

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION

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

*Petitioner,*

v.

LARRY A. HESS, Assessor  
of Berkeley County, West Virginia, and  
MARK W. MATKOVICH, State Tax  
Commissioner,

*Respondents.*

CASE NO. 14-AA-4  
Judge Wilkes

BERKELEY COUNTY  
CIRCUIT CLERK  
2015 MAY 15 PM 1:53  
VIRGINIA M. SHEPHERD

FINAL ORDER  
OVERRULING AND REVERSING DENIAL OF *AD VALOREM* PROPERTY TAX  
EXEMPTION AND TAXABILITY RULING

Introduction

This case involves the Petitioner's claim for exemption of its property, consisting of the Dorothy McCormack Cancer Treatment & Rehabilitation Center (the subject property), from 2014 *ad valorem* property tax in Berkeley County, West Virginia. The Respondent Assessor denied the Petitioner's requested tax exemption for the subject property, and the Respondent State Tax Commissioner issued Taxability Ruling 14-01, which upheld the Assessor's denial of the requested exemption. The Petitioner timely appealed the Respondent Assessor's denial of the tax exemption for the subject property and the Respondent State Tax Commissioner's Taxability Ruling 14-01. On appeal, the Court conducted a bench trial on January 9, 2015, and after consideration of the evidence presented at that trial, and after consideration of the briefs of the parties' respective counsel, the Court does hereby OVERRULE and REVERSE the Assessor's Denial and the State Tax Commissioner's Taxability Ruling 14-01, and ORDERS that the Petitioner's subject property shall be, and is, exempt from *ad valorem* property taxation

in tax year 2014. In accordance with this ruling, the Court makes the following findings of fact and conclusions of law.

#### Findings of Fact

1. The Petitioner, University Healthcare Foundation, Inc. is a not-for-profit West Virginia corporation which has been continuously designated as exempt from federal income taxes pursuant to the Internal Revenue Code (IRC) § 501(c)(3) since 1984.
2. Prior to an amendment of its articles of incorporation on December 23, 2013, the name of the Petitioner was City Hospital Foundation, Inc.
3. Prior to an amendment of its articles of incorporation on October 12, 2004, the name of City Hospital Foundation, Inc. was Gateway Foundation, Inc.
4. City Hospital, Inc. is a not-for-profit West Virginia corporation which has been continuously designated as exempt from federal income taxes pursuant to IRC § 501(c)(3) since 1940.
5. Berkeley Medical Center (or, at times herein, "BMC") is a registered trade name of City Hospital, Inc.
6. The Wellness Center at Berkeley Medical Center is a department of City Hospital, Inc. d/b/a Berkeley Medical Center.
7. West Virginia University Hospitals - East, Inc. is a not-for-profit West Virginia corporation which has been continuously designated as exempt from federal income taxes pursuant to IRC § 501(c)(3) since 2004.
8. University Healthcare is a registered trade name of West Virginia University Hospitals - East, Inc.

9. University Healthcare Physicians, Inc. (hereinafter, "UHP") is a not-for-profit West Virginia corporation which has been designated as exempt from federal income taxes pursuant to IRC § 501(c)(3) for all periods starting as of October 1, 2012.

10. American Cancer Society, Inc. is a not-for-profit corporation admitted to operate in West Virginia and has been designated for many years as, and remains as being, exempt from federal income taxes pursuant to IRC § 501(c)(3).

11. The Petitioner is the owner of that certain improved parcel of real property situate in Martinsburg District, of Berkeley County, West Virginia, consisting of 5.71 acres, described as Lot A, Dorothy McCormack Center, assessed on the land books of Berkeley County, West Virginia, as Map 4D, Parcel 1.1, including ten (10) sub parcels separately identified by the Respondent 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), 1.1.3006 (Suite 3500), 1.1.3007 (Suite 2200), 1.1.3008 (Suite 3100), 1.1.3010 (Suite 3650), and 1.1.3013 (Suite 1200) ("the Suites").

12. Lot A, Dorothy McCormack Center (hereinafter, the Dorothy McCormack Cancer Treatment & Rehabilitation Center), assessed as such on the land books of Berkeley County, West Virginia, as Map 4D, Parcel 1.1, including the aforesaid sub parcels/Suites thereof, is a "Common interest community" as that term is defined and used in West Virginia Code, Chapter 36B.

13. As of July 1, 2013, the individual Suites, and respective square footages and tenants, of the Dorothy McCormack Cancer Treatment & Rehabilitation Center were as follows:

- a. Suite 1100 (4,973 ft.<sup>2</sup>): Ambergris, LLC;
- b. Suite 1101 (315 ft.<sup>2</sup>): American Cancer Society;
- c. Suite 1200 (19,100 ft.<sup>2</sup>): BMC.;
- d. Suite 1300 (1,971 ft.<sup>2</sup>): BMC.;
- e. Suite 2100 (168 ft.<sup>2</sup>): Patient Transportation;

- f. Suite 2200 (2,800 ft.<sup>2</sup>): UHP.;
- g. Suite 2310 (4,644 ft.<sup>2</sup>): West Virginia University Hospitals - East, Inc.;
- h. Suite 2400 (2,200 ft.<sup>2</sup>): Robert E. Bowen, MD Ltd.;
- i. Suite 2600 (7,420 ft.<sup>2</sup>): BMC;
- j. Suite 3100 (3,200 ft.<sup>2</sup>): UHP.;
- k. Suite 3200 (3,450 ft.<sup>2</sup>): UHP.;
- j. Suite 3300 (1,728 ft.<sup>2</sup>): UHP.;
- l. Suite 3500 (1,933 ft.<sup>2</sup>): UHP.;
- m. Suite 3600 (1,292 ft.<sup>2</sup>): West Virginia University Hospitals - East, Inc.;
- n. Suite 3650 (1,140 ft.<sup>2</sup>): UHP.;
- o. Suite 3650 (183 ft.<sup>2</sup>): Vacant;
- p. Suite 3700 (2,800 ft.<sup>2</sup>): UHP.; and
- q. Suite 3800 (1,100 ft.<sup>2</sup>): BMC.

