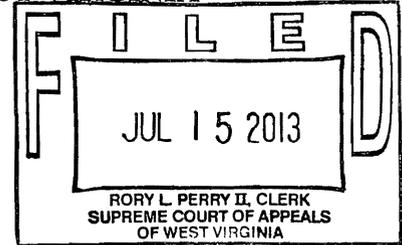


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**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.**

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**PETITIONER UNITED HOSPITAL CENTER, INC.'S REPLY BRIEF**

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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 (facsimile)  
dsteager@spilmanlaw.com

*Counsel for Petitioner, United Hospital Center, Inc.*

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## **I. SUMMARY OF THE ARGUMENT**

The issue before this Court is whether Petitioner's new hospital facility located off I-79 at 327 Medical Park Drive, Bridgeport, West Virginia, hereinafter "new facility" or "subject property," was exempt from ad valorem property taxation as of July 1, 2010, for the tax year 2011.

Respondents and the circuit court below denied Petitioner's claim of exemption because: (1) Petitioner's new facility, which on July 1, 2010, was in the final stage of construction, was not licensed as a hospital on that date, or being used to treat patients on that date; and (2) because Petitioner's existing operating hospital facility located in Clarksburg, West Virginia, was exempt from ad valorem property taxation for tax year 2011, even though that hospital was closed in October of 2010 prior to the start of the tax year.

Petitioner argues that: (1) it was error for the circuit court below to grant Respondents' motions for summary judgment without hearing Petitioner's appeal de novo as is required by W. Va. Code § 11-3-25; (2) it was error for the circuit court to grant Respondents' motions for summary judgment when there are genuine issues of material fact; (3) West Virginia's property tax scheme employs a snapshot approach in who owns the property, how the property is being used and its valuation are all determined as of the first day of July of the assessment year preceding calendar property tax year; (4) W. Va. Code §§ 11-3-9(a)(12) and (17) and § 11-3-9(d) are clear and unambiguous; (5) the Respondent Tax Commissioner's rule for exemption of property from ad valorem property taxation, W. Va. Code St. R. § 110-3-1 *et seq.*, is contrary to clear and unambiguous provisions of W. Va. Code §§ 11-3-9(a)(12) and (17) and § 11-3-9(d) and to the extent the rule is contrary statutory law, as written and/or as applied, the language of W. Va. Code § 11-3-9 controls and the rule must give way to the statute; (6) because hospitals

are required to obtain a certificate of need from the West Virginia Health Care Authority before beginning construction of capital improvements and to annually report to the Health Care Authority during the construction period, and because Petitioner was using the subject property and its resources for charitable purposes on July 1, 2010, it is an absurd result for this property to be denied exemption from ad valorem property taxation for the 2011 property tax year; (7) prior to July 1, 2010, Petitioner was using its property for its charitable purposes because prior to the July 1, 2010, assessment date, Petitioner had relocated its information technology operations (data center) from its Clarksburg, West Virginia, facility to Petitioner's new facility, and from the new facility information technology services and support were being provided to Petitioner's Clarksburg facility. Additionally, other employees of Petitioner were located at the new facility providing security services and readying the new facility for when it would begin treating patients; (9) as interpreted by Respondents, Section 110-3-24 of the West Virginia Code of State Rules exempts construction work for a capital addition to a facility on land already exempt from ad valorem property taxation, but taxes the construction work in progress when the facility purchases land on which to construct a capital addition to an exempt facility or to construct a facility to replace the existing exempt facility even though W. Va. Code §§ 11-3-9(a)(12) and (17) do not make that distinction; and (10) the charitable use property exemption is not being uniformly applied throughout the State resulting in Petitioner being discriminated against in violation of Article III, § 10 of the West Virginia Constitution (West Virginia's equal protection clause), the equal protection clause of the Fourteenth Amendment to the United States Constitution, and the equal and uniform taxation requirement of Article X, § 1 of the Constitution of this State.

## II. ARGUMENT

### **A. PETITIONER HAS A STATUTORY RIGHT TO HAVE ITS APPEAL HEARD DE NOVO BY THE CIRCUIT COURT OF HARRISON COUNTY.**

W. Va. Code § 11-3-25 (relief in circuit court against erroneous tax assessment) guaranteed Petitioner a de novo hearing before the Circuit Court of Harrison County, which Petitioner did not receive. Subsection 11-3-25 [1967]<sup>1</sup> reads, in relevant part:

If, however, . . . a question of classification or taxability is presented, the matter shall be heard de novo by the circuit court.

