there for UHC's operations in Clarksburg, and a number of UHC employees were on site providing security services and preparing the site for admission of patients. [A.R.154, 343-44, 465].

Additionally, UHC is aware of other properties in the State owned by charitable organizations that have enjoyed exemption from ad valorem property taxation in situations where the property was undergoing construction and was not being used to benefit the public or a segment of the public as of the relevant assessment date. [A.R. 9, 156, 368-395, 466]. UHC disclosed witnesses who would have testified to this fact, had there been an evidentiary hearing in this matter. [A.R. 98-100, 330-40, 368-71, 390-95]. A specific example of such situation existed on July 1, 2010, in Fayette County, West Virginia, where property purchased in 2009 for use by the Boy Scouts of America ("BSA property")⁶ was determined to be exempt as of July 1, 2010, notwithstanding the fact that it was not being used in any manner, and no construction had yet commenced. [A.R. 390-95]. While Petitioner has nothing against the Boy Scouts and is supportive of its project in Fayette County, Petitioner can find no rational basis for exemption of the Fayette County property from 2011 ad valorem property taxation under W. Va. Code § 11-3-9(a)(12), while Petitioner's new facility was determined to be taxable.

⁵ The Certificate of Occupancy could not be issued until the State Fire Marshall completed its inspection, which was delayed, at least in part, due to an unanticipated water line break that had to be repaired.

⁶ The subject land in Fayette County, West Virginia, was purchased by Arrow WV, Inc., a nonprofit corporation. [A.R. 391].

The only tax year at issue is 2011.⁷ [A.R. 1-3, 12, 26-30, 39-46, 133, 211]. Respondents have conceded that the new acute-care hospital facility is exempt from ad valorem property taxation for the 2012 tax year. [A.R. 29].

B. Procedural History

Pursuant to W. Va. Code § 11-3-24a, UHC by its agent, Douglas Coffman, sent a letter dated October 18, 2010, to the Respondent Assessor inquiring about the taxability of its new hospital facility for 2011 ad valorem property taxes. [A.R. 26-27]. The Assessor, by letter dated October 25, 2010, advised UHC that she believed that the property was taxable. [A.R. 28-29]. As a result of the Assessor's response, UHC requested that the question of taxability of the property be submitted to the State Tax Commissioner for a ruling as provided in W. Va. Code § 11-3-24a. [A.R. 3, 39-46]. By letter dated January 10, 2011, the Assessor asked the State Tax Commissioner for a taxability ruling based on the accompanying separate sworn statements of the Assessor and UHC. [A.R. 14 (referencing letter received January 11, 2011)]. By letter dated February 28, 2011, the Respondent State Tax Commissioner ruled that the property was taxable based on the affidavits and documents attached thereto. [A.R. 13-21]. W. Va. Code § 11-3-24a does not provide for an administrative hearing to be held, and no such hearing was held in this matter. [A.R. 4].

On March 28, 2011, UHC filed in the Circuit Court of Harrison County its petition for appeal of the State Tax Commissioner's taxability ruling. [A.R. 1-47]. The petition was filed in accordance with the provisions of W. Va. Code § 11-3-25, which provides that the appeal of question of classification or taxability shall be heard *de novo* by the circuit court. Nevertheless, the Circuit Court, without holding a *de novo* trial or evidentiary hearing and without the benefit

⁷ While taxes were assessed for the 2011 tax year, the amount of taxes levied have not been paid pursuant to an agreed order entered by the court below delaying payment during the pendency of this appeal. [A.R. 450-60].

of merit briefs on the substantive legal issues, entered Respondents' motions for summary judgment on January 7, 2013. [A.R. 462-88].

III. SUMMARY OF ARGUMENT

The Circuit Court concluded that because UHC's new hospital facility was not treating patients on the July 1, 2010, assessment date, the property was not primarily and immediately used by UHC for its charitable purpose of providing health care to residents of Harrison County, and was therefore not exempt from 2011 ad valorem property taxation. [A.R. 469-70]. This conclusion is, in both fact and law, erroneous and should be reversed by this Court.

The applicable test for exemption from taxation prescribed by the Legislature and set forth in W. Va. Code § 11-3-9 [2008] is whether the subject property was being used on July 1, 2010, for charitable purposes and not held or leased out for profit. *See* W. Va. Code §§ 11-3-9(a)(12) (exempting property used for charitable purposes and not held or leased out for profit), and (17) (exempting property belonging to any [charitable] hospital not held or leased out for profit). In 1945, the Legislature amended W. Va. Code § 11-3-9 by adding language providing that the charitable use exemption would not apply unless the property "is used primarily and immediately for the purposes of the [charitable] corporation or organization".⁸ The purposes of UHC are set forth in its articles of incorporation and include operating hospitals in Harrison County, West Virginia, exclusively for charitable purposes for the treatment and care of all persons without discrimination as to financial status. The authorized purposes also include the purchase, acquisition or construction of hospital facilities.

⁸ This limiting language also applies to the educational, literary, scientific and religious use exemptions in W. Va. Code § 11-3-9. The language of the 1945 amendment was amended by the Legislature in 1987 and the language, as amended, is now codified as Subsection (d) of Section 11-3-9. The primary substantive change made in 1987 to the language of the 1945 amendment is not relevant to the issue in the case *sub judice*.

There is no evidence that the subject property was held or leased out for profit by UHC on July 1, 2010. [See A.R. 463-66 (Circuit Court's Findings of Fact)]. UHC submits that the commitment of the land at 327 Medical Park Drive, Bridgeport, West Virginia, and its resources to construct a modern acute-care charitable hospital facility to better serve the healthcare needs of the citizens of Harrison County, evidenced by physical construction of the new facility that was 95 percent complete on July 1, 2010, and the sizeable debt incurred by UHC to construct, equip and furnish the new facility are in and of themselves charitable use of the subject property primarily and immediately for the charitable purposes of UHC as set forth in its articles of incorporation. [A.R. 2-3, 43-44]. Moreover, on and before July 1, 2010, employees of UHC were working at the new hospital facility and a completed portion of the new facility was being used to support the delivery of patient care and treatment at UHC's hospital facility in Clarksburg, West Virginia. [A.R. 154, 343-44, 465]. To hold that this property was not being used for charitable purposes on July 2010 is an absurd result and a strained application of W. Va. Code § 11-3-9. This result is certainly not one contemplated by the Legislature when W. Va. Code § 11-3-9 was amended and reenacted in 2008, or when any of its parent sections were enacted or amended and reenacted over the many years beginning shortly after West Virginia's first constitution was written and ratified in 1863. Additionally, there is no question that the subject property belonged to a charitable hospital on July 1, 2010, and that on that date the property was not used or held out for profit. Nor is there any doubt or dispute that the sole and exclusive (not just primary) use of the subject property on the assessment date was for UHC's charitable purposes.

Moreover, without a certificate of need, UHC could not have begun construction of its new hospital facility. It should not be ignored that one of the purposes of the certificate of need

program is containment of health care costs. W. Va. Code § 16-29B-1 (legislative findings; purpose) reads:

The Legislature hereby finds and declares that the health and welfare of the citizens of this state is being threatened by unreasonable increases in the cost of health care services, a fragmented system of health care, lack of integration and coordination of health care services, unequal access to primary and preventative care, lack of a comprehensive and coordinated health information system to gather and disseminate data to promote the availability of cost-effective, high-quality services and to permit effective health planning and analysis of utilization, clinical outcomes and cost and risk factors. In order to alleviate these threats: (1) Information on health care costs must be gathered; (2) a system of cost control must be developed; and (3) an entity of state government must be given authority to ensure the containment of health care costs, to gather and disseminate health care information; to analyze and report on changes in the health care delivery system as a result of evolving market forces, including the implementation of managed care; and to assure that the state health plan, certificate of need program, rate regulation program and information systems serve to promote cost containment, access to care, quality of services and prevention. Therefore, the purpose of this article is to protect the health and well-being of the citizens of this state by guarding against unreasonable loss of economic resources as well as to ensure the continuation of appropriate access to cost-effective, high-quality health care services.

