

ORIGINAL

IN THE SUPREME COURT OF OHIO

DIALYSIS CLINIC, INC.,

Case No. 2009-2310

Appellant,

-vs-

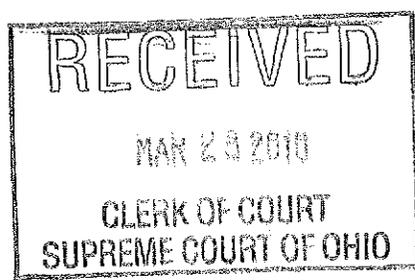
WILLIAM W. WILKINS,  
TAX COMMISSIONER OF OHIO,

On Appeal from the Ohio Board of Tax  
Appeals

Appellee.

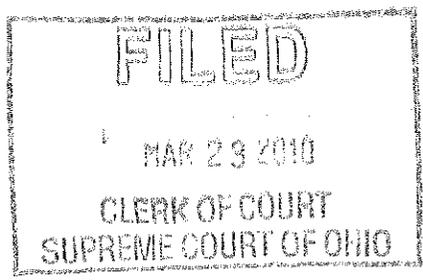
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## STATEMENT OF FACTS

**A. The BTA's decision misunderstands the modern realities of healthcare and relies on dubious legal authority.**

This is a charitable tax exemption case. Specifically, the Appellant, Dialysis Clinic, Inc. ("DCI") sought a real estate tax exemption under R.C. 5709.12(B) or R.C. 5709.121 for a dialysis clinic in West Chester, Ohio ("West Chester Clinic"). The Ohio Board of Tax Appeals (the "BTA") rejected DCI's request for an exemption. The BTA's November 24, 2009 Decision and Order (the "Decision") denying DCI an exemption under *both statutes* rests exclusively on the determination that DCI "provides no free or charitable service at the subject property." (Appx. 18.)

R.C. 5709.12(B) exempts real property used by any institution, whether that institution is charitable or not, provided the property is used exclusively for charitable purposes. Because the BTA determined that DCI "provides no free or charitable service at the subject property," the BTA concluded that DCI's West Chester, Ohio facility is not exempt under R.C. 5709.12(B).

The BTA then rejected DCI's application for exemption under R.C. 5709.121 *for the exact same reason*. Under R.C. 5709.121, if an institution is a "charitable institution," then a "more relaxed standard of 'exclusive charitable use'" applies. (Appx. 13.) In short, if an institution is charitable, then its normal operations generally will satisfy the exemption requirements. The focus of the analysis under R.C. 5709.121, therefore, is on the institution generally, not the particular use of any specific property.

Curiously, while acknowledging that "DCI is a [501(c)(3)] not-for-profit corporation that may operate the subject property without a view to profit," the BTA nevertheless found that DCI is not a charitable institution. (Appx. 15.) Erroneously, the BTA decided that because DCI "provides no free or charitable service *at the subject property*" it is not a charitable *institution*, and acts no differently than its for-profit competitors. (Appx. 18.) Conflating the analyses under R.C.

5709.12(B) and R.C. 5709.121, the BTA relied upon the same (erroneous) factual determination to deny DCI's exemption under R.C. 5709.12(B) as well.

At its core, the BTA's entire decision rests solely upon the notion that a healthcare provider must provide a certain quantum of so-called "free care" to be deemed "charitable." Because DCI accepts Medicare and Medicaid reimbursements, it can neither: (i) be deemed to use the subject premises for a charitable purpose, nor (ii) be considered a "charitable institution," according to the BTA.<sup>1</sup> This is wrong on both counts. First, as recognized by numerous state high courts, many patients are covered by various government "safety nets" such as Medicare and Medicaid. However, simply accepting these reimbursements does not impair the charitable nature of an organization that is otherwise a charity. Second, as implicitly recognized in these decisions, Medicare/Medicaid governmental reimbursements do not cover the cost of treatment. So, even with these reimbursements, a quantum of "free care" is contained in the treatment of each and every one of these patients. Moreover, using DCI's acceptance of Medicare reimbursement as the determining factor in denying DCI's exemption application is particularly wrongheaded given the disease DCI treats.

As set forth fully below, DCI provides dialysis services to patients with end-stage renal disease ("ESRD"). Medicare has established a program providing nearly universal coverage for dialysis treatment. In effect, this means that most patients walking in DCI's door have the government "safety net" of Medicare coverage for DCI's services. As a practical matter, DCI has only limited

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<sup>1</sup> The BTA also found that DCI's acceptance of government reimbursements was voluntary, implying a true charity would refuse such reimbursements. This is simply not supported in the record. While participation in government programs is voluntary in the sense no one forces DCI to participate, the testimony is crystal clear that DCI could not accomplish its charitable mission without Medicare/Medicaid reimbursements. So, the choice DCI faces is accept reimbursement, or cease to exist. There is no third choice whereby DCI continues its charitable work while refusing Medicare/Medicaid, and there is no evidence in the record that such a third choice is available but ignored by DCI.

opportunities to provide completely "free care." Indeed, because DCI accepts Medicare as a necessity to accomplish its mission, it is prohibited from providing care at a cost less than that charged to Medicare. Section 1320a-7 (b)(6)(A), Title 42, U.S. Code. Rather, DCI's charity is embodied in its stated mission to accept all patients, regardless of their ability to pay, and its willingness to open clinics in areas of need without regard for potential profit. DCI opens its doors to an unlimited number of Medicare and Medicaid patients, despite the shortfall between the government reimbursements and the cost of service. Consistent with its mission of patient service, DCI does not cap the number of Medicare/Medicaid patients seen at any particular clinic and accepts all patients.

If the Court were to adopt the BTA's decision in this case, the rule so established would, as a practical matter, eliminate the real estate tax exemption for any healthcare provider in Ohio. All charitable healthcare providers, including the large, public hospitals, accept Medicare/Medicaid reimbursements. In fact, as further described below, acceptance of government reimbursement is the modern incarnation of charity. More importantly, however, such a rule is inconsistent with the overwhelming majority of other states that have examined the issue.

Other courts have recognized that charity may incorporate some kind of "safety net" health coverage. For instance, in *St. Joseph's Living Center, Inc. v. Town of Windham* (2009), 290 Conn. 695, 966 A.2d 188, the Connecticut Supreme Court found that a nursing home accepting Medicare/Medicaid patients without discrimination, where the reimbursements did not cover the cost of care, was charitable because "under the current health care system in this country, accepting those patients who are eligible, or keeping those who thereafter become eligible, for Medicaid is the modern equivalent of caring for the indigent." *Id.* at 732. See, also, *Wexford Med. Group v. City of Cadillac* (2006), 474 Mich. 192, 204, 713 N.W.2d 734 (a non-profit provider with an "open access" policy and no cap on the number of Medicare/Medicaid patients was charitable because "the

reimbursements petitioner receives from the government funding fall well short of defraying the costs petitioner incurs to render medical care"); *ElderTrust of Florida, Inc. v. Town of Epsom* (2007), 154 N.H. 693, 703, 919 A.2d 776 (nursing home services were charitable in nature because many of the patients were covered by Medicaid, which did not cover the entire cost of the services provided); *St. Margaret Seneca Place v. Bd. of Property Assessment, Appeals & Rev.* (1994), 536 Pa. 478, 485, 640 A.2d 380 ("[P]eople whose costs are only partially covered by Medicaid payments are manifestly legitimate objects of charity and people who 'cannot afford to pay.'"); *Med. Ctr. Hosp. of Vermont, Inc. v. City of Burlington* (1989), 152 Vt. 611, 618-20, 566 A.2d 1352 (rejecting city's argument that acceptance of Medicare and Medicaid payments precluded a finding that a hospital was charitable).

