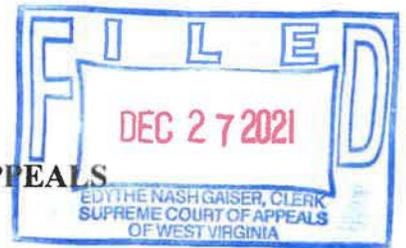


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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

APPEAL NOS. 21-0521 AND 21-0517

**MARK MUSICK, ASSESSOR OF MONONGALIA COUNTY,
Respondent Below, Petitioner**

v.

**BETA THETA PI FRATERNITY OF W.V.U., INC.
Petitioner Below, Respondent**

**DO NOT REMOVE
FROM FILE**

AND

**MATTHEW R. IRBY, WEST VIRGINIA STATE TAX COMMISSIONER,
Respondent Below, Petitioner,**

v.

**BETA THETA PI FRATERNITY OF W.V.U., INC.
Petitioner Below, Respondent**

**SUPREME COURT BRIEF OF THE
RESPONDENT BETA THETA PI FRATERNITY OF W.V.U., INC.**

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE. 1

II. STATEMENT REGARDING ORAL ARGUMENT. 4

III. STANDARD OF REVIEW 4

IV. SUMMARY OF ARGUMENT 5

V. ARGUMENT 6

1. The Circuit Court was correct in its application of West Virginia Code Section 11-3-9(a)(15) to the facts of this matter, in that the Beta property is exempt from ad valorem property tax as “real estate not exceeding one acre in extent, and the buildings on the real estate, used exclusively by any college or university society as a dormitory, if not used with a view to profit” 6

2. The Circuit Court correctly determined that the Administrative Decision and Ruling of the State Tax Commissioner and relied on by the Assessor is clearly wrong and correctly held that the Beta property as now being used is exempt from ad valorem real property taxation. 8

3. The Circuit Court properly found and determined that WVC Section 11-3-9, allows several exemptions, not just one. The property which is exempt under Subsection (15) includes:

(1) used exclusively by any college or university society as a literary hall, or as a dormitory or clubroom; OR

(2) including, but not limited to property owned by a fraternity or sorority organization affiliated with a university or college; OR

(3) property owned by a nonprofit housing corporation or similar entity on behalf of a fraternity or sorority organization affiliated with a university or college, when the property is used as residential accommodations (dormitory). 9

VI. CONCLUSION. 13

TABLE OF AUTHORITIES

Cases Cited in Standard of Review:

Gino’s Pizza of W. Hamlin, Inc. v. WV Human Rights Comm’n, 187 W.Va. 312, 418 S.E.2d 758
Operations Co., Inc. v. Tax Comm’r. of State of W.Va., 211 W.Va. 198, 564 S.E.2d 401
(2002).(1992). 4
Mayhew v. Mayhew, 197 W.Va. 290, 475 S.E.2d 382 (1996)(Albright, J.). 5
Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 416 91995). 5
Solution One Mortg. LLC v. Helton, 216 W.Va. 740, 613 S.E.2d 601 (2005). 5
Davis Memorial Hosp. v. W.Va. State Tax Comm’r., 222 W.Va. 677, 5
671 S.E.2d 682 (2008). 5
CB&T 5
Muscatell v. Cline, 196 W.Va. 588, 474 S.E.2d 518 (1996).. 5
Noble v. W.Va. Dept. Motor Vehicles, 223 W.Va. 818, 821 (W.Va. 2009) 5
Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 114 (1996). 5
Walker v. West Virginia Ethics Comm’n, 201 W.Va. 108, 492 S.E.2d 167 (1997). 5

Cases Cited in Argument:

Central Realty Co. v. Martin, 126 W.Va. 915, 30 S.E.2d 720 (1944). 7, 9
Gino’s Pizza of W. Hamlin, Inc. v. WV Human Rights Comm’n, 187 W.Va. 312, 418 S.E.2d 758
(1992). 7, 8
Matkovich v. University Healthcare Foundation, Inc., 238 W.Va. 345, 795 S.E.2d 67 (2016) .. 12
Patterson Memorial Fund v. James, 120 W.Va. 155, 197 S.E. 302 (1938). 7

