

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

UNIVERSITY HEALTHCARE FOUNDATION, INC.
f/k/a CITY HOSPITAL FOUNDATION, INC.

Petitioner

v.

CIVIL ACTION NO. 14-AA-4

LARRY A. HESS, ASSESSOR
OF BERKELEY COUNTY, WEST VIRGINIA, and
MARK W. MATKOVICH,
STATE TAX COMMISSIONER,

Respondents.

PETITION APPEALING DENIAL

OF AD VALOREM PROPERTY TAX EXEMPTION

Comes now your Petitioner, pursuant to West Virginia Code Sections 11-3-24a and 11-3-25, and it does represent unto this Honorable Court as follows:

1. That the Petitioner is aggrieved by the actions of Respondent, Larry A. Hess, as Assessor of Berkeley County, West Virginia, in denying the Petitioner's written Application for Exemption of certain improved real property owned by the Petitioner (assessed in its prior name of City Hospital Foundation, Inc.), situate in Martinsburg District, of Berkeley County, West Virginia, consisting of 5.71 acres, assessed in the name of Gateway Foundation Inc.¹ and being described in the land records of Berkeley County as Map 4D, Parcel 1.1, including ten (10) subparcels separately identified by the Assessor as 1.1.3001 (Suite 1100), 1.1.3002 (Suite 2100), 1.1.3003 (Suite 2400), 1.1.3004 (Suite 3200), 1.1.3005 (Suite 3300),

¹ The Petitioner was incorporated under the name of Gateway Foundation, Inc. By Certificate of Amendment to the Petitioner's Articles of Incorporation dated October 12, 2004, the Petitioner's name was changed to City Hospital Foundation, Inc. Subsequently, by Certificate of Amendment to the Petitioner's Articles of Incorporation dated December 23, 2013, the Petitioner's name was changed to University Healthcare Foundation, Inc.

1.1.3006 (Suite 3500), 1.1.3007 (Suite 2200), 1.1.3008 (Suite 3100), 1.1.3010 (Suite 3650), and 1.1.3013 (Suite 1200) Lot A, Dorothy McCormack Center, South of City Hospital (hereinafter, "the Subject Property") for 2014 *ad valorem* property tax purposes.² A copy of the Petitioner's Application, dated October 17, 2013, is attached hereto as Exhibit A and a copy of the Assessor's Denial Letter, dated December 18, 2013, is attached hereto as Exhibit B.

2. That the Petitioner is also aggrieved by Property Tax Ruling 14-01 issued by Respondent, Mark W. Matkovich, State Tax Commissioner, dated February 22, 2014 and received on behalf of the taxpayer on March 5, 2014, which ruled that the Subject Property is not exempt from 2014 *ad valorem* property taxes under West Virginia Code Section 11-3-9. A copy of Property Tax Ruling 14-01 is attached hereto as Exhibit C.

3. That, for many years, including and succeeding July 1, 2013, the Petitioner has been and is a charitable, non-profit, income tax exempt organization recognized as such by the Internal Revenue Service pursuant to the provisions of Internal Revenue Code (hereinafter, "IRC") Section 501(c)(3).

4. That, pursuant to its income tax exempt status, the Petitioner's primary charitable purpose is and has been, throughout its existence, to support, in various ways, the charitable and income tax exempt mission of West Virginia University Healthcare, Inc. t/a Berkeley Medical Center, f/k/a City Hospital and WVU Hospitals – East (hereinafter, "Berkeley Medical Center").

5. That, Berkeley Medical Center is, and has been throughout its existence, also recognized by the Internal Revenue Service as an IRC Section 501(c)(3) organization, the

² The Petitioner has not received prior tax year tickets for, and is unaware of whether the Assessor has assigned, sub-parcel numbers 1.1.3009, 1.1.3011, and 1.1.3012 to any property. Notwithstanding the general description of the Subject Property by the Assessor as one parcel, referred to as "06-4D-1.1" (See Exhibit B), it is inclusive of the entirety of the McCormack Center, including not only the residue of Map 4D, Parcel 1.1, but also the above-listed sub-parcels, each being separately identified as such by the Assessor in the land records.

primary purpose of which is to provide a wide range of critical healthcare services to the Berkeley County community and surrounding areas.

6. That, University Healthcare Physicians, Inc. (hereinafter, "UHP") is a charitable and non-profit organization which, as an affiliate of Berkeley Medical Center and by contract, employs physicians who attend to the patients of Berkeley Medical Center. While UHP's application to the Internal Revenue Service for recognition as an income tax-exempt organization under IRC Section 501(c)(3) is pending approval, it has always operated in a manner which is consistent with the requirements of that provision.

7. That, among the ways in which the Petitioner supports the Berkeley Medical Center is to invest capital, raised through private charitable giving and government grants, to develop, maintain and operate facilities which house the activities of operating divisions of Berkeley Medical Center itself, of UHP and of other, third-party, for-profit healthcare providers, the services of all of which are coordinated with, and immediately complimentary to, the healthcare services provided by Berkeley Medical Center.

8. That, the improvements on the Subject Property (hereinafter, "the Dorothy McCormack Center") consist of just such a facility, containing, along with common interior and exterior areas, units comprising eighteen (18) suites, of which, as of July 1, 2013, five (5) were leased by the Petitioner to Berkeley Medical Center, which includes suite 1200, consisting of 19,100 square feet and housing its Rehabilitation/Wellness Center; one (1) to University Healthcare, Inc., Berkeley Medical Center's parent; seven (7) to UHP (including UHP d/b/a University Surgical Associates); three (3) to other, third-party, for-profit healthcare providers;

one (1) provided rent-free to the American Cancer Association, itself an IRC Section 501(c)(3) organization; and one (1) was temporarily vacant pending use for similar healthcare purposes.³

9. That, the actively coordinated use of all parts of the McCormack Center, including the common areas and each discrete suite, are primarily and immediately integral to the Petitioner's charitable purpose of supporting Berkeley Medical Center in the latter's pursuit of its own charitable purpose of providing healthcare to the residents of Berkeley County and surrounding areas.

10. That, though all of the Petitioner's leases to each of the tenants (except for the American Cancer Society) contain standard commercial terms, including market-appropriate rental rates, none of them constitute leases "for profit" because all the rents from such leases are "used primarily and immediately for the [charitable] purposes" of the Petitioner, as those quoted terms are used in West Virginia Code Section 11-3-9, as interpreted by the West Virginia Supreme Court of Appeals.