Contrary to this wide body of law from Ohio's sister states' highest courts, the BTA chose to rely on a single lower court case from Illinois. The BTA relied on *Provena Covenant Med. Ctr. v. Dept. of Revenue* (2008), 384 Ill. App.3d 734, 894 N.E.2d 452, affirmed (Ill. Mar. 18, 2010), Docket No. 107328 (see Appx. 25), for the proposition that because Illinois's definition of charity somehow *requires* that "free care" be given, so must Ohio's. Under *Provena*, as adopted by the BTA, no charity exists without an undefined and unknowable quantum of "free care." Again, the *Provena* case, which is contrary to the vast majority of state supreme courts considering this issue in the modern Medicare/Medicaid context, applies Illinois, and not Ohio, law. The BTA's reliance on this single, anomalous case should not be sustained.

To sustain the BTA's Decision in this case would be a radical departure from this Court's long-standing and broad definition of charity. DCI urges the Court to refuse application of *Provena*, reversing the BTA's Decision. Simply accepting Medicare and Medicaid reimbursement should not be the touchstone for determining whether a healthcare provider uses its property for charitable purposes or whether the provider is a charitable institution. This Court should instead follow Ohio

law, its own prior decisions, and the overwhelming majority of other states in crafting a rule under which each provider is examined under a "totality of the circumstances" test. When examined in the context of the modern healthcare system, DCI is undoubtedly nothing like its for-profit competitors. DCI is clearly a charitable institution, using its West Chester Clinic exclusively for charitable purposes.

**B. DCI's Charitable Mission.**

DCI is a Tennessee non-profit, public benefit corporation qualified as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. (Appx. 5; Supp.41-42, 45.) Although DCI meets the stringent "non-profit" 501(c)(3) guidelines, the BTA refused to acknowledge it as a charitable institution.

Founded by Dr. Keith Johnson in 1971 (Supp. 155-56, Tr. 33-34; Supp. 117), DCI's mission was and is to treat ESRD patients. (Supp. 156, Tr. 36; Supp. 200-01, Tr. 213-14; Supp. 35, 115.) DCI was never intended to be a money-maker; DCI was created as, and remains, a charitable healthcare provider. DCI's Charter (and the later charter amendment) codify its mission, limiting DCI to the following corporate purposes:

To operate hemodialysis clinic, to dialyze patients and to render such additional care as patients with chronic renal failure may require on an outpatient basis \* \* \*.

To receive and maintain a fund or funds of real and personal property or both, and to use and apply the whole or any part of the income therefrom and the principal thereof exclusively for charitable, scientific or educational purposes, either directly or by contributions to organizations that qualify as exempt organizations \* \* \*.

***This corporation is not organized, nor shall it be operated for pecuniary gain or profit, and it does not contemplate the distribution of gains, profits or dividends to members and is organized solely for non-profit purposes.*** The property of this corporation is irrevocably dedicated to hospital and/or charitable and scientific purposes \* \* \*. No part of the net income or assets of this corporation shall ever inure to the benefit of any private persons. Upon dissolution or winding up of the corporation, its assets remaining after payment or provision for payment of all debts and liabilities shall be distributed to a non-profit fund, foundation or corporation

which is organized and operated exclusively for hospital and/or charitable and scientific purposes \* \* \*.

(Supp. 37, 40 (emphasis added).)

Dr. Johnson did not believe it was fair for people to lose their homes and their farms in order to be able to afford expensive dialysis while others profited from providing those treatments. (Supp. 156, Tr. 37; Supp. 117.) DCI's mission also includes striving to improve the methods and quality of ESRD treatment. (See Supp. 45.)

DCI is successful in its mission. Currently, DCI operates 195 outpatient facilities, providing dialysis to thousands of patients in 26 states. DCI also supports and participates in significant kidney-related research, and promotes professional and public education in this field of medicine. (Appx. 5; Supp. 45).

### **C. DCI's Charitable Activities.**

Nationwide, DCI donated \$13,622,000 to ESRD research for the fiscal year ending September 30, 2005.<sup>2</sup> (Supp. 45.) DCI retains no profits from dialysis operations, using all profits to fund unprofitable clinics or ESRD research. (Supp. 160, Tr. 50; Supp. 182, Tr. 141.) In other words, if a particular clinic happens to generate excess revenues, DCI donates fifty percent of those revenues for renal disease research initiatives at research universities. (Appx. 10.) DCI then uses the other fifty percent for operational purposes, such as opening new clinics and funding those clinics that are unprofitable. (Supp. 160, Tr. 50; Supp. 159, Tr. 47; Supp. 182, Tr. 141 ("Fifty

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<sup>2</sup> A patient with ESRD has reached a stage of kidney impairment such that without continued dialysis or a transplant, he or she will not survive. (Supp. 264-65, Tr. 266-67.) ESRD requires either dialysis or kidney transplantation to survive. See Section 406.13(b), Title 42 C.F.R. Because of the scarcity of kidneys available for transplantation, most patients with ESRD receive maintenance dialysis. See Institute of Medicine, *Kidney Failure & the Federal Government* (1991) 5, 8. It is undisputed that the cost of dialysis is "extremely expensive." (Supp. 179, Tr. 127.) An average patient needs three treatments per week to live. *Kidney Failure & the Federal Government* at 40.

percent of [net revenues] are used for research \* \* \* [t]he remaining fifty percent are used for operations such as new clinics").) DCI also founded and operates a summer camp for children suffering from ESRD and for children receiving kidney transplants. (See Supp. 45; Supp. 179, Tr. 128-29.) The summer camp is available to children throughout the United States free of charge. (See Supp. 45.)

In the Southwestern Ohio area, DCI works closely with the University of Cincinnati. (Supp. 182-83, Tr. 141-42.) The medical directors of all DCI's Southwestern Ohio area clinics are physicians with the University of Cincinnati. (Supp. 182-83, Tr. 141-42.) Within the last five years, DCI has donated about \$1.7 million to fund kidney research at the University of Cincinnati. (Supp. 182-83, Tr. 141-42.)

When DCI builds new facilities, site location is not driven by the potential profitability of the site. (Supp. 159, Tr. 47.) Instead, DCI considers the current dialysis population and the future dialysis population in order to determine locations that best serve the citizenry. (Supp. 188, Tr. 164-65.) DCI is typically invited into a community by the local citizens, the local government, or an educational institution citing a need for service, not touting the potential profitability of the site. (Supp. 159, Tr. 47.) DCI often intentionally provides services in geographic areas that other organizations, for profit or otherwise, might not. (Supp. 159, Tr. 47-48.) In short, DCI's development is driven by its mission to serve ESRD patients, not potential profits.

While DCI, as a whole, has historically generated revenues in excess of the cost of operations, certain clinics lose money, including the West Chester Clinic. (Supp. 159, Tr. 49.) DCI has operated clinics that are unprofitable for many years. (Supp. 185, Tr. 152.) However, as set forth above, when DCI is fortunate enough to generate excess revenue, those excess funds are used for research purposes, to operate the children's camp, to support less financially successful clinics, and to open new clinics to further DCI's dialysis mission. (Supp. 182, Tr. 141.)

DCI does not advertise and has no advertising budget as would be typical of a commercial operation. (Supp. 159, Tr. 48; Supp. 182, Tr. 140.) DCI's patients typically arrive at DCI by third-party hospital or physician referrals. (Supp. 182, Tr. 139.) Oddly, the BTA decided that the referral system militated against finding DCI's operations charitable, interpreting the referral process to mean that all of DCI's patients must have some source of payment. This is simply incorrect, as Mr. Dansro testified: " \* \* \* so we've had to take [patients], you know, through the dialysis, despite the fact they didn't have any insurance coverage." (Supp. 191, Tr. 174.) DCI's reliance upon referrals as opposed to advertising really means that DCI does not strive to obtain only those patients that can pay. The patient arrives by referral because the patient is sick, not because the patient can pay. Since DCI accepts all patients regardless of ability to pay, this includes patients without insurance.

