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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0120

UNITED HOSPITAL CENTER, INC.,

Petitioner Below, Petitioner,

v.

CHERYL ROMANO, ASSESSOR OF HARRISON COUNTY,
and MARK W. MATKOVICH, ACTING STATE TAX COMMISSIONER,

Respondents Below, Respondents.

BRIEF OF RESPONDENT MARK W. MATKOVICH ACTING STATE TAX COMMISSIONER

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UNITED HOSPITAL CENTER, INC.,

Petitioner Below, Petitioner,

v.

CHERYL ROMANO, ASSESSOR OF HARRISON COUNTY,
and MARK W. MATKOVICH[1], ACTING STATE TAX COMMISSIONER,

Respondents Below, Respondents.

BRIEF OF RESPONDENT MARK W. MATKOVICH, ACTING STATE TAX COMMISSIONER

I.

STATEMENT OF RELEVANT FACTS

On the assessment date, July 1, 2010, United Hospital Center, Inc. (hereinafter, "UHC" or "Petitioner") admitted it had a license for its Clarksburg facility but not for the hospital under construction in Bridgeport. App. 226. However, this admission must be placed in context. Anita L. Barnhouse is the Medicare/Hospital Program Manager at the West Virginia Office of Health Facility Licensure and Certification (OHFLAC).[2] Ms. Barnhouse provided an unrebutted sworn affidavit. Ms. Barnhouse stated that under State law a hospital is defined as "'any institution, place,

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[1]Pursuant to W. Va. R. Civ. P. 25(d), Mark W. Matkovich is automatically substituted as a party, having succeeded Charles O. Lorensen as Acting State Tax Commissioner. Mr. Lorensen had previously succeeded Craig A. Griffith as State Tax Commissioner.

[2]OHFLAC is under the Office of Inspector General, a division of the West Virginia Department of Health and Human Resources.

building or agency in which an accommodation of five (5) or more beds . . . is maintained, furnished, or offered for patient care and treatment.' 64 C.S.R. § 12-2.13." App. 225. Additionally Ms. Barnhouse stated that "[a]ny change in the location of a hospital requires the issuance of a new license" and that "[e]ach separate and distinct location of a hospital must have a separate license." App. 226.

Furthermore, while UHC admits that its Bridgeport facility did not have a certificate of occupancy on the assessment date, this fact must be placed in context. Ronald A. Stricker[3] is the Life Safety Code Program Manager at OHFLAC.[4] The Life Safety Code Program, which Mr. Stricker manages "is responsible for assuring that the physical facilities of health programs meet the state and federal life safety requirements." App. 216. Mr. Stricker's sworn affidavit stated in pertinent part:

> The process of obtaining OHFLAC approval for the opening of a newly constructed hospital is an ongoing process that occurs as various stages of planning and construction are completed. . . . It was determined through our progress inspections with the General Contractor and the Hospital that our final pre-opening inspection would occur in the middle of the month of August 2010. . . . My office conducted the pre-opening inspection using four inspectors. The inspection took two complete days and included all parts of the hospital. All of the subcontractors were required to be present for the inspection. . . . We received a certificate from a third party inspector assuring that all heating, ventilation, and air conditioning systems were working properly and balanced. . . . We completed the inspection on August 16, 2010 but did not issue a Certificate of Occupancy then because the State Fire Marshal had not yet inspected the facility. The State Fire Marshal's Office performed its inspection of the building on August 18, 2010 and issued an Occupancy Permit that day. . . . On August 23, 2010, having received the documentation of the State Fire Marshal's inspection, I issued a Certificate of Occupancy letter for the Hospital.

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[3]Mr. Stricker also provided an unrebutted sworn affidavit.

[4]OHFLAC is the regulatory agency responsible for enforcing the West Virginia state licensure standards for health care facilities and the federal certification standards for participation in Medicare and Medicaid.

App. 217-19.

Additionally, while UHC admits that on the assessment date, its new facility at the Jerry Dove Drive location in Bridgeport, West Virginia, had not admitted any patients, it failed to mention that its Hospital Plaza location in Clarksburg, which was a fully functioning hospital[5] on the assessment date, received an ad valorem tax exemption for the entire year, even though the Clarksburg location closed in October.[6] App. 463-64.

Furthermore, during the pendency of this litigation at the circuit court, UHC paid its 2009 personal property taxes. App. 153. Like the personal property taxes at issue *sub judice*, the assessment occurred while the new hospital was under construction.

II.

SUMMARY OF ARGUMENT

The central question in this case is whether UHC's almost completed hospital should have received an exemption from property taxes based on its anticipated use. The plain language of Article X, section 1 of the West Virginia Constitution, as well as the pertinent statues and the relevant legislative rule do not support the requested exemption because the property was not used to provide patient care on the assessment date.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

While the Tax Commissioner does not agree that the case *sub judice* presents an issue of first

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[5]UHC began the transfer of the patients from its Clarksburg facility to the Jerry Dove Drive location on October 3, 2010. App. 464.

[6]The Hospital Plaza location stopped providing patient services shortly after the transfer of patients to the Jerry Dove facility began on October 3, 2010. App. 464.

impression; however, he does not object to oral argument in this case.

IV.

ARGUMENT

A. CONTRARY TO UHC'S ASSERTION, THERE ARE NO GENUINE ISSUES OF MATERIAL FACT RELEVANT TO THE TAXABILITY OF ITS PROPERTY UNDERGOING CONSTRUCTION ON THE ASSESSMENT DATE IN BRIDGEPORT, WEST VIRGINIA. THEREFORE, IT WAS NOT ERROR FOR THE CIRCUIT COURT TO DISMISS UHC'S REQUEST FOR TAX EXEMPTION WITHOUT HOLDING A *DE NOVO* HEARING.

In the case before this Court, the Respondents, the Assessor of Harrison County and the Tax Commissioner, moved for summary judgment following the completion of discovery[7] but prior to the trial date. The Petitioner did not file a cross-motion for summary judgment and did not file any evidence in opposition to the Respondents' motions for summary judgment.[8] Instead UHC filed a memorandum containing its legal argument. As discussed herein, the Petitioner did not present any genuine issues of material fact and, therefore the circuit court properly granted the Respondents' motions for summary judgment.