11. That the Respondent Assessor's denial of exemption for the Subject Property for 2014 *ad valorem* property tax purposes, and the Respondent Tax Commissioner's Property Tax Ruling 14-01, violate the provisions of West Virginia Code Section 11-3-9, as interpreted by the West Virginia Supreme Court of Appeals.

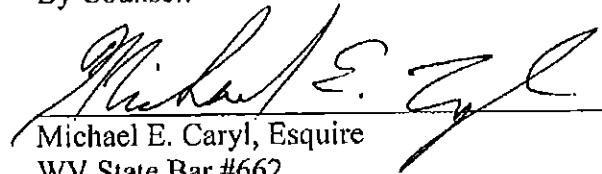
12. That the Assessor's denial of the Petitioner's Application for Exemption for the Subject Property for 2014 *ad valorem* property tax purposes, and Property Tax Ruling 14-01, are both erroneous for the reasons aforesaid.

³ By First Amendment to the Petitioner's Declaration for Dorothy A. McCormack Office Building, dated February 27, 2001 and recorded in the Office of the Clerk of the County Council of Berkeley County, West Virginia, in Deed Book 664 at Page 573 (the "First Amendment") the Petitioner created twelve (12) discrete units within the Dorothy McCormack Center (which were subsequently leased as eighteen (18) suites). As the McCormack Center is a Common Interest Community, because, due to the Petitioner's having conveyed, and then reacquired one unit, there has been, and now is, an owner of a unit (the Petitioner) other than in the capacity as the Declarant, each unit *must* be separately taxed and assessed. W.Va. Code § 36B-1-105.

WHEREFORE, Petitioner prays that this Honorable Court overrule and reverse the Respondent Assessor's Denial of the Petitioner's Application for Exemption of the Subject Property for 2014 *ad valorem* property tax purposes, and Property Tax Ruling 14-01, and, further, determine that the Subject Property is exempt for 2014 *ad valorem* property tax purposes as provided in West Virginia Code Section 11-3-9.

UNIVERSITY HEALTHCARE
FOUNDATION, INC.
f/k/a CITY HOSPITAL FOUNDATION,
INC.

By Counsel:

A handwritten signature in black ink, appearing to read "Michael E. Caryl", is written over a horizontal line.

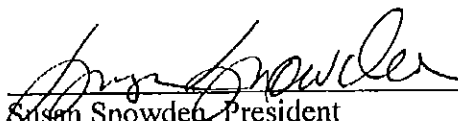
Michael E. Caryl, Esquire
WV State Bar #662
Bowles Rice LLP
Post Office Drawer 1419
Martinsburg, West Virginia 25402
(304) 264-4225
mcaryl@bowlesrice.com

Petitioner's Counsel

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF BERKELEY, TO-WIT:

Susan Snowden, President and duly authorized representative of University Healthcare Foundation, Inc., being first duly sworn, says that the facts and allegations contained in the foregoing Petition are true, except insofar as they are therein stated to be upon information, and that where so stated to be upon information, that she believes them to be true, to best of her knowledge and belief.


Susan Snowden, President

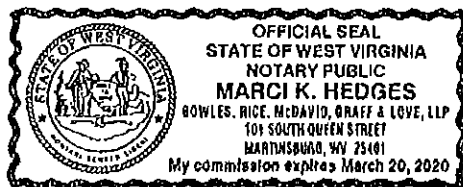
Taken, subscribed and sworn to before me this 3rd day of April, 2014,
by Susan Snowden, President and duly authorized representative of University Healthcare Foundation, Inc..

My commission expires:

March 20, 2020


NOTARY PUBLIC

[SEAL]



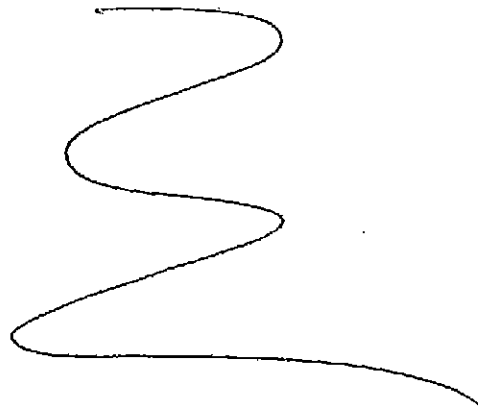
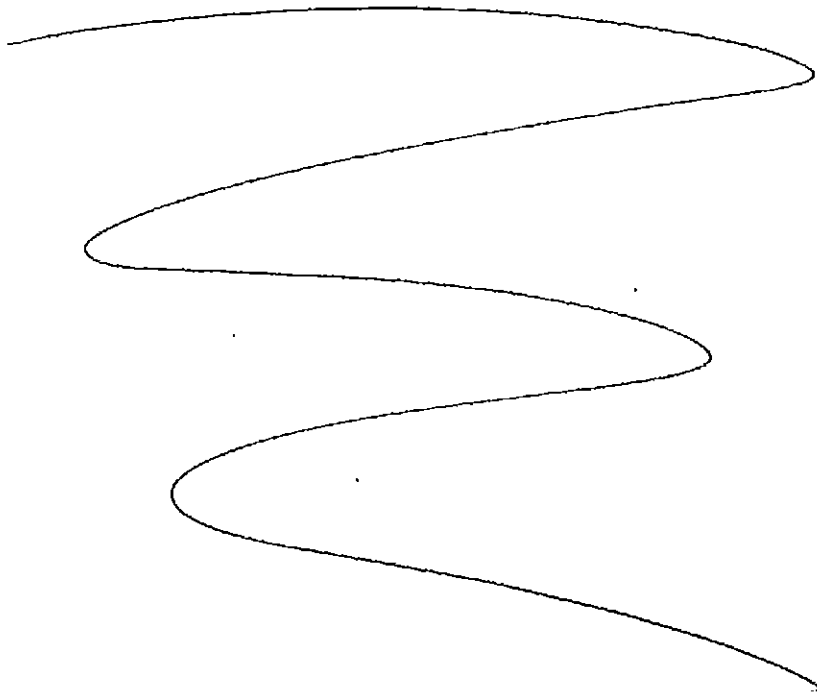


EXHIBIT A





WV UNIVERSITY HEALTHCARE
2000 FOUNDATION WAY, SUITE 2310
MARTINSBURG, WV 25401
304.264.1244

October 17, 2013

Larry A. Hess
Assessor of Berkeley County
400 W. Stephen Street, Suite 208
Martinsburg, WV 25401

Re: Property in the name of The Gateway Foundation, Inc.
Parcel ID: 06-4D-1.1 (3001-3018 incl.)
Part of 5.71 Acres, Lot A
Dorothy McCormack Center

Dear Mr. Hess,

This is in response to your letter dated October 10, 2013, regarding the taxability of the above properties for tax year 2014. Enclosed is the form entitled "Request for Exemption of Ad Valorem Property Taxation of Property Located in Berkeley County, West Virginia" which I have completed and signed and which, along with the schedules accompanying it, should address the various issues raised in your letter.