Unlike any of its for profit competitors, no person or organization profits financially from DCI's operations.<sup>3</sup> (Supp. 160, Tr. 50; Supp. 179, Tr. 128-29; Supp. 183, Tr. 143.) DCI does not operate with a view towards financial profit. (Supp. 159, Tr. 46; Supp. 160, Tr. 50.) Of vital importance here, DCI accepts all patients, does not cap the number of Medicare/Medicaid patients at any facility, and does not turn away patients it knows cannot pay the full cost of treatment. (Supp. 182, Tr. 138-39 ("Q: Do you provide service without regard to a patient's ability to pay at your facilities? A: That's true.")) DCI accepts without limitation many patients unable to pay the full cost of treatment, including those patients unable to pay the 20% difference between the Medicare reimbursement and the allowable charge. DCI is an "open door" operation whereby DCI operates without regard for a profitable patient "mix." This can, and does, result in unprofitable clinics, like DCI's West Chester Clinic.

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<sup>3</sup> DaVita is a publicly traded company with local operations that returns profits to its shareholders. In contrast, DCI uses its net revenues, if any, towards "furtherance of trying to figure out how [to] combat kidney diseases and to come up with ways to prevent [kidney diseases] \* \* \* ." (Supp. 202, Tr. 220.)

**D. Financial restrictions imposed by federal law on Medicare and Medicaid reimbursement recipients.**

Renal dialysis is the only treatment for ESRD short of a kidney transplant. See, Section 406.13(b), Title 42, C.F.R. (ESRD "means that stage of kidney impairment that appears irreversible and permanent and requires a regular course of dialysis or kidney transplantation to maintain life.") Dialysis is extraordinarily expensive. (Supp. 179, Tr. 127.) DCI is a true charitable organization in that it does not refuse patients that cannot pay the full cost of treatment. (Supp. 182, Tr. 139.) Without DCI's presence, Southwestern Ohio residents would have significantly decreased access to ESRD treatment.

DCI's patients fall into five principal categories: (1) Medicare beneficiaries; (2) Medicaid beneficiaries; (3) crossover patients with both Medicare and Medicaid; (4) patients without a payment source; and (5) private pay patients (either self-pay or private insurance). When a patient is referred to DCI, DCI requests information about the patient's ability to pay. (Supp. 183, Tr. 143; Supp. 191, Tr. 175-77.) This financial inquiry is driven by the Medicare system which requires providers to attempt to collect the 20% shortfall between the Medicare reimbursement and the allowable charge. Regardless of ability to pay, however, DCI indiscriminately accepts all categories of patients and does not cap the number of patients under any particular category. (Supp. 182, Tr. 138-39.)

*1. Medicare patients*

Recognizing the hardship and necessity of dialysis,<sup>4</sup> Congress extended all Medicare Part A and Part B benefits to individuals with ESRD, regardless of age. See Social Security Amendments

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<sup>4</sup> See "The Additional Views of Senator Vance Hartke," Committee on Finance, 1972b, Social Security Amendments of 1972 (92nd Congress, 2nd Session, Report No. 92-1230, September 26 (legislative day, September 25)) ("In what must be the most tragic irony of the twentieth century, people are dying because they cannot get access to proper medical care. More than 8,000 Americans will die this year from kidney disease who could have been saved if they had been able to afford an

of 1972 (P.L. 92-603); see, also, Section 426-1, Title 42, U.S. Code. This entitlement is nearly universal, covering about 90 percent of all people with ESRD in the United States.<sup>5</sup> *Kidney Failure & the Federal Government* at 6. Illegal immigrants and individuals who have never worked are some of the individuals that are ineligible for the benefit. *Id.* (See, also, Supp. 46.) The Medicare benefit generally kicks in after 90 days of dialysis treatment. Section 426-1(b)(1)(A), Title 42, U.S. Code. This means that outside the initial 90-day period, very few people in the United States do not have Medicare coverage for ESRD.

Since dialysis is so expensive, DCI would be unable to accomplish its charitable mission if it did not accept Medicare. (Supp. 179, Tr. 127; Supp. 201, Tr. 214.) Accordingly, DCI accepts Medicare reimbursements for dialysis treatment from those patients that are eligible, which is up to 75% of its patients. (Supp. 157, Tr. 39, 41; Supp. 188, Tr. 165.) The Medicare allowable charge per dialysis treatment is \$160.<sup>6</sup> (Appx. 11, n.5.) Medicare reimburses 80% of the \$160 allowable charge, or \$128, and DCI is *required* by Medicare law to seek the remaining \$32 balance from a collateral source, typically the patient's own assets. (Supp. 193, Tr. 182-84.)

Without question, Medicare is the primary source of funds for DCI. (Supp. 161, Tr. 55.) However, the \$160 Medicare allowable charge, even if paid in full through the collateral source,

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artificial kidney machine or transplantation. These will be needless deaths —deaths which should shock our conscience and shame our sensibilities. We have the opportunity now to begin a national program of kidney disease treatment assistance administered through the Social Security Administration, and I propose that we take that opportunity so that more lives are not lost needlessly.")

<sup>5</sup> Any individual diagnosed with ESRD and is or could be insured by Social Security or is the dependent or spouse of an individual that is or could be insured by Social Security qualifies for Medicare Part A and Medicare Part B coverage for dialysis or kidney transplantation. Section 426-1, Title 42, U.S. Code. "The ESRD program is unique within Medicare. It is the only case in which a diagnosis of a categorical disease provides the basis for an entitlement for persons of all ages." *Kidney Failure & the Federal Government* at 3.

<sup>6</sup> Statutory requirements for the Medicare ESRD program are found at Section 1395rr, Title 42, U.S. Code.

does not cover the cost of a treatment at many facilities, including the West Chester Clinic. (Supp. 158, Tr. 45; Supp. 175, Tr. 110.) Further, if a patient does not have a collateral source for payments, DCI loses even more money per treatment because it only receives the \$128 Medicare reimbursement. (Supp. 193, Tr. 182-84.) Nevertheless, DCI accepts all patients, even those it understands will never be able to pay the 20% shortfall.

In sum, DCI accepts Medicare patients with knowledge that even if it receives the maximum allowable charge in payment (\$160), that payment will not cover its costs at many facilities, including the West Chester Clinic. Moreover, many Medicare patients do not have the ability to pay the 20% shortfall. DCI accepts these patients while its for-profit competitors limit their Medicare patients.<sup>7</sup> True, DCI seeks payment of the 20% shortfall, even from patients that likely cannot pay it. However, DCI is **required** to seek this shortfall from patients by federal law. In the end, if a patient does not have the ability to pay for that "shortfall," it is written off as "bad debt." (Supp. 157, Tr. 39-40; Supp. 165, Tr. 71; Supp. 168, Tr. 83.)

In Southwestern Ohio, at least 15% of DCI's patients have no ability to pay beyond Medicare and the remainder owed by these patients is written off. (Appx. 11.) This "bad debt" policy is in place at all DCI clinics. (Supp. 159, Tr. 46.) Once a patient qualifies under the bad debt policy, no collection action is taken against that patient beyond what Medicare or another third-party provides. (Supp. 191, Tr. 177.)

## 2. *Medicaid patients*

Medicaid pays even less than Medicare for the cost of treatment — about \$155 per treatment. (Appx. 11, n.5; Supp. 193, Tr. 182-84.) About 10%-15% of DCI's patients are eligible for Medicaid only. (Supp. 157, Tr. 39-41; Supp. 188, Tr. 165.) If a patient is covered by Medicaid, DCI is legally

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<sup>7</sup> For example, a private company like DCI's "competitor," DaVita, only takes those that can pay. (Supp. 200, Tr. 212.)

prevented from seeking additional payment and does not do so. (Supp. 193, Tr. 183-84; Supp. 264, Tr. 265-66; Supp. 265, Tr. 268.) Medicaid reimbursements, like Medicare reimbursements, do not cover the cost of dialysis treatment at many DCI clinics, including the West Chester Clinic.<sup>8</sup> Yet, DCI willingly accepts Medicaid patients with full knowledge that treatment of Medicaid patients payments generates a “shortfall.”