14. Four of the Suites were leased directly to BMC to provide space for its outpatient treatment and testing services (Suites 1300, 2600 and part of Suite 1200), for its Wellness Center (rest of Suite 1200), and for its diabetes education program (suite 3800);

15. Seven of the Suites were leased to UHP to provide space from which its employed physicians provide a variety of medical specialties such as behavioral health (Suite 3500), endocrinology (Suite 3100), ear, nose and throat (Suite 3200), gastroenterology (Suite 3700), pulmonology (Suite 3300), surgery (Suite 2200) and urology (Suite 3650);

16. One specially-outfitted Suite was leased to Ambergris, LLC, to provide radiation treatment for BMC's patients (Suite 1100);

17. One Suite was leased to Dr. Robert E. Bowen, the director of BMC's cardiac rehabilitation program, so that he can be on-site as required by regulations of the Centers for Medicare and Medicaid ("CMS") for cardiac rehabilitation services. (Suite 2400);

18. One very small Suite (168 square feet -- an approximately 13' x 13' room) was leased to Patient Transportation so that patients who are unable, or do not have other means to travel, will

still be able to receive their scheduled radiation and chemotherapy treatments at the Dorothy McCormack Cancer Treatment & Rehabilitation Center (Suite 2100);

19. One small (315 square foot or slightly smaller than an 18 foot square room) Suite was provided rent-free as an office for the American Cancer Society (Suite 1101); and

20. Two Suites were leased to West Virginia Hospitals – East, Inc. for the administrative offices of that entity and of the Petitioner (Suites 2310 and 3600).<sup>1</sup>

21. The tax year at issue before the Court is the 2014 tax year, and the assessment date for the 2014 tax year was July 1, 2013.

22. The Petitioner, BMC, West Virginia University Hospitals - East, Inc., and UHP are all separate legal entities.

23. Ambergris, LLC, Patient Transportation, and Robert E. Bowen, MD, Ltd. have not been designated as exempt from federal income taxes pursuant to IRC § 501(c)(3).

24. BMC is a charitable hospital, the primary charitable purpose of which is to improve the health of Eastern Panhandle residents and to provide charitable healthcare services to the community. (Trial Tr., 55:2-6, 57:14-17, Jan. 9, 2015) (testimony of Zelenka, A.)

25. The Petitioner's immediate charitable purpose is to directly support BMC, and, thus, it has a common charitable purpose with BMC, which is to provide expanded health care services to the citizens of the Eastern Panhandle of West Virginia, and to promote medical care and well-being of the community as a whole. This has been the Petitioner's charitable purpose since its creation. (Trial Tr. 20:20-22:7, 44:6-18, Jan. 9, 2015) (testimony of Snowden, S.)

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<sup>1</sup> As of July 1, 2013, Suite 3650, consisting of only 183 square feet (i.e. slightly smaller than a 14' x 14' room), was vacant.

26. The primary charitable purpose of UHP is to improve the quality of healthcare services available to the citizens of the Eastern Panhandle by recruiting and employing quality physicians to the area. (Trial Tr. 76:23-77:19, Jan. 9, 2015) (testimony of Zelenka, A.)

27. Prior to construction of the Dorothy McCormack Cancer Treatment & Rehabilitation Center, BMC was unable to provide radiation oncology services to local cancer patients.

28. Then, Dorothy A. McCormack, a breast cancer patient at BMC, and her husband, Leonard McCormack, decided to help make sure that people in the Eastern Panhandle of West Virginia, who needed radiation oncology services, would have the option of getting their treatments locally. Thus, the primary purpose of building the Dorothy McCormack Cancer Treatment & Rehabilitation Center was to help BMC establish a radiation oncology department. (Trial Tr. 134:13-135:22, Jan. 9, 2015) (testimony of McCabe, T.)

29. The Dorothy McCormack Cancer Treatment & Rehabilitation Center is located on the BMC campus and is an operational extension of BMC.

30. The Dorothy McCormack Cancer Treatment & Rehabilitation Center must be located on the BMC campus due to CMS regulations governing reimbursement for patient services and West Virginia certificate of need guidelines. (Trial Tr., 64:6-65:5, Jan. 9, 2015) (testimony of Zelenka, A.)

31. Leasing space in the Dorothy McCormack Cancer Treatment & Rehabilitation Center to Ambergris, LLC primarily and immediately fulfills the common charitable purposes of BMC and the Petitioner by providing radiology oncology services for BMC's cancer patients. Thus, the Dorothy McCormack Cancer Treatment & Rehabilitation Center was built for the purpose of providing this service to cancer patients, and the first floor suite rented to Ambergris, LLC was specifically designed to house the radiation oncology equipment. (Trial Tr. 49:19-50:6, Jan. 9,

2015) (testimony of Snowden, S.); (Trial Tr. 66:11-14, 83:18-20, Jan. 9, 2015) (testimony of Zelenka, A.)

32. BMC does not independently provide radiation oncology, but instead contracts with Ambergris, LLC to provide that service to its patients. The evidence established that it would be extremely difficult for a hospital of its size to independently attract high quality oncologists, to stay current on best practices and treatments, and to afford the extremely high cost of equipment. (Trial Tr. 66:6-19 and 72:4-74:1, Jan. 9, 2015) (testimony of Zelenka, A.)

33. If Ambergris, LLC did not offer radiation oncology at BMC, local patients would have to travel to Winchester, Virginia; Morgantown, West Virginia; or Baltimore, Maryland for treatment. *Id.*

34. The Petitioner leases space in the Dorothy McCormack Cancer Treatment & Rehabilitation Center to BMC to house the Wellness Center, as one of BMC's operating departments, and, thus primarily and immediately fulfills the common charitable purposes of BMC and of the Petitioner by enabling the charitable hospital to offer cardiac and physical rehabilitation services of high therapeutic value to its patients and by enabling the general public to participate in a hospital-supervised, preventive health care, and physical fitness programs.