Based on the information contained in the enclosed form, I would respectfully ask you to confirm that all of the subject properties are exempt from *ad valorem* tax for tax year 2014.

If there is any other information you need to confirm the tax exempt status of the above-referenced properties, please let me know. Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Christopher D. Knight'.

Christopher D. Knight
Vice President, Finance

Enclosures as stated

REQUEST FOR EXEMPTION OF AD VALOREM PROPERTY TAXATION OF PROPERTY LOCATED IN
BERKELEY COUNTY, WEST VIRGINIA

ALL PROPERTY IS ASSUMED TAXABLE.

Exemption depends upon the USE of the property,
NOT (the non-profit status or 501(c)(3) status of the organization,
Real Property tax laws have special requirements for granting exemption
which are different from those for income tax exemption.
The fact that a property is being used for non-profit purposes will not merit an exemption,
UNLESS the use is one specifically exempted by state law.

Answer all questions as they apply to each parcel of property. Request additional forms if needed.
If form is incompletely filled out or incorrectly filled out, it may be returned to you.
ONLY ONE PARCEL PER FORM. DO NOT PUT MULTIPLE PARCELS ON ONE FORM.

Recorded in the name of: Gateway Foundation, Inc.
Mailing address: 2000 Foundation Way Suite 2310
Martinsburg, WV 25401
Telephone Number: (304) 264-1000

1. Parcel location - address or other description. Part of 5.71 Acres, Lot A -
Dorothy McCormack Center, Foundation Way, Martinsburg, WV

Parcel ID (District, Map, Parcel) or Account No.: 06-4D-1.1 (3001-3018 incl)

2. Is title holder a corporation, unincorporated association, organization or other?

Yes - Charitable, non-profit 501 (c) (3) corporation

3. The exemption is for: Real property X Personal Property _____

4. Exemption claimed
- | | |
|--------------|----------|
| Governmental | _____ |
| Scientific | _____ |
| Charitable | <u>X</u> |
| Religious | _____ |
| Educational | _____ |
| Literary | _____ |
| Other: | _____ |

What section of West Virginia Code §11-3-9 and what section of Legislative Rule §110-CSR-3 allow for the property to be exempt from ad valorem taxation? (In most cases, the fact that the owner is considered a 501(c)(3) for purposes of the Internal Revenue Service is not by itself sufficient to be exempt from taxation.) *This information MUST be provided by the taxpayer in order to facilitate a thorough review and determination, by the assessor's office, of the request for exemption.*

W. Va Code Section 11-3-9(a)(12)

5. Are services or activities CURRENTLY offered on this property available to the general public?

YES X NO

6. Date the exempt use began:

since it was constructed and opened in January 2003

7. Is any part of this property:

Leased or rented to anyone else?

YES X

NO

Used for the operation of any business?

YES

NO X (not by the owner)

Used for agricultural purposes?

YES

NO X

Used to produce any income other than donations?

YES X

NO

8. How is this property CURRENTLY being used?

Is the property vacant land?

YES

NO X

If there is a building, how is it being use?

See attached list of tenants, uses, rents,

apportioned costs, etc. for each suite in the property

If the property is not currently being used, but there is intent to use it later for an exempt purpose, describe the intended use and the date set for the intended use.

N/A

9. Explain why the property should be exempt from ad valorem taxation:

See attached explanation

If additional space is needed to answer any question, please attach sheet.

The above answers are based on present conditions.

When any changes are made that affect these answers, I will contact the Assessor's Office and advise the office of these changes.

Date

10/17/13

Signature of owner or preparer

Christopher D. Knight

Title of person signing

Vice President

Person to contact:

Christopher D. Knight, Vice-President of Finance

Mailing address:

WV University Healthcare

2000 Foundation Way, Suite 2310

Martinsburg, WV 25401

ASSESSOR'S USE ONLY

District: 1 Map: 1

Parcel: 1

Property has been granted tax exemption for ad valorem purposes: YES

Property has not been granted tax exemption for ad valorem purposes: NO

Date: 10/17/13

Request for Exemption of Ad Valorem Property Taxation of Property Located in Berkeley
County, West Virginia

Re: Property in the name of The Gateway Foundation, Inc.

Parcel ID: 06-4D-1,1 (3001-3018 incl.)
Part of 5.71 Acres, Lot A
Dorothy McCormack Center

Item 8

See attached pro forma schedule identifying the tenant, and showing the tenant's occupied space, rent and apportioned building costs for each suite in the subject property. In addition, attached is a pro forma income statement for the Wellness Center, which is operated by the Berkeley Medical Center for its account in Suite 1200.