3. *“Crossover” Patients with both Medicare and Medicaid.*

DCI does not recoup the full cost of treating even “crossover” patients, meaning patients with both Medicare and Medicaid coverage. With these patients, Medicare sets the maximum reimbursement at \$160 per treatment. (Supp. 189, Tr. 166.) Medicare pays \$128 as discussed above, and Medicaid pays the remaining \$32. (Supp. 189, Tr. 166.) Again, the \$160 maximum allowable charge under Medicare does not cover the cost of treatment at many facilities, including the West Chester Clinic. (Supp. 158-59, Tr. 45-46; Supp. 175, Tr. 110.)

4. *Patients without a payment source*

As set forth above, Medicare does not cover everyone, and not everyone has private insurance or means to pay. Some patients have no payment source at all. DCI also accepts these patients without discrimination.

Notwithstanding the reality that DCI accepts completely indigent patients with no way to pay for treatment, foibles of Federal law complicate the situation. Federal law prohibits providers that accept Medicare from advertising or charging less for services than the allowable charge offered to Medicare patients. (Supp. 157, Tr. 39-40; Supp. 182, Tr. 138.) Practically, this means that DCI cannot give its services away to those patients without any payment source. (Supp. 157, Tr. 39-40.)

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<sup>8</sup> See Supp. 158-59, Tr. 45-46; Supp. 175, Tr. 110. Although this testimony relates to the \$160 allowable charge under Medicare, it stands to reason that if DCI is unprofitable collecting \$160 per treatment, it is unprofitable when collecting \$155 per treatment.

It has to pursue collection of at least the allowable charge and can only write-off that amount if the patient is deemed indigent. DCI cannot adopt policies that contravene Medicare regulations.

Irrespective of the Medicare whipsaw, the record conclusively demonstrates that DCI treats all patients, regardless of financial ability, accepting even those without a payment source for their 20% share of the allowable charge, while knowing that accepting those patients will result in a shortfall. (Supp. 182, Tr. 139.) DCI's policies allow DCI to declare the patient indigent and write off the non-payment as bad debt.<sup>9</sup> (Supp. 168, Tr. 83.) Indeed, DCI often treats multiple patients at its Southwestern Ohio facilities who have no ability to pay. (Supp. 191, Tr. 174.) While DCI has to charge and seek to collect from those patients under Medicare/Medicaid law, DCI knows up-front that these patients are uncollectible. Yet, DCI nevertheless accepts these patients.

This is the critical difference between a for-profit and a charitable institution. For example, DaVita — a for-profit competitor — is "pretty exclusive" about who they accept and "generally accept[s] patients who can pay." (Supp. 200, Tr. 212.) DCI's charter prohibits it from turning away patients that cannot pay, and DCI knowingly and willingly accepts patients that DCI knows do not have the resources to pay. While DCI *must* bill these patients under federal Medicare law, the act of *accepting* these patients who DCI *knows* cannot and will not pay is charity.

5. *Patients with a private payment source.*

Some DCI Clinics generate excess revenues, typically when their patient mix includes multiple private insurance patients. (Supp. 186, Tr. 156-57.) Of course, as explained above, those excess revenues go only toward dialysis research, covering other patients' shortfalls, opening new clinics, and operating the children's summer camp. Moreover, DCI does not discriminate between

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<sup>9</sup> The BTA noted that DCI's indigence policy states it is "not a charity or gift to patients." (Appx. 16.) However, the BTA apparently misunderstands that this policy is based upon Medicare regulations requiring DCI to attempt to collect the amount of the allowable charge.

patients based on ability to pay, or whether they have Medicare, Medicaid, private insurance, or no payment source.

**E. DCI's West Chester Operations**

DCI opened the West Chester Clinic in 2003. (See Supp. 45.) The facility has 14 dialysis stations and currently serves 30 patients by providing them dialysis three days per week. (See Supp. 45.) DCI decided to build the West Chester Clinic at the urging of the University of Cincinnati physicians for both research purposes and because, at the time, no other dialysis providers served the area. (Supp. 183, Tr. 142-43.) Since opening in 2003, the West Chester Clinic has lost an average of \$250,000 per year, but DCI has no plans to close this clinic. (Supp. 181, Tr. 136; Supp. 183, Tr. 144.) The shortfall at the West Chester Clinic is funded by excess revenues from other clinics. (Supp. 182, Tr. 141.) The typical patient "mix" at the West Chester facility is 55 [*sic* -65%]-70% Medicare, 10% Medicaid, and the remainder self-pay or self-insured. (Supp. 188, Tr. 164-65.)

**ARGUMENT**

The question before this Court is whether DCI's activities, either as a whole or at its West Chester facility, are charitable so as to exempt DCI from paying real estate tax under Ohio law. When viewing both the totality of the circumstances, as well as DCI's particular activities, DCI is undoubtedly serving a charitable purpose. Contrary to the BTA's determinations, DCI does not operate in the same fashion as a for-profit dialysis center. Epitomizing charitable virtues, DCI purposefully accepts all patients regardless of ability to pay, does not cap the number of Medicare or Medicaid patients it treats, and even accepts patients unable to pay anything at all.

The BTA found that because DCI accepts reimbursement from Medicare or Medicaid, it is not charitable. The BTA effectively characterizes DCI's decision to accept Medicare and Medicaid, which does not cover the costs of treatment, as a bad, but voluntary, business decision. DCI urges this Court to reject the BTA's analysis. Instead, DCI urges the Court to follow the vast majority of

state supreme courts determining that this is not a bad business decision but, rather, accepting Medicare and Medicaid without restriction is a *charitable* decision. Moreover, accepting Medicare and Medicaid, while voluntary in a sense, is necessary. Without government reimbursement, DCI (and other charitable healthcare providers) could not fulfill its or their charitable mission(s).

The BTA also incorrectly analyzed DCI's attempts to collect collateral source payments from its Medicare patients as supporting the BTA's finding that DCI is not charitable. The BTA either ignored or misunderstood that DCI is required to seek collateral source payments by federal law. However, DCI is *not* required under federal law to take all patients who walk in the door. DCI is allowed to cap the number of Medicare and Medicaid patients it accepts or refuse to care for those that have no insurance or payment source whatsoever. DCI simply does not do so.

For-profit dialysis clinics generate tremendous profits by ignoring patients who cannot pay the full cost of treatment, while DCI takes all patients. DCI's mission prohibits it from discriminating based upon a patient's ability to pay for the entire cost of treatment, which entirely differentiates DCI from for-profit clinics. Providing treatment to all without regard for the ability to pay precisely fits this Court's definition of charity.

**Proposition of Law No. I**

*The Ohio Board of Tax Appeals erred by finding that Appellant is not a "charitable institution" as described in Revised Code 5709.121.*

DCI is entitled to the tax exemption described at R.C. 5709.121. This statute requires that in order to be exempt from taxation, the property must "(1) be under the direction or control of a charitable institution, (2) be otherwise made available 'for use in furtherance of or incidental to' the institution's 'charitable \* \* \* or public purposes,' and (3) not made available with a view to profit." *Community Health Professionals, Inc. v. Levin* (2007), 113 Ohio St.3d 432, 2007-Ohio-2336, 866

N.E.2d 478, at ¶19, citing *Cincinnati Nature Ctr. Assn. v. Bd. of Tax Appeals* (1976), 48 Ohio St.2d 122, 125, 2 O.O.3d 275, 375 N.E.2d 381. The record shows DCI meets all of these requirements.

As a threshold issue, the determination under R.C. 5709.121, although facially similar to that under R.C. 5709.12(B), is quite different. *Id.* at ¶17 ("R.C. 5709.121 has no application to noncharitable institutions seeking tax exemption under R.C. 5709.12."). The threshold determination under R.C. 5709.121 is whether DCI is entitled to an exemption because it is a charitable institution. *Id.* at ¶18 ("as this court stated [previously] [i]f the institution is charitable, its property may be exempt if \* \* \* it uses the property under the terms set forth in R.C. 5709.121." (internal quotations omitted)). The BTA completely ignores this legal distinction by focusing its R.C. 5709.121 analysis on DCI's West Chester Clinic, rather than DCI as an institution.