35. Promoting physical fitness through the Wellness Center is a community benefit in the form of better health care because statistics show that physical fitness is important to the quality of community health. (Trial Tr. 44:15-18, 50:8-51:10, Jan. 9, 2015) (testimony of Snowden, S.)

36. The Wellness Center is particularly important to the quality of health in the Eastern Panhandle because West Virginia residents are some of the most obese in the country (behind only Louisiana and Mississippi), and the health status of Berkeley County residents is among the

bottom three counties in West Virginia. (Trial Tr. 50:24-51:4, Jan. 9, 2015) (testimony of Snowden, S.); (Trial Tr. 55:12-18, Jan. 9, 2015) (testimony of Zelenka, A.)

37. By providing a tailored exercise routine in which individuals with, or at risk for, health problems can work to improve their health under the supervision of healthcare professionals, the Wellness Center offers far more than mere recreational use to its members. (Trial Tr. 67:13-16, 89:2-5, Jan. 9, 2015) (testimony of Zelenka, A.) and (Trial Tr. 130:10-134:12, Jan. 9, 2015) (testimony of McCabe, T.)

38. The Wellness Center further promotes the common charitable purposes of BMC and of the Petitioner by providing community outreach and education programs on nutrition, fitness, and exercise. Among the many programs sponsored by the Wellness Center are the Apple Trample 5K Run and training program, monthly running clinics with Dr. Mark Cucuzzella, presentations to the Berkeley County Chamber of Commerce Women's Network, and local health fairs. (Trial Tr. 127:5-130:9, Jan. 9, 2015) (testimony of McCabe, T.)

39. The Petitioner's leasing of space in the Dorothy McCormack Cancer Treatment & Rehabilitation Center to Dr. Bowen primarily and immediately fulfills the common charitable purposes of BMC and of the Petitioner because, as director of BMC's cardiac rehab program, he is required, by CMS rules governing reimbursement for the providing of such services, to be physically present in the building. (Trial Tr. 51:14-23, Jan. 9, 2015 (testimony of Snowden, S.)

40. If the Petitioner did not lease space to Dr. Bowen for his offices at the Dorothy McCormack Cancer Treatment & Rehabilitation Center, BMC would not be able to offer cardiac rehabilitation through the Wellness Center because both CMS reimbursement regulations, and the hospital's accrediting body, require Dr. Bowen to be physically on-site the entire time that



BMC patients are receiving cardiac rehabilitation. (Trial Tr. 70:10-71:17, Jan. 9, 2015) (testimony of Zelenka, A.)

41. The Petitioner's leasing of space in the Dorothy McCormack Cancer Treatment and Rehabilitation Center to Patient Transportation primarily and immediately fulfills the common charitable purposes of BMC and of the Petitioner because it enables BMC's patients, who otherwise have no means of travel from their homes, to get to the center for their treatments. (Trial Tr. 51:24-52:6, Jan. 9, 2015) (testimony of Snowden, S.)

42. Patient Transportation is particularly important to the cancer treatment modalities provided at the Dorothy McCormack Cancer Treatment & Rehabilitation Center because patients cannot skip a radiation or chemotherapy treatment without serious setback -- "if mom can't pick you up or you can't pick mom up that day she can't just stay at home [and miss her treatment]." When BMC explored relocating Patient Transportation to an office outside of the hospital campus, the radiation oncologist objected and explained that he depends on their services to access his patients. (Trial Tr. 75:5-76:1, Jan. 9, 2015 (testimony of Zelenka, A.)

43. All of the tenants of the Dorothy McCormack Cancer Treatment & Rehabilitation Center provide healthcare services that primarily and immediately fulfill the common charitable purposes of BMC and of the Petitioner.

44. The Petitioner only rents the suites in the Dorothy McCormack Cancer Treatment & Rehabilitation Center to tenants that provide either curative or preventive healthcare-related services to its patients and other members of the community. This includes, in addition to those described above, all the offices of UHP physicians who provided various medical specialty services to BMC's patients. (Trial Tr. 35:1-17, 49:3-9 Jan. 9, 2015) (testimony of Snowden, S.); (Trial Tr. 76:10 – 79:22 Jan. 9, 2015) (testimony of Zelenka, A.).

45. Due to the necessity to comply with the so-called Stark rules imposed by the CMS, which place severe limitations on self-referrals, the Petitioner charges rent to all of the tenants in the Dorothy McCormack Cancer Treatment & Rehabilitation Center that provide healthcare services, which rents are comparable to arms-length, fair market commercial office rental rates. (Trial Tr. 103:22 - 105:11, Jan. 9, 2015) (testimony of Quinones, K.)

46. However, the Petitioner did not realize any surplus revenue from the Dorothy McCormack Cancer Treatment & Rehabilitation Center in 2013, and in fact it operated the facility at a net operating loss of \$323,583. (Trial Tr. 106:10-109:9, 112:3-11, 119:21-120:13, Jan. 9, 2015) (testimony of Quinones, K.); (*See also* Exhibit UHF 27)

47. If the Petitioner were to realize any surplus revenue due to rents collected from tenants of the Dorothy McCormack Cancer Treatment & Rehabilitation Center, the policies of its governing body, and the necessity to comply with the requirements of the Internal Revenue Code, would result in such surplus being applied to further support BMC in the providing of additional healthcare and services to the community. (Trial Tr. 48:8-10, Jan. 9, 2015) (testimony of Snowden, S.)

48. No such surplus earned by the Petitioner, if any, inures to the benefit of any private individuals such as stockholders or equity partners, but would instead, due to the standing policies of its governing board and the necessity to comply with the requirements of the Internal Revenue Code, be reinvested in the Petitioner's facilities or distributed out to the hospital based upon its needs. (Trial Tr. 37:5-9 and 48:8-10, Jan. 9, 2015) (testimony of Snowden, S.) and (Trial Tr. 119:21 - 120:13, Jan. 9, 2015) (testimony of Quinones, K.)