Suite #		Square Footage	Tenant/Use	2013 Annual Rent Amount	2013 Per Square Foot	Terms
Projected Profit and Loss for 2013						
MOB 2						
1100	4,973	Projected Revenue		\$108,041.27	\$21.73	January 1, 2013 - December 31, 2013
1101	315	Ambergis Radiation Therapy		\$5,758.34	\$18.28	Community benefit - no fee charged - contribution expense
1200	19,100	Cancer Society		\$349,156.40	\$18.28	January 1, 2013 - December 31, 2013
1300	1,971	BMC - Rehab/Wel		\$36,030.75	\$18.28	January 1, 2013 - December 31, 2013
2100	158	BMC - Rad/Lab		\$3,759.39	\$22.38	January 1, 2013 - December 31, 2013
2200	2,800	Patient Transport Center		\$51,184.00	\$18.28	January 1, 2013 - December 31, 2013
2310	4,844	UHP Surgical Services		\$84,894.31	\$18.28	January 1, 2013 - December 31, 2013
2400	2,200	University Healthcare Admin		\$42,554.41	\$19.34	January 1, 2013 - December 31, 2013
2600	7,420	Bowen-Pulmonology		\$135,637.60	\$18.28	January 1, 2013 - December 31, 2013
3100	3,200	BMC Oncology		\$58,497.41	\$18.28	January 1, 2013 - December 31, 2013
3200	3,450	UHP Cardiologists		\$63,067.52	\$18.28	January 1, 2013 - December 31, 2013
3300	1,728	UHP ENT		\$31,588.60	\$18.28	January 1, 2013 - December 31, 2013
3500	1,933	UHP Pulmonology		\$35,332.11	\$18.28	January 1, 2013 - December 31, 2013
3600	1,292	UHP Behavioral Health		\$23,618.33	\$18.28	January 1, 2013 - December 31, 2013
3650	1,140	University Healthcare -IT Classrooms		\$20,839.70	\$18.28	January 1, 2013 - December 31, 2013
3650	183	Endocrinologist		\$0.00	\$0.00	Vacant - Old WMJH Clinics
3700	2,800	Storage		\$0.00	\$0.00	January 1, 2013 - December 31, 2013
3800	1,100	Cardiologist		\$20,108.48	\$18.28	January 1, 2013 - December 31, 2013
		BMC - Diabetic Educators				
		Total Revenue		\$1,070,068.63	\$17.71	
Projected 2013 Expenses						
		Salaries		\$ 159,000	\$ 2.63	
		Benefits		\$ 47,700	\$ 0.79	
		Maintenance and Repairs		\$ 105,695	\$ 1.75	
		Taxes		\$ 130,385	\$ 2.16	
		Utilities		\$ 50,494	\$ 0.84	
		Other Expenses		\$ 75,695	\$ 1.25	
		Capital Related Expenses/Debt Service		\$ 526,560	\$ 8.72	
		Total Expenses		\$ 1,095,529	\$ 18.13	
		Income/Loss		\$ (25,460.37)	\$ (0.42)	

Monthly Income Statement
300-056 - BMC Wellness Program
December, FY2012

	Year to Date - December, FY2012	
	Current Year 2012	Prior Year 2011
Total Gross Patient Revenue	\$ - \$	-
Total Deductions	\$ - \$	-
Total Net Patient Revenue	\$ - \$	-
OTHER REVENUE		
Membership Dues	782,447	794,201
Total Other Operating Revenue	\$ 782,447	\$ 794,201
Total Operating Revenue	\$ 782,447	\$ 794,201
OPERATING EXPENSES		
Salaries and Wages	364,405	344,148
Benefits	169,371	175,244
Professional Services	40,329	37,470
Medical Surgical Supplies	11,887	12,549
Drugs and IV	-	31
Travel and Registration	30	561
Maintenance and Repairs	4,644	551
Licenses and Taxes	140	140
Depreciation and Interest	117,367	119,190
Other Expense	188,752	186,912
Total Operating Expenses	\$ 837,475	\$ 814,736
Operating Margin	\$ [55,028]	\$ [20,535]
Total Non-Operating Revenue and Expenses	\$ - \$	-
Net Margin	\$ [55,028]	\$ [20,535]
Volumes		
Total Volumes	-	-
FTES		
Dollars-Only	-	-
Non-Productive	1.31	1.00
Productive	7.94	8.75
Total FTES	9.24	9.75

Request for Exemption of Ad Valorem Property Taxation of Property Located in Berkeley County, West Virginia

Re: Property in the name of The Gateway Foundation, Inc.

Parcel ID: 06-4D-1.1 (3001-3018 incl.)
Part of 5.71 Acres, Lot A
Dorothy McCormack Center

Item 2

As explained in the Foundation's recently filed property tax return, it is its position that the subject property, each of its suites (and the other properties listed in the return) are exempt from *ad valorem* property tax based on the facts that: (a) the Foundation, as owner, is an IRC § 501(c)(3) charitable organization; (b) the Foundation operates exclusively in pursuit of its charitable purpose as a supporting organization of City Hospital, Inc. (d/b/a Berkeley Medical Center) another IRC § 501(c)(3) charitable organization, which, in turn, uses the suites and common areas of the subject property, through its own operational units and the other healthcare providers occupying the same, exclusively for its charitable purpose of providing healthcare services to the general public; and (c) any rents the Foundation receives from the tenants occupying the subject property are exclusively applied to the debt service and operating costs of the subject property and, thus, are not for profit. See, Appalachian Emergency Medical Services, Inc. v. State Tax Commissioner, 218 W.Va. 550, 625 S.E.2d 312 (2005) which construed and applied W.Va. Code §11-3-9(a)(12) to similar facts.

That some of the tenants occupying some of the suites in the subject property are, themselves, providing health care services to the public on a for-profit, non-charitable basis, does not change the charitable and, thus, tax exempt status of the Foundation's freehold interest in such suites. See, In re Tax Assessment Against the Sarah and Pauline Maier Scholarship Foundation, Inc., 173 W.Va. 641, 319 S.E.2d 410 (1984), citing Greene Line Terminal Co. v. Marlin, 122 W.Va. 483, 10 S.E.2d 901 (1940) and The Great A & P Tea Co., Inc. v. Davis, 167 W.Va. 53, 278 S.E.2d 352 (1981). Moreover, though the tenants' leasehold interests may be taxable, taxes are due on those interests only if they have value as bargain leases whereby the rental rates and terms are more favorable to the tenant than are typical, arms-length, commercial leases in the same marketplace. The Great A & P Tea Co., Inc. v. Davis,

Upon applying those principles to the circumstances of the subject property (as described in more detail in response to the other items of this Request), it is apparent that, as of July 1, 2013, and, indeed, ever since its initial construction and opening, the subject property met the requirements for exemption from *ad valorem* property taxation under the provisions of W.Va. Code §11-3-9(a)(12). Specifically, as the attached pro forma income statements for each suite show, the Foundation realizes no economic profit from the rental payments nor, in the case of the Wellness Center, does its tenant, the Berkeley Medical Center, which operates that facility, realize profits from the membership dues it collects. Indeed, the costs to the payment of which its rental income is applied, and the costs of operating the Wellness Center to which the membership dues are applied by the Berkeley Medical Center, both exceed those revenue

sources and are of the identical nature as those costs approved by the Court in the Appalachian Emergency Medical Services, Inc. case as satisfying the rule prohibiting tax exempt charitable property from being "held or leased out for profit." W.Va. Code §11-3-9(a)(12).