The word “shall” in the above quoted language makes hearing the appeal de novo mandatory. “The word “shall,” in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation.’ Syl. pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 171 S.E.2d 480 (1969).” Syllabus point 1, *New Vrindaban Community, Inc. v. Rose*, 187 W. Va. 410, 419 S.E.2d 478 (1992).

In *New Vrindaban*, a property tax taxability case, the taxpayer appealed the assessment to the Circuit Court of Marshall County. The parties engaged in substantial discovery, although the matter was not heard de novo by the circuit court. 153 W. Va. at 411, 171 S.E.2d at 479. Rather, upon the taxpayer's motion for summary judgment or declaratory judgment in September, 1989, the circuit court certified a question to this Court, which, for some reason, was never presented to this Court. *Id.* The State’s requests for a de novo hearing were denied. The circuit certified to this Court the question which essentially asked: “Whether the ad valorem property taxation exemption provided by W. Va. Code, 11-3-9 [1973, 1990] violates the First Amendment to the United States Constitution? The circuit court opined that it does so violate.” *Id.* This Court declined to reach the question certified by the circuit court because it is clear that

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<sup>1</sup> W. Va. Code § 11-3-25 was amended and reenacted in 2010. The amendments are effective for assessment years beginning on or after July 1, 2011. The quoted language is now codified in Subsection 11-2-25(c).

the factual circumstances of the case could be more developed in that court, as required by W. Va. Code § 11-3-25. *Id.*, 187 W. Va. at 411-412, 419 S.E.2d at 479-480. In syllabus point 2, the Court wrote:

“Where a question of taxability arises under W. Va. Code, 11-3-25 [1967], and such question involves the constitutionality of a statute granting exemption from taxation, the matter shall be heard *de novo* by the circuit court before this Court will pass on the constitutionality of the statute granting the exemption.”

While the case *sub judice* does not involve the constitutionality of a statute, it does involve the constitutionality of the Tax Commissioner’s legislative rule and the lack of uniform application of the rule throughout the State. It was error for the circuit court to not hear Petitioner’s appeal *de novo*, as required by W. Va. Code § 11-3-25.

**B. THAT PETITIONER PAID PROPERTY TAXES ON THE SUBJECT PROPERTY IN PRIOR YEARS IS IRRELEVANT AND IMMATERIAL TO WHETHER THE SUBJECT PROPERTY IS EXEMPT FROM AD VALOREM PROPERTY TAXATION AS OF JULY 1, 2010.**

The Respondent Tax Commissioner implies in his brief that Petitioner’s payment of property taxes for prior tax years estops Petitioner from claiming exemption from tax as of July 1, 2010, for the 2011 property tax year. Decisions from this Court recognize, however, that each property tax year stands on its own. In syllabus point 2, *Mountain Am., LLC v. Huffman* (Mountain America II), 229 W. Va. 708, 735 S.E.2d 711 (2012), the Court wrote:

“The judgment of a circuit court rendered in a statutory proceeding brought by a taxpayer for the purpose of testing the validity of an ad valorem property tax is not *res judicata* of the same questions raised by the same taxpayer in a like proceeding for the purpose of testing the validity of a similar tax for a subsequent year, the demand for the tax in the subsequent year being a different demand from that for the former.” Syllabus point 1, *In re United Carbon Co. Assessment*, 118 W. Va. 348, 190 S.E. 546 (1937).

Moreover, West Virginia law makes it clear that property owners who do not timely protest classification, taxability or valuation for a particular tax year, waive their right to ask for correction of an assessment. W. Va. Code § 11-3-24 [1979] provides: “If any person fails to apply for relief at this meeting [board of equalization and review], he or she shall have waived the right to ask for correction in the assessment list for the current year, and shall not thereafter be permitted to question the correctness of the list as finally fixed by the board, except on appeal to the circuit court[.]”<sup>2</sup>

**C. THAT THE SUBJECT PROPERTY WAS NOT LICENSED AS A HOSPITAL ON JULY 1, 2010, AND THAT NO PATIENT WAS TREATED THERE ON THAT DATE ARE IRRELEVANT AND IMMATERIAL TO WHETHER THE SUBJECT PROPERTY IS EXEMPT FROM AD VALOREM PROPERTY TAXATION AS OF JULY 1, 2010.**

Article X, § 1 of the Constitution does not mention hospitals. That section does allow the Legislature to, by general law, exempt from taxation “property used for educational, literary, scientific, religious or charitable purposes, all cemeteries, public property, the personal property, including livestock, employed exclusively in agriculture as above defined and the products of agriculture as so defined while owned by the producers[.]”