**A. DCI is a charitable institution.**

The BTA erred when determining that DCI is not entitled to an exemption under R.C. 5709.121 on the basis that DCI is not a "charitable institution." (Appx. 15.) When making its determination, the BTA ignored multiple relevant factors. For instance, the BTA ignored that DCI is a tax-exempt organization pursuant to Section 501(c)(3) of the Internal Revenue Code. Of course, Section 501(c)(3) exempts certain institutions organized for charitable purposes from federal income tax. Because the Internal Revenue Service sets a high bar for Federal income tax exemption, DCI's exempt status militates heavily in favor of finding it to be a "charitable institution." The BTA also ignored this Court's prior statements that "the provision of medical or ancillary healthcare services qualifies as charitable if those services are provided on a nonprofit basis to those in need, without regard to their race, creed, or ability to pay." *Church of God in N. Ohio v. Levin*, 124 Ohio St.3d 36, 2009-Ohio-5939, 918 N.E.2d 981, ¶19; see, also, *Planned Parenthood Assn. v. Tax Commr.* (1966), 5 Ohio St.2d 117, 121-22, 34 O.O.2d 251, 214 N.E.2d 222 (medical care is charitable if offered to all

without regard to ability to pay, no matter how many actually do pay).<sup>10</sup> There is no dispute that DCI meets all of these criteria. Also, the BTA ignored DCI's articles of incorporation, which clearly establish it as a non-profit charity. See *Am. Chem. Soc. v. Kinney* (1982), 69 Ohio St.2d 167, 170, 431 N.E.2d 1007 (review of a corporation's charter can establish it is a charity under R.C. 5709.121).

The totality of the circumstances contained in the record also clearly and indisputably demonstrates DCI is a charitable institution. Specifically, the record is clear that (i) DCI willingly accepts indigent patients, yet does not attempt to collect funds from patients deemed indigent; (ii) DCI routinely accepts patients DCI knows are unable to pay DCI's cost to provide treatment; (iii) DCI does not turn away patients unable to pay DCI's cost to provide treatment; (iv) DCI uses any excess revenue from its activities exclusively for end-stage renal research and providing additional care to those suffering from end-stage renal disease; (v) no private person or entity benefits from DCI's operations; (vi) DCI opens clinics in underserved areas knowing they are not likely to be profitable; (vii) many DCI facilities (including the West Chester Clinic) lose money, yet remain open to serve its patients; and (viii) on dissolution DCI's assets will not benefit a private person or entity, but rather will benefit those suffering from ESRD. In short, DCI is a non-profit, tax exempt corporation with a mission to provide end-stage renal care to those in need, without a view towards financial profit, but only with the view of advancing mankind's fight against renal disease.

The BTA ignored all of this. The Decision simply contains no meaningful analysis of DCI as an institution. Instead, the BTA simply determined that DCI did not "use the subject property in furtherance of or incidentally to its charitable purpose because it conducts no charitable activities at

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<sup>10</sup> Ohio has long recognized that the provision of nonprofit medical care is charitable, entitling the provider to a real estate tax exemption. See *Community Health Professionals* at ¶23; *Warman v. Tracy* (1995), 72 Ohio St.3d 217, 220-21, 648 N.E.2d 833; *Bowers v. Akron City Hosp.* (1968), 16 Ohio St.2d 94, 95-96, 243 N.E.2d 95; *Vick v. Cleveland Mem. Med. Found.* (1965), 2 Ohio St.2d 30, 31 O.O.2d 16, 206 N.E.2d 2, at paragraph two of the syllabus.

the clinic." (Appx. 16.)<sup>11</sup> This reasoning is improper under R.C. 5709.121 because it is property specific, ignoring DCI as an institution.

The BTA also implicitly and impermissibly substituted its definition of charity – completely "free care" – for this Court's definition. In taking all patients regardless of ability to pay and opening clinics in underserved areas, DCI's clinics contribute greatly to charity at DCI's expense. Obviously, opening clinics in remote areas that serve patients that cannot pay the cost of treatment often results in DCI's clinics, including the one in West Chester, losing money. But, consistent with its mission, DCI continues to operate these clinics.

This is an activity of a charity, not a for-profit clinic. In other words, the implementation of DCI's "take all patients" mission is the very epitome of attempting "in good faith \* \* \* to advance and benefit \* \* \* those in need of advancement and benefit in particular \* \* \* without regard to their ability to supply that need from other sources, and without hope or expectation \* \* \* of gain or profit by the donor or by the instrumentality of the charity." While the BTA complains that DCI does not donate its services, the West Chester Clinic, in fact, has donated over \$250,000 of services by accepting patients that cannot and do not pay the full cost of treatment.

The Pennsylvania Supreme Court examined a case involving similar facts in *St. Margaret Seneca Place* 536 Pa. 478. There, a nursing home sought a property-tax exemption. *Id.* at 481. The nursing home provided very little free care because many of its patients had a government "safety net," just like DCI's patients. *Id.* at 482-83. Like the BTA in this case, the trial court found that the nursing home "did not donate or render gratuitously a substantial portion of its services." *Id.* at 484. The trial court relied on the same reasoning as the BTA in writing the following:

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<sup>11</sup> Appx. 16 (DCI is not charitable because "like the operations of a for-profit corporation, [DCI] charges all patients for dialysis, voluntarily enters contracts with government and private insurers to set charges for the provision of these services, and does not donate any of its services without charge or at a reduced charge").

It is the nursing home that has determined that it will accept whatever amount Medicaid pays out for services rendered to those residents paying through Medicaid. The nursing home also *expects payment* from Medicaid for those services. If payment is not received, the nursing home has incurred a bad debt as any other business would and has not provided charity. The nursing home's situation is analogous to the airline industry which charges passengers various rates for the same flight. No one would contend that an airline is a charity because individual passengers receive different rates while the airline loses money. The airline's goal is to fill the plane to capacity whichever way it can \* \* \*.

Id. at 484-85.

The Pennsylvania Supreme Court squarely rejected this reasoning, ultimately branding it "specious." Id. at 485. In particular, the Pennsylvania Supreme Court rejected the trial court's analogy and correctly recognized that if an airline passenger cannot afford a full-fare ticket and the airline does not offer her a reduced fare, that passenger will simply forgo the flight. Id. In contrast, "if the nursing home does not accept an aged Medicaid patient whose allotment does not fully cover his costs, the public will fund the patient's care at a public institution because such care is not viewed as a privilege like an airplane flight but is deemed to be a public responsibility." Id. Just as the Pennsylvania Supreme Court rejected the trial court's reasoning, so should this Court reject the BTA's reasoning.

**B. DCI uses the West Chester Clinic property at least incidentally to its charitable purpose and does not operate with an eye to profit.**

The second two prongs of the R.C. 5709.121 test — that the property's use is at least incidental to the institution's charitable purpose and that the institution does not operate with an eye to profit — are easily met here. This Court previously found a property exempt from taxation where a provider charged patients for services rendered, accepted payment from private and government sources, wrote off unpaid amounts, and did not offer services free of charge. *Community Health Professionals* at ¶17-19. This situation is almost exactly analogous. As the Court noted in *Community Health Professionals*, while an applicant may not offer free care, an applicant is charitable nevertheless if it provides services without regard to a patient's ability to pay and no

evidence is provided that a patient was denied services due to an inability to pay. In short, once DCI is determined to be a "charitable institution," its normal operations, which are nearly identical to those of Community Health Professionals, qualify its property for an exemption under R.C. 5709.121.