Moreover, even if there is a brief interruption in the active charitable use of one of suites in the subject property in order to refit it for an alternate and closely related charitable use, that does not operate to revoke its exemption status for either the current tax year or a subsequent one, so long as the alternate charitable use is commenced within a reasonable time and continues as such thereafter. This latter point is supported by prior taxability rulings of the State Tax Commissioner with respect to the temporary vacancy or suspended public education uses of the real property holdings of county boards of education.

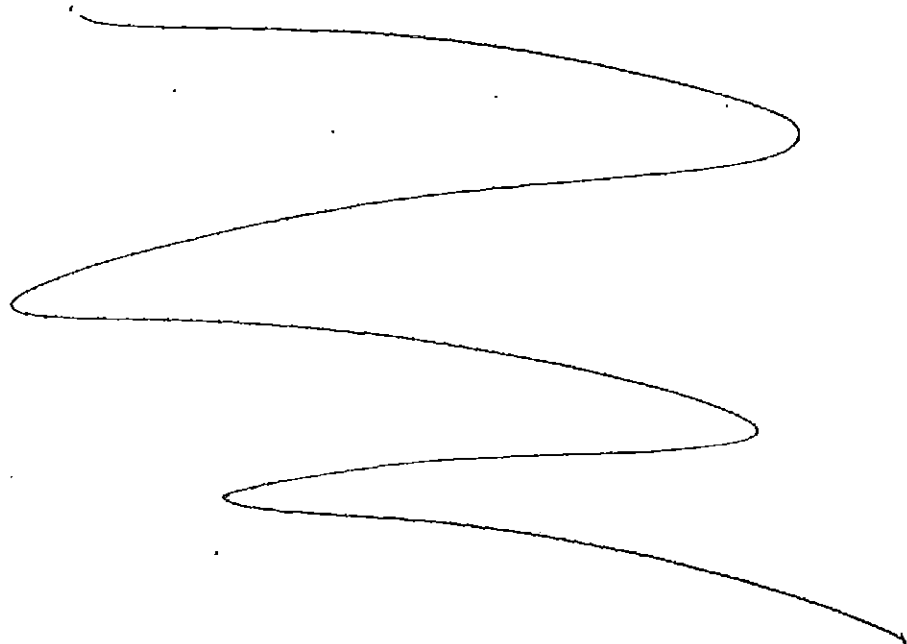
Specifically, the State Tax Commissioner ruled that, notwithstanding an absence of the active use by the Cabell County Board of Education of five (5) different properties it owned for educational purposes for periods ranging from two (2) to seven (7) years, they were still treated as being held for public education purposes and, thus, remained exempt from *ad valorem* property taxation for a reasonable time to enable the Board to complete plans to either sell them or put them to such use. See, Property Tax Ruling 98-02, (issued February 27, 1998), citing *inter alia* the decision of the West Virginia Supreme Court of Appeals in Madachy v. Huntington Horse Show Assn., 119 W.Va. 54, 192 S.E. 128 (1937).

Although Ruling 98-02 involved application of paragraph (4) of W.Va. Code §11-3-9(a), exempting the property of political subdivisions (e.g. county school boards) if used for "public purposes," and the present matter involves application of paragraph (12) of that same subsection, exempting property "used for charitable purposes and not held or leased out for profit," the practical and common sense principle is the same, to-wit: that temporary suspension of the tax exempt uses of an otherwise exempt property, pending resumption of the same within a reasonable time, does not operate to revoke such property's tax exempt status.

Upon applying that principle to the facts here, it is apparent that a brief few months' temporary interruption of active charitable use of any of the suites in the subject property, to enable them to be redeployed in the comparable, but even more efficacious provision of public health services, is a far stronger case than those addressed in the ruling involving interruptions of two (2) to seven (7) years' duration. Even if one applied a three (3) year maximum period of exemption for such tax exempt use interruptions as the Ruling appeared to adopt, going forward, based on the language of the Madachy ruling, the temporary vacancy of any of the subject suites, involving a suspension of active charitable use of less than one year, continues to provide a most favorable comparison and far more compelling case for exemption than even that safe harbor indicated in the Ruling.



EXHIBIT B





Assessor
Larry A. Hess
(304) 267-5051

Berkeley County Assessor's Office

Larry A. Hess, Assessor
400 W. Stephen Street, Suite 208
Martinsburg, WV 25401
Phone: 304-264-1904
Fax: 304-262-8484

www.TheAssessor.org

December 10, 2013



Chief Deputy
Brnd Unger
(304) 267-5072

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Christopher D. Knight
University Healthcare
2000 Foundation Way, Suite 2310
Martinsburg, WV 25401

Re: 08-4D-1.1
"Dorothy McCormack Building"

Dear Mr. Knight:

Thank you for your letter of October 17, 2013 and the enclosed Request for Exemption of Ad Valorem Property Taxation of Property Located in Berkeley County, West Virginia. I am sorry for the delay in responding to your letter, but I have been out of the office due to medical reasons.

Your letter requests that I confirm that all of the subject properties are exempt from ad valorem tax for tax year 2014.

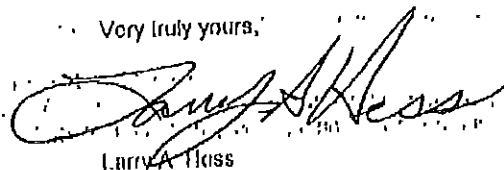
Based upon information supplied to our office and a visit to the property, your request is denied for the following reasons:

1. The property is not used exclusively for charitable purposes
2. Any "charitable" use of the property must be primary and immediate and not held or leased out for profit.
3. A number of the suites in the building are leased as physician's offices which are not a charitable use of the property.

At this time, because I believe that the above property does not qualify for exemption from ad valorem taxation. As in years past, our office will continue to bill for the areas which are deemed taxable. Enclosed is a copy of Request for Exemption you provided denying your request.

If you wish, we can ask for a tax ruling from the West Virginia Tax Commissioner. Enclosed is the form required if you wish to request a tax ruling. Please let me know of your decision and return the documentation to be supplied to the Tax Commissioner by January 6, 2014. Thank you for your cooperation.