(Emphasis added.)

To help finance modernization of existing hospital facilities and construction of new hospital facilities, the Legislature enacted the West Virginia Hospital Finance Authority Act creating a program which UHC utilized to obtain partial financing of its new hospital facility. The policy, purpose and intent of the Legislature in enacting this Act are set forth in W. Va. Code § 16-29A-2 which reads:

It is hereby declared to be the public policy of the state of West Virginia and a responsibility of the state of West Virginia, for the benefit of the people of the state and the improvement of their health, welfare and living conditions, to provide hospitals with appropriate means at reasonable cost to maintain, expand, enlarge and establish health care, hospital and other related facilities and to provide hospitals with the ability to refinance indebtedness. This article shall provide a method to enable

hospitals to provide or maintain at reasonable cost pursuant to reasonable terms the facilities, structures and services needed to accomplish the purposes of this article, all to the public benefit and good, to the extent and in the manner provided in this article.

(Emphasis added.)

Taxing the property of a charitable hospital during construction of a new hospital facility only increases the cost of that facility, thus thwarting the purpose of the certificate of need program and diminishing, if not eliminating, the value of the funding obtained through the Hospital Finance Authority, because the tax liability increases the cost of construction at a time when the property is not generating any revenue.

The above illustrates the irrationality of the Respondents' position and the lower court's ruling. On one hand, we have the legislative enactments promulgated with the specific intent to limit rising health care costs and to provide hospitals with a means to help finance construction of new hospital facilities and modernize existing facilities to better serve the health care needs of West Virginians. And on the other hand, we have the Office of the Tax Commissioner interpreting its own administrative rules inconsistently with the applicable statutory language, and with the clear legislative intent, in a manner that drives up the cost of hospital construction and modernization. Simply put, W. Va. Code § 11-3-9 neither states⁹ nor implies that during construction of property belonging to a charitable corporation to be used for its charitable purposes, such property is subject to ad valorem property taxation.

The Respondent Tax Commissioner may respond that his policy only affects new construction on land not already exempt from taxation. As previously stated, UHC hospital facility in Clarksburg, West Virginia, was landlocked. To build the new hospital facility there would have meant buying land on which to construct the new facility and, during construction,

⁹ UHC does not argue that vacant land owned by a charitable corporation should be exempt. Vacant land should be taxed.

that property too would have been taxable under the Tax Commissioner's administrative rule. Another option would have been for UHC to demolish its Clarksburg facility and build on that site a new hospital facility. But that option would not have been in the best interests of the residents who rely on UHC for their health care needs. Additionally, it is not at all clear under the Respondent Tax Commissioner's administrative rules that construction of the new facility on the old hospital site would have been exempt from ad valorem property taxation during the construction period.

The Respondent Tax Commissioner's property tax ruling and the decision of the circuit court below upholding that ruling need to be reversed by this Court because they lead to an absurd result not warranted by, required by, or permitted by, any of the applicable underlying statutes.

While this is the primary reason for reversal, there is a second reason. It is unconstitutional to tax UHC's property for 2011 ad valorem property taxes while other property owned by other charitable organizations that is undergoing construction or upon which construction has not yet begun is treated as exempt from 2011 ad valorem property taxes. Article X, § 1 of the Constitution mandates equal and uniform taxation throughout the State. This mandate is violated when property that should be exempt from taxation is taxed and when property that should be taxed is exempted from taxation. This principle was recognized by this Court more than 129 years ago in *State ex rel. Miller v. Buchanan*, 24 W. Va. 362 (1884). While a trial *de novo* would have yielded evidence of this non-uniformity in taxability determinations, the trial court erroneously denied UHC the opportunity to present such evidence at trial.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for a Revised Rule 20 oral argument because it involves an issue of first impression. To date, the Supreme Court of Appeals of West Virginia has not issued a published opinion respecting either the taxability or exemption from ad valorem property taxation of property undergoing construction that is owned on the July 1st assessment date by a nonprofit, charitable corporation that is exempt from federal income tax under 26 U.S.C. § 501(c)(3) and from state corporation net income tax under W. Va. Code § 11-24-5(a). Nor has this Court issued a published opinion regarding either the taxability or exemption from ad valorem property taxation of property owned by a charitable corporation that is in the final stages of construction on the July 1st assessment date that both prior to, on and after the July 1st assessment date was partially used by the charitable corporation to support its charitable operations performed at another location. Because this issue has far-reaching implications as to other hospitals in the State that may be considering the feasibility of planned improvements in light of the potential tax liabilities attendant thereto, and because the ultimate outcome in this case has a direct impact on the quality and cost of health care to the citizens of West Virginia, oral argument under Rule 20 is warranted.

Pursuant to the time limitations prescribed by Revised Rule 20, twenty (20) minutes of oral argument is requested.

V. ARGUMENT

A. A circuit court's entry of summary judgment is reviewed *de novo* by the Supreme Court of Appeals.

This matter is subject to *de novo* review by this Court, as has repeatedly been held that “[a] circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

B. There exist genuine issues of material fact relevant to the taxability of UHC's property in light of the controlling law and the use of the property on the assessment date of July 1, 2010, that would have been developed had a *de novo* trial been held as required by W. Va. Code § 11-3-25.

Under Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is appropriate only when the record shows that there exists “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c). The Supreme Court of Appeals of West Virginia has repeatedly stated that “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” *E.g.*, Syl. pt. 3, *Aetna Casualty & Surety Co., v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963); Syl. pt. 1, *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992); Syl. pt. 2, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994); Syl. pt. 2, *Pingley v. Perfection Turbo-Dry, LLC*, ___ W. Va. ___ (April 26, 2013). “Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as were the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995); Syl. pt. 3, *Pingley v. Perfection Turbo-Dry, LLC*, ___ W. Va. ___ (April 26, 2013).

A “trialworthy issue is present where the non-moving party can point to one or more disputed ‘material’ facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.” Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995). In determining whether a genuine issue of material fact exists, the circuit court must construe facts in the light most favorable to the non-moving party. *Alpine Prop. Owners Assn. v. Mountaintop Dev. Co.*, 179 W. Va. 12, 365 S.E.2d 57 (1987). The non-moving party, in order to

defeat a motion for summary judgment, must show that there will be sufficient competent evidence available at trial to warrant a finding favorable to the non-moving party. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60-61, 459 S.E.2d 329, 337-39 (1995).

Respondents did not demonstrate the absence of a genuine issue of material fact as to an undisputedly key element of the taxability analysis – use of the subject property by UHC on the July 1, 2010, assessment date.

Moreover, development of the material facts during a *de novo* trial, as required by W. Va. Code § 11-3-25, is critical to proper application of the law in this case, and to show how the charitable use exemptions are being applied in other situations in other areas of the State for purposes of determining whether there is equal and uniform taxation as required by W. Va. Const. Art. X, § 1.¹⁰ Questions of taxability or classification are decided by the Tax Commissioner without holding an evidentiary hearing because no such hearing is provided for in W. Va. Code § 11-3-24a. Instead, the Legislature has provided, in W. Va. Code § 11-3-25, for the factual evidence to be fully developed in a trial *de novo* before the circuit court, which did not happen here.¹¹

C. The Circuit Court below misapplied, as did Respondents, the clear and unambiguous provisions of W. Va. Code Section 11-3-9(a) in determining that UHC's property was taxable.

W. Va. Code Section 11-3-9 exempts, to the extent limited therein, certain property from ad valorem property taxation, including:

¹⁰ More than 129 years ago, this Court recognized in *State ex rel. Miller v. Buchanan*, 24 W. Va. 362 (1884), that unless exemptions from property tax were equally and uniformly applied through the State, there could be no equal and uniform taxation as required by Article X, § 1 of the Constitution.

¹¹ The West Virginia Tax Procedure and Administration Act does not apply to ad valorem property taxes per W. Va. Code § 11-10-3. The Office of Tax Appeals does not have jurisdiction to hear ad valorem property tax questions of taxability or classification. W. Va. Code § 11-10A-8.

