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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

UNITED HOSPITAL CENTER, INC.,
Petitioner,

V.

CHERYL ROMANO,
ASSESSOR OF HARRISON COUNTY,
and CRAIG GRIFFITH,
WEST VIRGINIA STATE TAX COMMISSIONER,
Respondent.

Appeal No. 13-0120

FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA
CASE NO. 11-C-124-1

RESPONDENT
CHERYL ROMANO'S RESPONSE TO
PETITION FOR APPEAL

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RESPONDENT
CHERYL ROMANO'S RESPONSE TO
PETITION FOR APPEAL

I. RESPONDENT'S STATEMENT OF CASE AND PROCEDURAL SUMMARY

For the purpose of conforming with Rule 10 of the West Virginia Rules of Appellate Procedure, Respondent provides the following Statement of Case and Procedural Summary to address perceived omissions in the Petitioner's Petition for Appeal.

Respondent Cheryl Romano is the Assessor for Harrison County, West Virginia. Respondent Craig Griffith is the Tax Commissioner for the State of West Virginia and

Petitioner, United Hospital Center (hereinafter UHC), is a corporation formed under West Virginia law as a nonprofit corporation for the purpose of providing medical care.

UHC began construction of a new hospital facility on Jerry Dove Drive in Harrison County, West Virginia, in the fall of 2006. Said facility opened for patients on October 3, 2010, and until such date, UHC operated a separate hospital facility in the Rosebud area of Clarksburg, West Virginia, which was providing both inpatient and outpatient health care to its clientele. It is not disputed that prior to October 3, 2010, the new hospital facility was not providing medical care for patients. Deposition Transcript attached as Exhibit "A" to Memorandum in Support of Motion for Summary Judgment, *p.11, line 24; p. 12, line 1-5; also see* Petitioner's Brief for Petition for Appeal, *p. 4, line 6-7.* In fact, the new facility being built at the Jerry Dove Drive location did not begin providing patient care until approximately ninety-four (94) days following the July 1, 2010, date on which the facility was assessed. *Id.*

On July 1, 2010, tangible personal property located on and incorporated into the new hospital facility was assessed by Respondent Romano at a value of Sixty Two Million Eight Hundred Ninety Five Thousand Thirteen Dollars ($62,895,013.00) and the land on which the new hospital facility is located was assessed by Respondent Romano at a value of One Million Two Hundred Nineteen Thousand Two Hundred Sixty Dollars ($1,219, 260.00). The value of the personal property assessment and land assessment are uncontested.

Subsequent to the assessment performed on the new UHC facility, Douglas Coffman, Vice President of Finance and Chief Financial Officer for UHC, sent a letter dated October 18, 2010, to Respondent Romano advising Respondent that it was the

position of UHC that the assessed property was being used for charitable purposes on July 1, 2010, and as such, the assessed property was exempt from tax liability. Douglas Coffman Letter attached as Exhibit "E" to Petition for Appeal of Ruling by West Virginia State Tax Commissioner Holding That Petitioner's New Hospital Facility is Taxable For Ad Valorem Property Tax Purposes. Following receipt by Ms. Romano of Mr. Coffman's correspondence dated October 18, 2010, Respondent Romano sent a letter to Mr. Coffman advising that the new hospital facility property was, in comport with the West Virginia Code and Code of State Rules, in fact taxable because the property was not being used for a charitable purpose on July 1, 2010. Cheryl Romano Letter attached as Exhibit "F" to Petition for Appeal of Ruling by West Virginia State Tax Commissioner Holding That Petitioner's New Hospital Facility is Taxable For Ad Valorem Property Tax Purposes.

Subsequent to Ms. Romano's correspondence of October 25, 2010, to Mr. Coffman, Ms. Romano sought the opinion of the State Tax Department in respect to the 2011 tax year tax liability issue concerning the new hospital facility. By ruling issued February 28, 2011, The Honorable Craig Griffith, Tax Commissioner for West Virginia, by Mark Morton, General Counsel for Revenue Operations, ruled that the new hospital facility was not eligible for exemption from ad valorem property taxation for tax year 2011.

Thereafter, Petitioner filed its "Petition for Appeal of Ruling by West Virginia State Tax Commissioner Holding That Petitioner's New Hospital Facility is Taxable For Ad Valorem Property Tax Purposes" in the Circuit Court of Harrison County. Respondent Cheryl Romano, by and through the undersigned, filed a Response to the

Petition for Appeal of Ruling by West Virginia State Tax Commissioner Holding That Petitioner's New Hospital Facility is Taxable For Ad Valorem Property Tax Purposes. Trial was then scheduled by Division I of the Circuit Court of Harrison County for October 3, 2011. Following completion of the discovery process, and a continuance of the trial previously scheduled in the underlying matter, Respondent Cheryl Romano filed a Motion for Summary Judgment with the court asking that the court affirm the ruling of the Tax Commissioner. After conducting a hearing on the Motion, The Honorable John L. Marks, Jr., granted the Motion for Summary Judgment and Petitioner now appeals.[1]

II. RESPONDENT'S SUMMARY OF ARGUMENT

A. THAT THERE WERE NO GENUINE ISSUES AS TO ANY MATERIAL FACTS OF CONSEQUENCE TO A DETERMINATION OF THE UNDERLYING PROCEEDING AND THEREFORE, THE CIRCUIT COURT WAS CORRECT IN AWARDING JUDGMENT AS A MATTER OF LAW TO RESPONDENT.

The issue before this Court is the exemption status of an otherwise charitable hospital that is not actually providing care to patients or engaging in other activities centrally and directly related to the function of a hospital. UHC, through its own representations via pleadings and statements of its agents, does not deny that the site at which the new UHC facility was being built was not providing patient care on July 1, 2010. In fact, the facility did not begin providing patient care until on or about October 3, 2010, approximately ninety-four (94) days following the date on which the facility was assessed.

[1] It may also be noted that during the pendency of the underlying proceedings, Petitioner sought to have the underlying proceedings transferred to the West Virginia Business Court, which Respondent opposed due to the facts and circumstances. Following referral of this matter for consideration, this Court refused transfer and agreed with Respondent that the Circuit Court of Harrison County was the appropriate venue for a determination of the issues associated with the underlying matter.

In order for charitable hospital property to receive the benefit of tax exempt status, the property must be used primarily and immediately for the purpose of the hospital. Because the term "primary use" means use which is chief, main or principal, and because the chief, main or principal purpose of a hospital is to provide patient care, whether on an outpatient or inpatient basis, it is abundantly clear that on July 1, 2010, the new UHC facility was not being used chiefly, mainly or principally to provide patient care – it was being used as a construction site with the intent to use the facility being built on the site as a hospital in the future. This fact in turn demonstrates that on July 1, 2010, the new UHC hospital facility was also not being used primarily for the purpose of the hospital.

The term "immediate use" means use which is direct and not separated in time, relationship or connection. Because the chief, main and principle use for the property was not accomplished until October 3, 2010, the date on which UHC began transferring patients from its "old" facility to the "new" facility, it is clear that the use of the site on which the new facility was being built on July 1, 2010, was separated in time from the primary purpose of the hospital which was not accomplished until October 3, 2010.