State ex rel. Hardesty v. Aracoma - Chief Logan No. 4523, Veterans of Foreign Wars of U.S., Inc.,
147 W.Va. 645, 129 S.E.2d 921 (1963)..... 7

State v. McDowell Lodge, 96 W.Va. 611, 123 S.E.2d 561 (1924) 12

In re Tax Assessment of Woodlands, 672 S.E.2d 150 (W. Va. 2008). 9

Statutes:

West Virginia Code Section 11-3-9..... 6

**SUPREME COURT BRIEF OF THE
RESPONDENT BETA THETA PI FRATERNITY OF W.V.U., INC.**

I. Statement of the Case

This matter arose from an appeal by Beta Theta Pi Fraternity of W.V.U., Inc., Respondent/Petitioner Below, to the Circuit Court of Monongalia County, West Virginia from the State Tax Commissioner's Property Tax Ruling 20-36, included in the Joint Appendix at JA-000014-000020, which Ruling determined "that the property of Beta Theta Pi Fraternity House, Inc., located at 225 Belmar Avenue, Morgantown, Monongalia County, is not eligible for exemption from ad valorem property taxation". The Circuit Court properly ruled in its Final Order of the Court, found in the Joint Appendix at JA 000175-183, that the Property Tax Ruling was incorrect and that the property of Beta Theta Pi Fraternity of W.V.U., Inc. (herein referred to as "Beta") continues to be exempt from ad valorem property tax. Both the State Tax Commissioner and Assessor appealed to the Supreme Court of Appeals of West Virginia.

The facts of the case are set out in the Circuit Court's opinion and Order, found in the Joint Appendix at JA 000175-183, as follows:

1. MARK MUSICK, ASSESSOR OF MONONGALIA COUNTY, WEST VIRGINIA, initially instituted a request for an ad valorem real property taxability ruling pursuant to W.Va.Code Section 11-3-24a, with regard to certain real property owned or used by certain organizations and/or property owners, Beta being one of those organizations, which request was made to DALE W. STEAGER, WEST VIRGINIA STATE TAX COMMISSIONER. A copy of the Assessor's Request letter dated December 13, 2019, is included in the Joint Appendix at JA-000021-000053. A copy of the Beta's Response to the Request for the ruling is included in the Joint Appendix at JA-000054-000060.

2. The State Tax Commissioner's Property Tax Ruling 20-36 is included in the Joint Appendix at JA-000014-000020, and determined "that the property of Beta Theta Pi Fraternity House, Inc., located at 225 Belmar Avenue, Morgantown, Monongalia County, is not eligible for exemption from ad valorem property taxation under W.Va. Code Section 11-3-9(a)(15) as property owned by a fraternity or sorority organization affiliated with a college or university and used as residential accommodations or as a dormitory for members of the organization", and is adverse to BETA THETA PI FRATERNITY OF W.V.U., INC.

3. This matter was instituted by BETA THETA PI FRATERNITY OF W.V.U., INC., as an appeal from the Administrative Decision, alleging that Beta is aggrieved by the Administrative Decision, which is entitled PROPERTY TAX RULING 20-36 ISSUED PURSUANT TO WEST VIRGINIA CODE 11-3-24a, and which was addressed to MARK MUSICK, ASSESSOR OF MONONGALIA COUNTY, WEST VIRGINIA, and dated FEBRUARY 24, 2020, and which decision is in favor of MARK MUSICK, ASSESSOR OF MONONGALIA COUNTY, WEST VIRGINIA, and adverse to the interests of the BETA THETA PI FRATERNITY OF W.V.U., INC.