The Constitution does not define or explain the meaning of the words “property used,” leaving that to the discretion of the Legislature. Additionally, unlike the constitutions of some other states, *see* Appendix A to Petitioner’s brief, the words “property used” in our Constitution are not modified by any limiting word such as “actually,” “directly,” “exclusively,” “immediately,” or by any other word of limitation. We further observe that had the writers of Constitution intended for the term “property used” to be so modified, they would have included a word of limitation like they did in the case of other exemptions provided for in Article X, § 1.

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<sup>2</sup> This language is now codified as W. Va. Code § 11-3-24(h) [2010, effective for assessment years beginning on or after July 1, 30, 2011, as provided in W. Va. Code § 11-3-32].

For example, the word “exclusively” is used three times in the following exemption language from Article X, § 1:

No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessed in any one year upon personal property employed **exclusively in agriculture**,... shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof **exclusively for residential purposes** and upon farms occupied and cultivated by their owners or bona fide tenants, one dollar;... but property used for educational, literary, scientific, religious or charitable purposes, all cemeteries, public property, the personal property, including livestock, **employed exclusively in agriculture** as above defined and the products of agriculture as so defined while owned by the producers may by law be exempted from taxation;...

Petitioner submits that either one or both of two exemptions apply here and that application of either or both results in Petitioner’s “new hospital facility” property being exempt from ad valorem property taxation as of July 1, 2010. W. Va. Code § 11-3-9(a) exempts from tax:

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

(17) Property belonging to any public institution for the education of the deaf, dumb or blind or any hospital not held or leased out for profit[.]

In these exemptions, the Legislature did not limit the words “property used” by any word of limitation such as the words “actually,” “exclusively,” or “immediately.” If the Legislature had meant to insert a word of limitation between the words “property” and “used,” it could have done so like the Legislature did in in the case of five other exemptions. W. Va. Code §§ 11-3-9(a)(2), (3), (5), (20) and (28), which read:

(2) Property belonging **exclusively** to the state;

(3) Property belonging **exclusively** to any county, district, city, village or town in this state and used for public purposes;

(5) Property used **exclusively** for divine worship;

(20) Fire engines and implements for extinguishing fires, and property used **exclusively** for the safekeeping thereof, and for the meeting of fire companies;

(28) Personal property, including vehicles that qualify for a farm use exemption certificate pursuant to section two, article three, chapter seventeen-a of this code and livestock, employed **exclusively** in agriculture, as defined in article ten, section one of the West Virginia Constitution: *Provided*, That this exemption only applies in the case of such personal property used on a farm or farming operation that annually produces for sale agricultural products, as defined in rules of the Tax Commissioner.

In 1945, in response to the Court's opinion in *Central Realty Co. v. Martin*, 126 W. Va. 915, 30 S.E.2d 720, the Legislature amended W. Va. Code § 11-3-9 in two ways. First, it removed from the section the language the *Central Realty* Court held to be unconstitutional. Second, the Legislature modified the syllabus point in *State ex rel. Farr. v. Martin*, 105 W. Va. 600, 143 S.E. 356 (1928), and provided for the new language to apply to the exemptions for property owned by or held in trust for, educational, literary, scientific, religious corporations or organizations as well as charitable corporations and organizations. The language of the 1945 amendment was amended in 1987 and recodified as Subsection 11-3-9(d), which reads:

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.)

In property tax exemption cases decided by this Court after 1945, the text of the 1945 amendment was quoted, without discussion, in *In re Hillcrest Memorial Gardens*, 146 W. Va.

337, 119 S.E.2d 753, 758 (1961); and was quoted, without discussion, in footnote 2, *State ex rel. Cook v. Rose*, 171 W. Va. 392, 299 S.E.2d 3, 8 (1982). The language of Subsection 11-3-9(d) [1987] was quoted, without discussion, in *New Vrindaban Community, Inc. v. Rose*, 187 W. Va. 410, 412, 419 S.E.2d 478, 480 (1992).