Because the only genuine factual issue of consequence to a determination of the underlying matter was the use of the site on which the new UHC facility was being built as of July 1, 2010, and because the clear and uncontested facts of the underlying matter conclusively demonstrate that the site on which the new UHC facility was being built was not being used primarily and immediately for the purpose of UHC on July 1, 2010, summary judgment for Respondent was appropriate in the underlying proceedings.

B. THAT THE CIRCUIT COURT CORRECTLY APPLIED THE PROVISIONS OF WEST VIRGINIA CODE 11-3-9(a) IN DETERMINING THAT THE SITE ON WHICH

THE NEW UHC FACILITY WAS BEING BUILT ON JULY 1, 2010, WAS NOT EXEMPT FROM AD VALOREM PROPERTY TAXES.

Petitioner avers that the Circuit Court incorrectly applied the provisions of West Virginia Code 11-3-9(a) in the underlying proceedings. Respondent submits that, quite to the contrary, the Circuit Court not only applied the provisions of said Code Section in a correct manner but in doing so, it was clear that the site on which the new UHC facility was being built on July 1, 2010, was not subject to a tax exemption.

West Virginia Code Section 11-3-9(a), which provides a tax exemption for property used for charitable purposes and property belonging to hospitals and not held or leased out for profit, cannot be read in a vacuum. This Code Section must be read in comport with the guidance contained in the rules lawfully promulgated by the Tax Commissioner and provided to each assessor to ensure uniform assessment practices statewide for the purpose of effectuating the intent of Section 9, Article 3, Chapter 11 of the West Virginia Code. When West Virginia Code Section 11-3-9(a) is read in comport with the guidance contained in the rules lawfully promulgated by the Tax Commissioner, namely those rules mandating that charitable hospital property be used primarily and immediately for the purpose of the hospital, it is clear that the Circuit Court correctly applied West Virginia Code Section 11-3-9(a) to the uncontested facts of this case. In doing so, it is additionally clear that the Circuit Court was correct in finding that the site on which the new UHC facility was being constructed on July 1, 2010, was not being primarily and immediately used for the purpose of the hospital.

C. THAT THE TAX COMMISSIONER'S ADMINISTRATIVE RULE REQUIRING THAT PROPERTY OWNED BY A CHARITABLE HOSPITAL BE USED PRIMARILY AND IMMEDIATELY FOR THE PURPOSE OF THE HOSPITAL IS

NOT WRONG ON ITS FACE, NOR WAS THE RULE APPLIED INCORRECTLY AND THE RULE IS CONSISTENT WITH THE CONTROLLING STATUTE.[2]

This Court has consistently and repeatedly held that exemption of property from taxation depends on its use and to warrant such exemption, the use must be primary and immediate, not secondary or remote. See State ex rel. Farr v. Martin, *105 W.Va. 600, 143 S.E.2d 356 (1928)*, State ex rel. Cook v. Rose, *171 W.Va. 392, 299 S.E.2d 3 (1982)*; Central Realty Company v. Martin, *126 W.Va. 915, 30 S.E.2d 720 (1944)*; and Wellsburg Unity Apartments, Inc., v. County Commission of Brooke County, *202 W.Va. 283, 503 S.E.2d 851 (1998)*. Thus, it is well settled law in this State that in order for property to be exempt from taxation, the charitable purpose for which the property is being used must be immediate and primary. Your Respondent submits that it is difficult to fathom that such well settled law, which forms the basis for the Tax Commissioner's rule, could be characterized as wrong on its face.

Additionally, there is no evidence present to support Petitioner's assertion that the Tax Commissioner's rule requiring that charitable property be used primarily and immediately for the purpose of the charity to qualify for tax exemption is inconsistent with the clear meaning of West Virginia Code 11-3-9(a). As discussed above, the rule promulgated by the Tax Commissioner addressing the use and temporal requirements of charitable property constitutes lawful guidance for assessors to ensure uniform assessment practices statewide for the purpose of effectuating the intent of Section 9, Article 3, Chapter 11 of the West Virginia Code.

[2] Respondent assumes that the rule of the Tax Commissioner to which Petitioner addresses his argument is the rule requiring primary and immediate use of the charitable property for the purpose of the charity as the specific rule complained of by Petitioner in this assignment of error is not cited.

D. THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT PRESENT IN THE UNDERLYING MATTER RESPECTING THE USE OF THE SITE ON WHICH THE NEW UHC FACILITY WAS BEING CONSTRUCTED ON JULY 1, 2010, AND IN LIGHT OF THE WELL SETTLED LAW ADDRESSING TAX EXEMPTION FOR THE TYPE OF PROPERTY AT ISSUE, THE ISSUE OF TAXATION OF THE PROPERTY WAS APPROPRIATE FOR SUMMARY JUDGMENT.

Rule 56(b) of the West Virginia Rules of Civil Procedure provides "[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." The sole question present in the underlying matter was whether the property located on the site on which the new UHC facility was being constructed on July 1, 2010, was being used primarily and immediately for the purpose of the hospital. The clear answer to this question, as evidenced by the record, is that said property was not being used primarily and immediately for the purpose of the hospital on the assessment date.[3]

110 CSR 3 – 24.2 provides in pertinent part that "[a] hospital to be eligible for ad valorem property tax exemption may attain such exemption by using property owned or leased in a charitable manner. For purposes of this Section 24, charitable use is defined as...[t]he provision of health services on an inpatient or outpatient basis to individuals who cannot afford to pay for such services...[or] [t]he provision of activities which promote the health of the community served by the hospital and/or decrease the burdens of state, county or municipal governments...."

While UHC put forth evidence that the new UHC hospital facility being constructed on July 1, 2010, housed some employees (an Information Technology

[3] Respondent believes it important to note that UHC continued to receive tax exemption status for its "old" facility in Clarksburg that was providing inpatient and outpatient health care during the time period in question.

department, housekeeping, and security staff), it was also acknowledged by Petitioner that the site on which the new facility was being built was not providing inpatient or outpatient health care to individuals who could otherwise not afford to pay for such services. Deposition Transcript attached as Exhibit "A" to Memorandum in Support of Motion for Summary Judgment, *p.11, line 24; p. 12, line 1-5; also see* Petitioner's Brief for Petition for Appeal, *p. 4, line 6-7.*

As for providing activities which promote the health of the community served by the hospital and/or decrease the burdens of state, county or municipal governments, there was likewise no evidence ever obtained during discovery or put forth by Petitioner prior to Respondent's filing of the Motion for Summary Judgment that indicated that the site on which the new UHC facility was being built was providing activities which promote the health of the community served by the hospital and/or decrease the burdens of state, county or municipal governments on July 1, 2010. To the contrary, all evidence clearly indicates that this function was being carried out at the "old" UHC facility in Clarksburg on July 1, 2010, and that the site at which the new UHC facility was being built was merely being outfitted for occupancy on July 1, 2010.

E. THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT RESPECTING THE STATE'S TREATMENT OF OTHER CHARITABLE PROPERTY WITHIN THE STATE AS THE EXAMPLE CITED BY PETITIONER (i.e. THE EXEMPTION OF THE BOY SCOUT PROPERTY) IS FACTUALLY AND LEGALLY DIFFERENT FROM THE ISSUE IN THIS CASE.

Petitioner, in essence, raises an equal protection claim that Petitioner's property was treated differently than other charitable property for purposes of taxation. Your Respondent replies that the example cited by Petitioner in support of its claim, namely that property located in Fayette County, West Virginia, belonging to the Boy Scouts of

America (hereinafter "Boy Scout property"), was not assessed or taxed by the Fayette County Assessor despite the property not being used primary immediately for the purpose of the Boy Scouts, is not only factually different from the instant matter, but the legal import of the decision of the Fayette County Assessor does not create an equal protection claim.[4]

First, it must be recognized that the Boy Scout property is not a charitable hospital nor is it property belonging to a charitable hospital thus making it property of a different classification than that which is at issue in this matter. Second, it appears that the Fayette County Assessor not only acted outside the confines of the West Virginia Code and Code of State Rules, but that the decision of the Fayette County Assessor was made without the consent or participation of the West Virginia State Tax Commissioner. Tax Rulings, tax years 1989 through 2010 attached as Exhibit "B" to Respondent Cheryl Romano's Motion for Summary Judgment (*showing absence of participation and acquiescence by Tax Commissioner in any decision by Fayette County Tax Assessor to exempt property*).

Petitioner's claim thus appears to be based on a single violation of assessment and taxation guidelines by an assessor in another county and not on a violation of assessment and taxation guidelines by Your Respondent. In other words, it is almost a "reverse" equal protection claim – the pertinent laws and guidelines were applied as they should be in Harrison County while seemingly not being applied at all in Fayette County. This factor, coupled with the absence of any involvement by the West Virginia State Tax Commissioner in the decision of the Fayette County Tax Assessor, illustrates that not only was the Fayette County decision an apparent isolated local decision but that any

[4] The Boy Scout property is also referred to as the Bechtel Family property.

equal protection claim should lie in Fayette County as a result of the failure of the Fayette County Assessor to follow the pertinent law and guidelines.

F. THAT OTHER STATE COURT DECISIONS RESPECTING TAX EXEMPTIONS CITED BY PETITIONER IN SUPPORT OF ITS POSITION INVOLVE THE APPLICATION OF LAW DIFFERENT FROM THAT INVOLVED IN THE INSTANT MATTER.

Notwithstanding the fact that this Court is not bound by decisions of other state courts respecting charitable exemptions from taxation, the example cited by Petitioner in its Petition for Appeal in support of its position that other charitable property situated in a similar manner to that which is at issue in the present matter has been treated differently than the property of Petitioner is easily differentiated from the present issue.

Petitioner cites Abbott Ambulance, Inc., v. Leggett, *926 S.W.2d 92 (Mo. App. E.D. 1996),* for the proposition that property owned by a charitable organization and which is in the process of being developed for the purpose of the charity should be exempted from taxation despite the property not being actually used for the purpose of the charity at the time it was exempted. The operative language of the Missouri tax laws creating the exemption claimed by Abbot Ambulance, Inc., *supra*, provided that charitable property should receive an exemption if such property was "actually and regularly used exclusively...for purposes purely charitable and not held for private or corporate profit..." Vernon's Annotated Missouri Code Section 137.100.

As may be readily noted, the Missouri law respecting tax exemption employs the words "actually and regularly used" and not "primarily and immediately used" as does the West Virginia law governing charitable tax exemptions. Your Respondent would point out that the import of the words "actually and regularly" is not the same as

"primarily and immediately" and as such, comparing the decision of the Missouri Supreme Court to the issue present in this matter is not a like comparison.

III. RESPONDENT'S STATEMENT REGARDING ORAL ARGUMENT

Respondent submits, in accordance with Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure, that the facts and legal arguments involved in this matter have been adequately presented herein and that the decisional process of this Court would not be significantly aided by oral argument. However, and in comport with Rule 19(a)(4) of the West Virginia Rules of Appellate Procedure, Respondent believes that if this case is submitted for oral argument, such submission should be under the parameters of Rule 19 as the issues in the pending Appeal involve a narrow issue of law.

IV. ARGUMENT AND ANALYSIS

A. THAT THERE WERE NO GENUINE ISSUES AS TO ANY MATERIAL FACTS OF CONSEQUENCE TO A DETERMINATION OF THE UNDERLYING PROCEEDING AND THEREFORE, THE CIRCUIT COURT WAS CORRECT IN AWARDING JUDGMENT AS A MATTER OF LAW TO RESPONDENT

Rule 56(b) of the West Virginia Rules of Civil Procedure provides "[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." "Summary judgment is required when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Jochum v. Waste Management of West Virginia, Inc., *224 W.Va. 44, 48, 680 S.E.2d 59, 64 (2009).*

"[T]ax exemptions are strictly construed against people claiming them." In re Hillcrest Memorial Gardens, *146 W.Va. 337, 119 S.E.2d 753 (1961)*; State ex rel. Farr v.

Martin, *105 W.Va. 600, 143 S.E. 356 (1928)*. Similarly, "if any doubt arises as to the exemption, that doubt must be resolved against the one claiming it." Syllabus Point 2, Maplewood Community v. Craig, *216 W.Va. 273, 607 S.E.2d 379 (2004)*; also see In re Hillcrest Memorial Gardens, *supra*.

West Virginia Code 11-3-1 provides in pertinent part that "[a]ll property shall be assessed annually as of the first day of July at its true and actual value." West Virginia Code 11-3-9(a)(12) provides that "[a]ll property, real and personal, described in this subsection, and to the extent limited by this section, is exempt from taxation [including] [p]roperty used for charitable purposes and not held or leased out for profit." West Virginia Code 11-3-9(a)(17) provides that "[a]ll property, real and personal, described in this subsection, and to the extent limited by this section, is exempt from taxation [including] [p]roperty belonging to any public institution for the education of the deaf, dumb or blind or any hospital not held or leased out for profit."

The foregoing legal authority demonstrates that there is a broad exemption from ad valorem property taxation for property held and used by a charitable organization. This broad exemption is however properly quantified by the Code of State Rules. In other words, while charitable organizations, including those which are hospitals not leased or held out for profit are *generally* exempt from taxation, there are specific instances and circumstances under which a charitable organization is not exempt.

110 CSR 3 – 4.1.12 provides that "[p]roperty used for charitable purposes, and not held or leased out for profit" is exempt from ad valorem property taxation. Similarly, 110 CSR 3 – 4.1.18 provides that "[p]roperty belonging to any hospital not held or leased out for profit" shall be exempt from ad valorem property taxation. 110 CSR 3 – 4.2.2

provides that the exemption from ad valorem property taxation for property owned by charitable corporations or organizations is not applicable unless "such property...is used primarily and immediately for the purposes of such corporations or organizations."