In its argument before this Court, UHC accurately lays out the standard of evidence required to defeat a motion for summary judgment. "'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 w[h]ere 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.

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[7]The court granted an extension of the originally set discovery deadline and the trial date to allow the parties ample time to complete discovery and prepare their case. App. 87-91.

[8]As discussed *infra*, Petitioner filed a Memorandum but no affidavits or testimony from depositions was attached.

____ (April 26, 2013)." Pet'r's Br. 13.

In *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995), this Court made clear that Rule 56 is to be utilized if no genuine issue of material fact is present. The Court stated the following with regard to the nonmoving party's obligation when a motion for summary judgment is filed.

> When a motion for summary judgment is mature for consideration and properly is documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56(e) empowers a circuit court to grant the pretrial motion.

Precision Coil, 194 W. Va. at 58, 459 S.E.2d at 335. *Precision Coil* went on to state the type of evidence a nonmoving party must come forward with in order to defeat a motion for summary judgment. While a nonmoving party need not present admissible evidence, the court indicated that "'[u]nsupported speculation is not sufficient to defeat a summary judgment motion.'" *Precision Coil*, 194 W. Va. at 61, 459 S.E.2d at 338. Additionally, the *Precision Coil* court stated "self-serving assertions without factual support in the record will not defeat a motion for summary judgment" and "Rule 56 requires a nonmoving party to produce specific facts that cast doubt on a moving party's claims." *Id.* The Court next contrasts the plaintiff's burden when seeking summary judgment as compared to the defendant's burden when it seeks summary judgment:

> The situation for a defendant usually is different. Except as to affirmative defenses, a defendant does not bear the burden of proof. Therefore, a defendant may be entitled to summary judgment if he can negate an issue as to which a plaintiff as the nonmoving party has the burden of proof or, if he can show that the plaintiff will be unable to prove a critical fact at trial.

Id., 194 W. Va. at 62, 459 S.E.2d at 339. Inasmuch as UHC sought a tax exemption it had the burden of proof. Thus, the question *sub judice* is did the Respondents negate the issues the

Petitioner had to prove to prevail. It is undisputed that UHC was constructing a hospital in Bridgeport on the day of the assessment. Additionally, it is admitted that a hospital must have a license for every location. App. 226. On the assessment date, UHC did not have a license for its yet to be completed Bridgeport hospital. Moreover, there is no dispute that this facility did not have a certificate of occupancy and as a result it could not and had not admitted any patients. App. 219. Thus, on the assessment date, UHC did not have the ability to provide charity care to anyone at its Bridgeport location. Therefore, the Bridgeport location did not qualify for a charitable tax exemption.

In summary, there are no disputed facts regarding UHC's inability to provide medical service at its Bridgeport site on the date of the assessment.[9] It is uncontroverted that the Bridgeport location was not being used for a charitable purpose. The only fact asserted by the Petitioner in opposition to the Respondent's Motion for Summary Judgment relates to UHC's Equal Protection challenge. Specifically, UHC asserts that the Boy Scouts received an exemption for property in Fayette County where construction had not started. The circuit court assumed that this exemption was erroneously given to the Boy Scouts but found that this isolated instance alone did not demonstrate a violation of the Equal Protection Clause. App. 484.[10] Thus, even viewing the facts in the light most favorable to the Petitioner, the court correctly found that UHC's request for a property tax exemption failed

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[9]UHC's argument that its Bridgeport facility, which was under construction, would in the future care for patients is not contested; however, as discussed, *infra*, this anticipatory use does not meet the constitutional, statutory or regulatory requirements to obtain an exemption.

[10]The record reflects that the Fayette County Assessor granted the exemption without requesting a taxability ruling from the Tax Commissioner. App. 284.

as a matter of law.[11] Inasmuch as the Petitioner failed to provide sufficient evidence to carry its burden of proof, the circuit court was compelled to dismiss the case without a *de novo* hearing. Plainly stated, the Petitioner's failure to provide any evidence other than the affidavit for the Fayette County Assessor was not enough.[12]

B. THE PLAIN AND UNAMBIGUOUS LANGUAGE OF ARTICLE X, SECTION 1 OF THE WEST VIRGINIA CONSTITUTION AND WEST VIRGINIA CODE § 11-3-9 COMPELLED TAXATION OF UHC'S BRIDGEPORT PROPERTY.

As discussed herein, on the date of the assessment the Bridgeport property was not a hospital. In contrast to UHC's Clarksburg hospital, which was exempt from taxation in tax year 2011, the Bridgeport facility was incomplete and had no patients.[13] These undisputed facts are central to the interpretation of all the relevant law. Prior to examining the statutes and regulations, the paramount law regarding exemption from taxation contained in the West Virginia Constitution must be examined. Article X, section 1 of the West Virginia Constitution provides in pertinent part: "Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. . . . but property used for educational, literary, scientific, religious

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[11]The Petitioner did not provide any other evidence regarding unequal treatment. UHC's CFO testified that the only instance of unequal treatment was the granting of the exemption in Fayette County to the Boy Scouts of America. App. 156, 273, 365. Furthermore, no other evidence of unequal treatment was presented. Doctor Calvin Kent was disclosed as an expert witness and it was assumed that his testimony was going to be based on hypothetical scenarios of potential unequal treatment in some counties. However, no affidavit from Dr. Kent was submitted in opposition to Respondents' Motions for Summary Judgment. App. 341-96.

[12]While Dr. Calvin Kent was listed as a witness, there was no affidavit or deposition testimony from Dr. Kent.

[13]UHC is seeking a second ad valorem tax exemption for tax year 2011 even though it is undisputed that only its Clarksburg facility was licensed as a hospital and was treating patients on the assessment date.

or charitable purposes, all cemeteries, public property, . . . may by law be exempted from taxation."