In *Miracit Dev. Corp. v. Zaino*, 10th Dist. No. 04AP-322, 2005-Ohio-1021, the plaintiff, Miracit, sought a real estate exemption for a day-care operated by a subsidiary. *Id.* at ¶2. Miracit itself was a non-profit focused on the well-being and revitalization of inner-city Columbus. *Id.* at ¶1. Operationally, the day care charged all clients the same rate, regardless of their ability to pay; it had no sliding scale tuition arrangement. *Id.* at ¶26. The day care primarily (75%) served Title XX clients, meaning that the day care received government reimbursements, much like Medicare/Medicaid. *Id.* at ¶34. On these facts, the court found that because the day care operation advanced Miracit's goals of revitalizing inner-city Columbus, the property qualified for a real estate exemption under R.C. 5709.121. *Id.*

In this case, the West Chester Clinic is certainly at least incidental to DCI's mission to treat ESRD as established in its charter and confirmed by its 501(c)(3) status. In fact, the West Chester Clinic is the obvious manifestation of DCI's charitable mission. If a day care in Columbus is exempt in furtherance of an affiliate's charitable mission, then certainly the West Chester Clinic should be exempt in furtherance of DCI's mission.

This Court has held that a charitable health facility should have as its primary purpose the provision of health services to those in need without regard to ability to pay, and such facility should provide its services to indigent patients and to the public generally. See, e.g., *Vick*, 2 Ohio St. 2d at 31. DCI, just like any community hospital, meets these criteria by providing services to indigent patients without ability to pay the full costs of treatment. Undoubtedly, DCI is a charitable institution and the West Chester Clinic is used in furtherance of those charitable purposes, without a

view to profit. Therefore, the Court should reverse the BTA's decision and grant DCI an exemption from property tax pursuant to R.C. 5709.121.

**Proposition of Law No. II**

*The Ohio Board of Tax Appeals erred by finding that Appellant does not use the subject property for a charitable purpose as contemplated by Revised Code 5709.12.*

The BTA erred by finding that Appellant does not use the subject property for a charitable purpose as contemplated by Revised Code 5709.12(B). DCI's West Chester Clinic is exempt from real estate taxes under Revised Code 5709.12(B) because it is "used exclusively for charitable purposes."<sup>12</sup> Under R.C. 5709.12(B), the dispositive question is whether DCI is *using* the property for a charitable purpose, not whether DCI is a *charitable institution*, which is the inquiry under R.C. 5709.121.

The BTA incorrectly determined that DCI does not provide any charitable services on the subject property. Based upon that incorrect determination, the BTA concluded that the use of the property could not be "exclusively charitable," rejecting DCI's application under Revised Code 5709.12(B). Importantly, when analyzing an application under Revised Code 5709.12(B), the term "exclusively" means "primary use." *Girl Scouts Great Trail Council v. Levin*, 113 Ohio St.3d 24, 2007-Ohio-972, 862 N.E.2d 493, at ¶19, citing *True Christianity Evangelism v. Zaino*, 91 Ohio St.3d 117, 120, 2001-Ohio-295, 742 N.E.2d 638; *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134, 135, 465 N.E.2d 1281, 12 OBR 174. In other words, DCI need only show the West

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<sup>12</sup> To "grant exemption under R.C. 5709.12, the arbiter must determine that (1) the property belongs to an institution, and (2) the property is being used exclusively for charitable purposes." *True Christianity Evangelism v. Tracy*, 87 Ohio St.3d 48, 51, 1999-Ohio-220, 716 N.E.2d 1154, citing *Highland Park Owners, Inc. v. Tracy*, 71 Ohio St.3d 405, 406, 1994-Ohio-32, 644 N.E.2d 284. However, since this Court has determined that "a corporation meets the definition of an 'institution'" and, since it is undisputed that DCI is a corporation, DCI must qualify under the first prong as an institution. *True Christianity Evangelism*, 87 Ohio St.3d at 50, (a "non-profit corporation cannot properly be disqualified from an exemption under R.C. 5709.12(B) on the basis that it is not an 'institution'").

Chester Clinic is used *primarily* for charitable purposes. The record overwhelmingly demonstrates that DCI carried its burden.

As discussed above, the following facts are undisputed:

- i. DCI's West Chester Clinic accepts patients DCI knows cannot pay the full cost of treatment (i.e. accepts Medicare and Medicaid, does not cap the number of Medicare or Medicaid patients, and accepts patients with no ability to pay);
- ii. DCI's West Chester Clinic does not turn *any* patients away;
- iii. DCI's West Chester Clinic loses about \$250,000 per year because its patients cannot pay the full cost of treatment, yet remains in operation;
- iv. DCI's West Chester Clinic does not operate with a view towards financial profit;
- v. DCI's West Chester Clinic has a policy of continuing to offer services without collecting any payment where no payment is available; and
- vi. If DCI's West Chester Clinic generated excess revenue over costs of providing service (which it currently does not), these sums would be donated towards research at public universities or providing care or services to those suffering from end-stage renal disease. Accordingly, no person or organization profits financially from DCI's operation of the West Chester Clinic.

These undisputed and indisputable facts clearly fit the legal definition of charity as articulated by this Court, meaning that the West Chester property is being used for charitable purposes.<sup>13</sup> In fact, DCI's use of the West Chester property meets each and every clause in the charitable definition:

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<sup>13</sup> “[T]he attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, of gain or profit by the doner or by the instrumentality of the charity.” *True Christianity Evangelism*, 91 Ohio St. 3d at 119-120 (emphasis removed).

Legal definition of charity	How DCI meets the legal definition
The legal definition of charity calls for DCI to make its mission to " * * * advance and benefit mankind in general * * * ."	DCI's mission, as manifested at the West Chester Clinic, is to treat each end-stage renal disease patient it can without a motive towards profit and donate or use any excess funds to research improvements to the methods and quality of end-stage renal disease treatment.
The legal definition of charity calls for DCI to focus on " * * * those in need of advancement and benefit in particular * * * ."	DCI's West Chester Clinic offers services to those who have no collateral source payments. DCI continues to offer services at clinics, such as at the West Chester Clinic, that lose money every year.
The legal definition of charity calls for DCI to act " * * * without regard to [patients] ability to supply that need from other sources * * * ."	DCI's West Chester Clinic does not refuse care if the prospective patient cannot pay the cost of treatment and accepts patients knowing the patient cannot pay at all.
The legal definition of charity calls for DCI to act " * * * without hope or expectation * * * of gain or profit by the donor or by the instrumentality of the charity."	DCI's West Chester Clinic does not turn away patients who are unable to pay the full cost of treatment, and no person or organization profits financially from the West Chester Clinic

Finding that DCI operates the West Chester Clinic for primarily charitable purposes is consistent with other decisions by this Court when considering similar issues. For example, in *Vick*, 2 Ohio St.2d at 31, this Court held that a non-profit corporation operating a hospital was exempt from property taxes on the hospital even when the hospital operation accumulated a \$700,000 surplus. The use of the property was considered charitable largely because no patients were turned away and there was no evidence that individuals or private entities benefited from the surplus. This Court held that "[w]here a corporation not for profit is operating a hospital for the primary purpose of providing services for those in need, without regard to \* \* \* ability to pay, the fact that the hospital charges patients who are able to pay for its services and that a surplus has been created \* \* \* (no part of which has been diverted to a private profit) does not change its essentially charitable nature." *Id.* at 33. Like the non-profit hospital in *Vick*, DCI is a non-profit corporation providing

medical services to those in need without regard to those patients' ability to pay the full cost of treatment. The facts that patients are charged and some clinic locations generate excess revenue that does not inure to private benefit does not change DCI's "essentially charitable nature." *Id.* If DCI's intentions were anything other than charitable, it would have closed the West Chester Clinic years ago as an economic failure. Pursuant to this Court's broad definition of charity, DCI is using the West Chester Clinic primarily for charitable purposes. Accordingly, the Court should reverse the BTA's decision and grant DCI an exemption from property taxes pursuant to R.C. 5709.12(B).