4. BETA THETA PI FRATERNITY OF W.V.U., INC. is a non-profit housing corporation which owns a fraternity (dormitory type) house and lot located at 224 Belmar Avenue, Morgantown, Monongalia County, West Virginia.

5. MARK MUSICK, ASSESSOR OF MONONGALIA COUNTY, WEST VIRGINIA, and DALE W. STEAGER, WEST VIRGINIA STATE TAX COMMISSIONER, of the State of West Virginia, are governmental agencies of the County of Monongalia, and of the State of West Virginia, respectively.

6. The Circuit Court of Monongalia County, West Virginia, has jurisdiction over the original

Petition pursuant to the provisions of West Virginia Code Section 29A-5-4, as it is appeal by a party adversely affected by a final decision in a contested case under the West Virginia State Administrative Procedures Act, for which Beta is entitled to judicial review thereof, and as the real property in question is located in Monongalia County, West Virginia.

7. BETA THETA PI FRATERNITY OF W.V.U., INC. is aggrieved by the Property Tax Ruling 20-36, which is an administrative decision of the of the State of West Virginia, dated February 24, 2020, and postmarked and mailed February 24, 2020, and received by the Beta on February 25, 2020, which administrative decision is adverse to the Beta in that it would impose ad valorem real property tax on the real property of Beta, which property is exempt from the tax by statute.

8. Beta Theta Pi Fraternity of W.V.U., Inc. is the legal entity which owns the real property located as 225 Belmar Avenue, in Morgantown, West Virginia, and Beta is affiliated with the national Beta Theta Pi Fraternity, located at Miami, Ohio on the campus of Miami University of Ohio where it was founded, and with the local fraternal organization Beta Theta Pi Fraternity, which used the property as its fraternity house and dormitory for its student members who attended West Virginia University.

9. The local fraternal organization at West Virginia University Beta Theta Pi Fraternity had a charter from the national fraternity Beta Theta Pi, due to certain student activities which the national organization did not condone, although alumni of the fraternity are seeking to recharter the local chapter.

10. Beta Theta Pi Fraternity of W.V.U., Inc. is a non-profit housing corporation managed by alumni of the national fraternity Beta Theta Pi, who are generally former members of the local fraternal chapter of Beta Theta Pi at West Virginia University. Beta Theta Pi Fraternity of W.V.U.,

Inc. is the owner and holds the legal title to the house and lot at 225 Belmar Avenue, Morgantown, West Virginia.

11. As a non-profit housing corporation, Beta rented the fraternity house out to members of the local fraternal organization chapter at West Virginia University Beta Theta Pi Fraternity.

12. When the charter of the local fraternal organization at West Virginia University Beta Theta Pi Fraternity was revoked by the national fraternity (not West Virginia University), Beta continued to rent the property to other fraternal organization chapters at West Virginia University, including Sigma Pi Epsilon Fraternity, and Pi Kappa Alpha Fraternity, and Alpha Omnia Fraternity, all fraternal organizations on the WVU campus. At all times the property was used as a fraternity dormitory house by local WVU affiliated fraternal organizations. It was never rented out to the public or non-fraternity members or organizations.

II. STATEMENT REGARDING ORAL ARGUMENT

Respondent Beta Theta Pi Fraternity of W.V.U., Inc. requests a Rule 20 Oral Argument pursuant to Rules of Appellate Procedure as involving issues of fundamental public importance in the administration of the State tax laws.

III. STANDARD OF REVIEW

An administrative decision, such as the Property Tax Ruling 20-36, which is based upon a finding of facts which is contrary to the evidence, or is not supported by the evidence, or is based on a mistake of law, or which is clearly wrong, will be reversed and set aside. See *Gino's Pizza of W. Hamlin, Inc. v. WV Human Rights Comm'n*, 187 W.Va. 312, 418 S.E.2d 758 (1992). This Court and the Circuit Court below have the authority to reverse, vacate, or modify an administrative decision of a state agency if the decision issued was in violation of constitutional or statutory provisions, in

excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedures, affected by other error, clearly wrong in view of the reliable, probative and substantial evidence in the whole record, or arbitrary or capricious or characterized by an abuse of discretion or by a clearly unwarranted exercise of discretion. W.Va. Code Sections 11-10-A-19(f) and 29A-5-4(g).