(12) Property used for charitable purposes and not held or leased out for profit;

....

(17) Property belonging to . . . any hospital not held or leased out for profit.

Section 9 goes on to provide the following limiting language:

(d) Notwithstanding any other provisions of this section, this section does not exempt... property owned by, or held in trust for,... charitable corporations or organizations... 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.

W. Va. Code Section 11-3-9(d). The West Virginia Supreme Court of Appeals has never discussed or applied this language in a property tax exemption case even though subsection (d) has been in the Code since 1987 and a variation of that language was enacted by the Legislature in 1945, in response to the Court's decision in *Central Realty Co. v. Martin*, 126 W. Va. 915, 30 S.E.2d 720 (1944).¹²

There is no question or dispute that UHC is a charitable corporation and a hospital. Respondents readily acknowledged both points throughout the record of this matter. [A.R. 28-29, 49, 57, 115, 131, 291, 463]. Similarly, there can be no dispute that the land and construction work in progress located at 327 Medical Park Drive, Bridgeport, West Virginia, is property belonging to a hospital. [A.R. 13-21, 39, 115, 131, 210, 291-92, 463] Additionally, there is likewise no dispute that UHC has never held or leased out the subject property for profit.¹³

¹² The language added to W. Va. Code § 11-3-9 by the 1945 amendment was quoted without discussion in *In re Hillcrest Memorial Gardens*, 146 W. Va. 337, 345, 119 S.E.2d 753, 758 (1961); and again in footnote 2, *State ex rel. Cook v. Rose*, 171 W. Va. 392, 299 S.E.2d 3, 8 (1982). The language reads: “Notwithstanding any other provisions of this section, however, no language herein shall be construed to exempt from taxation any property owned by, or held in trust for, educational, literary, scientific, religious or other charitable corporations or organizations, unless such property is used primarily and immediately for the purposes of such corporations or organizations.” (Emphasis added.)

¹³ In *Reynolds Memorial Hospital v. County Court Of Marshall County*, 78 W. Va. 685, 689 (1916), this Court recognized that “[t]he test applied to hospitals by the Legislature (sec. 57, ch. 29, Code), is whether or not they were

There should be no question that the construction of the subject new hospital facility, the stationing of certain of UHC's employees, and the housing of certain of UHC's operations at the new facility prior to July 1, 2010, constitute the "primary and immediate [use of the property] for the purposes of . . . [UHC]" consistent with its article of incorporation and consistent with the previously cited Code provisions containing the exemption criteria.¹⁴ Yet, that question is precisely why this case is before this Court.

Application of the plain meaning of the controlling statutes dictates the subject property is exempt from 2011 ad valorem property taxation. It is a well-established rule of statutory construction that "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syllabus point 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). "Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use." Syl. pt. 4, *State v. General Daniel Morgan Post 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959). Interestingly, although the limiting language of what is now W. Va. Code Section 11-3-9(d) was enacted in 1945, after *Central Realty Co.* was decided, this Court has never discussed its language in any property tax use exemption case decided after 1945.¹⁵ Therefore, the Court has not dealt with the issue of a property's "primary"

"held or leased out for profit." [Section 57, chapter 29 of the Code in 1916 is the forerunner of W. Va. Code § 11-3-9. Subdivision (a)(17) retains the same test for property belonging to a hospital.]

¹⁴ UHC agrees that the land was subject to ad valorem property taxation while the land was vacant and during the pendency of the legal challenge to its certificate of need to construct a new acute-care hospital facility. UHC believes, however, that once construction began on the new hospital facility pursuant to its certificate of need, which facility cost more than \$280 million, it was using its property and resources for charitable purposes and the property should have been exempt from ad valorem property taxation. Nevertheless, the only tax year in issue here is the 2011 property tax year, the assessment day for which was July 1, 2010. [See, e.g., A.R. 1-3, 12, 26-30, 39-46, 133, 211].

¹⁵ This language was mentioned in the 1961 Opinion *In re Hillcrest Memorial Gardens, Inc.*, 146 W. Va. 337, 119 S.E.2d 753 (1961) (Article X, § 1 allows the Legislature to exempt cemeteries from property tax. Pursuant to this authority, § 11-3-9 exempts cemeteries. The issue in *Hillcrest* was whether property held for future growth of the

and “immediate” use for the purposes of an educational, literary, scientific, religious or charitable corporation or organization in the context of W. Va. Code § 11-3-9(d) when determining the taxability of the property of the corporation or organization for ad valorem property taxation.

UHC submits that the terms “primary” and “immediate” are unambiguous and need no interpretation by the Court, but need merely be applied to the facts of this case. In any event, the Respondent State Tax Commissioner defined those terms in the administrative rule promulgated in 1989 pursuant to W. Va. Code § 11-3-9 and the rule-making procedure set forth in the State Administrative Procedures Act in Article 3, Chapter 29A of the Code. Even assuming that the Tax Commissioner’s definitions are the correct definitions of terms used but not defined in Subsection 11-3-9(d),¹⁶ UHC’s use of the subject property on the July 1, 2010, assessment date more than satisfies the use required by Subsection 11-3-9(d), and the subject property is exempt from 2011 ad valorem property taxation under W. Va. Code § 11-3-9(a)(12) and/or (17).

The Tax Commissioner’s rule defines the term “primary use” as “use which is chief, main or principal” (110 CSR 3-2.48) and defines “immediate use” as “use which is direct and not

cemetery was exempt from tax. The Court answered this question in the affirmative.) The 1945 amendment was also mentioned, but not discussed, in footnote 2 of *State ex rel. Cook v. Rose*, 171 W. Va. 392, 299 S.E.2d 3 (1982).

¹⁶ The term “primary use” is defined in C.S.R. § 110-3-2.48 and means “use which is chief, main or principal.” The rule goes on to explain:

2.48.1. 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 or 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 use must further the stated, primary use.

Significantly, the words “primarily,” and “immediately” are not found in the Article X, § 1 authority granted to the Legislature to exempt certain property from ad valorem property taxation. Moreover, while the Legislature requires that property be used exclusively for certain purposes before one of the exemptions in W. Va. Code § 11-3-9(a) applies, the word “exclusively” is not used in W. Va. Code § 11-3-9(a)(12) or (17), the exemptions applicable here. Appendix A demonstrates that the Article X, § 1 of the West Virginia Constitution is somewhat unique in the scope of authority granted to the Legislature to exempt property from taxation. The list also demonstrates why understanding the organic law of other states as it relates to exemptions from property tax is essential when looking at cases from other states applying the charitable use exemption of the particular state.

separated in time, relationship or connection.” W. Va. Code St. R. § 110 CSR 3-2.31. Utilizing Respondents’ definitions and applying them in the context of the relevant statutory language, UHC’s property must be held to be tax exempt if on the assessment date of July 1, 2010, the property was used primarily (chiefly, mainly or principally) and immediately (directly and not separate in time, relationship or connection) for the purposes of the corporation (UHC). Under the plain meaning of the statute and the Tax Commissioner’s own definitions of the terms used therein, UHC’s property must be held to be exempt based upon its undisputed use. Being 95 percent completed and equipped, and housing various operations to support UHC’s tax-exempt hospital in Clarksburg, West Virginia (a fact ignored by Respondents and the Circuit Court), the Bridgeport property as of July 1, 2010, if not before, clearly was being used primarily and immediately for the charitable purposes of UHC.¹⁷ [See A.R. 154, 343-44, 465]. The fact that UHC employees were working at the new facility on and before July 1, 2010, also demonstrates primary and immediate use of the property for the charitable purposes of UHC as set forth in its articles of incorporation on July 1, 2010.