49. Based on the totality of the circumstances, including, but not limited to the affirmative and credible testimony of the Petitioner's witnesses, the regulation of reimbursement by public

and private health insurers, the oversight of the Internal Revenue Service with respect to BMC's tax-exempt status and the Court's experienced impressions of the market for healthcare services, and the absence of evidence to the contrary, the compensation paid to the Petitioner's, BMC's and UHP's professional employees is not unreasonable or in excess of fair market value for comparable services, and are not such as to represent the "syphoning off" of BMC's or of the Petitioner's revenues in violation of either the federal income tax or West Virginia property tax exemption rules.

50. Furthermore, if BMC were to realize any surplus revenue from its operations, the policies of its governing body and the necessity to comply with the requirements of the Internal Revenue Code, would result in that surplus revenue being reinvested in the future of the organization by replacing equipment, purchasing new technology, improving employee pay, and recruiting quality physicians. (Trial Tr. 84:2-86:7, Jan. 9, 2015) (testimony of Zelenka, A.)

51. However, BMC did not realize any surplus revenue from Dorothy McCormack Cancer Treatment & Rehabilitation Center or the Wellness Center in 2013, and in fact operated that department at a net operating loss of \$55,428. (Trial Tr. 112:19-114:1, Jan. 9, 2015) (testimony of Quinones, K.); (*See also* Exhibit UHF 28)

52. The Petitioner has never had to treat the rents collected from the Dorothy McCormack Cancer Treatment and Rehabilitation Center as unrelated business income on its tax returns. (Trial Tr. 114:20 – 117:3, Jan. 9, 2015)(testimony of Quinones, K.).

53. BMC has never had to treat the membership dues collected by its Wellness Center department as unrelated business income. *Id.*; (*See also* Exhibits Tax Department 7-9).

54. The operations of both the Petitioner and BMC serve to relieve the burdens on state and local government, not only by providing charity health care and preventive health care to the

community, but by, among other things, providing logistical support to local law enforcement agencies. (Trial Tr. 37:5-19, Jan. 9, 2015) (testimony of Snowden, S.); (Trial Tr. 60:12-61:7, Jan. 9, 2015) (testimony of Zalenka, A.).

#### Conclusions of Law

From the totality of the record, and for the following reasons, the Court finds that the Petitioner's use of the Dorothy McCormack Cancer Treatment & Rehabilitation Center, and each of its Suites, satisfies the standard of proof required to support its entitlement to an exemption of the subject property from *ad valorem* property taxation under W.Va. Code §11-3-9(a)(12) and the governing legislative regulations.

1. The Court's review of matters involving questions of taxability of property for *ad valorem* property tax purposes "shall be heard de novo." W.Va. Code §11-3-25(c).
2. The West Virginia Constitution authorizes the Legislature to exempt certain types of property from *ad valorem* property tax by general enactment. W.Va. Const., Art. X, Sec. 1.
3. In the exercise of that authority, the Legislature enacted a statute which exempts, from *ad valorem* property tax various properties including "[p]roperty used for charitable purposes and not held or leased out for profit." W.Va. Code §11-3-9(a)(12). The statute and case law do not require users of the property, like tenants, to themselves qualify as "charitable organizations."
4. The same statute provides that it "does not exempt from taxation any property owned by ... charitable corporations or organizations ... unless such property ... is used primarily and immediately for the [tax exempt] purposes of the corporations or organizations." W.Va. Code §11-3-9(d).
5. Respondents seek to remove the property's *ad valorem* tax status, in part, because for profit entities use the Dorothy McCormick center.

6. Real property that is used exclusively for charitable purposes and is not held or leased for profit is exempt from *ad valorem* real property taxation. W.Va.Code § 11-3-9 (1990); Syl. Pt. 1, *Appalachian Emergency Medical Services, Inc. v. State Tax Commissioner*, 218 W. Va. 550 (2005). In order for real property to be exempt from *ad valorem* property taxation, a two-prong test must be met: (1) the owning 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 CSR § 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 Apts., Inc. v. County Com'n of Brooke Co.*, 202 W.Va. 283 (1998) (Upheld circuit court's decision to apply tax exemption even though tenants were required to pay rent and could be evicted because property was being used for purposes of relieving poverty and for other purposes which are beneficial to the community and was being operated on a break-even basis.)

7. A misinterpretation of the *Wellsburg* text, that it must be "exclusively used for charitable purposes," might lead one to think that none of the functions occurring on the premises may be non-exempt. However, a wider reading of the case and subsequent cases demonstrates that charitable purposes are the indication of the tax exemption and are not thwarted by a user's charging of money. To hold otherwise would be at odds with the reality of how non-profit hospitals operate. For example, a surgical practice may perform operations at a non-profit hospital for the personal profit of the surgeon and his practice without raising the ire of the tax assessor.

8. Though the Court in *Wellsburg Unity Apartments, Inc. v. County Comm'n of Brooke County*, 202 W.Va. 283, 503 S.E.2d 851 (1998), states the degree of charitable use required for exemption as being "exclusive," the West Virginia Supreme Court of Appeals clarified that this

term is interchangeable with the phrase “primarily and immediately” and is not a higher standard than the one required by statute.

9. For example, as *United Hosp. Ctr., Inc. v. Romano*, demonstrates that supporting roles and tasks may exclusively accomplish charitable purposes.

Because the Hospital had relocated its IT department prior to July 1, 2010, to the Bridgeport facility and because that department was fully engaged in providing technology support services necessary to keep the Clarksburg hospital operating until the Hospital was able to fully complete its move to the new facilities, the IT employees were utilizing the physical premises of the Bridgeport facility to accomplish the undisputed charitable purposes of the Hospital. In this day and age, the integral nature of an organization's IT department cannot be seriously debated. Without the IT department and its attendant corporate ability to enable the myriad uses of technology required in a modern hospital, a healthcare facility would be incapable of retrieving patient information; meeting the pharmaceutical needs of those patients; processing insurance and payment information; conducting research; operating its security systems; communicating interdepartmentally; and completing innumerable additional functions necessary to meet the quotidian needs of both staff and patients. In addition to the IT department and its employees, the Hospital had housekeeping employees working to prepare the facilities for the imminent arrival of patients; security employees who were actively guarding the premises; and environmental employees in charge of overseeing the climate needs of the facility. All of these employees who were physically present at the Bridgeport facility were either directly contributing to the provision of charitable purposes that were taking place at another location or they were readying the Bridgeport premises for the facility's forthcoming admission of patients.