The term "primary use" is defined by 110 CSR 3 – 2.48 as "use which is chief, main or principal." Further, the term "immediate use" is defined by 110 CSR 3 – 2.31 as "use which is direct and not separated in time, relationship or connection." Pursuant to 110 CSR 3 – 24.8.6, Article X §1 of the West Virginia Constitution and State ex rel. Farr v. Martin, *105 W.Va. 600, 143 S.E.2d 356 (1928)*, the "exemption of property from taxation depends on its use [and] to warrant such exemption, the use must be primary and immediate, not secondary or remote."

110 CSR 3 – 24.2 provides in pertinent part that "[a] hospital to be eligible for ad valorem property tax exemption may attain such exemption by using property owned or leased in a charitable manner. For purposes of this Section 24, charitable use is defined as...[t]he provision of health services on an inpatient or outpatient basis to individuals who cannot afford to pay for such services...[or] [t]he provision of activities which promote the health of the community served by the hospital and/or decrease the burdens of state, county or municipal governments...."

In the present matter, it is undisputed that UHC is a charitable hospital. Petitioner's Petition for Appeal, *p. 2, line 5-7*. It is further undisputed that UHC received a tax exemption from ad valorem property taxes for the "old" facility it ran in Clarksburg, West Virginia, as said facility was actually providing patient care until October 3, 2010. *Id. at line 8-10*. It is undisputed that UHC began constructing a "new" facility on Jerry Dove Drive in Harrison County sometime in 2007 and that the West Virginia Department

of Health and Human Resources issued a license to UHC to operate its "new" facility on October 3, 2010. *Id. at p. 3, line 3; p. 4, line 3-4.* It is undisputed that the site on which the new UHC facility was being built did not begin accepting patients until October 3, 2010. *Id. at p. 4, line 3-8.* Thus, it is clear from the undisputed facts of this case that the site on which the new UHC facility was being built did not begin to operate as a hospital until October 3, 2010, approximately ninety-four (94) days after the July 1, 2010, tax assessment date.

Because the primary purpose of UHC is to provide health care services on a not for profit basis, any property owned by UHC on July 1, 2010, must have been used primarily and immediately for the purpose of providing health care on a not for profit basis in order for any such property to be exempt from ad valorem property taxation. On July 1, 2010, it is undisputed that the site on which the new UHC hospital facility was being constructed was not being used primarily for the provision of health care services to patients but was rather primarily being used for construction of the new facility. The "old" UHC facility was still providing health care to patients on July 1, 2010, and as such, that site was primarily being used for the purpose of UHC and therefore receiving an exemption from ad valorem property taxation.

In order for the site on which the new UHC facility was being constructed on July 1, 2010, to be characterized as being primarily used for the purpose of UHC on that date, than the chief and principal use of the site on said date would necessarily have had to entail the provision of health services on an inpatient or outpatient basis to individuals who could afford to pay for such services or the provision of activities which promoted the health of the community served by the hospital and/or decreased the burdens of state,

county or municipal governments. Because the site was unquestionably not being used for this purpose on July 1, 2010, than the site was unquestionably not being used for the primary purpose of UHC on July 1, 2010.

It is similarly clear that on July 1, 2010, the immediate use of the site on which the new UHC hospital facility was being built was likewise for purposes of construction and not for the provision of health care to patients on a not for profit basis. In other words, if the purpose of UHC is to provide health services on an inpatient or outpatient basis to individuals who cannot afford to pay for such services or provide activities which promote the health of the community served by the hospital and/or decrease the burdens of state, county or municipal governments, and this purpose was not accomplished at the new site until October 3, 2010, some ninety-four (94) days following the July 1, 2010, assessment date, it is clear that the use of the new site on July 1, 2010, was separated in time from the date on which UHC began primarily using the facility for its intended purpose on October 3, 2010.

Because the facts that govern the exemption status of the site on which the new UHC facility was being built are indisputable as they relate to the issue of whether the primary and immediate use of the site on July 1, 2010, was for the purpose of UHC, and because such facts conclusively demonstrate that the primary and immediate use of the site was not for the provision of health services on an inpatient or outpatient basis to individuals who cannot afford to pay for such services or the provision of activities which promote the health of the community served by the hospital and/or decrease the burdens of state, county or municipal governments, there was absolutely no genuine issue of

material fact present in the underlying proceeding relevant to whether the new site qualified for an ad valorem property tax exemption.

Although it is abundantly apparent that there was no genuine issue of material fact present in respect to whether the new UHC facility qualified for a tax exemption on July 1, 2010, Petitioner nonetheless avers that there was such an issue – specifically, whether the provision of security by UHC personnel at the new facility, the presence of housekeeping at the facility, training on heating and cooling (environmental) equipment and the presence of an information technology department constituted a sufficient basis on which to award a tax exemption for the new facility.

Your Respondent contends that the information put forth by Petitioner does not constitute a genuine issue of material fact, but rather presents a legal issue as to whether such factors qualify as fulfilling the primary and immediate use of the facility for the purpose of UHC on July 1, 2010. Because the issues raised by Petitioner necessitated a legal determination based on established law and not one based on a factual determination, the issue of whether the site on which the new UHC facility was being built qualified for a tax exemption on July 1, 2010, was ripe and appropriate for summary judgment.

B. THAT THE CIRCUIT COURT CORRECTLY APPLIED THE PROVISIONS OF WEST VIRGINIA CODE 11-3-9(a) IN DETERMINING THAT THE SITE ON WHICH THE NEW UHC FACILITY WAS BEING BUILT ON JULY 1, 2010, WAS NOT EXEMPT FROM AD VALOREM PROPERTY TAXES.

West Virginia Code 11-3-9(a)(12) provides that "[a]ll property, real and personal, described in this subsection, and to the extent limited by this section, is exempt from taxation [including] [p]roperty used for charitable purposes and not held or leased out for

profit." West Virginia Code 11-3-9(a)(17) provides that "[a]ll property, real and personal, described in this subsection, and to the extent limited by this section, is exempt from taxation [including] [p]roperty belonging to any public institution for the education of the deaf, dumb or blind or any hospital not held or leased out for profit." West Virginia Code 11-3-9(d) provides in pertinent part that "[n]otwithstanding any other provisions of this section, this section does not exempt...property owned by, or held in trust for...charitable corporations or organizations...unless such property...is used primarily and immediately for the purposes of the corporations or organizations."

Without belaboring the point, and as discussed above, the facts of the present matter conclusively demonstrate that the site on which the new UHC facility was being constructed on July 1, 2010, was not primarily and immediately being used for the provision of health services on an inpatient or outpatient basis to individuals who could not afford to pay for such services or the provision of activities which promoted the health of the community served by the hospital and/or decreased the burdens of state, county or municipal governments. As such, it is clear that the property's use on July 1, 2010, was not chiefly, mainly or principally for the purpose of UHC and further, that the use of the property on July 1, 2010, was separated in time from the purpose of UHC.

C. THAT THE TAX COMMISSIONER'S ADMINISTRATIVE RULE REQUIRING THAT PROPERTY OWNED BY A CHARITABLE HOSPITAL BE USED PRIMARILY AND IMMEDIATELY FOR THE PURPOSE OF THE HOSPITAL IS NOT WRONG ON ITS FACE, NOR WAS THE RULE APPLIED INCORRECTLY AND THE RULE IS CONSISTENT WITH THE CONTROLLING STATUTE.