Very truly yours,



Larry A. Hess

Enclosures

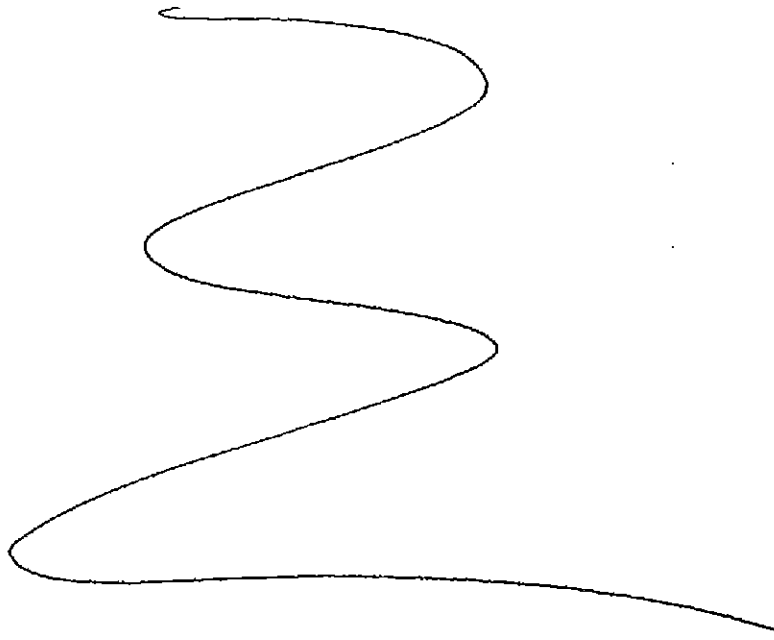
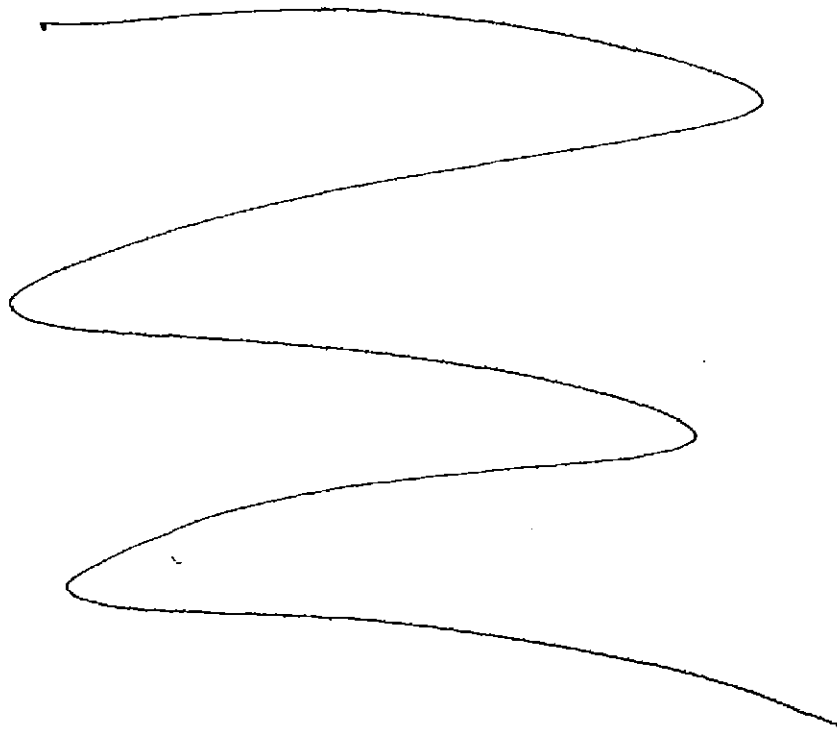


EXHIBIT C





STATE OF WEST VIRGINIA
Department of Revenue
State Tax Department

RECEIVED
2/25/2014

Earl Ray Tomblin
Governor

Mark W. Matkovich
State Tax Commissioner

February 22, 2014

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

The Honorable Larry A. Hess
Assessor of Berkeley County
Berkeley County Courthouse
400 W. Stephen St., Suite 208
Martinsburg, WV 25401

RE: Property Tax Ruling 14-01
Legal Log No 14-016ds

Dear Mr. Hess

Pursuant to the provisions of West Virginia Code §11-3-24a, you requested instructions from this Office concerning whether certain property owned by the City Hospital Foundation, Inc., and located in Berkeley County is subject to ad valorem property taxation.

Enclosed is our ruling. You are advised that under West Virginia Code §11-3-24a, this ruling is binding unless either you or the taxpayer, or both, apply to the Circuit Court of Berkeley County for review of the ruling within thirty (30) days after receiving the ruling. See W. Va. Code §§11-3-24a and 11-3-25.

Very truly yours,

Mark W. Matkovich
State Tax Commissioner

Pc Michael E. Caryl,
Bowles Rice, Attorneys at Law
101 S. Queen Street
Martinsburg, WV 25401

RECEIVED
3/5/2014

**PROPERTY TAX RULING 14-01
ISSUED PURSUANT TO WEST VIRGINIA CODE §11-3-24a**

February 22, 2014

TAXPAYER: GATEWAY FOUNDATION, INC.

**ASSESSOR: LARRY HESS
BERKELEY COUNTY**

**SUBJECT: PROPERTY PARTLY USED FOR EXEMPT PURPOSES AND
PARTLY USED FOR NON-EXEMPT PURPOSES MAY NOT BE EXEMPTED
FROM AD VALOREM PROPERTY TAXATION**

LEGAL LOG 14-016ds

West Virginia Code §11-3-24a outlines procedures to be followed where the taxpayer and the county assessor disagree on the proper classification or taxability of property for ad valorem tax purposes. Under provisions of this section, the county assessor may, and if the taxpayer requests, the county assessor shall certify the question to the State Tax Commissioner for a ruling. The State Tax Commissioner has until February 28th of the assessment year to render a decision. This decision may be appealed to the Circuit Court of Berkeley County by either the taxpayer or the assessor within thirty (30) days after its receipt.

STATEMENT OF FACTS

On January 13, 2014, this Office received from the Assessor of Berkeley County (Assessor) a request for a ruling on the treatment of certain real property owned by City Hospital Foundation, Inc., (Taxpayer) and located in Berkeley County, for ad valorem taxation purposes.