*United Hosp. Ctr., Inc. v. Romano*, 233 W. Va. 313, 320-21, 758 S.E.2d 240, 247-48 (2014).

10. The Court further explained that its ruling coincided with State Rules that required exclusive charitable use for property tax exemptions.

W. Va.C.S.R. § 110-3-2.48 (1989) provides as follows:

2.48. The term "primary use" is use which is chief, main or principal.

2.48.1. Whenever property is required to be "used" for stated purposes in order to qualify for exemption under W. Va. Code § 11-3-9, the stated purpose must be the primary or immediate use of the property, and not a secondary or remote use. The property may be used for purposes which are ancillary to the stated purpose, but the ancillary use must further the stated, primary use.

2.48.2. Whenever property is required to be "used exclusively" for stated purposes in order to qualify for exemption under West Virginia Code § 11-3-9, the stated purposes must be the primary and immediate use, and not a secondary or remote use. The property may not be used for purposes which are ancillary to the stated purpose.

*Romano*, 233 at 326.

11. The applicable exemptions state:

(a) All property, real and personal, described in this subsection, and to the extent limited by this section, is exempt from taxation:

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

...  
(d) Notwithstanding any other provisions of this section, this section does not exempt from taxation any property owned by, or held in trust for, educational, literary, scientific, religious or other charitable corporations or organizations, including any public or private nonprofit foundation or corporation existing for the support of any college or university located in West Virginia, unless such property, or the dividends, interest, rents or royalties derived therefrom, is used primarily and immediately for the purposes of the corporations or organizations.

W. Va. Code §11-3-9.

12. This position is also supported by *State ex rel. Cook v. Rose*, 171 W. Va. 392, 395, 299 S.E.2d 3, 6 (1982), overruled on other grounds, wherein the Court found that hospitals that

required pay from patients that did not meet poverty thresholds, could still be considered solely charitable.

[W]here a hospital devotes all proceeds arising from its operation to its maintenance and support and where deficits caused by expenses in excess of receipts are paid by voluntary contributions, and no profit is sought or received by its/their owners, property owned by that hospital is exempt from taxation as a charitable organization.

*Id.*

13. Overall and more simply put, the Court has made it clear that the statute must be applied within the framework hospitals operate. A rational interpretation of the legislature's statute must consider that Hospitals require supporting actors and that these support systems fall within that charitable purpose.

What has always been pivotal in any determination regarding entitlement to tax exemption is the absence of profit making combined with the concurrent incident of public beneficence. In exchange for the indisputable benefits to society, which typically have a consequent reduction in governmental burdens, a tax exemption is extended to the charitable provider. *See Bethesda Gen'l Hosp. v. State Tax Comm'n*, 396 S.W.2d 631, 633-34 (Mo.1965) (recognizing that charitable exemptions are given in return for performance of functions which benefit public, and consequently relieve state's burden to care for and advance interests of its citizenry); Abel, *supra*, 55 W.Va. L.Rev. at 188 (stating that rationale of extending tax exemption for charitable purposes "is a reciprocal of benefit conferred on the people of the state by the exemption beneficiary"). The respondents do not challenge the benefits that the Hospital confers on this state's citizens through its now fully-operational Bridgeport facility. Instead, they seek to benefit from the construction-related delays over which the Hospital appears to have had little control. Not only do we find their approach unduly restrictive, but we have little doubt that it is not in keeping with what this state's constitutional framers intended.

*United Hosp. Ctr., Inc. v. Romano*, 233 W. Va. 313, 321-22, 758 S.E.2d 240, 248-49 (2014).



14. The governing statute and legislative regulation makes it clear that the necessary degree of charitable use is “primary and immediate.” W.Va. Code § 11-3-9(d); W.Va. Code R. § 110-3-19.1.

15. Thus, Syllabus Point 1 of *Romano* expressly recognizes that the legally correct degree of charitable use required by the Legislature: “[u]nder section 1, art. 10, Const., the exemption of property from taxation depends on its use. To warrant such an exemption for a purpose there stated, the use must be primary and immediate, not secondary or remote.” Syl. Pt. 1, *United Hosp. Center, Inc. v. Romano*, 233 W.Va. 313, 758 S.E.2d 240 (2014).

16. In the instant case, the Petitioner is not making a profit and the property is being exclusively used to carry out the charitable purpose of the Petitioner, to directly assist BMC in providing expanded health care services to the citizens of the Eastern Panhandle of West Virginia, and to promote medical care and well-being of the community as a whole.

17. A legislative regulation, adopted, pursuant to the legislative rule-making process set forth in the West Virginia Administrative Procedures Act, for the purpose of implementing a given substantive statutory directive, has “the force of the statute itself.” W.Va. Code §29A-3-1 et. seq.; *Appalachian Power Company v. State Tax Department*, 195 W.Va. 573, at 585, 466 S.E. 2d 424 at 436 (1995).

18. When, due to ambiguity about their meaning, statutory exemptions from taxation are strictly construed against the party claiming the benefit of the exemption. *In re Hillcrest Memorial Gardens*, 146 W.Va. 337, 119 S.E.2d 753, at Syl. Pt. 2 (1981).

19. However, in all events, the construction of the terms of a statutory tax exemption must be rational so as to give effect to the spirit, purpose, and intent of those terms. Syl. Pt. 3, *United*

*Hosp. Center, Inc. v. Romano*, 233 W.Va. 313, 758 S.E.2d 240 (2014), citing Syl. Pt. 3, *State v. Kittle*, 87 W.Va. 526, 105 S. E. 775 (1921).