Therefore, as reflected *supra*, the Constitution does not exempt any property from taxation. Rather, it authorized the Legislature to provide exemptions in certain situations. *In re Hillcrest Memorial Gardens, Inc.*, 146 W. Va. 337, 119 S.E.2d 753 (1961). However, the Constitution, as ratified by the citizens of this State, requires that the exemption for certain classes of property is tied inextricable to the property's use. Of relevance to the case *sub judice*, charitable property must be used for a charitable purpose. The plain and unambiguous meaning of the language chosen is clear. The property must be **used** for charitable purposes. Thus, the Petitioner's argument that its anticipatory use of the Bridgeport hospital under construction qualified for an exemption in tax year 2011 ignores the requirement of "charitable use" contained in the Constitution. Simply stated the Constitution requires that in order to obtain an exemption, as requested by Petitioner, the Bridgeport property must have been used for a charitable purpose on the assessment date. It was not. The property was not licensed or opened as a hospital. It did not and could not accept patients. The fact that UHC's property was providing IT services for its exempt hospital at Clarksburg does not qualify the Bridgeport property for exemption because it was not used for a charitable purpose.

Petitioner's argument also ignores the fact that Article X, section 1 of the Constitution did not require use of all the potentially exempt property for entitlement to an exemption. In contrast to charitable property, cemeteries and public property are automatically exempt from taxation when authorized for exemption by the Legislature. Thus, the use requirement for charitable property was deliberate and cannot now be ignored as urged by the Petitioner. UHC's position overlooks the textual language of the Constitution, as well as the presumption against exemption from taxation contained in the Constitution, and the myriad of cases decided by this Court which hold that

exemption from taxation is to be strictly construed against the party seeking an exemption. Furthermore, if UHC obtains the exemption requested from this Court it will obtain a second exemption in one tax year when only one hospital was licensed and in operation on the assessment date.[14] Inasmuch as the West Virginia Constitution is supreme and overrides any statutory enactments or authorized legislative rules, the Petitioner's request for an exemption based upon its Bridgeport hospital's anticipatory use in 2011, must fail.

Assuming *arguendo* that this Court does not find the constitutional language regarding charitable exemptions controlling, an analysis of the statutory exemptions is provided *infra*. The West Virginia Constitution makes no provision for exempting property owned by hospitals. Therefore, a hospital that seeks an exemption for its real or personal property must prove that the property is used for charitable purposes. W. Va. Code R. § 110-3-24.9.4; *Reynolds Memorial Hospital v. Marshall County Court*, 78 W. Va. 685, 90 S.E. 238 (1916) and *State ex rel. Cook v. Rose*, 171 W. Va. 392, 299 S.E.2d 3 (1982) *overruled on other grounds by City of Morgantown v. West Virginia University Medical Corp.*, 193 W. Va. 614, 457 S.E.2d 637 (1995).

West Virginia Code § 11-3-9 sets forth the following relevant exemptions from property taxes:

> (a) All property, real and personal, described in this subsection, and to the extent limited by this section, is exempt from taxation:
>
> . . . .
>
> (12) Property used for charitable purposes and not held or leased out for profit;
>
> . . . .

[14]As discussed herein the date of exemption is July 1st of each tax year.

> (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.

Because no medical care for patients, let alone charitable medical care, was being provided at the Bridgeport location, the Petitioner's request for exemption under W. Va. Code §§ 11-3-9(a)(12) and 11-3-9(a)(17) fails.

As discussed *supra*, the Bridgeport property was not used for a charitable purpose on the assessment date. As a result it cannot meet the Legislative requirement that the property for which an exemption is sought is used for charitable purpose. The Petitioner's use of the IT department in Bridgeport for the benefit of the Clarksburg hospital does not constitute a charitable use at the Bridgeport location. Obviously, the presence of an IT department does not meet the definition of a hospital. W. Va. Code R. § 64-12-2.13 defines a hospital as "any institution, place, building, or agency in which an accommodation of five (5) or more beds . . . is maintained, furnished, or offered for patient care and treatment." Again as of the assessment date, no patient medical care, charitable or otherwise, was being provided in Bridgeport.

Next, UHC asserts that its property is exempt from ad valorem property taxes by virtue of W. Va. Code § 11-3-9(a)(17), which provides an exemption for "Property belonging to . . . any hospital not held or leased out for profit." Because there was no hospital on the Bridgeport property no exemption lies under W. Va. Code § 11-3-9(a)(17). Plainly stated, a nearly constructed hospital is not yet a hospital. Furthermore, no patient care was provided at the Bridgeport site. The general policy of the state, articulated by Art. X, § 1 of the West Virginia Constitution, is that "all property shall contribute to the expenses of the government." *State v. McDowell Lodge, No. 112, A.F. & A.M.*, 96 W. Va. 611, 613, 123 S.E. 561, 562-63 (1924). There are exceptions to this general policy which may be made by the Legislature, but the Constitution "confines [the exemptions] to property

which is *used for* educational, scientific, religious, or charitable purposes." *Id.*, 96 W. Va. at 614, 123 S.E. at 563 (emphasis added). The West Virginia Supreme Court of Appeals has explained the rationale underlying the exemptions as follows:

> The theory justifying exemption of this class of property so used is that the resultant benefits to the body politic will be equal to or in excess of the taxes which would otherwise be imposed, and such religious, scientific, literary, or *charitable use* of the property should be encouraged by relief from taxation.

Id. (emphasis added).

Furthermore, the Petitioner's analysis of *Reynolds Memorial Hospital*, *supra*, ignores the salient distinction between that case and the case *sub judice*. The *Reynolds Memorial Hospital* court was faced with the question of whether a hospital that was not used exclusively to provide charity care to its patients could be exempt as a charitable organization under the West Virginia Constitution. Unlike this case, Reynolds Memorial Hospital was providing medical care to patients. The question for determination was whether Reynolds Memorial Hospital was disqualified from receiving a charitable exemption because some of its patients paid for the service provided. In finding entitlement for a charitable exemption for Reynolds Memorial Hospital, the court's analysis rested on the second requirement of the exemption regarding whether the hospital qualified as a not-for-profit institution. However, contrary to UHC's implication, the case does not stand for the proposition that as long as a hospital is a not-for-profit facility, it qualifies for the charitable exemption contained in the West Virginia Constitution. Simply stated, what is missing here is the provision of medical care for patients and therefore the owner's non-profit status is irrelevant.

C. THE TAX COMMISSIONER'S LEGISLATIVE RULE WAS PROMULGATED PURSUANT TO HIS AUTHORITY AND ACCURATELY INTERPRETS THE REQUIREMENTS FOR A CHARITABLE EXEMPTION.

1. All property given a legislative exemption from taxation must be used primarily, directly, and immediately for the statutorily enumerated exempt purpose.