Petitioner apparently claims that the rule promulgated by the Tax Commissioner requiring that property held by a charitable organization be used primarily and immediately for the purposes of the charity is either wrong on its face or was incorrectly

interpreted and applied because taxation is "clearly inconsistent with the clear meaning of the controlling statute."[5] In making this argument, Petitioner in fact raises several issues – 1) The legality of 110 CSR 3 – 4.2.2; 2) the manner in which the rule was applied in this case; and 3) whether the rule is in comport with the legislative intent of West Virginia Code 11-3-9. Your Respondent submits, for the reasons set forth below, that 110 CSR 3 – 4.2.2 is a legally promulgated and correct rule, that the rule was applied correctly in this case and that the rule is clearly in comport with the legislative intent of West Virginia Code 11-3-9.

As for the legality of 110 CSR 3 – 4.2.2, an analysis of this issue must first begin with an examination of the West Virginia Constitution. The West Virginia Constitution does not itself exempt property from taxation – rather, the Constitution merely authorizes the Legislature to create certain exemptions for certain types of property. *See* In re Hillcrest Memorial Gardens, *supra*; State v. Kittle, *87 W.Va. 526, 105 S.E. 775 (1921).* Because there is no constitutional authority for tax exemptions, only constitutional authority for the legislative body to create such exemptions, the Legislature is vested with the power to determine which property is exempt and under which circumstances such property is exempt.

Because the Legislature is vested with the power to determine which property is exempt and under which circumstances such property is exempt, and because the West Virginia Legislature has specifically and explicitly authorized the West Virginia State Tax Commissioner to promulgate rules for determining exemptions from taxation, the rules promulgated for such purposes by the Tax Commissioner are lawful and proper.

[5] As noted above, Respondent can only assume that Petitioner is referring to the rule requiring primary and immediate use of property for the purpose of the charitable organization in order to obtain a tax exemption as the rule to which Petitioner refers is not specifically cited in this section of the Petition for Appeal.

Title 110, Series 3 of the West Virginia Code of State Rules is a compilation of legislative regulations. The term "regulation" is synonymous with the term "rule" pursuant to West Virginia Code 29A-1-2(i). Thus, the term "legislative regulation" is synonymous with the term "legislative rule." The term "legislative rule" is defined in pertinent part by West Virginia Code 29A-1-2(d) as "every rule, as defined by subsection (i) of this section, proposed or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the legislature, has (1) the force of law, or (2) supplies a basis for the imposition of civil or criminal liability, or (3) grants or denies a specific benefit. Every rule which when effective is determinative on any issue affecting private rights, privileges or interests is a legislative rule."

West Virginia Code 29A-3-9 provides in pertinent part that "[w]hen an agency proposes a legislative rule, other than an emergency rule, it shall be deemed to be applying to the Legislature for permission, to be granted by law, to promulgate such rule as approved by the agency for submission to the Legislature or as amended and authorized by the Legislature by law." Furthermore, "[w]hen an agency finally approves a proposed legislative rule for submission to the Legislature [pursuant to West Virginia Code 29A-3-9]...[t]he [legislative] committee shall review each proposed legislative rule and, in its discretion, may hold public hearings thereon. Such review shall include, but not be limited to, a determination of: (1) whether the agency has exceeded the scope of its statutory authority in approving the proposed legislative rule; (2) **Whether the proposed legislative rule is in conformity with the legislative intent of the statute which the rule is intended to implement, extend, apply interpret or make specific** (emphasis

added); (3) Whether the proposed rule conflicts with any other provision of this code or with any other rule adopted by the same or a different agency; (4) Whether the proposed legislative rule is necessary to fully accomplish the objectives of the statute under which the rule was proposed for promulgation; (5) Whether the proposed legislative rule is reasonable, especially as it affects the convenience of the general public or of persons particularly affected by it; (6) Whether the proposed legislative rule could be made less complex or more readily understandable by the general public; and (7)Whether the proposed legislative rule was proposed for promulgation in compliance with the requirements of this article and with any requirements imposed by any other provisions of this code. West Virginia Code 29A-3-11(a) *in pertinent part* and (b).

After the legislative committee has undertaken the above referenced review of a proposed legislative rule and found such proposed legislative rule to be proper, the committee shall recommend "that a rule be authorized...by the Legislature" and the "cochairmen of the legislative rule making review committee shall submit to the clerk of the respective houses of the Legislature copies of [the proposed rule]...to the Legislature for study..." West Virginia Code 29A-3-11(d); West Virginia Code 29A-3-12(a). At the conclusion of this procedure, and if approved by the Legislature, the agency originally proposing the rule is then authorized to adopt the rule. West Virginia Code 29A-3-12.

Because 110 CSR 3 – 4.2.2 was subjected to the approved rule making process outlined in West Virginia Code 29A-3-9, West Virginia Code 29A-3-11, and West Virginia Code 29A-3-12, and because the rule survived such process and was enacted, it is clear that the rule is a legal rule and therefore correct on its face.

As for the issue of 110 CSR 3 – 4.2.2 being in comport with the legislative intent of West Virginia Code 11-3-9, the same analysis as above is applied with the result being that it is clear that said rule is in comport with the legislative intent underlying West Virginia Code 11-3-9. This position is unequivocally supported by the fact that in order for the rule to have progressed to the point where it becomes effective, the rule must have been found to "be in conformity with the legislative intent of the statute which the rule is intended to implement, extend, apply, interpret or make specific." West Virginia Code 29A-3-11(b)(2). Simply put, if 110 CSR 3 – 4.2.2 was contrary to the legislative intent of West Virginia Code 11-3-9, it would not have survived the rule making process.

As for the application of 110 CSR 3 – 4.2.2 in the present matter, Your Respondent submits that the rule was correctly applied to the facts of this matter. Pursuant to 110 CSR 3 – 4.2.2, the exemption from ad valorem property taxation for property owned by charitable corporations or organizations is not applicable unless "such property...is used primarily and immediately for the purposes of such corporations or organizations." The term "primary use" is defined by 110 CSR 3 – 2.48 as "use which is chief, main or principal." Further, the term "immediate use" is defined by 110 CSR 3 – 2.31 as "use which is direct and not separated in time, relationship or connection." Pursuant to 110 CSR 3 – 24.8.6, Article X §1 of the West Virginia Constitution and State ex rel. Farr v. Martin, *105 W.Va. 600, 143 S.E.2d 356 (1928)*, the "exemption of property from taxation depends on its use [and] to warrant such exemption, the use must be primary and immediate, not secondary or remote."

110 CSR 3 – 24.2 provides in pertinent part that "[a] hospital to be eligible for ad valorem property tax exemption may attain such exemption by using property owned or

leased in a charitable manner. For purposes of this Section 24, charitable use is defined as...[t]he provision of health services on an inpatient or outpatient basis to individuals who cannot afford to pay for such services...[or] [t]he provision of activities which promote the health of the community served by the hospital and/or decrease the burdens of state, county or municipal governments...."