The Legislature has not defined the words “use” or “used” as they are found in W. Va. Code § 11-3-9. This Court has instructed that “In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” Syl. pt. 1, *Miners in General Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), overruled on other grounds, *Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982). *See also* syl. pt. 3, *Byrd v. Board of Educ. of Mercer Co.*, 196 W. Va. 1, 467 S.E.2d 142, 539 S.E.2d 764 (1995) (“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.”) (citation omitted).

*In re Tax Assessment Against American Bituminous Partners*, 208 W. Va. 250, 539 S.E.2d 757 (2000) (a property tax valuation case), the Court examined the word “use” writing:

[T]he verb “use” is defined as “to employ for some purpose; put into service; make use of.” *Id.* [Random House Webster’s Unabridged Dictionary (2d ed. 1998)], at 2097; *see also Black’s Law Dictionary* 1541 (6th ed. 1990) (“To make use of; to convert to one’s service; to employ; to avail oneself of; to carry out a purpose or action by means of; put into action or service; especially to attain an end.”).

208 W. Va. at 257, 539 S.E.2d at 764.

Under the above definition of “use,” the Court must ask whether Petitioner was using the subject property primarily and immediately for the charitable purposes of Petitioner as set forth in its articles of incorporation? The answer here is an unequivocal “yes.” The subject property

was no longer vacant land and had not been vacant land since footers were poured and steel began to be erected in 2007. Moreover, as previously discussed, Petitioner's information technology department had been relocated to the subject property and Petitioner's employees were present providing security and readying the facility for patient admissions and treatment prior to the assessment date of July 1, 2010. Construction of hospitals is one of the purposes for which Petitioner was organized. For Respondents to argue that Petitioner was not using the subject property for charitable purposes on July 1, 2010, defies both logic and reality.

Respondent Tax Commissioner's legislative rules arbitrarily make a distinction between construction on land exempt from taxation and owned by a charitable hospital, and construction on land purchased by a charitable hospital, with the former being exempt and the latter being taxable. *Compare* W. Va. Code St. R. § 110-3-24.17.4 and § 110-3-24.17.3. This arbitrary distinction is exacerbated when the construction on exempt land is ultimately used for a taxable purpose. *See* W. Va. Code St. R. § 110-3-24.17.5. W. Va. Code St. R. § 110-3-24.17 reads:

**24.17. Vacant land and construction.**

24.17.1. When a hospital purchases land which it intends to use for capital improvements, which will be used for charitable purposes, the land shall not be exempt so long as the land is vacant. So long as the land is vacant, it can be sold and used for noncharitable purposes.

24.17.2. Vacant tracts owned by a hospital will remain subject to taxation, even if plans are made which show that the land will be used for tax exempt purposes.

24.17.3. If construction is begun on a tract for the purpose of making improvements to be used for hospital purposes, such property shall not be exempt under this section until it has been put to such actual use as to make the primary and immediate use of the property charitable in accordance with Section 19 of these regulations.

24.17.4. If construction is begun on a tract exempt under this section from ad valorem taxation at the time construction is initiated, such construction shall not void the pre-existing exemption if the proposed use

of the improvements so constructed is to be a charitable use consistent with the provisions of this section.

24.17.5. Construction of improvements, the proposed use of which is not charitable, shall not void a pre-existing exemption under this section until such time as the primary and immediate use of the property is not longer charitable in accordance with this section and Section 19 of these regulations.

(Emphasis added.)

While subsection 24.17.3 provides that “[i]f construction is begun on a tract for the purpose of making improvements to be used for hospital purposes, such property shall not be exempt under this section until it has been put to such actual use as to make the primary and immediate use of the property charitable in accordance with Section 19 of these regulations,” the Respondents’ interpretation, and the lower court’s application, of this rule is flawed because it does not comport with the statutorily conferred exemption under W. Va. Code §§ 11-3-9(a)(12) (charitable use) or (a)(17) (property belonging to any hospital). Moreover, it is inconsistent with the manner in which the Tax Commissioner’s treats all other exempt non-profit entities under its legislative rule. Specifically, section 19.1 of the legislative rule makes no mention of construction. It merely requires that “the primary and immediate use of the property must be for one or more exempt purposes,” mirroring the requirements of W. Va. Code § 11-3-9(d). Petitioner satisfies this requirement by virtue of its operations being performed at the facility on the assessment date and by virtue of the fact that hospital construction, in and of itself, is one of the charitable purposes for which Petitioner is incorporated. Section 19 reads:

**§110-3-19. Property Used For Charitable Purposes, And Not Held Or Leased Out For Profit.**

19.1. 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.