Legal issues are subject to de novo review. *Mayhew v. Mayhew*, 197 W.Va. 290, 475 S.E.2d 382 (1996)(Albright, J.); *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 416 (1995); *Solution One Mortg. LLC v. Helton*, 216 W.Va. 740, 613 S.E.2d 601 (2005). Syl.Pt. 1, *Davis Memorial Hosp. v. W.Va. State Tax Comm'r.*, 222 W.Va. 677, 671 S.E.2d 682 (2008); Syl.Pt. 1. *CB&T Operations Co., Inc. v. Tax Comm'r. of State of W.Va.*, 211 W.Va. 198, 564 S.E.2d 401 (2002); *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

Underlying factual findings are reviewed under a clearly erroneous standard. See Syl. Pt. 2, *CB&T Operations Co., Inc. v. Tax Comm'r. of State of W.Va.*, 211 W.Va. 198, 564 S.E.2d 401 (2002); *Noble v. W.Va. Dept. Motor Vehicles*, 223 W.Va. 818, 821 (W.Va. 2009); Syl. pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996). Accord Syl. pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997) ("In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review underlying factual findings under a clearly erroneous standard.. Questions of law are subject to a de novo review.")...

IV. SUMMARY OF THE ARGUMENT

The Circuit Court properly determined and ruled that the Property Tax Ruling of the State Tax Commissioner was incorrect and that the property of Beta Theta Pi Fraternity of W.V.U., Inc.

continues to be exempt from ad valorem property tax under West Virginia Code Section 11-3-9(a)(15), in that the Beta property is “real estate not exceeding one acre in extent, and the buildings on the real estate, used exclusively by any college or university society as a dormitory, if not used with a view to profit”.

V. ARGUMENT

1. The Circuit Court was correct in its application of West Virginia Code Section 11-3-9(a)(15) to the facts of this matter, in that the Beta property is exempt from ad valorem property tax as “real estate not exceeding one acre in extent, and the buildings on the real estate, used exclusively by any college or university society as a dormitory, if not used with a view to profit”.

West Virginia Code Section 11-3-9, “Property exempt from taxation”, provides, in pertinent part:

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

* * *

(15) All real estate not exceeding one acre in extent, and the buildings thereon, **used exclusively by any college or university society as a literary hall, or as a dormitory** or clubroom, if not used with a view to profit, *including, but not limited to*, property owned by a fraternity or sorority organization affiliated with a university or college, **or property owned by a nonprofit housing corporation or similar entity on behalf of a fraternity or sorority** organization affiliated with a university or college, when the property is used as residential accommodations, or as a dormitory for members of the organization;” (Emphasis added.)

The State Tax Commissioner assigns as error: “A.iii” The circuit court did not properly apply the elements of W.Va. Code Section 11-3-9(a)(15) because the court did not apply the statute as written and added additional commas and words not present in the original statute. Beta disagrees. the statute is set out above EXACTLY as it reads in the code book. There is clearly an exemption (“All real estate not exceeding one acre in extent, and the buildings thereon, **used exclusively by any college or university society as a literary hall, or as a dormitory** or clubroom, if not used with

a view to profit”) and an addition or explanation, which states “including, but not limited to” particular organizations (property owned by a fraternity or sorority organization affiliated with a university or college, **or property owned by a nonprofit housing corporation or similar entity on behalf of a fraternity or sorority** organization affiliated with a university or college, when the property is used as residential accommodations, or as a dormitory for members of the organization;”). The State Tax Commissioner apparently only wants to apply the addition or explanation section, while the Circuit Court applied the statute itself, the primary exemption: “All real estate not exceeding one acre in extent, and the buildings thereon, **used exclusively by any college or university society as a literary hall, or as a dormitory** or clubroom, if not used with a view to profit”. The State Tax Commissioner is wrong and was wrong in Property Tax Ruling 20-36 and the Circuit Court was clearly correct in its strict application of the statute.