It has long been established that in order for property to be exempt as "used for . . . charitable purposes," the use of the property must be actual direct use. In *McDowell Lodge, supra*, a fraternal organization owned a building, part of which it used for its own meetings and functions and the remainder of which it leased out to businesses. The lodge asserted that it "used" all of the property for charitable purposes because it applied the proceeds of the leases to pay its mortgage and support its other charitable activities. The West Virginia Supreme Court rejected this argument because the property was not used wholly for charitable purposes. "The character of use of the property itself determines its exemption from taxation, and not the proceeds from its use." *McDowell Lodge*, 96 W. Va. at 616, 123 S.E. at 563. Real estate is not exempt merely because it is owned by a charitable organization; rather, "the constitutional provision rests exemption on use rather than ownership." *Central Realty Co. v. Martin*, 126 W. Va. 915, 921, 30 S.E.2d 720, 724 (1944). And the use must be "primary and immediate." *Id.*, 126 W. Va. at 922, 30 S.E.2d at 726.

In order for property to be exempt as "used for charitable purposes," it must meet a two-prong test: (1) the owner must have charitable status under 26 U.S.C. § 501(c)(3) or (c)(4), as provided in W. Va. Code R. § 110-3-19.1, and (2) the property must be used exclusively for charitable purposes and must not be held or leased out for profit, as provided in W. Va. Code § 11-3-9. *Wellsburg Unity Apartments, Inc. v. County Commission of Brooke County*, 202 W. Va. 283, 503 S.E.2d 851 (1998); *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 17 n.2, 672 S.E.2d 150, 153 n.2 (2009); *Maplewood Community, Inc. v. Craig*, 216 W. Va. 273, 282, 607 S.E.2d 379, 388 (2004). Moreover, "'[a]ll property given a legislative

exemption must be used primarily, directly and immediately for those enumerated purposes.'" *Wellsburg*, 202 W. Va. at 286, 503 S.E.2d at 854, quoting *Cook, supra*. Uses that are secondary or remote fall outside the contemplation of the statute. *Maplewood*, 216 W. Va. at 282, 607 S.E.2d at 388.

Entitlement to exemption from property taxation is not determined by whether the charitable organization at issue falls "within a generalized concept of charity that involves benevolent acts extended to humankind for the purpose of relieving suffering or pain or for spiritual or educational enlightenment." *Maplewood*, 216 W. Va. at 281, 607 S.E.2d at 387. Rather, the determination is made by reference to the specific statute that is at issue and the various regulations that have been promulgated to implement that statute. *Id.*

2. UHC's Bridgeport construction site is not exempt under either W. Va. Code § 11-3-9(a)(12) or (a)(17) because it was not being used primarily, directly, and immediately for charitable purposes.

West Virginia Code § 11-3-9(a)(12) exempts "[p]roperty used for charitable purposes and not held or leased out for profit." UHC claims that its Bridgeport facility that was under construction on the assessment date qualifies for this exemption because it was being used for charitable purposes as of that date. The term "charitable" is defined to mean "of, or for, charity." W. Va. Code R. § 110-3-2.9. "Charity" is defined as follows:

> The term "charity" means a gift to be applied consistently with the existing laws, for the benefit of an indefinite number or persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. . . .

W. Va. Code R. § 110-3-2.10.

As of the assessment date, July 1, 2010, the Bridgeport facility that was under construction

was not being used for the charitable purpose of "relieving [any] bodies from disease" or "otherwise lessening the burdens of government." W. Va. Code R. § 110-3-2.10. It was not yet a "hospital" because it was not providing any "diagnostic and therapeutic services for medical diagnosis, treatment, and care of injured, disabled or sick persons," which is the primary purpose of a hospital, and it was not licensed as a hospital. W. Va. Code R. § 110- 3-2.29. Because the property was still under construction as of July 1, its prospective charitable uses were, at best, secondary and remote. Moreover, it could not lawfully have provided any such services because it had not yet received a state license to operate as a hospital. It was not so licensed until October 3, 2010, the date that it received patients for treatment by transfer from the UHC Clarksburg facility. This first use of the facility to provide patient treatment and its first licensure as a hospital – three months after the assessment date – is "separated in time" from the July 1 assessment date and, therefore, not an immediate use. Accordingly, the property is not exempt from taxation under W. Va. Code § 11-3-9(a)(12) as "[p]roperty used for charitable purposes."

West Virginia Code § 11-3-9(a)(17) exempts "[p]roperty belonging to . . . any hospital not held or leased out for profit." UHC claims that its Bridgeport property also qualifies for this exemption. In order to qualify for this exemption, the following conditions must be met: (1) the hospital must be operated on a not-for-profit basis; and (2) the property for which the exemption is sought must be used in a charitable manner. W. Va. Code R. §§ 110-3-24.1.3, -24.2. As to hospital property, key determinants of charitable use are:

> The provision of health services . . . to individuals who cannot afford to pay for such services in a volume and frequency determined by the hospital board of trustees, as articulated in the charity care plan of the hospital[; or]
>
> The provision of activities which promote the health of the community. . . or decrease the burdens of . . . governments.

W. Va. Code R. §§ 110-3-24.2.1., -24.2.2.

In order to be "charitable" for purposes of this exemption, the hospital must provide "an amount of free and below cost necessary medical services" as specified by its board of trustees. W. Va. Code R. § 110-3-24.9.8. The regulation also specifies a variety of services that may meet the requirement of "activities which promote the health of the community." W. Va. Code R. § 110-3-24.2.2. They include the following: public education related to preventive medicine, donations of medical supplies, free, at- or below-cost health screenings, social services, free or reduced charge medical clinics, operation of poison control centers, free or below-cost blood bank services, free or below-cost training to EMS and ambulance services, disaster planning, and unreimbursed costs for education and training of medical, nursing, and health profession students. W. Va. Code R. §§ 110-3-24.10.1. to -24.10.10.

The UHC Bridgeport facility that was under construction as of the tax assessment date, was not providing any medical services whatsoever, and thus was not providing any "free or below cost" services such as would be charitable in nature within the meaning of W. Va. Code R. § 110-3-24.2.1. Moreover, there is no evidence that the UHC Bridgeport facility was providing any of the enumerated types of services that would qualify as activities that "promote the health of the community" within the meaning of W. Va. Code R. § 110-3-24.2.2. Indeed, it could not have used the facility to provide any such services because the physical facility had not been cleared for occupancy by the Fire Marshal or the Life Safety Code office, much less licensed as a hospital. App. 216-20, 225-28.