19.2. The beneficiaries of a charity may be limited to a class of beneficiaries bearing a rational relationship to the purpose of the charity.

19.2.1. For example: A charity for the purpose of assisting persons suffering with cancer may limit the class of beneficiaries to cancer victims and their families. Despite the limitation of the class, beneficiaries constitute an indefinite class, and society is generally benefited by the charity.

(Emphasis added.)

In summary, the provisions of W. Va. Code St. R. § 110-3-24.17 apply only to charitable hospitals. There is no similar provision in W. Va. Code St. R. § 110-3-19. There is no statutory basis for the position that hospital owned property is not exempt from taxation unless its “actual use” is admitting and treating patients, as argued by Respondents. While Petitioner does not believe that § 11-3-24-17.3 is properly interpreted to impose such a requirement, such interpretation, if adopted by the Court, renders the rule invalid as an abrogation of the taxation exemption conferred by statute. Because the rules for charitable hospitals and the rule for other charitable organizations are not consistent, as interpreted by Respondents and the lower Court,<sup>3</sup> and because there is no statutory authority that would allow such a distinction, Section 24.3 of the legislative rule must be ignored as being arbitrary and capricious and beyond the Tax Commissioner’s statutory authority to promulgate. Syllabus point 2, in part, *W. Va. Health Care Cost Review Auth. v. Boone Mem’l Hosp.*, 196 W. Va. 326, 472 S.E.2d 411 (1996); syllabus point 3, in part, *Men & Women Against Discrimination v. Family Protection Services Board*, 229 W. Va. 55, 725 S.E.2d 756 (2011). While Respondent Cheryl Romano correctly argues in her Response brief that a legislatively approved regulation, having gone through the statutorily mandated rule-making process, has the force of a statute itself, the legislative approval of the rule

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<sup>3</sup> Compare W. Va. Code St. R. § 110-3-19 and 110-3-24.

certainly does not render the rule invulnerable to challenge. The law is clear that a legislative rule authorized and subsequently approved by the Legislature is invalid if the agency has exceeded its constitutional or statutory authority, or the rule is arbitrary or capricious. *Id.*

**D. WHILE WEST VIRGINIA STRICTLY CONSTRUES EXEMPTION FROM AD VALOREM PROPERTY TAXATION, THAT DOES NOT MEAN THE RESPONDENTS CAN BY LEGISLATIVE RULE DEFEAT THE INTENTION OF THE LEGISLATURE OR PROMULGATE A RULE THAT LEADS TO AN ABSURD RESULT.**

In *State v. Kittle*, 87 W. Va. 526, 529-530, 105 S.E. 775 (1921) (a property tax exemption case), the Court said:

[P]rovisions in constitutions and statutes exempting property from taxation are always strictly construed. They constitute exceptions from the operation of more general provisions requiring, ordinarily, equality and uniformity in taxation, so as to place the public burdens, as nearly as may be, upon all property and citizens alike. Considered independently of any adopted principle, equal and uniform taxation must be regarded as being equitable, fair and just. In as much as all exemptions evade the operation of this principle or encroach upon it, they ought to be strictly construed and the courts uniformly hold that they must be. *Baltimore & Ohio R. Co. v. Supervisors*, 3 W. Va. 319; *Baltimore & Ohio B. Co. v. Wheeling*, 3 W. Va. 372; *Cincinnati College v. State*, 19 Ohio 110; *Stahl v. Association*, 54 Kan. 542; *Church of Beatrice v. City of Beatrice*, 39 Neb. 432; *Academy v. Trey*, 51 Neb. 755; *Washburn College v. Commissioners*, 8 Kan. 344; *Young Mens Christian Association v. Douglass County*, (Neb.) 83 N. W. 924; Copley on Taxation 357.