The Assessor assigns as error that “The Circuit Court erred in holding the real property is issue was exempt from taxation by its failure to apply a reasonable and rational interpretation and application of W.Va. Code Section 11-3-9(a)(15) as required by law. Beta disagrees. It is clear that the Constitutional and statutory provisions exempting property from taxation are to be strictly construed. *Central Realty Co. v. Martin*, 126 W.Va. 915, 30 S.E.2d 720 (1944). However, while judicial construction of tax exemptions should be strict, it should be *rational*. *Patterson Memorial Fund v. James*, 120 W.Va. 155, 197 S.E. 302 (1938).

For example, see *State ex rel. Hardesty v. Aracoma - Chief Logan No. 4523, Veterans of Foreign Wars of U.S., Inc.*, 147 W.Va. 645, 129 S.E.2d 921 (1963), which held that a veterans organization was not deprived of its exemption by reason of its practice of permitting member to invite guests into its restaurant facilities. On the other hand *Central Realty Company v. Martin*, 126

W.Va. 915, 30 S.E. 720 (1944), determined that an Odd Fellows property which was completely rented out to a hotel corporation and used as storerooms for commercial purposes was clearly not exempt as being used for profit. Clearly, the concept of "rationality" applies to grant exemption for general compliance with the statute, but not where the situation is clearly adverse to the requirements of the statute.

2. The Circuit Court correctly determined that the Administrative Decision and Ruling of the State Tax Commissioner and relied on by the Assessor is clearly wrong and correctly held that the Beta property as now being used is exempt from ad valorem real property taxation.

The Assessor assigns as error that "The Circuit Court erred in reversing Property Tax Ruling 20-36", and "The Court erred in not giving deference to the Tax Commissioner's Property Tax Ruling 20-36."

An administrative decision, such as the Property Tax Ruling 20-36, which is based upon a finding of facts which is contrary to the evidence, or is not supported by the evidence, or is based on a mistake of law, or which is clearly wrong, **will be reversed and set aside**. See *Gino's Pizza of W. Hamlin, Inc. v. WV Human Rights Comm'n*, 187 W.Va. 312, 418 S.E.2d 758 (1992).

Property Tax Ruling 20-36, issued by the State Tax Commissioner in this case, page 6, (Joint Appendix 000018) states:

"The statute sets forth three criteria for this exemption:

- (1) The property must be owned by a fraternity organization affiliated with the University;
- (2) The property must be used as residential accommodations or as a dormitory;
- (3) That use must be by members of the organization."

The Ruling then states that Beta's property in question fails to meet (1) and (3). This is in clear error. The property is clearly being used by fraternal organizations affiliated with WVU and used by members of the organization renting the facility. The property is not being rented out to the public at large, and it is and always has been used by fraternity members. The Administrative

Decision of the State Tax Commissioner is not “rational” in its application. It may be “strict”, but it does not comport completely with the statute. The statute is being followed by Beta in its efforts to keep and maintain the property for the use of fraternities and ultimately for another Beta Theta Pi chapter when recolonized. In the meantime, the statute is clearly being complied with. The Property Tax Ruling is clearly wrong and for that reason requires no deference.

No doubt that if it was rented out for other purposes, rather than fraternal, it would be taxable, just as in *Central Realty Company v. Martin*, 126 W.Va. 915, 30 S.E. 720 (1944), cited above, where the rental was for purely commercial purposes.

In re Tax Assessment of Woodlands, 672 S.E.2d 150 (W. Va. 2008), belies this assertion of three criteria, with the statement: “[T]o be exempt from ad valorem property taxation, a two-prong test must be met: (1) the corporation or other entity must be deemed to be a charitable organization; 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...”. In the instant Beta Theta Pi case, the word “fraternal” would be substituted for “charitable”, in both places, and the criteria of the statute is met: “the corporation must be deemed to be a fraternal organization and the property must be used exclusively for fraternal purposes and no be held or leased out for profit”.