110 CSR 3 – 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."

110 CSR 3 – 19.1 provides in pertinent part that "in order for the property to be exempt, the primary and immediate use of the property must be for one or more exempt purposes." As referenced *supra*, said exempt purposes are "...[t]he provision of health services on an inpatient or outpatient basis to individuals who cannot afford to pay for such services...[or] [t]he provision of activities which promote the health of the community served by the hospital and/or decrease the burdens of state, county or municipal governments...." 110 CSR 3 – 24.2. Furthermore, "all property given a legislative exemption must be used primarily, directly and immediately for those enumerated purposes." State ex rel. Cook v. Rose, *171 W.Va. 392 at 394, 299 S.E.2d 3 at 5 (1982) overruled on other grounds.*

Based upon the foregoing authority, and as previously discussed, the site on which the new UHC facility was being constructed could not receive an exemption from ad valorem property taxes until such time as the site was actually being used as to make

the primary and immediate use of the property charitable. See 110 CSR 3 – 24.17.3. In order for the primary and immediate use of the property to have been charitable, the property would have had to have been used for one or more exempt purposes. See 110 CSR 3 – 19.1. In the case of a charitable hospital, such as UHC, the exempt purpose is "...[t]he provision of health services on an inpatient or outpatient basis to individuals who cannot afford to pay for such services...[or] [t]he provision of activities which promote the health of the community served by the hospital and/or decrease the burdens of state, county or municipal governments...." 110 CSR 3 – 24.2.

Thus, it is again readily apparent that because the site on which the new UHC facility was being built was not actually providing health services on an inpatient or outpatient basis to individuals who could not afford to pay for such services or providing activities which promoted the health of the community served by the hospital and/or decreased the burdens of state, county or municipal governments, on July 1, 2010, the site did not qualify for an exemption from ad valorem taxes.

Despite the pertinent legal authority being decidedly unambiguous in respect to the failure of UHC to qualify for an ad valorem property tax exemption for the site on which the new UHC facility was being built on July 1, 2010, Petitioner attempts to "muddy the waters" by contending that charitable hospital property does not need to in fact provide health care (as mandated by 110 CSR 3 – 24.2) in order for property held by the charitable hospital to be exempt from ad valorem property taxes. In support of this contention, Petitioner cites 110 CSR 3- 24.15.1 for the proposition that property owned by a charitable hospital does not need to be used for the provision of medical treatment to

patients in order for the property to receive an exemption. Respondent replies that 110 CSR 3- 24.15.1 does not stand for this proposition at all.

110 CSR 3- 24.15.1 is titled "Ancillary Functions" and provides that "[a] hospital may engage in certain non-medical activities, so long as these activities are designed to serve hospital staff, employees, patients, and visitors, and are not such as to cause the primary and immediate use of the property to be other than charitable use in accordance with Section 19 of these regulations. These activities include, but are not limited to [operating parking facilities, pharmacies, cafeterias and gift shops]." Black's Law Dictionary defines the term "ancillary" as "supplementary or subordinate." Black's Law Dictionary, *Seventh Edition (2000).*

As noted by the title "Ancillary Functions", and as may be noted by the language of the section, Respondent submits that it is obvious that 110 CSR 3- 24.15.1 actually stands for the proposition that so long as charitable hospital property is being used primarily and immediately for the provision of health services on an inpatient or outpatient basis to individuals who cannot afford to pay for such services or for the provision of activities which promote the health of the community served by the hospital and/or decrease the burdens of state, county or municipal governments, such property is exempt from ad valorem property taxes even if the hospital is **additionally** engaging in the functions enumerated in 110 CSR 3- 24.15.1 (emphasis added).

Put another way, a charitable hospital cannot receive a tax exemption if it isn't complying with 110 CSR 3 – 24.2, but it can receive the benefit of such an exemption if it is engaging in functions such as those listed in 110 CSR 3- 24.15.1 so long as it is complying with 110 CSR 3 – 24.2. In the present mater, the site on which the new UHC

facility was being constructed was not in compliance with requirements of 110 CSR 3 – 24.2 on July 1, 2010, so it is immaterial whether it was engaging in any of the functions enumerated in 110 CSR 3- 24.15.1 at the site on July 1, 2010.

D. THAT THERE WERE NO GENUINE ISSUES OF MATERIAL FACT PRESENT IN THE UNDERLYING MATTER RESPECTING THE USE OF THE SITE ON WHICH THE NEW UHC FACILITY WAS BEING CONSTRUCTED ON JULY 1, 2010, AND IN LIGHT OF THE WELL SETTLED LAW ADDRESSING TAX EXEMPTION FOR THE TYPE OF PROPERTY AT ISSUE, THE ISSUE OF TAXATION OF THE PROPERTY WAS APPROPRIATE FOR SUMMARY JUDGMENT.

As referenced throughout this Response, it is undisputed that the site at which the new UHC facility was being built on July 1, 2010, was not providing health care to patients. This is the sole factual issue associated with the determination of whether the site qualified for an ad valorem property tax exemption and this issue is not and has never been in dispute. On July 1, 2010, the "old" UHC facility located in the Rosebud area of Clarksburg was providing health care to patients and the facility being built on Jerry Dove Drive that is the subject of this appeal did not begin providing health care to patients until October 3, 2010. This factual summary is this whole case in a nutshell – "new" facility not providing health care to patients on July 1, 2010, and "old" facility, which was receiving a tax exemption, providing health care to patients on July 1, 2010.

110 CSR 3 – 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." 110 CSR 3 – 19.1 provides in pertinent part that "in order for the property to be exempt, the primary and immediate use of the property must be for one or

more exempt purposes." These exempt purposes are "...[t]he provision of health services on an inpatient or outpatient basis to individuals who cannot afford to pay for such services...[or] [t]he provision of activities which promote the health of the community served by the hospital and/or decrease the burdens of state, county or municipal governments...."110 CSR 3 – 24.2.

Because the site on which the new UHC facility was being built on July 1, 2010, was not actually being used primarily and immediately for the purposes of UHC (i.e. the provision of health services on an inpatient or outpatient basis to individuals who could afford to pay for such services or the provision of activities which promoted the health of the community served by the hospital and/or decreased the burdens of state, county or municipal governments), the property did not qualify for an exemption. Your Respondent would note that the key word in the foregoing regulation is "actual" – as in occurring in the present, not sometime in the future. The site on which the new UHC facility was being built was not providing health care in the present on July 1, 2010, it was the "old" existing facility that was providing health care in the present on said date. Therefore, it is apparent that the site on which the new facility was being built did not qualify for an exemption on July 1, 2010, as the actual, primary and immediate use of the site on said date was not for the purposes enumerated in 110 CSR 3 – 24.2.

E. THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT RESPECTING THE STATE'S TREATMENT OF OTHER CHARITABLE PROPERTY WITHIN THE STATE AS THE EXAMPLE CITED BY PETITIONER (i.e. THE EXEMPTION OF THE BOY SCOUT PROPERTY) IS FACTUALLY AND LEGALLY DIFFERENT FROM THE ISSUE IN THIS CASE.