The only arbitrary requirement of the rule of strict construction, however, is that its subject matter must be within the terms, as well as the spirit, of the provision under construction. It does not require assignment to terms actually used, of the most restricted meaning of which they are susceptible, nor any particular meaning. So long as the court stays within the terms used, it may give effect to the spirit, purpose and intent of the makers of the instrument. The rule permits, and other law requires, rational interpretation within the terms actually used. *Reeves v. Ross*, 61 W. Va. 7; *Bolles v. Outing Co.*, 175 IT. S. 262; *State v. Small*, 29 Minn. 216; Lewis' Suth. Stat. Con., 2nd Ed., Sec. 530.

(Emphasis added.)

In *Patterson Memorial Fund, Inc. v. James*, 120 W. Va. 155, 157, 197 S.E. 302 (1938) (a property tax exemption case), the Court said that “[w]hile judicial construction of tax exemption statutes should be strict, it should be rational.” Although the holding in *Patterson* was disapproved in *Central Realty Co. v. Martin*, 126 W. Va. 915, 30 S.E.2d 720 (1944), the general statement relating to judicial construction of tax exemptions remained undisturbed.

The United States Supreme Court, in *Trotter v. Tennessee*, 290 U.S. 354, 356, 54 S.Ct. 138, 78 L.Ed. 358 (1933), while holding that tax exemptions should be strictly construed, additionally said: “On the other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers.”

A similar expression is found in *Mountain View Cemetery Company v. Massey*, 109 W. Va. 473, 477, 155 S.E. 547 (1930) (a property tax exemption case), wherein the Court said: “There is a general rule that statutory tax exemptions are to be strictly construed. But, even so, a strict construction must be reasonable and not limited so as to defeat the underlying purpose of the statute.” See also *In re Mountain State College, Inc., Assessment*, 117 W. Va. 819, 821, 188 S.E. 480 (1936) (“[a]lthough tax exemptions are strictly construed, the principle does not justify an interpolation in a plain statute for the purpose of defeating the privilege,” citing *Mountain View Cemetery Co. v. Massey*, 109 W. Va. 472, 155 S. E. 547.)

The Legislature has provided a series of tools to help insure that West Virginia residents receive health care at a reasonable cost. See W. Va. Code § 16-2D-1 (legislative findings certificate of need program); §16-29B-1 (legislative findings; purpose of Health Care Authority); §16-29A-2 (declaration of policy and responsibility, Hospital Finance Authority). While these are enactments within the last 30 or so years, the Legislature has provided for the property of charitable hospitals to be exempt from property tax since the late 1860s. See 1870 Code of

West Virginia, Chapter 29, § 43 at page 162. In contrast, the Respondent Tax Commissioner has promulgated a legislative rule that requires actual use of property to treat patients as a condition precedent to exemption from property tax even though there is no statutory basis for this requirement. This requires charitable hospitals that build new or replacement hospital facilities to pay property taxes on the land and construction work in progress until the facility is actually used to treat patients, which increases the cost of building the new or replacement hospital facility. Because West Virginia employs a July 1 “snap shot” date to determine taxability, whether a hospital begins to use its new hospital facility before or after the July 1<sup>st</sup> date affects the hospital’s liability for taxes for the next tax year, as it did in Petitioner’s case. Moreover, the Respondents’ fixation on the fact that Petitioner’s new facility was not licensed as a hospital on July 1, 2010, and patients were not being treated at the new facility blinds them to the fact that Petitioner was directly and immediately using the property for its charitable purposes on July 1, 2010, as required by W. Va. Code § 11-3-9(d) for exemption under W. Va. Code § 11-3-9(a)(12). Simply put, for what purpose was the subject property being used on July 1, 2010 if not for UHC’s charitable purposes?

The Respondent Tax Commissioner’s legislative rule on property tax exemptions, W. Va. Code St. R. § 110-3-1 *et seq.*, is unlawful to the extent it is contrary to the provision of W. Va. Code § 11-3-9. If it is interpreted to be consistent with said Code Section, it was incorrectly applied in violation thereof.

**E. THE BRIEF FILED BY THE RESPONDENT TAX COMMISSIONER IS CORRECT IN THE ASSERTION THAT PROPERTY TAX EXEMPTION CASES FROM OTHER STATES MUST BE READ IN LIGHT OF WHETHER PROPERTY TAX EXEMPTIONS ARE STRICTLY OR LIBERALLY CONSTRUED IN THAT STATE.**

The Respondent Tax Commissioner is correct when he says in his brief that property tax exemption cases from other states must be read in light of whether property tax exemptions are strictly or liberally construed in that state. Tennessee was a state that liberally construed property tax exemptions. *See, e.g., George Peabody College for Teachers v. State Bd. of Equalization*, 219 Tenn. 123, 407 S.W.2d 443, 445 (1966). However, the Tennessee Supreme Court has been narrowing the scope of property tax exemptions as Tennessee's revenue laws have changed. *Metropolitan Government of Nashville and Davidson County v. State Board of Equalization*, 543 S.W.2d 587, 588 (Tenn. 1976).