UHC acknowledges that the rule of strict construction applies in this case, as in any case where a taxpayer claims exemption from taxation; and if any doubt arises as to the exemption, that doubt must be decided against the person who claims the exemption. Syl. pt. 2, *In Re*

¹⁷ Respondents’ argument appears to confuse the intended application of the words primary and immediate, applying these descriptors to the ultimate intended use of the property rather than how the property is being primarily and immediately used for the charitable purposes of the corporation on the July 1st assessment date. [See A.R. 118-23, 134-38, 298-305]. This significant misapplication is apparent in Respondents’ assertion, and in the lower court’s ruling, that the facility was not being used for UHC’s primary charitable purpose on the assessment date because the facility was not receiving and treating patients. While treating patients certainly is the primary purpose of the hospital under its articles of incorporation, that is not the relevant analysis to be made with respect to the taxability determination of the hospital’s property prior to the time the facility is licensed by the State as a hospital. In fact, the only analysis permitted under the statute is whether the property at issue is used primarily and immediately “for the purposes of the [charitable] corporation,” in the context of property used for charitable purposes and not held or leased out for profit, and property belonging to a hospital not held or leased out for profit. The strained construction of the “primary” and “immediate” requirements included in the Tax Commissioner’s administrative rule as proposed by the Respondents and adopted by the circuit court would result in derogation of the applicable statutory provisions and of the authority conferred upon the Tax Commissioner thereunder.

Hillcrest Memorial Gardens, Inc., 146 W. Va. 337, 119 S.E.2d 753 (1961). However, strict construction also must be a reasonable construction to accomplish the intention of the Legislature. The West Virginia Supreme Court has explained the rules of construction of the tax exemption statutes as follows:

[W]e must not lose sight of the fact that the general rules of statutory construction, one of the cardinal principles of which is the determination of legislative intent, shall always prevail. The following statement is contained in 51 Am.Jur. 531, Taxation, Section 528: ‘Legislative Intention and Language-The primary rule of construction of statutes-to ascertain and declare the intention of the legislature and carry such intention into effect-applies to the construction of enactments granting exemption from taxation. While the intention to exempt from taxation must be determined from the language of the statute itself, which is to be construed strictly against the claim of exemption, where, by the terms of a statute, an exemption from taxation is granted, the mandate of the statute is as much entitled to obedience as one imposing taxation... The rule of strict construction, in the absence of ambiguity, does not require otherwise; nor does it mean that the courts are not to search for and ascertain, if possible, the true meaning of language used in a tax exemption statute.

State ex rel. Hardesty v. Aracoma - Chief Logan No. 4523, Veterans of Foreign Wars of U.S., Inc., 147 W. Va. 645, 650-651, 129 S.E.2d 921, 925 (1963). “The rule of strict construction does not require limitation of legislative terms to their narrowest meaning, nor to any particular meaning. They are allowed such scope as is clearly indicated by the legislative purpose revealed by the statute in which they are found.” Syl. pt. 3, *State v. Blazovitch*, 88 W. Va. 612, 107 S. E. 291 (1921). “The rule permits, and other law requires, rational interpretation within the terms actually used.” *State v. Kittle*, 87 W. Va. 526, 530 (1921) (internal citations omitted). The issue in *Kittle* was whether a parsonage no longer being used as a parsonage was exempt under the religious use exemption. In holding the property to be exempt, the Court wrote “[a]cquisition and disposition of parsonages are necessarily incident to the right to hold them and, while they are owned and used as such, they are exempt.” 87 W. Va. at 533.

D. The Tax Commissioner’s administrative rule, to the extent that its provisions resulted in taxation of UHC’s property, is either wrong on its face or the rule was incorrectly interpreted and applied because taxation is clearly inconsistent with the clear meaning of the controlling statute.

Any reliance by Respondents or the Circuit Court upon an interpretation of the Tax Commissioner’s administrative rule that supports taxability of the subject property, was in error and resulted in misapplication of the law and the wrong result.

The West Virginia Supreme Court of Appeals has held on numerous occasions that “rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency’s rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute.” Syl. pt. 4, *Maikotter v. University of W.Va. Bd. of Trustees*, 206 W. Va. 691, 527 S.E.2d 802 (1999); Syl. pt. 2, *Apollo Civic Theatre, Inc. v. State Tax Commissioner*, 223 W. Va. 79, 672 S.E.2d 215 (2008). “It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.” Syl. pt. 3, *Rowe v. W. Va. Dept. of Corrections*, 170 W. Va. 230, 292 S.E.2d 650 (1982) (emphasis added). *See also* syl. pt. 3, *Apollo Civic Theatre, Inc., supra*. “The judiciary is the final authority on issues of statutory construction, and [is] obliged to reject administrative constructions that are contrary to the clear language of a statute.” Syl. pt. 5, *CNG Transmission Corp. v. Craig*, 211 W. Va. 170, 564 S.E.2d 167 (2002); Syl. pt. 5, *Apollo Civic Theatre, Inc., supra*. In the instant case, as more fully discussed herein, any construction of the applicable administrative regulations that leads to taxation must be rejected because such construction is contrary to the clear meaning of the

statutory provisions the regulations are intended to implement, which statutory provisions clearly require exemption of the subject property from 2011 ad valorem property taxation.

Moreover, the administrative rule need not be contorted in a manner that leads to inconsistency with the applicable statutory provisions. A reading of the administrative rule in question quickly dispels any notion that in order to be exempt from ad valorem taxation, property owned by a non-profit hospital must be used for the provision of medical treatment to patients. In fact, the administrative rule expressly provides otherwise. One example is found at W. Va. Code St. R. § 110-3-24.15.1, which provides:

A hospital may engage in certain non-medical activities, so long as these activities are designed to serve hospital staff, employees, patients and visitors, and are not such as to cause the primary and immediate use of the property to be other than charitable use in accordance with Section 19 of these regulations. These activities include, but are not limited to:

- 24.15.1.1. The operation of a parking facility,
- 24.15.1.2. The operation of a pharmacy,
- 24.15.1.3. The operation of a cafeteria or coffee shop, and
- 24.15.1.4. The operation of a gift shop.

Clearly, while the provision of health care is a hospital's primary function, the administrative rule expressly provides for tax exemption of property owned by hospitals and used other purposes, so long as such uses are charitable in nature and further the hospital's charitable purpose. Certainly, the functions being performed at UHC's new facility on the relevant assessment date fall within the parameters of the uses that qualify for exemption as contemplated in the above-quoted rule.

E. Even if the Court declines to determine that the plain meaning of the applicable statute mandates exemption based on the undisputed facts in the record, there are genuine issues of material facts regarding UHC's use of the property that preclude summary judgment.

The use to which the property was put on the assessment date of July 1, 2010, was repeatedly mischaracterized by Respondents as mere construction in their motions and supporting memoranda filed in the court below, and that characterization was accepted by the court below. [See, e.g., A.R. 15 (property “being constructed on July 1, 2010”), 20 (same), 28-29 (same), 115 (same), 119-22 (same), 136-38 (same) 212 (property “not being used at all”), 291 (property “still under construction”), 295 (same), 302 (same), 305 (same), 462-66 (finding that property did not meet charitable use)]. The reality is that more than mere construction was occurring on the property on July 1, 2010. [A.R. 154, 343-44, 465]. While UHC contends that construction alone, especially at the near state of completion that existed on the July 1, 2010 assessment date, is a sufficient primary and immediate use of the property for charitable purposes to warrant exemption, this Court need not go that far in deciding this appeal. UHC was occupying certain completed portions of building for significant components of its hospital operations. [*Id.*] It had employees from various departments engaged there in their normal work activities as part of the hospital's staff occupying the property. [*Id.*]

It must be noted that the “primary and immediate” language first appeared in W. Va. Code § 11-3-9 after the Court decided *Central Realty Co. v. Martin*, 126 W. Va. 915, 720 S.E.2d 720 (1944) (holding that real estate owned by a fraternal association, used for purely commercial enterprises, is not exempt from taxation under Article X, Section 1, Constitution, and Code, 11-3-9, as amended by Chapter 40, Acts of the Legislature, 1933, even though rental income was used for charitable purposes). The *Central Realty* Court stated:

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.”