20. When, as here, the governing tax statute and legislative regulations are clear, and unambiguous, as to their meaning, such authorities are applied and no construction is needed or permitted. *J.D. Moore v. Hardesty*, 147 W.Va. 611, 129 S.E.2d 722 (1963); *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970).

21. When, from the evidence in a particular case, doubt arises as to whether a property owner claiming an exemption from *ad valorem* taxation, is entitled to such exemption, that doubt, as to the factual question of entitlement to the exemption, is resolved against the property owner. *In re Hillcrest Memorial Gardens*, 146 W.Va. 337, 119 S.E.2d 753, at Syl. Pt. 3 (1981); *see, also, e.g. New Vrindaban Community v. Rose*, 187 W.Va. 410, 419 S.E.2d 478 (1992).

22. For purposes of the exemption of the property of charitable organizations from *ad valorem* property tax, the term “‘charitable’ means of, or for, charity” which is, in turn, defined to mean “a gift to be applied ... for the benefit of an indefinite number of persons, either by ... relieving their bodies from disease, suffering or constraint, or by erecting public buildings or works, or otherwise lessening the burdens of government.” W.Va. Code R. §§ 110-3-2.9 and - 2.10.

23. For purposes of those same rules, the term “‘public’ means for the use or benefit of the people in general.” W.Va. Code R. §110-3-2.52.

24. To have their property exempt from *ad valorem* taxes, “[c]harities and others operating property not used for profit are not precluded from exacting charges upon beneficiaries for services rendered, nor are they precluded from deriving profits from total aggregate operations or from individual beneficiaries on a case by case basis so long as aggregate annual operations

produce no significant economic benefit or inurement to private individuals or entities apart from those *which are necessarily incorporated into the operation of the charitable activity.*" W.Va. Code R. §110-3-2.52, emphasis added.

25. For a charitable organization's property to be exempt from *ad valorem* property tax, the owning organization, as is the case here, "must be operated on a not-for-profit basis, must directly benefit society, must be for the benefit of an indefinite number of people, and must be exempt from federal income taxes under [IRC] §§ 501(c)(3) or 501(c)(4). Moreover, in order for [its] property to be exempt, the primary and immediate use of the property must be for one or more exempt purposes." W.Va. Code R. §110-3-19.1.

26. In the instant case, there is no dispute that the Petitioner is a non-profit, charitable organization.

27. When a charitable organization seeks to claim exemption from *ad valorem* tax for its property, its payment, as here, "of reasonable salaries or wages to administrative staff and employees of a charitable organization will not constitute disqualifying private gain if such salaries or wages closely approximate pay rates for comparable positions and are not for the purpose of siphoning off earnings (sic) of the organization." W.Va. Code R. §110-3-19.4.

28. Here, there is no allegation of such conduct. Likewise, if a charitable organization seeks to claim exemption from *ad valorem* tax for its property, it can still earn a surplus of its revenues over its operating expenses "[s]o long as any surplus or earnings are used in furtherance of the charitable activities of the organization, no disqualifying gain can be said to inure to the benefit of any private person." W.Va. Code R. §110-3-19.5. Further, though Petitioner is UHF, a supporting non-profit organization to the Hospital, West Virginia Code Regulations demonstrate the reasonable and rational interpretation of the statutory tax exemption at issue.

29. "Private gain" or "significant economic benefit accruing to any individual or entity other than the charitable hospital," which would otherwise disqualify a "charitable hospital" from claiming exemption from *ad valorem* tax for its property, "does not include payments for the receipt of reasonable goods and services which are furnished to the hospital under valid arms-length contracts..." W.Va. Code R. §110-3-24.1.3.

30. "As long as any surplus of the [charitable hospital] is used to continue its charitable activities, no disqualifying gain can be said to inure to the benefit of any private individual. For purposes of these regulations, surplus is the excess of net earnings over the expenditures incurred producing the net earnings." W.Va. Code R. §110-3-24.1.4.

31. "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 any one of the following or combination of elements listed below: 24.2.1. The provision of health services on an inpatient or outpatient basis to individuals who cannot afford to pay for such services in a volume and frequency determined by the hospital board of trustees, as articulated in the charity care plan of the hospital. 24.2.2. The provision of activities which promote the health of the community served by the hospital and/or decrease the burdens of state, county and municipal governments." W.Va. Code R. §110-3-24.2.

32. Though the determination that a charitable hospital is exempt from federal income tax under IRC §§ 501(c)(3) and 501(c)(4) is not, alone, conclusive of whether its property is exempt from *ad valorem* property tax, under the general requirements for charitable organizations under the governing legislative rule, such a determination, and the treatment of the hospital and its revenues for federal income tax purposes, is one of the essential requirements for such property tax exemption. W.Va. Code R. §§ 110-3-19.1 and 110-3-24.8.8.

33. In order to obtain and maintain status as a charitable organization exempt from federal income taxes, such an organization must show, *inter alia*, that no part of its revenues inure to the benefit of a private individual or entity. IRC §501(c)(3),

34. The prohibition against private inurement for a charitable organization claiming exemption of its property from *ad valorem* property tax is the same standard as that applied for federal income tax exemption purposes. W.Va. Code R. §110-3-19.5.

35. “The quantity of free and below cost health care which a [charitable] hospital can provide, therefore, is necessarily limited to the amount which can be reasonably provided consistent with the maintenance of the economic well-being and fiscal soundness of the hospital.” W.Va. Code R. §110-3-24.9.2.

36. “In addition to providing charitable medical care, a hospital may provide other volunteer and community services which also assist in relieving the burdens of government. ... The volunteer and community services which may be utilized for ... purpose [of qualifying the hospital for exemption of its property from *ad valorem* property taxation] include[s], but [is] not necessarily limited to ... 24.10.1 [p]ublic education programs relating to preventive medicine or the public health of the community.” W.Va. Code R. §110-3-24.10.

37. Charitable hospitals “may provide space for use by physicians in connection with hospital related responsibilities.” W.Va. Code R. §110-3-24.5.2.