**Proposition of Law No. III**

*The Ohio Board of Tax Appeals erred in finding that the subject property is not exempt from taxation.*

The decision of the BTA rests on two misapplications of law that, if allowed to stand, will be a radical departure from this Court's prior decisions, potentially endangering the existence or efficacy of many charitable healthcare providers. First, the BTA equated "charity" with "free care." Second, the BTA suggested that a threshold level of free care is required in order for an institution to be a "charitable institution."

**A. The BTA's decision wrongly defines charity as the provision of free health care.**

The BTA's decision erroneously defines charity as free care.<sup>14</sup> This definition ignores this Court's long-standing definition of charity described in Section I(A), above. Moreover, the BTA's Decision wrongly devalues the inherent charitable activity of providing care to all patients regardless of their ability to pay and providing care to Medicaid and Medicare patients. In short, the BTA's

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<sup>14</sup> The BTA states, DCI "provides no free or charitable service at the subject property." (Appx. 18.) Then it goes further asserting that DCI "conducts no charitable activity at the clinic" because "it charges all patients for dialysis services, voluntarily enters contracts with government and private insurers to set charges for the provision of these services, and does not donate any of its services without charge or at a reduced charge." (Appx. 19.)

decision disregards the modern realities of charitable health care, and particularly the modern reality of government assistance to pay for dialysis.

1. *Medicare and Medicaid Coverage for End-Stage Renal Disease*

Medicare coverage is nearly universal for ESRD. ***DCI could not accomplish its mission without accepting payments from Medicare and Medicaid.*** (Supp. 179, Tr. 127; Supp. 200-01, Tr. 213-14.) Institution-wide, 75% of DCI's patients qualified for Medicare in 2004, and 20% qualified for Medicaid that year, with some patients qualifying for both coverages. At the West Chester Clinic, 55 [*sic* -65%]-70% of the patients are covered by Medicare, 10% of the patients are covered by Medicaid, and the remainder have no insurance or are self-insured. (Supp. 188, Tr. 164-65.) The record is clear that DCI does not recover all of its costs of treatment at the West Chester Clinic even when it collects the maximum allowable charge. (Supp. 158-59, Tr. 45-46; Supp. 175, Tr. 110.)

The BTA's confusion about this case arises from the board's apparent misunderstanding and misapplication of the Medicare/Medicaid laws. Once an organization agrees to accept reimbursement from Medicare, it is restrained from charging less for services than the allowable charge offered to Medicare patients. (Supp. 157, Tr. 39-40.) By accepting Medicare at its West Chester facility, DCI must charge at least \$160 for dialysis to all patients.<sup>15</sup> DCI is reimbursed \$128 by Medicare per treatment, and DCI must charge the remainder to the patient. (Supp. 193, Tr. 183.) If a patient is indigent, DCI writes off this remaining charge (or the entire charge, if no coverage applies) pursuant to its bad-debt policy. (Supp. 165, Tr. 71.) If DCI does not follow these rules, DCI could either not accept Medicare or it would violate federal Medicare laws. Practically, this means that if DCI ever takes a Medicare patient, then DCI is *prevented by federal law* from giving

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<sup>15</sup> Patients covered solely by private insurance carriers are charged between \$175 and \$475 depending on the negotiated rate with the insurance carrier, and a self-pay patient is charged the commercial rate of \$800. (Supp. 193, Tr. 185.)

away completely "free care," yet it is primarily for this reason that the BTA denied DCI's appeal. Effectively, the BTA's Decision means that accepting Medicare patients cannot be a "charity."

Similarly, Ohio's Medicaid regulations limit DCI to charging \$155 per treatment and prohibits seeking a collateral source to account for the difference between the reimbursement amount and the cost of service. (Supp. 193, Tr. 182-84; Supp. 264, Tr. 265-66; Supp. 265, Tr. 268.) Thus, as required by law, DCI does not recover the full cost of the service it provides to a Medicaid patient.

Based on that cost of service, DCI has a shortfall for each Medicaid patient treatment and for each Medicare patient treatment (regardless of whether the Medicare patient has a collateral source for payments). The only way DCI "makes up" for this shortfall is by other clinics effectively subsidizing the Medicare/Medicaid patients at the West Chester Clinic. DCI's charity is demonstrated by its willingness to open clinics in underserved and unprofitable areas, treat patients who cannot pay, and continue to operate unprofitable clinics, such as the West Chester Clinic.

2. *The majority of states recognize that modern charitable health care encompasses more than 'free care.'*

Courts around the country have recognized the charitable activity of accepting patients regardless of their ability to pay. Recently, the Supreme Court of Michigan addressed a case with a factual scenario very similar to this case. See *Wexford Med. Group*, 474 Mich. at 204. Like DCI, the plaintiff, a health care provider, sought a real estate tax exemption for its facility. The plaintiff was organized as a charitable institution as reflected in its statement of purpose and bylaws. *Id.* at 196-97. The plaintiff had an "open-access policy" under which it accepted all patients without preferential treatment and without a cap on the number of Medicare and Medicaid patients. *Id.* at 197. In 2000 and 2001, 13 patients received free care at a value of about \$2,400.00 at which time the plaintiff's annual budget was \$10 million, handling approximately 40,000 to 44,000 patients. *Id.* at 197. Fifty percent of patients had Medicare or Medicaid coverage. These patients paid 20-40%

less than self-pay or private insurance patients. *Id.* at 197-98. Further, the plaintiff had financial losses around \$600,000 for 1999-2001. *Id.* at 198.

The Tax Tribunal found the plaintiff not entitled to a real estate tax exemption because it provided an insufficient amount of "free care." The court of appeals affirmed. Overturning the court of appeals, the Michigan Supreme Court found that the plaintiff was a "charitable institution." *Id.* at 215. Specifically, the court found that the plaintiff engaged in charitable acts by providing care to Medicaid and Medicare patients. *Id.* at 217. "[T]he fact that petitioner receives government reimbursements has little bearing on the analysis because, despite any government aid, the beneficiary of the medical care receives a gift \* \* \*" and "\* \* \* the reimbursements petitioner receives from the government funding fall well short of defraying the costs petitioner incurs to render medical care." *Id.*

As in *Wexford*, DCI does not recoup the full cost of treatment. Moreover, DCI provides more completely "free care" than did the plaintiff in *Wexford*, despite the fact that Medicare/Medicaid coverage for renal dialysis is nearly universal. (Appx. 19-20.) Further, DCI has an open-access policy, just like the health center in *Wexford*. Because of this open-access policy, the patients at DCI's clinics, including the West Chester Clinic, receive gifts — the gift of treatment regardless of their ability to pay and the gift of the unreimbursed treatment if they cannot pay. The result of these activities is that the West Chester Clinic is indisputably unprofitable, yet it remains open.

The difference between the BTA's Decision and the *Wexford* Court's decision is that the *Wexford* court properly recognized that government payments do not cover the costs that health care facilities incur to provide medical care. In *Wexford*, the hospital received 20-40% less from Medicare and Medicaid patients than from other patients. *Id.* at 197-98. Similarly, DCI receives dramatically less reimbursement for Medicare and Medicaid patients than private paying patients.

(Supp. 193, Tr. 182-85 (Medicare reimbursements are from \$128-\$160, Medicaid is \$155, and private care is \$175-\$475).) As a public policy matter, were DCI not to exist, the cost of covering these "shortfalls" would fall to community hospitals and, ultimately, the Ohio taxpayers.

The Supreme Court of Connecticut also recognized that providing care to patients, regardless of their ability to pay, is charity. *St. Joseph's Living Ctr., Inc.*, 290 Conn. 695. In *St. Joseph's Living Center*, a nursing home generally did not provide free care, but did not discriminate between patients on the basis of their ability to pay. *Id.* at 703-704. The nursing home derived most of its revenue from Medicare and Medicaid reimbursements and from private paying patients. *Id.* at 702-03. The Court found that the nursing home undertook a financial burden by accepting Medicaid patients without discrimination because the reimbursement under that program did not fully compensate the nursing home for actual patient care costs and thus "relieve[d] the state of having to shoulder the entire financial burden of caring for the indigent elderly." *Id.* at 732. The Court aptly summarized modern charitable health care: "[U]nder the current health care system in this country, accepting those patients who are eligible, or keeping those who thereafter become eligible, for Medicaid is the modern equivalent of caring for the indigent." *Id.* at 732 (emphasis in original).