126 W. Va. at 922.

In *State ex rel Farr v. Martin*, 105 W. Va. 600, 143 S.E. 356 (1928), the issue before the Court was whether property used for commercial purposes held in trust for a school was exempt from taxation when the school received no rental income from the property. The *Farr* Court answered this question in the negative writing the syllabus point quoted above. In other words, this Court viewed commercial use of real property as being the primary and immediate use of the real property in both the *Farr* and *Central Realty* cases and that use of income from the rental property for educational or charitable purposes was the secondary or remote use of the property, making the property ineligible for exemption from property tax. But that is not the factual situation here.

Three recent property tax exemption decisions of this Court support UHC’s position. In syllabus point 2 of *Wellsburg Unity Apts., Inc. v. County Com'n of Brooke Co.*, 202 W. Va. 283, 503 S.E.2d 851 (1998), the Court wrote: “Real property that is used exclusively for charitable purposes and is not held or leased for profit is exempt from ad valorem real property taxation. W. Va. Code § 11-3-9 (1990).” *See also* syllabus point 1, *Appalachian Emergency v. State Tax Com'r*, 218 W. Va. 550, 625 S.E.2d 312 (2005).

In Syllabus point 3, *Wellsburg Unity Apts., Inc. v. County Com'n of Brooke Co.*, 202 W. Va. 283, 503 S.E.2d 851 (1998) the Court wrote: “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.” *See also*, syl. pt. 1, *Maplewood Community, Inc. v. Craig*, 216 W. Va. 273, 607 S.E. 2d 379 (2004); and syl. pt. 2, *Appalachian Emergency v. State Tax Com’r*, 218 W. Va. 550, 625 S.E.2d 312 (2005). None of these recent cases elaborated on the concept of secondary or remote use of the property for charitable purposes, as contrasted with the requirement in W. Va. Code § 11-3-9(d) that primary and immediate use of the property for the purposes of the charitable corporation is required for exemption under W. Va. Code § 11-3-9(a)(12) and (17).

In the case *sub judice*, there was no question at any time during the planning and construction of the new hospital that UHC would operate its new facility as a charitable hospital consistent with the certificate of need issued to it in 2006 by the West Virginia Health Care Authority and as required by UHC’s articles of incorporation.

The argument upon which Respondents rely for taxability of UHC’s property is based primarily on their mischaracterization of the use of the subject property by UHC on the assessment date of July 1, 2010. [*See, e.g.*, A.R. 15, 20, 28-29, 115, 119-22, 136-38, 212, 291, 295, 302, 305]. As previously stated herein, and in Respondents’ motions and supporting memoranda filed in the court below, Respondents posit that UHC’s use of the property on the July 1, 2010 assessment date was not, as required for exemption under W. Va. Code 11-3-9(d) (and its mirror administrative rule - 110 CSR 3-4.2.2) “primarily and immediately” for UHC’s charitable purpose. [*See id.* (arguing that UHC’s property was being used primarily for purposes of construction)]. Respondents’ application of the law to the facts in this case and adopted by the circuit court was and is clearly in error. There is no question that the subject property was being used by UHC on July 1, 2010, primarily and immediately for its charitable purposes as set forth

in its article of incorporation. Well before that assessment date, UHC had applied for and been granted a certificate of need by the West Virginia Health Care Authority; had secured financing, in part by a low-interest loan sponsored by the West Virginia Hospital Finance Authority; had expended significant capital in building and equipping the new hospital facility which was nearing completion; had actually housed certain of its operations at the new facility; and had employees working in the new facility. [A.R. 2, 42-43, 157, 343 (certificate of need and low-interest loan); 154, 343-44, 465 (use of property)]. All of these activities constitute primary and immediate use of the property for UHC's charitable purposes.

On July 1, 2010, the chief, main and principal use (in fact the sole and exclusive use of the property) was to further UHC's purpose of providing health care to residents of Harrison County, West Virginia, in its capacity as a non-profit charitable hospital. No other use existed nor has any other use been suggested by Respondents. There is absolutely no basis, factual or legal, for the conclusion that UHC's use of the subject property on July 1, 2010, was not primarily and immediately for the charitable purposes of UHC as set forth in its articles of incorporation. Any other conclusion requires a tortured and constrained interpretation of the applicable statutory and regulatory provisions and leads to an absurd result. "Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity will be made." Syl. Pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938)." Syl. pt. 1, *Justice v. West Virginia Office Insurance Commission and Lowe's Home Centers, Inc.*, 230 W. Va. 80, 736 S.E.2d 80 (2012).

Because UHC is undisputedly a charitable organization, and because its only use of the subject property on the July 1, 2010, assessment date was undoubtedly part and parcel of its charitable purpose as set forth in its articles of incorporation, the circuit court's decision adopting

Respondents' position that the property was taxable as a matter of law is a misinterpretation and/or misapplication of the law and should be reversed.

F. There exists a genuine issue of material fact as to the State's treatment of other property within the State owned by charitable organizations relative to the property at issue.

Respondents cannot overcome the material facts presented with respect to other properties within the State that were treated as tax exempt when no more than the planning of construction had commenced. UHC was not allowed to present facts demonstrating unequal treatment because no trial or evidentiary hearing was held by the Circuit Court of Harrison County.¹⁸

Even on the face of the Tax Commissioner's administrative rule, charitable hospitals are inexplicably treated differently from other charitable organizations. Hospitals are the only entity, for example, for which the taxability analysis specifically includes the issue of facilities construction. While there is a strong argument to be made that the administrative rule is facially unconstitutional in violation of the Equal Protection Clause of U.S. Const. Amend. 14 and W. Va. Const., Art. III, Section 10, as well as the equal and uniform taxation mandate in W. Va. Const. Art. X, § 1, the Supreme Court of Appeals need not make that determination in this case.

¹⁸ UHC would have presented that showing that on July 1, 2010, Arrow WV Inc. owned property commonly known as the Summit in Fayette County which was purchased for use by the Boy Scouts of America as a base camp. [A.R. 98-100, 330-40, 368-71, 390-95]. Construction of facilities on the property had not yet begun, and a number of mine openings and other work needed to be done to make the property safe for use by the Boy Scouts. Nevertheless, this property was exempt from property tax for the 2011 tax year. [A.R. 369-70, 390-95]. UHC has disclosed to Respondents its intention to present evidence to support the unequal and non-uniform treatment of property at the trial of this matter through witnesses Harvey E. ("Eddie") Young, Assessor of Fayette County, West Virginia, and Dr. Calvin Kent, Vice President for Business and Economic Research at Marshall University, who was awarded the designation of Assessment Administration Specialist (AAS) by the International Association of Assessing Officers and is senior national instructor for that organization. [A.R. A.R. 98-100, 330-40, 368-71, 390-95]. He teaches the advanced courses in property appraisal and administration with a special emphasis on mass appraisal and statistical procedures for property valuation and is certified as a general property appraiser. [A.R. 332-33, 368-69]. Both of these witnesses have direct knowledge of facts that evince non-uniformity in the manner in which the State's taxability determinations are made and the unfavorable treatment of UHC relative thereto.

Merely examining how UHC was using the subject property on July 1, 2010, demonstrates that the property should be exempt from 2011 ad valorem property taxation.

While the Respondents in their Motions and supporting memoranda go through the tortured exercise of attempting to distinguish charitable hospitals as a separate classification of property, therefore permissibly distinguished for taxation purposes, there is no rational basis for doing so in a manner that would result in exemption for all charitable corporations and organizations other than hospitals. [A.R. 134-47, 297-308]. The W. Va. Constitution does not include hospitals as a “classifications” for which exemptions are authorized. As the Respondents have readily pointed out, the West Virginia Constitution does not provide for exemption but simply authorizes the Legislature to do so with respect to certain enumerated classifications of property, among them charitable organizations, of which UHC is one. W. Va. Const. Art. X, Section 1. [A.R. 123, 298-99]. As such, tax exemption for hospitals is only authorized by virtue of the use of the property for charitable purposes. *Reynolds Memorial Hospital v. County Court of Marshall County*, 78 W. Va. 685 90 S.E. 238 (1916) (property used for a hospital cannot be exempted from taxation under the Constitution of this State unless it is used for charitable purposes). As to both the “charitable use” exemption in W. Va. Code § 11-3-9(a)(12) and the “hospital exemption” in W. Va. Code § 11-3-9(a)(17), the test for exemption prescribed by the Legislature is that the property “not be held or leased out for profit.” (“The test applied to hospitals by the Legislature (sec. 57, ch. 29, Code), is whether or not they were ‘held or leased out for profit.’” *Reynolds Memorial, supra*, at 689.)