The property that is the subject of this ruling is described as Parcel 06-4D-1 1, 5.71 Acres, Lot A, South of City Hospital, the "Dorothy McCormack Center." The owner of record as of the assessment date of July 1, 2013 was The Gateway Foundation, Inc. Subsequently, it became the City Hospital Foundation, Inc., and, as of December 2013, University Healthcare Foundation, Inc. As far as can be determined from the information submitted, these represent changes in name only, and are not reflective of any change in ownership. The Request for Exemption of Ad Valorem Property Taxation was filed in the name of Gateway Foundation, Inc., hereinafter, "Taxpayer."

The Taxpayer is exempt from federal income tax under 26 U.S. Code § 501 (c) (3).

The property is occupied by the tenants listed below, all of whom pay rent to the Taxpayer, at roughly the same rate per square foot. Some of these tenants are tax-exempt entities, others are for-profit businesses. The following table shows the uses of the property in square footage, and the exemption status of the tenant:

Suite No.	Tenant / use	Square footage	Taxable
1100	Ambergris	4,973	Y
1101	Cancer Society	315	N
1200	BMC – Rehab/Wellness Center	19,100	Y
1300	BMC – Radiology/Lab	1,971	N
2100	Patient Transportation	168	Y
2200	University Surgical Associates	2,800	Y
2310	Univ. Healthcare – Corp. Office	4,644	N
2400	Center for Positive Aging	2,100	Y
2600	BMC Oncology	7,420	N
3100	UHP Endocrinology	3,200	Y
3200	UHP ENT	3,450	Y
3300	UHP Pulmonology	1,728	Y
3500	UHP Behavioral Health	1,933	Y
3600	BMC – IT Classrooms	1,292	N
3650	UHP Urology	1,140	Y
3650	(storage)	183	N
3700	UHP – Gastroenterology	2,800	Y
3800	BMC – Diabetic Education	1,100	N

Rent Schedule As of 7/1/2013 for Dorothy McCormack Center, provided by University Healthcare to Assessor.

Of the total 60,417 square feet of space, 16,925 square feet, or 28% of the total, are used for exempt purposes, while 43,492 square feet, or 72% of the total, are used for non-exempt purposes

According to the Assessor, the tenants of the individual suites are billed separately for property taxes

ISSUE

Whether property leased by an exempt organization for use as a for-profit business is subject to ad valorem property taxation.

DISCUSSION

West Virginia Constitution Article X, Section 1 in part provides the following:

§1 Subject to the exceptions in this section contained, taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law but property used for educational, literary, scientific, religious, or charitable purposes may by law be exempted from taxation

The foregoing does not of itself exempt any property from taxation, it merely authorizes the legislature to provide exemption in certain situations. In re Hillcrest Memorial Gardens, 146 W. Va. 337, 119 S.E.2d 753 (1961) Additionally, according to the Constitution, it is the use of the property, not the status of the property owner, which determines exemption. Therefore, the Taxpayer's tax-exempt status under Internal Revenue Code Section 501(c)(3) may not be relevant to the issue

Taxation of all property, both real and personal, is the general rule fixed by constitutional mandate, while exemption from taxation constitutes the exception id. The constitutional and statutory provisions exempting property from taxation are strictly construed. id. If any doubt arises as to exemption, that doubt must be decided against the person who claims the exemption State v McDowell Lodge No. 112 A.F.&A.M., 96 W. Va. 611, 123 S.E. 561 (1924); Central Realty Co. v. Martin, 126 W. Va. 915, 30 S.E.2d 720 (1944). This is because all exemptions evade the operation of the general principle that taxation laws should be equal and uniform, so as to place the public burdens, as nearly as may be, upon all property and citizens alike. In re Hillcrest Memorial Gardens, 146 W. Va. 337, 119 S.E.2d 753 (1961); State v. Kittle, 87 W. Va. 526, 105 S.E. 775 (1921)

At issue here is whether a building that is owned by a tax-exempt charitable organization and used partly for charitable purposes and partly for profit, may be exempt from ad valorem property taxation under W. Va. Code §11-3-9 (a) (12), which exempts "property used for charitable purposes and not held or leased out for profit"

The West Virginia Supreme Court of Appeals construed this Code section as follows.

In order for real property to be exempt from ad valorem 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, Inc. v. County Comm'n. 202 W. Va. 283, 503 S.E.2d 851 (1998).

In an attachment to its Request for Exemption, the Taxpayer asserts that the Dorothy McCormack Center should be entirely exempt from ad valorem property taxation because:

- (a) The Foundation, as owner, is an IRC § 501 (c) (3) charitable organization;
- (b) The Foundation operates exclusively in pursuit of its charitable purpose as a supporting organization of City Hospital, Inc. (d/b/a Berkeley Medical Center) another 501 (c) (3) charitable organization, which, in turn, uses the suites and common areas of the subject property, through its own operational units and the other healthcare providers occupying the same, exclusively for its charitable purpose of providing healthcare services to the general public; and
- (c) Any rents the Foundation receives from the tenants occupying the subject property are exclusively applied to the debt service and operating costs of the subject property and, thus, are not for profit

As authority for its position, Taxpayer cites *Appalachian Emergency Medical Services, Inc., v. State Tax Commissioner*, 218 W. Va. 550, 625 S.E.2d 312 (2005)

It is a long-settled rule of law in West Virginia that,

[W]here property belonging to a charitable institution is rented out or otherwise employed as a source of profit to the institution, it is not sufficient to save that property from taxation because the rent or income is devoted exclusively to charitable purposes

State v. McDowell Lodge No. 112, A. F. & A. M., 96 W. Va. 611, 614, 123 S.E. 561, 563 (1924)

The Court in the *McDowell Lodge* case further held that,

It is sufficient to say that the great weight of authority appears to be that because the rents, issues and profits of the property of a charitable institution are used for the purposes of charity, that fact will not exempt the property from taxation, under the rule of strict construction applicable where property is claimed to be exempt under the exceptions to the general rule that all property must bear its equal burdens of taxation.