Moreover, the result in *Metropolitan Government* did not turn on whether the exemption was strictly or liberally construed. Instead, the Tennessee Court denied the exemption because the property was not occupied by the property owners as required by the applicable Tennessee statute.

While the Tennessee Constitution provides the Tennessee Legislature with somewhat similar authority to exempt property used for charitable purposes, legislation implementing that authority is more restrictive in Tennessee than is the language in W. Va. Code § 11-3-9.

Pursuant to Article 2, Section 28, the Tennessee Legislature enacted T.C.A. § 67-513 which insofar as is relevant here, provides:

(a) There shall be exempt from property taxation, the real and personal property **owned by any religious, charitable, scientific or educational institution which is occupied and used by such institution or its officers purely and exclusively for carrying out thereupon one or more of the purposes for which said institution was created or exists[.]**

(Emphasis added.)

In *City of Nashville v. State Board of Equalization*, 210 Tenn. 587, 360 S.W.2d 458 (1962), the Supreme Court recognized that for property to be exempt, the property must be both (1) occupied and (2) used exclusively for one of its charter purposes. The statutory requirement of occupancy clearly distinguishes the Tennessee statute from the West Virginia statute (exempting property used for charitable purposes and not held or leased out for profit when the property is used primarily and immediately for purposes of the charitable corporation or organization.)

The facts in *Metropolitan Government of Nashville and Davidson County v. State Board of Equalization*, 543 S.W.2d 587 (Tenn. 1976), are somewhat similar to the facts in the case *sub judice*. In *Metropolitan*, Saint Thomas Hospital was a non-profit corporation which has provided medical service to citizens of Nashville since 1905. Because of demands for a larger and more modern medical facility, St. Thomas procured land to build a new hospital. It paid the property tax on the land for the years 1970 through 1973, and applied for the exemption to be effective January 1, 1974. On January 1, 1974, construction on the new hospital was in its final stages. The hospital actually began operation in December 1974. There was no controversy between the parties for years subsequent to 1974, the exemption having been allowed except for a minor portion of the premises. 543 S.W.2d at 587.

The Tennessee Supreme Court denied the property tax exemption for 1974 because the property was not occupied and used by owner for charitable purposes on the January 1<sup>st</sup> assessment day. The Court noted that “[g]iving the statute a liberal construction would not, in our opinion, permit a finding that the hospital was in use for charitable purposes on January 1, 1974.” 543 S.W.2d at 588.

Petitioner's brief cites *Abbott Ambulance, Inc. v. Leggett*, 926 S.W.2d 92 (Mo. App. E.D. 1996), as an example of a state that treats construction work in progress as eligible for that state's charitable use property tax exemption. We expressly noted that in Missouri, exemptions from property tax are strictly construed against the person claiming the exemption. We additionally note here that unlike Tennessee, Missouri law does not require occupancy as a condition precedent to application of its charitable use property tax exemption.

**F. RESPONDENTS' ANTICIPATORY USE ARGUMENT IS UNAVAILING.**

Respondents argue that a property tax exemption for property under construction should not be allowed until the property is actually used for a charitable purpose. This argument is unsuccessful here for several reasons.

First, Petitioner was in fact occupying and using the subject property for its charitable purposes on July 1, 2010. As previously discussed, Petitioner had relocated its information technology department (data center) to the new facility prior to July 1, 2010, and that department was supporting operations at Petitioner's Clarksburg, West Virginia, facility. Additionally, other employees of Petitioner were working at the new facility providing security and making preparations for when the new facility would begin treating patients.