The West Virginia Legislature, in exercising the authority conferred under Article X, specifically included among exempt property “[p]roperty belonging to... any hospital not held or leased out for profit.” W. Va. Code Section 11-9-3(a)(17). Later, the Legislature amended the

referenced Code Section and added the limiting language contained in subsection (d), which requires that in order to be exempt, the property owned by charitable corporations must be used primarily and immediately for the purposes of the corporation. The language of W. Va. Code 11-3-9 does not distinguish hospitals from other charitable organizations in terms of taxability. However, in performing the mandate contained in subsection 11-3-9(e), which requires the Tax Commissioner to issue rules providing assessors with guidelines to ensure uniform assessment practices statewide to effect the intent of section 11-3-9, the Commissioner promulgated rules that expressly provide rules for charitable hospitals not applicable to other charitable organizations. This is demonstrated by the fact that the Respondent Assessor determined that UHC's property was subject to 2011 ad valorem property taxation while the Assessor of Fayette County determined that the property of another charitable corporation was exempt - even though on July 1, 2010, construction had not yet begun on that property. [See A.R. 28-29, 390-92]. Moreover this different and unequal treatment is clearly contrary to the mandate in Article X, § 1 of the Constitution that "taxation shall be equal and uniform through the state," except as otherwise provided in or authorized by the Constitution.

G. While the issue in this appeal appears to be one of first impression in West Virginia, decisions of courts of other states addressing are consistent with UHC's position here.

Petitioner initially notes that a danger in looking at how the courts of other states have addressed the charitable use exemption is that the constitution and/or the statutes of that other state may be less restrictive or more restrictive than the Constitution and statutes of West Virginia. Review of the constitutions of other states indicates that many of them include modifiers in the phrase "used for charitable purposes" such as "actually," "directly," "immediately," or "exclusively." However, none of those modifiers appear in Article X, § 1 of our Constitution, and the Legislature did not include any of those modifiers in the language of

W. Va. Code § 11-3-9(a)(12) and (17).¹⁹ In those states where the courts decided the question here adverse to the charitable organization, the constitutions of those states or the laws of this State impose restrictions not found in the West Virginia Constitution or in W. Va. Code § 11-3-9. In Appendix A, *infra*, Petitioner lists the constitutional provisions of other states relating to the charitable use exemption from ad valorem property taxation. With this as a preface, Petitioner notes below some decisions of courts of other states applying their charitable use exemption when property is in the process of construction on the applicable assessment date.

In *Abbott Ambulance, Inc. v. Leggett*, 926 S.W.2d 92 (Mo. App. E.D., 1996), the sole issue presented was whether unoccupied land owned by a charity which was in the early stages of development for construction of a headquarters building and maintenance garage that would be used for charitable purposes when completed was being “used exclusively ... for purposes purely charitable” and thus exempt from real property taxes pursuant to § 137.100(5) RSMo 1994. The trial court held that the property was taxable. The Missouri Court of Appeals reversed and remanded the case for entry of judgment in favor of Abbott.

Abbott was the owner of the property on January 1, 1992, the date for assessing and taxing real property for 1992. RS Mo. § 137.080. By January 1, 1992, Abbott had, among other things, (1) entered into a Grading Agreement with Midland Equity, Inc., dated July 23, 1991, for the site preparation and grading of the property; (2) negotiated and executed a Letter of Intent dated December 19, 1991, with Webbe Corporation, a design-build construction contracting firm, for the design and construction of the headquarters facility on the property; and (3) moved

¹⁹ When the Legislature intends for use to be restricted for property tax exemption purposes, it knows what language to use to limit or qualify the exemption. For example, property belonging to the State is exempt only if it belongs “exclusively to the State,” Subdivision 9(a)(2); property belonging to a county, district, city, village or town is exempt only when the property belongs “exclusively to” the entity and “is used for public purposes,” Subdivision 9(a)(3); property used for divine worship is exempt only if it is “used exclusively for divine worship,” Subdivision 9(a)(5); property used for the safekeeping of fire engines and implements for extinguishing fires is exempt when it is “used exclusively for the safekeeping thereof, and for the meeting of fire companies,” 9(a)(20).

substantial amounts of earth on the property pursuant to the Grading Agreement, which was approximately 30% performed or completed as of the January 1, 1992, assessment date.

Construction of the headquarters facility was completed, and Abbott began moving into the facility on November 27, 1992. At all times prior to November 27, 1992, Abbott had the express intention of using the property for construction of the headquarters facility. Abbott had never used the property for any purpose other than construction and operation of the headquarters/garage facility and had never leased any part of the property to a third party or received any rentals or other income from any part of the property.

The property tax exemption at issue in Abbott was authorized by Article X, Section 6 of the Missouri Constitution of 1945, which provided in part:

... all property, real and personal, not held for private or corporate profit and used exclusively ... for purposes purely charitable ... may be exempted from taxation from general law.

(Emphasis added.) Pursuant to this constitutional provision, the Missouri legislature enacted § 137.100, which states, in relevant part:

The following subjects are exempt from taxation for state, county or local purposes: ... (5) All property, real and personal, actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes;....

(Emphasis added).

In Missouri, like West Virginia, taxation of property is the rule and exemption is the exception to this rule. *Affiliated Medical Transport v. Tax Commissioner*, 755 S.W.2d 646, 649 (Mo.App.1988). The law disfavors exemption from taxation. *Id.* Statutes granting exemption

for taxation are to be construed strictly, but reasonably, against the party claiming the exemption.

Iron County v. State Tax Commission, 437 S.W.2d 665, 668 (Mo. 1968).

The Missouri Court of Appeals held that the property was exempt from tax reasoning:

As Abbott points out, under the express language of § 137.100(5), whether property is to be exempted is determined by reference to the actual and regular use by the owner. Construction and other activities in preparation for the rendition of charitable services are either charitable uses or they are not; the imminence of the rendition of charitable services is immaterial. Likewise, there is no requirement in the statute that the owner prove that all conceivable future uses will be charitable. If that were the case, no property could ever qualify for exemption because every tax-exempt owner has the right to sell the property to a non-exempt user. Nor does a requirement of “substantial completion” provide any assurance of charitable use. Just as the tax-exempt taxpayer in *Spelman* purchased the nearly completed hospital from a non-exempt entity, so too might a tax-exempt enterprise decide to sell a completed hospital to a group of doctors who plan to operate it for a profit. Even after the construction was completed, the facility at issue in this case is not unique and presumably would be suitable for either charitable or non-charitable uses. Basing the exemption on the extent of construction thus bears no necessary relationship to the purpose to which the property may ultimately be devoted. In any event, under the plain language of the statute it is the purpose for which the owner actually uses the property that is controlling, not the potential purposes for which the property could conceivably be used.

In this case, it is undisputed that from the outset Abbott’s actual use of the property has been for construction and, ultimately, operation of the property as a headquarters facility and garage and maintenance center for its ambulances. Activities essential to accomplishment of that purpose were underway prior to the assessment date. There is not a scintilla of evidence that Abbott held the property for investment purposes or had even considered any other use. It is conceded that Abbott's use of the property since construction was completed qualifies for exemption. Abbott's use of the property in constructing the facility as a prerequisite to such use should likewise be considered a charitable use.