The Beta Theta Pi property is not being “used” for profit, but for the fraternal purposes of the statute, as it is no more rented out for profit to the local fraternities using it than it was rented out previously to members of the local Beta Theta Pi chapter. Both uses are the same: fraternity dormitories.

3. The Circuit Court properly found and determined that WVC Section 11-3-9, allows several exemptions, not just one. The property which is exempt under Subsection (15) includes:
 - (1) used exclusively by any college or university society as a literary hall, or as a dormitory

or clubroom; OR

(2) including, but not limited to property owned by a fraternity or sorority organization affiliated with a university or college; OR

(3) property owned by a nonprofit housing corporation or similar entity on behalf of a fraternity or sorority organization affiliated with a university or college, when the property is used as residential accommodations (dormitory).

The statute, WVC Section 11-3-9, allows several exemptions, not just ONE, as the State Tax Commissioner and Assessor seem to misunderstand. The property which is exempt under Subsection (15) includes properties:

(1) used exclusively by any college or university society as a literary hall, or as a dormitory or clubroom; OR

(2) **including, but not limited to** property owned by a fraternity or sorority organization affiliated with a university or college; OR

(3) property owned by a nonprofit housing corporation or similar entity on behalf of a fraternity or sorority organization affiliated with a university or college, when the property is used as residential accommodations (dormitory).

Clearly the Beta property meets the criteria of the statute. The Administrative Decision and Ruling of the State Tax Commissioner and relied on by the Assessor is clearly wrong. Under the standard of review, the Circuit Court had no other option but to reverse and disapprove that Ruling and hold that the property as now being used is exempt from ad valorem real property taxation.

State Tax Commissioner assigns as error that “A.i. The circuit court erred because BTP Housing Corp failed to satisfy the first element of W.Va. Code Section 11-3-9(a)(15) in that it does not hold the property on behalf of local fraternity that is affiliated with West Virginia University.” and “Aii. The circuit court erred in determining that W.Va. Code Section 11-3-9(a)(15) does not

require the BTP Housing Corp. to house members of a local fraternity chapter of Beta Theta Pi.” Beta disagrees as the statute clearly makes NO such requirements.

This assertion completely misreads the applicable statute: The statute exempts “(15) All real estate not exceeding one acre in extent, and the buildings on the real estate, used exclusively by any college or university society as ...dormitory... or property owned by a nonprofit housing corporation on behalf of a fraternity or sorority affiliated with a university or college.” The Circuit Court found in Fact No. 12: “Beta continued to rent the property to other fraternal organization chapters at West Virginia University, including Sigma Pi Epsilon Fraternity, and Pi Kappa Alpha Fraternity, and Alpha Omnia Fraternity, all fraternal organizations on the WVU campus. At all times the property was used as a fraternity dormitory house by local WVU affiliated fraternal organizations. It was never rented out to the public or non-fraternity members or organizations. The State Tax Commissioner wants only to read the second part of the statute which clearly states “including, but not limited to...members of the organization. Unfortunately, for the State Tax Commissioner the Circuit Court property read the FIRST part of the statute and did not need to address the “including, but not limited to” portion.

The fraternities using Beta’s property *are fraternities affiliated with WVU and use the building as a dormitory for their members.* There is nothing requiring one particular fraternity or another from using the property. The State Tax Commissioner and Assessor are just not reading the statute in its entirety, but simply applying their own wrong interpretation. The exemption clearly applies.

Property Tax Ruling 20-36 (JA-000014) is the ruling which is in question and must either stand or fall on its own merits. The Ruling does not question that the property is being “used as a

residence and/or dormitory” And, the Ruling, (Page 8, JA000020), clearly states that “we cannot determine whether the property is being held out for profit.”