The regulation provides very specific guidance as to when the taxability status of a newly constructed hospital property is to be determined: no determination is made until the primary and

immediate use of the property has changed to its new use. W. Va. Code R. § 110-3-24.17. The regulation provides as follows:

> 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.
>
> 25.17.5. 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 no longer charitable in accordance with this section and Section 19 of these regulations.

W. Va. Code R. § 110-3-24.17 (emphasis added). Under W. Va. Code R. § 110-3-24.17.3, it is clear that the Assessor, Tax Commissioner and the Circuit Court of Harrison County correctly determined that the UHC Bridgeport facility that was under construction on July 1, 2010 was not exempt from taxation: the facility was not yet completed and had not yet "been put to such actual use as to make the primary and immediate use of the property charitable." Therefore, it was not exempt. UHC also understood this. It paid the property taxes on the Bridgeport property the previous tax year. App. 261.

D. CONTRARY TO UHC'S ASSERTION THERE ARE NO GENUINE ISSUES OF MATERIAL FACT REGARDING ITS USE OF THE BRIDGEPORT PROPERTY ON THE ASSESSMENT DATE. THEREFORE, THE CIRCUIT COURT WAS COMPELLED TO ENTER SUMMARY JUDGMENT IN THE HARRISON COUNTY ASSESSOR'S AND THE TAX COMMISSIONER'S FAVOR.

It is undisputed that on the assessment date the Bridgeport hospital was not complete. Further the activity on the site principally involved preparations for the yet to be completed hospital. Notwithstanding the relocation of the IT department which was then supporting the Clarksburg facility, but in the future would support the Bridgeport facility, the property was not being used as a hospital. No rearrangement of the facts or downplaying of them can change the fact that the hospital was not open.

Moreover, this Court's opinions in *Wellsburg Unity Apartments*, *supra*, and *Appalachian Emergency Medical Services, Inc. v. State Tax Commissioner*, 218 W. Va. 550, 625 S.E.2d 312 (2005), as discussed *infra* demonstrate that UHC attempts to substitute the anticipated use of the Bridgeport property for the use required by the West Virginia Constitution must fail. Plainly stated, the position of UHC is contrary to the Constitution, the applicable statutes and the legislative rule discussed herein. In *Wellsburg Unity Apartments*, unlike this case, there was no question that the property was being used to provide low income housing for citizens in Brooke County. In fact, the apartment building consisted of twenty-five one-bedroom apartments and nine efficiency apartments housing the elderly or low income residents of the area. In finding an ad valorem tax exemption, the *Wellsburg Unity Apartments* court found that "[r]eal 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)." Syl. Pt. 2, *Wellsburg Unity Apartments*, *supra*. Additionally, the *Wellsburg Unity Apartments* court created the two-prong test for charitable

exemptions reaffirmed in *Appalachian Emergency Medical Services*.

> 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.

Syl. Pt. 3, *Wellsburg Unity Apartments*, *supra*.

In commenting on when a charitable organization can be exempt from taxation the *Wellsburg Unity Apartments* court stated the following:

> The rule regarding "use" is stated succinctly in *Reynolds Memorial Hospital v. Marshall County Court*, 78 W. Va. 685, 687, 90 S.E. 238, 239 (1916), as follows: "If the property is used for charitable purposes within the meaning of the Constitution, then it is exempt from taxation; if it is not so used it is not exempt."

Wellsburg Unity Apartments, 202 W. Va. at 286, 503 S.E.2d at 854.

In *Appalachian Emergency Medical Services*, the property for which a tax exemption was being sought was being used by a charitable organization to further its mission of assisting emergency services organizations to relieve human suffering. It was the provision of these emergency services and not the purpose or the mission of the organization that was controlling. *Appalachian Emergency Medical Services*, 218 W. Va. at 555, 625 S.E.2d at 317. Thus, UHC's argument that the undertaking to build a hospital in furtherance of its mission is not enough. The hospital must be providing charity care.

In examining whether the Unity Housing's apartment complex should be exempt the court examined the facts against the following definition of charity.

> "Charity" is defined by the legislative regulations as:
>
> [A] gift to be applied consistently with the existing laws, *for the benefit of an indefinite number of persons*, either by bringing their hearts under the influence of

> education or religion, *by relieving their bodies from disease, suffering or constraint*, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, *or otherwise lessening the burdens of government. . . .* Any gift not inconsistent with existing laws which is promotive of science or tends to the education, enlightenment, benefit or amelioration of the condition of mankind or the diffusion of useful knowledge, or is for the public convenience is a charity.
>
> 110 C.S.R. § 3-2.10 (1989).

Wellsburg Unity Apartments, 202 W. Va. at 287, 503 S.E.2d at 855 (emphasis added).

Thus, the Bridgeport property for which an exemption is sought does not qualify for an exemption because it was not benefitting an indefinite number of people by relieving their bodies from disease, suffering or constraint. The *Wellsburg Unity Apartments* court also makes clear that the charitable use requirement to qualify for exemption is in addition to the entities' status as a charitable organization when it stated:

> Property taxes are fundamentally different from other types of taxes, and the question of whether property is used for charitable purposes is fundamentally different from the question of whether the property-owning entity qualifies as a charitable organization for purposes of income taxes or business and occupation taxes. The status of the entity or corporation above might determine whether income taxes or business and occupation taxes are to be paid. However, that is not true with real property taxes. In the case of real property taxes, use of the property must also be considered in addition to the status of the entity owning the property.

Wellsburg Unity Apartments, 202 W. Va. at 288-89, 503 S.E.2d at 856-57.

In summary, because the Bridgeport hospital, which was nearing completion, was not open, it was not providing charity care. Thus, UHC's status as a non-profit organization alone does not qualify the Bridgeport site for an exemption from ad valorem taxation.

E. THE CONSTITUTIONAL REQUIREMENT THAT CHARITABLE PROPERTY BE USED FOR CHARITABLE PURPOSE TO OBTAIN A TAX EXEMPTION IS EVENLY APPLIED TO ALL CHARITIES. FURTHERMORE, THE USE REQUIREMENT FOR EXEMPTION FROM AD VALOREM TAXATION IS GROUNDED IN THE CONSTITUTION AND IS RATIONAL.