926 S.W.2d at 95 (emphasis added).

In reaching this decision the Court of Appeals cited, with approval, *Hedgcroft v. City of Houston*, 150 Tex. 654, 244 S.W.2d 632 (1951) (where Texas Supreme Court found that

remodeling of a home into a not-for-profit clinic was sufficient use of the property so as to warrant an exemption from property tax. The court noted that the preparation for operation was indispensable to the use of the clinic); *Utah County v. Intermountain Health Care*, 725 P.2d 1357 (Utah 1986) (where the Utah Supreme Court followed the reasoning of *Hedgecroft* and allowed a tax exemption for a hospital during its construction); *Overmont Corporation v. Board of Tax Revision of the City of Philadelphia*, 479 Pa. 249, 388 A.2d 311 (1978) (holding that construction of facilities by a charity constitutes use for purposes of their similar exemption statute). The Court also cited *Village of Hibbing v. Commissioner of Taxation*, 217 Minn. 528, 535, 14 N.W.2d 923, 927 (Minn. 1944) (parties were adapting and fitting the property for use as a public hospital, they were devoting the property to a use comprehended within the exemption, and consequently that it was being used and operated as a public hospital within the meaning of the exemption provisions of the constitution and statutes); *Carney v. Cleveland City School District Public Library of Cuyahoga County*, 169 Ohio St. 65, 157 N.E.2d 311, (1959) (where an entity, which under the law is entitled to have its property exempted from taxation, acquires real property with the intention of devoting it to a use exempting it from taxation, such property is entitled to be exempted from taxation, as long as it is not devoted to nonexempt or commercial use, even though actual physical use of the property for the exempt purpose has not yet begun); *City of Richmond v. Richmond Memorial Hospital, et al.*, 202 Va. 86, 95, 116 S.E.2d 79, 84 (1960) (it is a matter of common knowledge that where property is being developed for an intended use, actual physical occupancy cannot begin immediately. The hospital existed as a corporate entity before it was a hospital in brick and mortar, and as a corporate entity it was occupying and using its real estate during the two years in question to develop the hospital in the physical sense. In other words, it is not necessary that actual physical use of property for an

exempt purpose be commenced before it is entitled to be exempted from taxation. It is sufficient if it is acquired by the organization entitled to the exemption, with the intention of, within a reasonable time, devoting it to an exempt use); *Cleveland Memorial Medical Foundation v. Perk*, 10 Ohio St.2d 72, 225 N.E.2d 233 (1967) (court authorized exemption of a parcel of land purchased by the taxpayer for the relocation of a general hospital which it had been operating, and construction plans and funding for such purpose were in progress).²⁰

Lastly, the *Abbott* court reasoned that “[d]enial of an exemption during construction of a facility which is to be used for an unquestionably charitable activity necessarily increases the cost, thereby diminishing the charity’s ability to carry out its activities for the benefit of the public.” 926 S.W.2d at 97.

UHC fully agrees with the logic of the *Abbott* Court. On July 1, 2010, there was no question about how UHC was going to use its new acute-care hospital facility once it was completed. Article X, § 1 of the Constitution does not mention “hospitals” as a class of property that the Legislature may exempt from taxation, and W. Va. Code § 11-3-9 does not exempt hospitals per se from taxation. What W. Va. Code § 11-3-9(a)(17) exempts from property tax is property belonging to a hospital not leased or held out for profit, provided the property is being used “primarily and immediately for the purposes of the corporation,” W. Va. Code § 11-3-9(d). There is no question here that the subject property belonged to a 501(c)(3) charitable hospital on

²⁰ There are cases to the contrary. However, these cases are distinguishable because either the constitution of the state or the underlying statute required actual use of the property for charitable purposes as a condition for exemption. See, e.g., *Lake Worth Towers, Inc. v. Gerstung*, 262 So.2d 1 (Fla. 1972); *Dade County Taxing Authorities v. Cedars of Lebanon Hospital Corp., Inc.*, 355 So.2d 1202 (Fla. 1978); *Metropolitan Dade County v. Miami-Dade County Community College Foundation, Inc.*, 545 So.2d 324, 14 Fla. L. Weekly 1134 (Fla. App. 3 Dist., 1989). See also, *Cedars of Lebanon Hospital v. Los Angeles County*, 35 Cal.2d 729, 221 P.2d 31 (1950) (where exemption was denied for building undergoing construction because the pertinent constitutional provision, Art. XIII, § 1c, and the implementing statute, Rev. & Tax. Code, § 214, required that the property be “used” for the enumerated purposes, which court said contemplates actual use as differentiated from an intention to use the property in a designated manner). In 1954, the California Legislature amended the statute to allow exemption where construction was plainly evident. See California Codes, Revenue and Taxation Code Sections 214.1 and 214.2.

July 1, 2010, just as there is no question that the property was not leased out or held out for profit on July 1, 2010. The facility was being used by UHC on July 1, 2010, primarily and immediately for the purposes of the charitable corporation as set forth in its articles of incorporation, and the exemption in W. Va. Code § 11-3-9(a)(17) applies.

The property was also exempt from property tax under W. Va. Code § 11-3-9(a)(12), which exempts from tax property “used for charitable purposes and not held or leased out for profit” provided the property was being used “primarily and immediately for the purposes of the corporation,” W. Va. Code § 11-3-9(d).

VI. CONCLUSION

The errors of law committed by the Circuit Court of Harrison County are readily apparent and cannot go uncorrected. The Circuit Court ignored and violated the requirement in W. Va. Code § 11-3-25 that appeals of property tax taxability questions be heard *de novo* by the Circuit Court. The Circuit Court erred by granting Respondents’ motions for summary judgment despite and notwithstanding the existence of genuine issues of material fact concerning how Petitioner’s property located at 327 Medical Park Drive, Bridgeport, West Virginia, was being used on the July 1, 2010, assessment date. The Circuit Court erred when it misapplied the applicable statutes, administrative rules, and holdings of this Court in property valuation cases to discrimination issue here.

For the reasons stated herein, and for such other and further reasons appearing to this Honorable Court, Petitioner United Hospital Center, Inc. respectfully requests that the Circuit Court’s Order be vacated; that Petitioner’s property at 327 Medical Park Drive, Bridgeport, West Virginia, be declared exempt from 2011 ad valorem property taxes, or, in the alternative,

the decision of the Circuit Court be reversed and the case remanded to the Circuit Court for trial *de novo* as required by W. Va. Code § 11-3-25.

Submitted May 8, 2013

United Hospital Center, Inc., Petitioner

By Counsel



Michael S. Garrison (WV Bar No. 7161) (Counsel of Record)
Kelly J. Kimble (WV Bar No. 7184)
Spilman Thomas & Battle, PLLC
48 Donley Street, Suite 800
P.O. Box 615
Morgantown, WV 26507 -0615
(304) 291-7920 / (304) 291-7979 (facsimile)
mgarrison@spilmanlaw.com
kkimble@spilmanlaw.com

Dale W. Steager (WV Bar No. 3581)
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
P.O. Box 273
Charleston, WV 25321-0273
(304) 340-3800 / (304) 340-3801
dsteager@spilmanlaw.com

Counsel for Petitioner

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Appendix A. State Constitutions Providing for or Authorizing Property Tax Exemptions for Property of Charitable Organizations.

State constitutions that allow or provide for property to be exempt from ad valorem property taxation when **used for** charitable purposes, without the word “used” being modified in any way, include Indiana, Nevada, New Mexico, Virginia and West Virginia.

State constitutions that allow or provide for property to be exempt from ad valorem property when the property is **used exclusively for** charitable purposes include Alabama, Alaska, Arkansas, California, Colorado, Illinois, Kansas, Missouri, Montana, Nebraska, New Jersey, New York, North Dakota, Ohio, Oklahoma, South Dakota and Utah.

State constitutions that allow or provide for property to be exempt from ad valorem property when the property is **used predominately for** charitable purposes include Florida.

State constitutions that allow or provide for property to be exempt from ad valorem property when the property is **owned and occupied by** institutions of purely public charity include Kentucky.

State constitutions that allow or provide for property of institutions of purely public charity to be exempt from ad valorem property taxation include Minnesota.

State constitutions that allow or provide for property of institutions of purely public charity to be exempt from ad valorem property taxation when the property is **actually and regularly used** for the purposes of the institution include Pennsylvania.