38. “Use of charitable property for [recreational activities] may be considered reasonably necessary or incidental to the primary functions of a [charitable] hospital provided certain conditions are met. Recreation may be recognized for its therapeutic value to patients, the main beneficiary of the hospital’s services. Additionally, use of recreational facilities by any person or group of people who has or have been identified as high risk for any disease, condition or malady

or recovering from such disease, condition or malady (e.g. pre or post heart attack, stroke recovery, or weight reduction) will not jeopardize the exempt status of hospitals provided such programs constitute preventative or rehabilitative health care. In such instances, the hospital may charge for the use of such facilities by inpatients or outpatients without danger to its exempt status. ... 24.6.3. The primary and repeated use of facilities for mere recreational reasons by the general public, charged for such utilization, is not consistent with charitable use." W.Va. Code R. §110-3-24.6.

39. A charitable "hospital may lease a portion of its space to private business for the purpose of furnishing necessary segments of the normal hospital operation; e.g. leasing space to a third party to operate a for-profit pharmacy. Total leased areas [of the charitable hospital] shall not be more than ten percent (10%) of the available floor space of the hospital; available floor space shall be all floor space exclusive of maintenance areas or common areas such as hallways and stairways." W.Va. Code R. §110-3-24.11.1.1.

40. A hospital complex may include more than one building or structure. W.Va. Code R. §110-3-24.11.1.2

41. Applicable federal Medicare and Medicaid statutes, and the regulations implementing them, require that, when a participating hospital leases space to affiliated health care providers, to or from whom patients are referred to it for services, such leases charge market-based rental rates. 42 U.S.C. §1395nn.

42. "A [charitable] 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:

... [t]he operation of a parking facility, ... of a pharmacy. ... of a cafeteria or coffee shop, and ... of a gift shop.” W.Va. Code R. §110-3-24.15.

43. “A [charitable] hospital may lease part of a tract out for an (sic) legal use and retain the tax exemption ... so long as the primary and immediate use of the tract is charitable in accordance with Section 19 of these regulations...” W.Va. Code R. §110-3-24.16.

44. When the implementation of a charitable organization’s charitable purpose inherently requires that some personal benefit be conferred on individuals, either in the form of free or below-market rental housing, or in the form of arms-length compensation for services rendered, or of market-based rents paid or received for the use of space, none of those circumstances operate to deny the charitable organization’s entitlement to exemption of its property from *ad valorem* tax so long as the organization is exempt from federal income tax pursuant to IRC §§501(c)(3) or 501(c)(4), and its use of such property is primarily and immediately for its charitable purpose, and the property is not held or leased out for profit as defined above. *United Hospital Center, Inc. v. Romano*, 233 W.Va. 313, 758 S.E.2d 240 (2014) (citing Syl. Pt. 3, *Wellsburg Unity Apartments, Inc. v. County Commission of Brooke County*, 202 W.Va. 283, 503 S.E.2d 851 (1998)).

45. Though not controlling for *ad valorem* property tax purposes, it is worth noting that the West Virginia Supreme Court has held that, in construing an exemption for charitable organizations from municipal business and occupation tax, the fact that 34% of a charitable healthcare organization’s revenues went to pay the compensation of its employed healthcare professionals did not preclude the organization’s entitlement to the tax exemption. *City of Morgantown v. West Virginia University Medical Corporation*, 193 W.Va. 614, 457 S.E.2d 637 (1995).

46. However, if the renting of its property by a charitable organization is simply to raise money for its charitable purposes, that does not satisfy the requirement that, to be exempt from *ad valorem* property tax a property must be used for its charitable purpose. *Central Realty Co. v. Martin*, 126 W.Va. 915, 30 S.E.2d 720 (1944) and *State v. McDowell Lodge, No. 112, A.F. & A.M.*, 96 W.Va. 611, 123 S.E. 561 (1924).

47. Where, as here, the renting of its property by charitable organization is for the functional and operational achievement of its charitable purposes, the rule requiring use of such property for the charitable owner's charitable purposes is satisfied. *United Hospital Center, Inc. v. Romano*, 233 W.Va. 313, 758 S.E.2d 240 (2014) (citing Syl. Pt. 3, *Wellsburg Unity Apartments, Inc. v. County Commission of Brooke County*, 202 W.Va. 283, 503 S.E.2d 851 (1998)).

48. Separate interests in properties, whether part of a single structure, or otherwise, which are subject to the Uniform Common Interest Ownership Act, are separately assessed for *ad valorem* property tax purposes. W.Va. Code §§ 36B-1-105. See, also, *Pope Properties etc. v. Robinson*, 230 W.Va. 382, 738 S.E.2d 546 (2013).

49. The cardiac rehabilitation services provided to BMC patients at the Wellness Center in the Dorothy McCormack Cancer Treatment & Rehabilitation Center to BMC's patients are recognized for their therapeutic value to those patients, and are primarily and immediately related to BMC's and the Petitioner's common charitable purposes *Appalachian Emergency Medical Services, Inc.*, 218 W.Va. 550, 625 S.E.2d 312 (2005).

50. The other rehabilitative and preventive healthcare services, provided by the Wellness Center at the Dorothy McCormack Cancer Treatment & Rehabilitation Center, for both BMC's patients and its other members from the general public, are primarily and immediately related to BMC's and the Petitioner's common charitable purposes because they are specifically addressed



to persons and groups of persons at high risk for various diseases, conditions or maladies, including, for example pre or post heart attack, stroke recovery or weight reduction, and such services are recognized for their therapeutic value to those patients. *Appalachian Emergency Medical Services, Inc.*, 218 W.Va. 550, 625 S.E.2d 312 (2005); W.Va. Code R. §110-3-24.6.

51. By providing a safe, non-intimidating environment in which individuals with, or at risk for, health problems can work to improve their health under the supervision of healthcare professionals, the Wellness Center offers far more than mere recreational use to its members. Thus, such rehabilitative and preventive health services are not for the mere recreational use of the public, but, rather, primarily and immediately promote the common charitable purposes of BMC and of the Petitioner. *Id.*

52. By providing volunteer and community services which also assist in relieving the burdens of government, including, but not limited to, public education programs relating to preventive medicine or the public health of the community, the Wellness Center at the Dorothy McCormack Cancer Treatment & Rehabilitation Center is primarily and immediately used for BMC's and the Petitioner's common charitable purposes. W.Va. Code R. §§ 110-3-24.6, -24.10 and 24.16.