Petitioner claims, in essence, that it was deprived of equal protection of the law as a result of the Fayette County, West Virginia, Assessor exempting certain property

owned by the Boy Scouts of America at a time when the property was not being primarily and immediately used for the purpose of the charity. Respondent submits that the matter involving the Fayette County Assessor is facially different from the case at hand and that such decision did not create an equal protection claim for Petitioner. Because of the facial differences in the two matters, and because the Fayette County Assessor's decision did not create an equal protection claim for Petitioner, there was no genuine issue of material fact respecting this matter and as such, a determination of Petitioner's claim in this regard was appropriate for summary judgment.

Rule 56(b) of the West Virginia Rules of Civil Procedure provides "[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." "Summary judgment is required when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Jochum v. Waste Management of West Virginia, Inc., *224 W.Va. 44, 48, 680 S.E.2d 59, 64 (2009).*

The critical aspect of the scenario involving the Boy Scout property which is not present in this matter is that the Fayette County Assessor acted outside the confines of the West Virginia Code and Code of State Rules and without the consent or participation of the West Virginia State Tax Commissioner. See Tax Rulings, tax years 1989 through 2010 attached as Exhibit "B" to Respondent Cheryl Romano's Motion for Summary Judgment (*showing absence of participation and acquiescence by Tax Commissioner in any decision by Fayette County Tax Assessor to exempt property).*

In other words, the Fayette County Assessor's decision to exempt the Boy Scout property was a local decision of the assessor which was not made in accordance with the applicable law or approved by the State Tax Commissioner. Thus, the decision of the Fayette County Assessor to exempt the Boy Scout property was an exception from the standard and not the norm. In other words, it is almost as if the scenario constitutes a "reverse equal protection" claim in that the UHC property was properly and appropriately treated in light of the controlling authority while the decision regarding exemption of the Boy Scout property was made outside of and not in comport with the controlling authority. Respondent therefore submits that it is clear that no genuine issue of material fact regarding an equal protection claim was present in the underlying matter respecting the treatment of the Boy Scout property when such treatment was an apparent isolated act undertaken outside the parameters of the law governing tax exemptions.[6]

Petitioner also claims that it is inherently unfair that charitable hospitals are treated differently for tax exemption purposes than other types of charitable properties. Respondent does not believe this to be the case.

Petitioner points out that there are no other provisions governing construction of charitable property such as that found in 110 CSR 3 – 24.17.3. 110 CSR 3 – 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."

[6] While Petitioner states in its Petition for Appeal that "Respondents cannot overcome the material facts presented with respect to other properties within the State that were treated as tax exempt when no more than the planning of construction had commenced", the Petitioner has throughout the course of these proceedings failed to reference any other "properties" and has only made reference to one singular property – that being the Boy Scout property.

"The Legislature may prescribe different rates for different businesses and callings, but the rate of taxation must be uniform and equal within each classification." Syllabus Point 5, Armco, Inc. v. Hardesty, *172 W.Va. 67, 303 S.E.2d 706 (1983)*; Syllabus Point 5, City of Weston, *209 W.Va. 145, 544 S.E.2d 72 (2001)*. Your Respondent would submit that the converse of this proposition is that the Legislature may prescribe different exemptions from taxation for different entities so long as exemption is applied equally and uniformly within each classification.

Importantly, the "principles of equal protection are not invoked solely because a law, properly enacted, has a disproportionate impact. Without proof of a discriminatory purpose underlying the law's enactment, a disproportionate impact on one classification will not on its own create a violation of this State's equal protection provision." Syllabus Point 6, City of Weston, *supra*. "Critical to understanding any equal protection claim is the recognition that 'equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner.'" *Id. at 77, 150.*

110 CSR 3 – 24.17 treats all charitable hospitals, for tax exemption purposes, equally and uniformly. The fact that 110 CSR 3 – 24.17 does not address other charitable organizations other than charitable hospitals has no bearing on whether UHC was denied equal protection of the law. As long as 110 CSR 3 – 24.17 is applied equally and uniformly among all charitable hospitals - which there is no indication that it has not been applied in such a manner - 110 CSR 3 – 24.17 does not deprive UHC equal protection of the law.

In narrowing down what Petitioner's equal protection contention actually is, the claim that there are no other provisions similar to 110 CSR 3 – 24.17 that concern ad

valorem property tax exemption limitations for other nonhospital charitable organizations is in reality a claim that 110 CSR 3 – 24.17 disproportionately impacts charitable hospitals when compared to other types of charitable organizations. As stated above, the legislative rules contained in 110 CSR 3 *et seq.*, were properly and lawfully enacted. Furthermore, Petitioner has not put forth any facts in this matter that show that 110 CSR 3 – 24.17 was enacted and promulgated with any sort of discriminatory intent.

Because the legislative rules contained in 110 CSR 3 *et seq.*, were properly and lawfully enacted, and because there is absolutely no evidence of discriminatory intent underlying the promulgation and enactment of 110 CSR 3 – 24.17, any disproportionate impact of 110 CSR 3 – 24.17 on charitable hospitals when compared to other charitable organizations would not create a violation of this State's equal protection provision. See Syllabus Point 6, City of Weston, *supra.*

Your Respondent also submits that Petitioner's claim that there are no other qualifications in the tax rules similar to 110 CSR 3 – 24.17.3 is not correct. In essence, 110 CSR 3 – 24.17.3 does nothing but qualify the requirement for a tax exemption for charitable hospitals until such time as the purpose of the hospital is actually effectuated (i.e. the exemption does not "kick in" until the hospital property has been put to such actual use as to make the primary and immediate use of the property charitable). Several other provisions in the tax rules mandate the same type of requirement (i.e. the actual purpose of the property being effectuated prior to the tax exemption becoming operative).

For example, 110 CSR 3 – 15.6, governing taxation of family cemeteries, provides in pertinent part that "[w]hen a family cemetery is part of a larger parcel of property, the parcel shall not be exempt from tax unless the primary and immediate use of

the parcel, as a whole, is as a cemetery." 110 CSR 3 – 16.1.1, governing taxation of college property, provides in pertinent part that "[i]f a college were to purchase a tract and initiate the construction of a building which is to be used for educational, literary or scientific purposes, the property would not be exempt from taxation until the exempt use actually occurred." 110 CSR 3 – 18.1, governing taxation of libraries, provides in pertinent part that "[a] parcel of realty and the buildings thereon are exempt fro mad valorem property taxation if the primary and immediate use of the parcel, as a whole, is as a public or family library."

Thus, it is not only evident that 110 CSR 3 – 24.17.3 does nothing more than qualify the requirement for a tax exemption for charitable hospitals until such time as the purpose of the hospital is actually effectuated, but that there are other provisions in the tax rules mandating the same requirement for other types of properties in order for said properties to qualify for a tax exemption.

F. THAT OTHER STATE COURT DECISIONS RESPECTING TAX EXEMPTIONS CITED BY PETITIONER IN SUPPORT OF ITS POSITION INVOLVE THE APPLICATION OF LAW DIFFERENT FROM THAT INVOLVED IN THE INSTANT MATTER.