UHC's Equal Protection argument regarding its inability to present evidence to the trial court is puzzling because it did not submit an affidavit from Dr. Kent regarding the Equal Protection violations that were alleged by Petitioner. The only other evidence UHC relied upon for its Equal Protection claim was the granting of an exemption to the Boy Scouts of America.[15]

Thus, UHC's argument regarding an alleged Equal Protection violation is purely a question of law. Contrary to UHC's argument, it is not being treated differently than other charitable organizations such that an equal protection violation has occurred. Simply stated, all charitable entities must be used for a charitable purpose. Thus, all property owned by charitable institutions must be used for a charitable purpose. The Tax Commissioner promulgated regulations specific to each charitable organization which is reflective of the difference in activities engaged in by various charitable organizations. Obviously differences exist because of the inherent differences of charitable organizations. For example, property used by the Boy Scouts does not necessarily need any building on its property to provide a charity service to young men. A Boy Scout can go hunting

[15]For purposes for ruling on the Assessor of Harrison County and the Tax Commissioner's Motions for Summary Judgment, the Circuit Court of Harrison County assumed that the exemption given to the Boy Scouts was erroneous. However, the circuit court correctly found that this one isolated instance of assumed unequal treatment was not enough to constitute an Equal Protection violation. The circuit court's ruling on this point is correct because an isolated instance with no proof of intentional discrimination is all that the Petitioner presented to the circuit court. It is also noteworthy that no affidavit from Dr. Kent was presented to support any genuine issue of material fact.

and fishing without the construction of a building. However, a hospital[16] needs a building licensed and certified to provide patient care before it can provide charitable patient care. Thus, regulations relating to hospital construction are rational and the fact that there are differences for other charitable organizations is also rational.

Furthermore, it is well settled that legislative rules in West Virginia carry the full force and effect of law. *See Appalachian Power Company v. State Tax Department of West Virginia*, 195 W. Va. 573, 585, 466 S.E.2d 424, 436 (1995); *see also*, Syl. Pt. 2, *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W. Va. 326, 472 S.E.2d 411 (1996). The genesis of the legislative rule before this Court is important to resolving the issues at bar. In the early 1980's, the Tax Department did not have any legislative rules regarding the implementation of the ad valorem property tax exemptions found in W. Va. Code § 11-3-9. To a large extent, the Tax Commissioner relied on institutional memory and the various assessors to apply the statutory exemptions from taxation. The Tax Commissioner issued a *Guideline to Assessors* which included five factors for assessors to consider in granting tax exemptions. *See Cook*, 171 W. Va. at 395, 299 S.E.2d at 6.[17] This Court admonished the Tax Commissioner for the possible inconsistent treatment of taxpayers.

> These rulings indicate factors considered by the commissioner to determine eligibility for tax exempt status. Yet, these loosely structured, unorganized directives cannot possibly guarantee uniformity of taxation. They are but a first step.

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[16]Likewise it was appropriate to promulgate regulations to calculate how much charity care must be provided in order to obtain a charitable exemption.

[17]The Supreme Court overruled *Cook,* to the extent that *Cook* determined that a designation of an organization by the Internal Revenue Service as a charitable organization was not dispositive of the question of an entity's charitable status under State law for Business and Occupation tax purposes. *See* Syl. Pt. 2, *City of Morgantown v. West Virginia University Medical Corporation*, 193 W. Va. 614, 457 S.E.2d 637 (1995).

Cook, 171 W. Va. at 396, 299 S.E.2d at 7.

This Court specifically directed the Tax Commissioner to promulgate legislative rules as required pursuant to W. Va. Code § 11-3-9(e).

> W. Va. Code, 11-3-9 and W. Va. Const. art. X, § 1 require the tax commissioner to issue *clear and specific regulations*, guidelines, forms and instructions about determining tax-exempt status of property.

Syl. Pt. 2, *Cook*, *supra* (emphasis added).

As a result of the direction from this Court, in 1989 the Tax Department promulgated the current legislative rules for the proper implementation of the exemptions set forth in W. Va. Code § 11-3-9.

As directed, the Tax Department has rather detailed procedures for determining when a building becomes a hospital for the purposes of claiming the exemption in W. Va. Code § 11-3-9(17). According to the legislative rule, a building cannot claim the exemption from ad valorem property tax until the building is primarily engaged in providing medical treatment to patients and properly licensed as a hospital.

> 2.29. The term "hospital" means *an institution which is primarily engaged in providing to in-patients*, by or under the supervision of physicians, *diagnostic and therapeutic services for medical diagnosis, treatment, and care of injured, disabled or sick persons*, or rehabilitation services for the rehabilitation of injured, disabled or sick persons *and which is either licensed by the West Virginia Department of Health as a hospital*, or operated by the federal government or the state government as a hospital. This term also includes psychiatric and tuberculosis hospitals. See W. Va. Code §16-2D-2(t).

W. Va. Code R. § 110-3-2.29 (emphasis added).

According to State law, one cannot operate a hospital without a license from the State of West Virginia authorizing the operation of a hospital.

> *No person*, partnership, association, *corporation* or any local governmental unit or any division, department, board or agency thereof *may continue to operate* an existing ambulatory health care facility, ambulatory surgical facility, hospital or extended care facility operated in connection with a hospital, *or open* an ambulatory health care facility, ambulatory surgical facility, *a hospital or extended care facility operated in connection with a hospital, unless such operation shall have been approved and regularly licensed by the state as hereinafter provided.* Licenses shall be issued for a particular number by type of beds and/or type of services. Any change in the number by type of bed and/or type of services shall require the issuance of a new license.

W. Va. Code § 16-5B-2 (emphasis added).

The legislative rule promulgated by the Tax Commissioner in 1989, reflected the licensing requirement in effect at that time and still in effect today. In adopting the issuance of a license by the West Virginia Department of Health and the requirement that a "hospital" be engaged in providing medical care to patients, the West Virginia Legislature enacted a bright line test. The courts are not required to litigate the issue of whether acquiring land, grading the job site, erecting structural steal, hanging dry wall, buying furniture, or having 3,000 tongue depressors on site, constitutes operating a hospital for the purposes of the ad valorem property tax exemption. A building is not a hospital for the purposes of the exemption until it is licensed by the State to operate as a hospital and medical care is being provided to patients.