Id., 615, 563

The Taxpayer puts forth the proposition that, because no net gain is realized by the Dorothy McCormack Center from the rents paid by its tenants, the property cannot be said to be "profits" within the meaning of W. Va. Code §11-3-9 (a) (12). Again, the Court in *McDowell Lodge* addressed this issue:

The clause "not held or leased out for profit," is significant. It is difficult to see how the property of charitable and benevolent associations could be rented except for profit to the association.
Id., 616, 563-4

In other words, the Court construed the word "profit" in its plain meaning, i.e., as "An advantageous gain or return: BENEFIT" See, Webster's II New Riverside University Dictionary (1994) The Taxpayer, instead, wants the word to be construed in the technical sense used by the professional accountant, as a net gain, after deduction for expenses. But this interpretation is nothing more than an equivocation that ultimately belies the plain meaning of the term so as to defeat the Constitutional mandate that "taxation shall be equal and uniform throughout the state." The rents paid by the tenants of the Dorothy McCormack Center to the Gateway Foundation confer a very clear benefit upon the Foundation, which constitutes a "profit" to the Foundation in the plain meaning of the word And this profit defeats the tax exemption of the property, according to both statute and case law.

The case relied on by the Taxpayer, *Appalachian Emergency Medical Services, Inc., v. State Tax Commissioner*, op. cit., is distinguishable from the case at hand on the facts. In that case, the Court ruled that, where an IRC § 501(c)(3) organization occupied a building which it owned, and leased space in that building to a second IRC § 501(c)(3) organization, the use of the building was deemed to be charitable within the meaning of W. Va. Code § 11-3-9

The facts in the instant case are quite different. Here we have an IRC § 501(c)(3) organization leasing space to numerous non-exempt, for-profit entities. As noted above, 72% of the available space in the building is used for non-exempt purposes.

In its Request for Exemption, the Taxpayer makes one further argument:

That some of the tenants occupying some of the suites in the subject property are, themselves, providing health care services to the public on a for-profit, non-charitable basis, does no change the charitable, and, thus, tax exempt status of the Foundation's freehold interest in such suites. See, In re Tax Assessment Against the Sarah and Pauline Maier Scholarship Foundation, Inc., 173 W. Va. 641, 319 S.E.2d 410 (1984), citing Greene Line Terminal Co. v. Martin, 122 W. Va. 483, 10 S.E.2d 901 (1940) and The Great A & P Tea Co., Inc. v. Davis, 167 W. Va. 53, 278 S.E.2d 352 (1981). Moreover, though the tenants' leasehold interests may be taxable, taxes are due on those interests only if they have value as bargain leases whereby the rental rates and terms are more favorable to the tenant than are the typical, arms-length, commercial leases in the same marketplace. The Great A & P Tea Co., Inc. v. Davis

We find no merit in this argument. If the leaseholds were held to be "chattels real," as the Taxpayer's counsel suggests, it would defeat the Taxpayer's assertion that the entire property be exempt from taxation.

The *Maier Foundation* case stands for the proposition that,

(A) lessee who has an interest in property which is subjected to tax is not entitled to exemption from taxation by the mere fact that he holds the property by lease from an organization or institution which would be entitled to a tax exemption for the property if it directly made use of the property for its exempt purposes
In re Maier Foundation, op cit, 848, 417

It is difficult to see how this legal principle supports the Taxpayer's position

The *Greene Line Terminal* case, also cited by the Taxpayer, stands for the proposition that,

Under Code, 11-3-9, which exempts from taxation "property belonging exclusively to any county, district, city, village, or town in this state, and used for public purposes," a leasehold on a city-owned wharf is not exempt from taxation, where the lessee operates the wharf on a personal profit basis, though public convenience is thereby served
Syl pt 1, *Greene Line Terminal*, op cit

Both the *Maier Foundation* and *Greene Line Terminal* cases are consistent with previous rulings by the Court, that is, that a for-profit business leasing property from a tax-exempt entity is not entitled to the property tax exemption that would otherwise be available to the lessor. Again, it is difficult to see how this bolsters the Taxpayer's request for exemption

The assertion that "taxes are due on those interests only if they have value as bargain leases, etc.", attributed the *Great A. & P. Tea Co.* case is likewise without merit and has no basis in the case to which Counsel attributes it; no such word appear in that case, and Counsel's attribution is fanciful, at best Under this interpretation, Taxpayer's Counsel, to paraphrase the *Great A. & P. Tea Co.* case, "would [have us] arrive at the ridiculous conclusion that an individual can escape taxation of a valuable asset merely by [leasing from an exempt entity]" see *Great A. & P. Tea Co.*, 56-57, 355

What the *Great A. & P. Tea Co.* case does stand for is quite contrary to the Taxpayer's assertion The Court in that case held that "a separate leasehold is taxable if it has a separate and independent value from the freehold" *Id.*, 55, 355 The Court further held that, in cases where the value of a freehold is diminished by the existence of a separate leasehold, the assessor may apply the diminution in value to the value of the separate leasehold, so that the property is taxed at its actual value.

The county assessor may presume that commercial leases do not diminish the value of the freehold estate and proceed to tax all real property at its true and actual value, the burden of showing that a leasehold reduces the value of a freehold is upon the taxpayer
Id. 58, 356

But this rule only applies where a separate leasehold has a separate and independent value from the freehold. Such is not the case here. Again, from the *A & P* case,

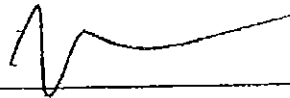
Under ordinary conditions the freehold estate will not be reduced in value by virtue of the leasehold, nor will the leasehold have any ascertainable market value.
Id 56,355

That is to say, when a lease is for a relatively short duration, such as is the case here, with tenants occupying suites in a single office building, the value of the Foundation's freehold estate will not be diminished, the value of the separate leaseholds would not be separate and independent from the value of the freehold, and it would be both inappropriate and unnecessary to tax the various leasehold interests separately, or, as Taxpayer's Counsel would have it, not at all.

Because the Taxpayer has not shown that this property qualifies for the exemption set forth in W. Va. Code § 11-3-9(a) (12), the property is subject to ad valorem taxation as determined by the Assessor.

RULING BY THE TAX COMMISSIONER

Based upon the facts and information provided and a review of the applicable law and rules, I hereby **RULE** that the property located in Berkeley County and owned by the Gateway Foundation, Inc., identified as "The Dorothy McCormack Center," is not eligible for exemption from ad valorem property taxation as determined by the Assessor.



Mark W. Matkovich, State Tax Commissioner