Appellants cite *Matkovich v. University Healthcare Foundation, Inc.*, 238 W.Va. 345, 795 S.E.2d 67 (2016) for the proposition that all property must contribute to the expenses of the government. However, that case clearly decided, 795 S.E.2d at 75, and held: “To the extent that real estate owned by a **qualifying** 501(c)(3) or 501(c)(4) charitable organization under 26 U.S.C. § 501(c)(3) or 501(c)(4) **is leased or rented to a private, non-qualifying organization**, the real estate is not wholly exempt from ad valorem taxation pursuant to West Virginia Code § 11-3-9(a)(12) notwithstanding the application of rental fees or other moneys realized from such lease or rental to the charitable purposes of such organization.” (Emphasis supplied.) In the instant case, Beta is leasing to “qualifying” organizations, being fraternities under this particular statute, therefore the exemption applies.

The *University Healthcare Foundation, supra*, continues: “Additionally, for purposes of determining whether a qualifying charitable organization under 26 U.S.C. § 501(c)(3) or 501(c)(4) has established the exclusive, or primary and immediate, charitable use required for seeking ad valorem tax exemption under West Virginia Code § 11-3-9(a)(12), **the physical use of the property, rather than any income derived from such property, is the determining factor as to the usage of such property.**” (Emphasis supplied.)

Further, *State v. McDowell Lodge*, 96 W.Va. 611, 123 S.E.2d 561 (1924) is inopposite as that case applies when the property is rented out for commercial purposes, the building in that case having been “rented as offices for various persons, and the cellar leased for a printing office.” 96 W.Va. at 611. None of those purposes exist in the instant case of Beta.

The Assessor assigns as error that “The Circuit Court erred in holding that the real property was exempt from taxation by its interpretation of, and failure to apply, a strict and narrow application of W.Va. Code Section 11-3-9(a)(15). Beta disagrees as the Circuit Court ‘strictly’ applied the facts to the statute, stating:

“And the facts in this case are that Beta Theta Pi Fraternity of W.V.U., Inc. owns property less than an acre, used as a dormitory for a fraternity organization affiliated with the University and that property is exempt irrespective of whatever the Legislature may have intended. The Code Section supports the argument submitted by the Petitioner [Beta] in this case and therefore, based on the argument and the brief and response, and based on comments of counsel. That is the ruling of the Court. **I must follow the strict interpretation of this Code Section.** The Betas are the lessee; I would read that in. I do not think it is there. So the ruling of the Court is that the property is exempt for those reasons.”

The “strict and narrow” interpretation of the statute is that fraternal dormitory property is exempt when used by a college or university society if not used to a view to profit. It is the Assessor and State Tax Commissioner that wants to ignore the statute.

VIII. CONCLUSION

The State Tax Commissioner and Assessor were clearly wrong in adding requirements to exemption from ad valorem property tax not found in West Virginia Code Section 11-3-9, and then applying those requirements to Beta in this case. Beta meets the plain wording of the statute in that the Beta property is exempt from ad valorem property tax as “real estate not exceeding one acre in extent, and the buildings on the real estate, used exclusively by any college or university society as a dormitory, if not used with a view to profit”. The opinion and order of the Circuit Court should be upheld and affirmed by this Court.

Respectfully submitted,
BETA THETA PI FRATERNITY OF W.V.U. INC.
Respondent, By Counsel

/S/ C PAGE HAMRICK



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Petitioner Below, Respondent

NOTICE OF CERTIFICATE OF SERVICE

I, C. Page Hamrick III, counsel for Respondent Beta Theta Pi Fraternity of W.V.U., Inc., do hereby certify that service of **SUPREME COURT BRIEF OF THE RESPONDENT BETA THETA PI FRATERNITY OF W.V.U., INC.** has been made upon the following interested parties of record by mailing a true and exact copy thereof and this Notice of Certificate addressed as follows, this ____ day of DECEMBER, 2021:

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