The legislative rule requires that the property claimed to be exempt pursuant to W. Va. Code § 11-3-9 must be "used primarily and immediately for the purposes of such corporations or organizations." W. Va. Code R. § 110-3-4.2.2. Section 4.2.2 of the legislative rule includes the same language found in the statute. The rule further defines the term "immediate use" as "use which is direct and not separated in time, relationship or connection." W. Va. Code R. § 110-3-2.3.1. The Bridgeport Hospital could not operate as a hospital on the assessment date under West Virginia law; therefore, any future use of the property as a hospital was separated in time, relationship, and

connection form the assessment date.

In addition, the legislative rule specifically addresses the issue of whether a building becomes a hospital during the construction phase of development.

> 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.

W. Va. Code R. § 110-3-24.17.3 (emphasis added).

These regulations are consistent with the constitutional requirement that property be used for a charitable purpose as a prerequisite to obtain an exemption from taxation. West Virginia has a long history of requiring that hospital property must be used in order to be exempt from ad valorem property taxation.

Furthermore, the common thread in the regulations requires that all charitable organizations be used for charitable purposes. West Virginia Code R. §§ 110-3-19.1 and -19.2 provide

> Charities must be operated on a not-for-profit basis, *must directly benefit society*, must be for the benefit of an indefinite number of people, and must be exempt from federal income taxes under 26 U.S.C. § 501(c)(3) or 501(c)(4). *Moreover, in order for the property to be exempt, the primary and immediate use of the property must be for one or more exempt purposes.*
>
> The beneficiaries of a charity may be limited to a class of beneficiaries bearing a rational relationship to the purpose of the charity.

(Emphasis added.)

The regulation challenged in the instant case is W. Va. Code R. § 110-3-24.17. Because it is an economic rule, the rational relationship test applies, and the Commissioner will prevail if there is any reasonable state of facts that could justify the classification. There is such a state of facts that provides the rational basis for the rule. The nature of a hospital is to provide medical care and

treatment for sick, injured, and disabled persons. W. Va. Code § 16-5B-1; W. Va. Code R. § 64-12-2.13; W. Va. Code R. § 110- 3-2.29. Because of this, it necessarily houses patients who would be unable to evacuate themselves in the event of a fire. The regulatory definition of a "hospital" is an institution that is "primarily engaged in providing to in-patients . . . diagnostic and therapeutic services for medical diagnosis, treatment, and care of injured, disabled or sick persons" and is "licensed by the West Virginia Department of Health [and Human Resources]." W. Va. Code R. § 110-3-2.29. The licensure requirement includes a Life Safety Code inspection and a State Fire Marshal inspection. App. 216-20.

These requirements are particularly important for hospitals because many patients are nonambulatory, bedridden, or too weak to protect themselves by fleeing a fire. Accordingly, the Tax Department in promulgating the regulation and the Legislature in approving it, could reasonably have believed that requiring a hospital to be fully operational and licensed, including passing Life Safety Code standards and State Fire Marshal standards, before granting the exemption would protect the patients housed in the hospital who would be unable to evacuate themselves in the event of a fire. Exemption from taxation is a *quid pro quo* for providing a level of public benefit that is equal to or greater than the amount of tax lost by exempting such property. *McDowell Lodge, supra.* Therefore, the Tax Department and the Legislature could rationally have believed that requiring the meeting of safety requirements was necessary in order to be a sufficient public benefit to outweigh the tax revenue. In contrast, the fact that other types of exempt facilities do not have such an explicit regulatory requirement is readily distinguishable by the types of persons who could regularly be expected to use such facilities. In churches, art museums, and other charitably-exempt buildings that the public regularly uses, the vast majority of users will be able-bodied. Therefore, the special

circumstances that justify the rule for a hospital do not apply.

The legislative rule discussed above is consistent with Article X, section 1 of the West Virginia Constitution, as well as W. Va. Code § 11-3-9. Furthermore, it was filed as authorized by W. Va. Code § 11-3-9(e). It was subsequently approved by the Legislature and as a result it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. *Men & Women Against Discrimination v. Family Protection Services Bd.*, 229 W. Va. 55, 725 S.E.2d 756 (2011).

F. BECAUSE UHC'S REQUEST FOR A TAX EXEMPTION IS CONTRARY TO WEST VIRGINIA LAW, IT ASKS THE COURT TO EXAMINE CASES IN OTHER JURISDICTIONS.

In examining whether property qualified for a charitable exemption this Court has stated: "Decisions by courts of last resort in the various jurisdictions are not uniform, doubtless because of the diverse provisions of their organic and statute law, and hence do not furnish a guide for decision." *Central Realty Co.*, 126 W. Va. at 920, 30 S.E.2d at 723. As a consequence, Petitioner is correct when it acknowledges that there is "a danger in looking at how the courts of other states have addressed the charitable use exemption." Pet'r's Br. 28. Consistent with *Central Realty Co.*, the Petitioner touches on some reason why reliance on other court's interpretations of a charitable use exemption is dangerous, because "other state[s] may be less restrictive or more restrictive than the Constitution and statues of West Virginia." *Id.*

Petitioner is right. In addition to textual differences in other states' constitutions, there are differences in construction of exemptions. For example, some states, like Tennessee, in *Metropolitan Government of Nashville and Davidson County v. State Board of Equalization*, 543 S.W.2d 587 (Tenn. 1976), liberally construe exemptions which differs from the law in West

Virginia. Likewise, hospital licensing may differ. In some jurisdictions, unlike West Virginia, a hospital may not need separate licenses for each location as UHC did in this matter. However, in spite of its caution regarding reliance on other courts, UHC presents a sampling of cases from other jurisdictions.[18] Undoubtedly, UHC employed this strategy to avoid the great weight of West Virginia law which does not support its request for an exemption. In extending an invitation to this Court to follow cases from other jurisdictions, UHC's reach is not limited to reliance on cases decided by the highest appellate tribunal in the state. The *Abbott Ambulance, Inc. v. Leggett*, 926 S.W.2d 92 (Mo. App. E.D. 1996) decision clearly stands for the proposition that construction constitutes a charitable use of real and personal property. This conclusion is contrary to the plain language in Article X, section 1 of the Constitution, W. Va. Code §11-3-9(d), the legislative rule, and the great weight of State law; consequently, the *Abbott Ambulance* decision should not be adopted by the Court.