Petitioner cites Abbott Ambulance, Inc. v. Leggett, *926 S.W2d 92 (Mo. App. E.D. 1996)*, in support of its position that the site on which the new UHC facility was being built should have received an exemption for ad valorem property taxes. Respondent posits that the law under which Abbott Ambulance, *supra,* was decided involves different criteria than that which are present in the West Virginia rules governing ad valorem property tax exemption.[7]

[7] Respondent understands that Petitioner cites cases from other states as examples in support of its position, however Respondent would also note that this Court is not bound by the decisions of other state courts.

In Abbott Ambulance, *supra*, the issue was whether a parcel of property owned by a not for profit ambulance service should receive a property tax exemption during the time period in which the ambulance service was building on the vacant parcel. The applicable provision of the Missouri Code which led the Missouri Court of Appeals to rule that the parcel was exempt from taxation read "[t]he following subjects are exempt from taxation for state, county or locale purposes...(5) All property, real and personal, actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, except that the exemption herein granted does not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes..." Vernon's Annotated Code of Missouri Section 137.100.

It may be readily noted that the applicable Missouri Code Section exempting charitable property from taxation employs the wording "actually and regularly used" as the criteria to qualify for an exemption. *Id.* As has been discussed repeatedly in this Response, the applicable language exempting the type of property at issue herein employs the wording "primary and immediate use" as criteria to qualify for an exemption. Based upon a reading of the language employed in defining the respective legal criteria in Missouri and West Virginia to determine qualification for tax exemption, it is obvious that two (2) different standards are present – "actually and regularly" under Missouri law and "primary and immediate use" under West Virginia law. As a result of the different language employed by West Virginia law and Missouri law in respect to tax

exemption for charitable properties, Petitioner's example, at least from Respondent's view point, is an "apples to oranges" comparison.

Notwithstanding the fact that Petitioner discloses in its Petition for Appeal that there are cases from other states contrary to its position in this case and contrary to the decision of the Missouri Court of Appeals in Abbott Ambulance, *supra*, Your Respondent submits that the difference in the applicable language governing charitable exemptions in Missouri and West Virginia results in the Abbott Ambulance decision providing scant support for Petitioner's position in this mater.

V. CONCLUSION

Your Respondent submits that a review of the record of the underlying proceedings clearly demonstrates that there were no genuine issues of material facts present in the proceedings that would have precluded disposal of this matter by way of summary judgment. At the time Respondent filed for summary judgment, the discovery process was complete and all information available to the parties in support of, and in opposition to, their respective positions was "on the table "so to speak. A review of this information, which would have constituted the evidence presented at any trial in this matter, clearly and unambiguously demonstrated that the site on which the new UHC facility was being built on July 1, 2010, was not engaging in any of the activities mandated by 110 CSR 3 – 24.2 that permit a charitable hospital to receive an exemption from ad valorem property taxes.

In turn, because the site on which the new UHC facility was being built on July 1, 2010, was not engaging in any of the activities mandated by 110 CSR 3 – 24.2 that permit a charitable hospital to receive an exemption from ad valorem property taxes, the

site was not being used primarily and immediately for the purposes of the hospital. The site was not primarily being used on July 1, 2010, to provide the activities and services delineated in 110 CSR 3 – 24.2 because the chief, main and principal use of the site was for construction, outfitting for occupancy, provision of security and housekeeping and other secondary functions not constituting the primary purpose of UHC that makes it a charitable hospital.

The site on which the new UHC facility was being built on July 1, 2010, was additionally not being used immediately for the purpose of UHC because, as acknowledged by Petitioner, the site did not begin serving patients until ninety-four (94) days following the July 1, 2010, assessment date. Because the site did not begin engaging in the activities delineated in 110 CSR 3 – 24.2 until ninety-four (94) days following the July 1, 2010, assessment date, the actual use of the site in compliance with 110 CSR 3 – 24.2 on October 3, 2010, was separated in time from the July 1, 2010, date. Again, this fact, along with the facts demonstrating that the site was not being used primarily for the purposes of UHC on July 1, 2010, cannot in any way be deemed to have been in dispute at the time the Motion for Summary Judgment was filed.

The whole crux of the issue before this Court, and before the lower court, is what the actual use of the property was on the assessment date. The actual use of the property is what defines the exemption and the actual use of the property on July 1, 2010, was not for the purposes conferring an exemption on charitable hospitals. While Petitioner believes that charitable hospitals are treated unfairly, or at least differently than other charitable properties by our state's tax rules, Respondent points out that this is not the case. As cited herein, a review of this state's tax rules shows that other charitable

properties are likewise required to comply with actual use requirements in order to receive tax exemptions - charitable hospitals are no different. Despite the fact that the wording of the rules governing exemptions for charitable hospitals may be different than the wording of the rules governing other charitable entities, the substance of the rules is the same.

Respecting equal protection in regard to the treatment of the Boy Scout property, Your Respondent would again point out that the decision made by the Fayette County Assessor does not appear to have been in compliance with the established mandates governing tax exemptions for charitable organizations. Thus, it is not so much that UHC was deprived equal protection of the law, but that an Assessor in another county does not appear to have followed the law. All facts before the court below unequivocally show that UHC was treated fairly and that the effective tax rules and laws governing exemptions were applied uniformly to their situation.

As for the case of Abbott Ambulance, *supra*, and Missouri's treatment of charitable property, Your Respondent finds the difference in wording of the governing Missouri tax law and governing West Virginia tax law to be significant. While the wording of the Missouri tax law evidences the possible contemplation of intent of the charitable organization in respect to their use of property for purposes of awarding an exemption, the wording of the pertinent West Virginia tax law and rules evidences consideration of the actual use of the property for purposes of determining the award of an exemption.

In sum, there were no genuine issues of material fact of consequence to a determination of this matter present in the underlying proceeding necessitating against

summary judgment. The factors that Petitioner raises in this appeal (i.e. what activities were being performed at the new UHC site on July 1, 2010) were factors of which the lower court was aware at the time it granted the Respondent's Motion for Summary Judgment and which were not disputed by Respondent. Although these issues are "factors", they are not genuine issues of materials facts – they were issues to be considered in making a purely legal determination, namely, whether such activities fulfilled the requirements of 110 CSR 3 – 24.2.

Because there were no genuine issues of material fact present in the underlying matter, and because a determination of Petitioner's issues centered on purely legal determinations based upon well settled areas of law, the lower court's award of summary judgment to Respondent was proper, lawful and appropriate in this matter.

WHEREFORE, based upon the foregoing, Respondent Cheryl Romano respectfully requests that this Court deny the relief requested in the Petition for Appeal.

Respectfully submitted,
STATE OF WEST VIRGINIA,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

UNITED HOSPITAL CENTER, INC.,
Petitioner,

V.

CHERYL ROMANO,
ASSESSOR OF HARRISON COUNTY,
and CRAIG GRIFFITH,
WEST VIRGINIA STATE TAX COMMISSIONER,
Respondent.

Appeal No. 13-0120

FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA
CASE NO. 11-C-124-1

CERTIFICATE OF SERVICE

I certify that on the 17th day of June 2013 I served the foregoing Response to Petition for Appeal upon the following parties by depositing a true copy thereof, enclosed in a sealed envelope, postage prepaid, in the United States mail and addressed as follows:

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