State constitutions that allow or provide for property **held and used for** purposes purely charitable include Tennessee.

State constitutions that allow the General Assembly to exempt from ad valorem property taxation property **held for** charitable purposes include North Carolina.

State constitutions that allow or provide for buildings to be exempt from ad valorem taxation when they are **used exclusively and owned by** institutions engaged primarily in public charitable functions include Texas.

State constitutions that exempt from ad valorem property taxation all property of charitable institutions in the nature of hospitals and institutions caring for the infirmed, the handicapped, the aged, children and indigent persons except when the profits of the institutions are applied to private uses include South Carolina.

State constitutions that give counties and municipalities authority to exempt property from ad valorem property taxation when the exemption promotes the general welfare include Delaware.

State constitutions that give the Legislature general authority to exempt property from ad valorem property taxation include Mississippi, Washington and Wyoming.

State constitutions that are silent on the subject include Connecticut, Georgia, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, New Hampshire, Oregon, Rhode Island, Vermont and Wisconsin.

State	Exemption Language in Constitution
Alabama	Legislature may not tax the property, real or personal, when the same are used exclusively for purposes purely charitable. Article VI, § 91 of Constitution.
Alaska	All or any portion of property used exclusively for non-profit charitable purposes , as defined by law shall be exempt from taxation. Article 9, § 9.4 of Constitution.
Arizona	Property of charitable institution not held or used for profit may be exempt from taxation by law. Article 9, § 2(2) of Constitution.
Arkansas	Building and grounds and materials used exclusively for charitable purposes shall be exempt from taxation. Article 16, § 5(b) of Constitution.
California	The Legislature may exempt from taxation property used exclusively for hospital, or charitable purposes and owned or held in trust by corporations or other entities (1) that are organized and operating for those purposes, (2) that are nonprofit, and (3) no part of whose net earnings inures to the benefit of any private shareholder or individual. Article 13, § 4(b) of Constitution.
Colorado	Property, real and personal, that is used solely and exclusively for strictly charitable purposes, not used or held for private or corporate profit, shall be exempt from taxation, unless otherwise provided by general law. Article X, § 5 of Constitution.
Connecticut	None
Delaware	Counties and municipalities have discretionary authority to exempt property from taxation that best promotes the general welfare. Article VIII, § 1 of Constitution.
Florida	The Legislature may exempt from taxation such portions of property as are used predominately for charitable purposes. Article VII, § 3 of Constitution.
Georgia	None

Hawaii	None
Idaho	The Legislature may allow such exemptions from taxation from time to time as shall be deemed necessary and just. Article VII, § 5 of Constitution.
Illinois	The General Assembly may exempt from taxation property used exclusively for charitable purposes . Article 9, § 6 of Constitution.
Indiana	The General Assembly may exempt from property taxation property being used for charitable purposes . Article 10, § 1(c)(1).
Iowa	None
Kansas	All property used exclusively for charitable purposes is exempt from property taxation. Article 11, § 1(b) of Constitution.
Kentucky	There shall be exempt from taxation real property owned and exclusively occupied by , and personal property both tangible and intangible owned by institutions of purely public charity . Article 11, § 170 of Constitution.
Louisiana	Property owned by a nonprofit corporation or association organized and operated exclusively for charitable purposes, no part of the net earnings of which inure to the benefit of any private shareholder or member thereof and which is declared to be exempt from federal or state income tax is exempt from ad valorem taxation. Article VII, § 21.
Maine	None
Maryland	None
Massachusetts	None
Michigan	None
Minnesota	Property of institutions of purely public charity is exempt taxation. Article X, § 1 of Constitution.
Mississippi	The Legislature may by general law exempt particular species of property from taxation in whole or in part. Article 4, Section 112 of Constitution.
Missouri	All property, real and personal, not held for private or corporate profit and used exclusively for purposes purely charitable may be exempted from taxation by general law. Article X, § 6 of Constitution.

Montana	All property, real and personal, not held for private or corporate profit and used exclusively for purposes purely charitable may be exempted from taxation. Article X, § 6 of Constitution.
Nebraska	The Legislature may by general law exempt from taxation property owned and used exclusively for charitable purposes, when such property is not owned or used for financial gain or profit to either the owner or user. Article VIII, § 2(2) of Constitution.
Nevada	The Legislature may exempt by law property used for charitable purposes. Article 10, § 1(8) of Constitution.
New Hampshire	None
New Jersey	Real and personal property used exclusively for charitable purposes, as defined by law, and owned by any corporation or association organized and conducted exclusively for one or more of such purposes and not operating for profit is exempt from taxation. Article VIII, § 1 of Constitution.
New Mexico	All property used for charitable purposes shall be exempt from taxation. Article VIII, § 3 of Constitution.
New York	Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit. Article XVI, § 1 of Constitution.
North Carolina	The General Assembly may exempt property held for charitable purposes. Article V, § 2(3) of Constitution.
North Dakota	Property used exclusively for charitable purposes shall be exempt from taxation. Article X, § 5 of Constitution.
Ohio	General laws may be passed to exempt from taxation institutions used exclusively for charitable purposes. Article 12, § 12.02.
Oklahoma	All property used exclusively for charitable purposes shall be exempt from taxation. Article X, § 6(a) of Constitution.
Oregon	None
Pennsylvania	The General Assembly may by law exempt from taxation institutions of purely public charity , but in the case of any real property tax exemptions

only that portion of real property of such institution which is **actually and regularly used for the purposes of the institution**. Article VIII, § 2((a)(v) of Constitution.

Rhode Island	None
South Carolina	There is exempt from taxation all property of all charitable institutions in the nature of hospitals and institutions caring for the infirmed, the handicapped, the aged, children and indigent persons, except where the profits of such institutions are applied to private use; and all property of all charitable trusts and foundations used exclusively for charitable and public purposes. Article X, §§ 3(b) and (d) of Constitution.
South Dakota	The Legislature shall, by general law, exempt from taxation, property used exclusively for charitable purposes. Article XI, § 6 of Constitution.
Tennessee	The Legislature may except from taxation property as may be held and used for purposes purely charitable. Article II, § 28 of Constitution.
Texas	The legislature may, by general laws, exempt from taxation all buildings used exclusively and owned by institutions engaged primarily in public charitable functions . Article 8, § 2 of Constitution.
Utah	Property owned by a nonprofit entity used exclusively for charitable purposes is exempt from property tax. Article XIII, § 3(1)(f).
Vermont	None
Virginia	Property used by its owner for charitable purposes shall be exempt from taxation. Article X, § 6(a)(6) of Constitution.
Washington	Such property as the Legislature may by general law provide shall be exempt from taxation. Article VII, § 1 of Constitution.
West Virginia:	Legislature may exempt from property tax property used for charitable purposes. Article X, § 1 of Constitution.
Wisconsin	None
Wyoming	In addition to certain property being exempted from taxation in the constitution, other property may be exempted as the legislature may by general law provide. Article 15, § 12 of Constitution.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

UNITED HOSPITAL CENTER, INC., Petitioner Below,

Petitioner,

vs.

Docket No. 13-0120

CHERYL ROMANO,
ASSESSOR OF HARRISON COUNTY,
and CRAIG GRIFFITH,
STATE TAX COMMISSIONER, Respondents Below,

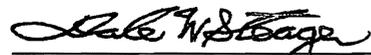
Respondents.

CERTIFICATE OF SERVICE

I, Dale W. Steager, counsel for United Hospital Center, Inc., do hereby certify that the foregoing *Brief of United Hospital Center, Inc.* was served by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail this 8th day of May, 2013, addressed as follows:

James Armstrong, Esquire
Assistant Prosecuting Attorney
Harrison County Court House
301 West Main Street
Clarksburg, WV 26301

Katherine A. Schultz, Esquire,
Office of Attorney General
Building 1, Room W-435
1800 Kanawha Boulevard, East
Charleston, WV 25305


Dale W. Steager (WV Bar No. 3581)