Abbott, in turn, was premised on *Spelman/St. Luke Hospital, Corp. v. Platte County Board of Equalization*, 812 S.W.2d 196 (Mo. App. W.D. 1991).[19] The *Spelman* decision from Missouri is particularly interesting. In *Spelman* the hospital seeking to obtain an exemption from the ad valorem property taxes under Missouri exemption statute, V.A.M.S. 137.100, was operating but was not admitting or treating patients at the new hospital facility. In addition, the construction of the

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[18]UHC also put the Court on notice in footnote 20 that other jurisdictions disallow the exemption it requests. UHC's position that these cases are distinguishable is premised on its assertion, "the constitution of the state or the underlying statute required actual use." Pet'r's Br. 33. Assuming its characterization is correct, those cases are not distinguished because West Virginia's Constitution, statutes and W. Va. Code R. Title 110, Series 3 require use to qualify for an exemption.

[19]Both the *Spelman* decision and the *Abbott Ambulance* decision were issued by the Missouri intermediate appellate courts. Consequently, we do not know what the position of the Missouri Supreme Court would be on the issue of when a hospital actually becomes a hospital for purposes of an ad valorem property tax exemption.

hospital in *Spelman* was completed as of the January 1, 1989 assessment date. Significantly, the parties in the *Spelman* case stipulated that the hospital was actually and regularly used to relieve an indefinite number of people from disease or suffering. The Missouri intermediate appellate court took exception to the taxing authorities attempting to argue contrary to the stipulated facts of the case that the hospital was not in use on the assessment date. *Spelman*, 812 S.W.2d at 197.

The Bridgeport building is in a different factual situation. According to Mr. Coffman's testimony at the deposition, UHC did not obtain the certificate of occupancy from the State Fire Marshall and OHFLAC until mid-August 2010. App. 364. Construction is not complete until the new building can be occupied. Both the Tax Commissioner and the County Assessor have argued consistently that the Bridgeport building could not be used as a hospital prior to the issuance of the hospital license on October 3, 2010.

Furthermore, the reliance on other states is predicated on the narrow view that this is a case of first impression. This is not a case of first impression because this Court has examined the use requirement for hospitals and other charitable institutions. *Reynolds Memorial Hospital*, *supra*; *Cook*, *supra*; *Wellsburg Unity Apartments*, *supra*; and *Appalachian Emergency Medical Services*, *supra*.

Notwithstanding, the West Virginia cases referenced herein, UHC asks this Court to ignore Article X, section 1 of the Constitution, West Virginia Code §11-3-9 and W. Va. Code R. Title 110, Series 3 to adopt anticipatory use as a new standard for obtaining a tax exemption. The adoption of anticipatory use, as urged by Petitioner, would, for all practical purposes, erase the legislatively established assessment day at least for determining tax exemptions. Likewise, this Court's longstanding strict construction of exemptions would be replaced by liberal construction.

Furthermore, because anticipatory use lacks certainty, exemptions could be given for property that never serves a charitable purpose. Additionally, the timing and duration of an anticipatory use exemption would be open ended. Using this case as an example when would UHC's anticipatory use have begun? Would the purchase of the property be enough to satisfy anticipatory use? Or would the obtaining of a certificate of need be enough to qualify as an anticipatory use? Conversely what would happen during the time when the certificate of need was being contested? Would a work stoppage, supply shortage or a lost of funding affect the qualification for anticipatory use?

Furthermore, affirmance of the Circuit Court of Harrison County's denial of the requested exemption is consistent with West Virginia law as well as satisfying the recognized reasons for the granting of tax exemptions. Plainly stated, exemptions from taxation are granted when a charitable benefits is conferred not anticipated.

V.

CONCLUSION

Based upon the foregoing, the Tax Commissioner respectfully requests that the Order of the Harrison County Circuit Court denying UHC's request for an ad valorem tax exemption for its yet to be completed hospital be affirmed.

Respectfully submitted,

MARK W. MATKOVICH, ACTING STATE TAX COMMISSIONER,

By counsel

PATRICK MORRISEY
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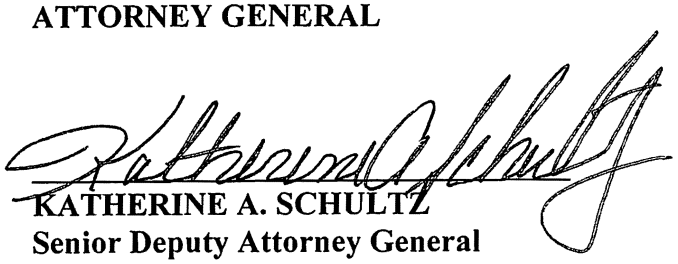

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0120

UNITED HOSPITAL CENTER, INC.,

Petitioner Below, Petitioner,

v.

CHERYL ROMANO, ASSESSOR OF HARRISON COUNTY,
and MARK W. MATKOVICH, ACTING STATE TAX COMMISSIONER,

Respondents Below, Respondents.

CERTIFICATE OF SERVICE

I, Katherine A. Schultz, Senior Deputy Attorney General, do hereby certify that a true and accurate copy of "*Brief of Respondent Mark W. Matkovich Acting State Tax Commissioner*" was served upon counsel for all parties by placing into the U.S. mail, postage prepaid, this 24th day of June, 2013, addressed as follows:

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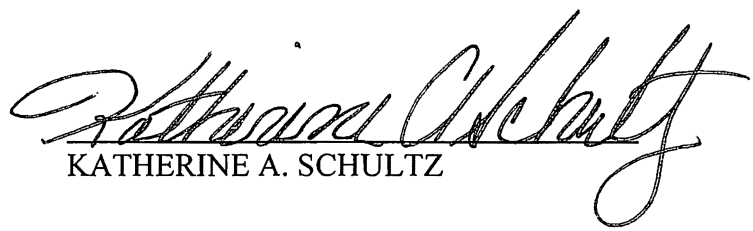

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