53. Thus the Petitioner's leasing of Suites in the Dorothy McCormack Cancer Treatment & Rehabilitation Center to BMC for outpatient treatment and testing, and diabetes education, is directly, primarily and immediately related to the accomplishment of the common charitable purposes of the Petitioner and BMC. *Appalachian Emergency Medical Services, Inc.*, 218 W.Va. 550, 625 S.E.2d 312 (2005); W.Va. Code R. §110-3-24.16.

54. The Petitioner's leasing of Suites in the Dorothy McCormack Cancer Treatment & Rehabilitation Center to UHP for offices for staff physicians, providing an array of medical specialty services to BMC's patients, is directly, primarily and immediately related to the

accomplishment of the common charitable purposes of the Petitioner and BMC. *Appalachian Emergency Medical Services, Inc.*, 218 W.Va. 550, 625 S.E.2d 312 (2005); W.Va. Code R. §§ 110-3-24.5.2 and -24.16.

55. The Petitioner's leasing of a Suite in the Dorothy McCormack Cancer Treatment & Rehabilitation Center to Ambergris, LLC for its cancer radiation treatment of BMC patients, is not for a "non-medical" or "ancillary" function, but, instead, is directly, primarily and immediately related to the accomplishment of the common charitable purposes of the Petitioner and BMC. *Appalachian Emergency Medical Services, Inc.*, 218 W.Va. 550, 625 S.E.2d 312 (2005); W.Va. Code R. §§ 110-3-24.11.1.1, -24.15 and -24.16,

56. The Petitioner's leasing of a Suite in the Dorothy McCormack Cancer Treatment & Rehabilitation Center to Dr. Bowen, as a practicing physician in general and as director of BMC's cardiac rehabilitation program in particular, is not for a "non-medical" or "ancillary" function, but, instead, is directly, primarily and immediately related to the accomplishment of the common charitable purposes of the Petitioner and BMC. *Id.* But for the leasing of the suite to such a doctor, the Petitioner and BMC would be precluded from offering cardiac rehabilitation.

57. The Petitioner's leasing of a Suite in the Dorothy McCormack Cancer Treatment & Rehabilitation Center to Patient Transport, is not for a "non-medical" or "ancillary" function, but, instead, is directly, primarily and immediately related to the accomplishment of the common charitable purposes of the Petitioner and BMC. *Id.*

58. Because, for the tax year in question, the Petitioner did not realize a surplus of revenues over expenditures from its ownership and maintenance of any of units/suites of the Dorothy McCormack Cancer Treatment & Rehabilitation Center, including the Wellness Center, the

subject property was not held or leased out for profit. *Appalachian Emergency Medical Services, Inc.*, 218 W.Va. 550, 625 S.E.2d 312 (2005).

59. Because, for the tax year in question, BMC did not realize a surplus of revenues over expenditures from its use of any of the units/suites it leased at the Dorothy McCormack Cancer Treatment & Rehabilitation Center, including the Wellness Center, the subject property was not held or leased out for profit. *Id.*

60. Even if the Petitioner had realized an accounting profit or surplus from its ownership and use of the Dorothy McCormack Cancer Treatment & Rehabilitation Center, or any of its Suites, including the Wellness Center, such profit or surplus would be required, by federal income laws governing its tax-exempt status, to be applied entirely to its charitable purposes. Therefore the subject property would not be held or leased out for profit. W.Va. Code R. §110-3-19.5.

61. Even if the BMC had realized an accounting profit or surplus from its use of the Suites it leases at the Dorothy McCormack Cancer Treatment & Rehabilitation Center, including the Wellness Center, such profit or surplus would be required, by federal income tax laws governing its tax-exempt status, to be applied entirely to its charitable purposes. Therefore the subject property would not be held or leased out for profit. W.Va. Code R. §110-3-24.1.4.

62. The Petitioner holds and uses the Dorothy McCormack Cancer Treatment & Rehabilitation Center, and each of its Suites, primarily and immediately for its charitable purposes and it does not hold or rent them out for profit. W.Va. Code §11-3-9(a)(12).

63. The Dorothy McCormack Cancer Treatment & Rehabilitation Center, and each of its Suites, are exempt from *ad valorem* property tax for tax year 2014. *Id.*

While exemptions are strictly construed, they must also be applied rationally. To apply the exemption in the way Respondents request would preclude growth of the health care systems

in West Virginia. The nature of healthcare, with its regulatory, insurance, and competitive schemes has changed the face of charitable hospitals from small facilities with fifty beds and limited services to ones that strive to provide patients with the benefits and services that would be unattainable to a hospital operating under the Respondent's rubric. To hold otherwise would run afoul the obvious objective of the exemption and legislative intent: to relieve the burden of taxation to promote charitable function. From the totality of the record, the Court finds that the Petitioner's use of the Dorothy McCormack Cancer Treatment & Rehabilitation Center, and each of its Suites, satisfies the standard of proof required to support its entitlement to an exemption of the subject property from *ad valorem* property taxation under W.Va. Code §11-3-9(a)(12) and the governing legislative regulations.


WHEREFORE, it is ORDERED and ADJUDGED that the Assessor's Denial of *Ad Valorem* Property Tax Exemption, and the Tax Commissioner's Taxability Ruling 14-1, are REVERSED AND OVERRULED. The Respondent's exceptions are noted.

The Clerk shall enter this Order as of the date noted below and shall transmit a true copy of the same to the parties' respective counsel.

ENTER this 8 day of May, 2015.

  
CHRISTOPHER C. WILKES, JUDGE  
BUSINESS COURT DIVISION

A TRUE COPY  
ATTEST

Virginia M. Sine  
Clerk Circuit Court  
By:   
Deputy Clerk