Second, Petitioner's new facility cost more than \$280 million. This was a huge investment and commitment Petitioner made in order to provide residents of Harrison County with health care in a modern, technologically advanced hospital facility. The amount and the nature of the investment, the value of which was the basis for challenged assessment, clearly illustrate the charitable purpose for which the property was developed. There can be no argument that the use of the property on the subject assessment date was in any way speculative. There can likewise be no doubt that the investment inured to the benefit of the community, or

that, pursuant to 110 CSR 3-24.2, UHC's activities with respect to the property as of the assessment date "promote[d] the health of the community served by it..." The costs associated with equipping, furnishing and otherwise "outfitting" the facility is every bit as much part of the charitable work done by UHC as the treatment of patient. Obviously, the latter could not possibly occur without the former.

Third, Petitioner was required to obtain from the West Virginia Health Care Authority a certificate of need prior to beginning construction of the new facility and to file annual reports with the Authority during construction of the new facility. W. Va. Code § 16-2D-3.

Fourth, and finally, the Respondent Tax Commissioner's legislative rules allow exemption for anticipatory use when the capital addition is on land already exempt from taxation even though once completed, the capital addition may be used for a nonexempt purpose. W. Va. Code St. R. § 110-3-24.3.5.

**G. THE CIRCUIT COURT BELOW DID NOT ALLOW PETITIONER TO PRESENT EVIDENCE REGARDING THE LACK OF UNIFORM APPLICATION OF THE CHARITABLE USE EXEMPTION.**

Respondents thwarted Petitioner's efforts to present evidence that the charitable use exemptions were not being uniformly administered throughout the State. For example, a motion in limine was filed to exclude Dr. Calvin Kent's testimony, based on the assertion that Dr. Kent was somehow prohibited from testifying adversely to Respondent Tax Commissioner because of his service as a member of the Property Valuation Training and Procedures Commission established under W. Va. Code § 11-1C-3. [A.P. 101-104]. Respondents also objected to Petitioner deposing the State Tax Commissioner or other employees of the State Tax Department.<sup>4</sup> [A.P. 101-104, 312-314]. The Court below did not rule upon these motions and

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<sup>4</sup> Dr. Kent is the primary author of a report entitled "Property Tax Exemption of Nonprofit Organizations in West Virginia: Survey Results," January 14, 2011, Prepared by the Center for Business and Economic Research,

instead granted Respondents' motions for summary judgment and gave no consideration to the pervasive and systemic non-uniformity of taxation determinations throughout the State, which Petitioner intended to prove through evidence provided through the testimony of these witnesses. Petitioner disagrees because both the "charitable use" exemption in W. Va. Code § 11-3-9(a)(12) and the exemption for "property belonging to any hospital not held or leased out for profit" in W. Va. Code § 11-3-9(a)(17) are charitable use exemptions. See *Reynolds Memorial Hospital v. County Court of Marshall County*, 78 W. Va. 685, (0 S.E. 239 (1916)); and *State ex rel. Cook v. Rose*, 171 W. Va. 392, 299 S.E.2d 3 (1982).

### **III. CONCLUSION**

For the reasons stated herein, as well as in Petitioner United Hospital Center Inc.'s Brief, United Hospital Center respectfully requests that this Honorable Court reverse the Circuit Court's Order; that United Hospital Center, Inc.'s new hospital facility located off I-79 at 327 Medical Park Drive, Bridgeport, West Virginia, be declared exempt from 2011 ad valorem property taxes, or alternatively that the Circuit Court's Order be reversed and remanded to the Circuit Court below for purposes of a trail de novo as provided in W. Va. Code § 11-3-25; and that this Honorable Court grant such other and further relief as it deems just and proper.

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Marshall University, in cooperation with the West Virginia Association of Counties. [A.P. 315-327]. This report demonstrates that the property tax charitable use exemption is not being equally and uniformly applied throughout the State and Petitioner should have been allowed to develop evidence on this point in the circuit court below.

Submitted July 15, 2013.

**UNITED HOSPITAL CENTER, INC., Petitioner**

By Counsel



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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 I (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 (facsimile)  
dsteager@spilmanlaw.com

*Counsel for Petitioner*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

UNITED HOSPITAL CENTER, INC., Petitioner Below,

Petitioner,

vs.

Docket No. L3-0120

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

Respondents.

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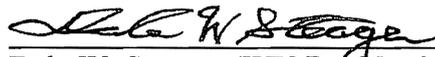
CERTIFICATE OF SERVICE

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I, Dale W. Steager, counsel for United Hospital Center, Inc., do hereby certify that the foregoing **Petitioner United Hospital Center, Inc.'s Reply Brief** was served by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail this 15th day of July 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)