Like the nursing home in *St. Joseph's Living Center*, DCI derives most of its funding from Medicare and Medicaid and from some private pay patients. Similar to the Medicare entitlement to dialysis, the elderly indigent are entitled to nursing home care. In the same way that ESRD coverage is nearly universal, one would be hard-pressed "to find any person in need of nursing home care who is uninsured, unable to pay, and wholly ineligible for government support \* \* \*." *Id.* at 733-34, quoting *St. Margaret Seneca Place*, 536 Pa. at 483. Despite this lack of free care, the Connecticut court found that the nursing home was an organization "organized exclusively for a charitable purpose." *Id.* at 709, 739-40, citing *Isaiah 61:1, Inc. v. Bridgeport* (2004), 270 Conn. 69, 76-77, 851 A.2d 277.

Similarly, DCI is a charitable institution and uses the West Chester Clinic for charitable purposes. DCI may not provide much care to patients who are "uninsured, unable to pay, and wholly ineligible for government support," but DCI engages in charitable activity by providing care to patients regardless of their ability pay, opening clinics in underserved and unprofitable areas, and by providing care to Medicare and Medicaid patients.<sup>16</sup>

Despite the BTA's anachronistic attempt to drastically narrow the Ohio Legislature's definition of charity, courts across the country have recognized that the definition of charity is broad enough to encompass the modern intersection between charitable institutions and government-subsidized care. See, e.g., *SHARE v. Commr. of Revenue* (Minn. 1985) 363 N.W.2d 47, 52 ("We recognize that major changes in the area of health care, especially in modes of operation and financing, have necessitated changes as well in definitional predicates. The term 'charitable' as applied to health care facilities has been broadened since earlier times when it was limited mainly to almshouses for the poor."); *Evangelical Lutheran Good Samaritan Soc. v. Cty. of Gage* (1967) 181 Neb. 831, 836, 151 N.W.2d 446, 449 ("With the advent of present day social security welfare programs, this type of charity [free care] is not often found because assistance is available to the poor under these programs. Yet, ' \* \* \* the courts have defined "charity" to be something more than mere alms-giving or the relief of poverty and distress, and have given it a significance broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who

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<sup>16</sup> State supreme courts across the country have similarly held that providing care to Medicare and Medicaid patients is a form of charitable care. See, e.g., *ElderTrust of Florida, Inc.*, 154 N.H. at 703 (nursing home services were charitable in nature because many of the patients were covered by Medicaid, which did not cover the entire cost of the services provided); *St. Margaret Seneca Place*, 536 Pa. at 485 ("[P]eople whose costs are only partially covered by Medicaid payments are manifestly legitimate objects of charity and people who 'cannot afford to pay.'"); *Med. Ctr. Hosp. of Vermont, Inc.*, 152 Vt. at 618-20 (rejecting city's argument that acceptance of Medicare and Medicaid payments precluded a finding that a hospital was charitable).

receive the benefits."'), quoting *Young Men's Christian Assn. of the City of Lincoln v. Lancaster Cty.* (Neb. 1921) 106 Neb. 105, 111, 182 N.W. 593.

These courts have all recognized that charitable health care is no longer characterized by "free care." Rather, charities and the government jointly provide quality health care to the indigent. Without the work of charities like DCI, the full cost and responsibility of caring for individuals with ESRD would fall entirely upon the government.

This Court should join the overwhelming majority of state supreme courts that recognize that modern charitable health care is not limited to "free care." Rather, charities and the government work together to provide quality health care to those who cannot afford it. This is especially true in areas like dialysis or end-of-life care where the cost of care is prohibitively expensive and the care is needed until death. By offering its dialysis to all patients regardless of each patient's ability to pay and regardless of the patient's insurance coverage (be it government or a private payer), DCI is using the property for a charitable purpose.

**B. A threshold level of "free care" should not be required.**

The BTA's decision was clearly premised on a mistaken belief that charitable care in Ohio requires a threshold level of completely "free care." (See Appx. 18 (DCI "provides no free or charitable service at the subject property").) This is neither the law in Ohio nor the majority of the country.

1. *Ohio does not require a specific percentage or amount of completely free care in order to find charity.*

This Court has never required a specific percentage of charitable care at a property to find a charitable use and, therefore, a property tax exemption. *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, 806 N.E.2d 142, ¶36. Rather, "[w]hether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable

use of property must be determined on the totality of the circumstances; *there is no absolute percentage.*" *Id.* at ¶39. Yet, the BTA's decision implies that a threshold amount of free care is required for a property to be used for charitable purposes.<sup>17</sup>

As set forth above, the BTA denied DCI's appeal under R.C. 5709.12(B) and R.C. 5709.121 because DCI "provides no free or charitable service at the subject property." (Appx. 15.) So, the BTA requires some "free care." The BTA further stated that \$6.7 million or 1.27 percent of institution-wide charges of bad debt write-offs for Medicare patients was "insufficient to meet the charitable service standards required for exemption." (Appx. 19, citing *Bethesda Healthcare, Inc.*) The BTA also decided that serving an average of 96 uninsured indigent patients out of an average of 13,082 patients was insufficient to be deemed charitable. (Appx. 19.) By rejecting DCI's percentage of free care and its Medicare debt write-offs as insufficient, the BTA implicitly required a specific, yet unknown, amount of free care.

This Court should uphold its prior decisions and reject a threshold level of completely "free care." To sustain the Decision would allow the BTA to usurp the power of the General Assembly by inserting a statutory requirement into the exemption statutes that simply is not there. The Constitution provides that "general laws may be passed to exempt \* \* \* institutions used exclusively for charitable purposes \* \* \*" from property taxes. Section 2, Article XII, Ohio Constitution. The General Assembly has exercised this power through various laws including R.C. 5709.12(B) and 5709.121. Notably absent from either of those statutes is a requirement that an exempted entity provide *anything* for free. The statutes simply do not require a threshold level of free services.

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<sup>17</sup> In interpreting the statutes regarding property tax exemption, this Court has embraced a broad definition of "charity" including "the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity." *Planned Parenthood Assn.*, 5 Ohio St.2d at paragraph one of the syllabus.

Instead of a specific percentage of “free care,” this Court requires an evaluation of the totality of the circumstances to determine whether charity exists. Indeed, this Court has specifically rejected an “absolute percentage of charitable use.” *Bethesda Healthcare, Inc.* at ¶39.

2. *The majority of state supreme courts considering these issues similarly reject a requirement of a specific percentage of completely “free care” to find charitable activity for a property tax exemption.*

Other state supreme courts have rejected threshold levels of free care. In *Wexford*, the court rejected a monetary threshold as arbitrary and outside the realm of the judiciary:

The Tax Tribunal and the Court of Appeals focused exclusively on the dollar amount of free health care petitioner gifted as part of its charity care program, looking no further into the nature of petitioner's organization. This was error because it is clear that both tribunals had in mind a monetary threshold that is not only not discernible from the statute, but that would be, by its very nature, quite arbitrary.

\* \* \* [T]here are multiple reasons why inventing legislative intent in this regard would be ill-advised and most unworkable. In fact, the difficulties with formulating a monetary threshold illuminate why setting one is the Legislature's purview not the courts'. To set such a threshold, significant questions would have to be grappled with. For instance, a court would have to determine how to account for the indigent who do not identify themselves as such but who nonetheless fail to pay. A court would have to determine whether facilities that provide vital health care should be treated more leniently than some other type of charity because of the nature of its work, or even if a health care provider in an underserved area, such as petitioner, is more deserving of exemption than one serving an area of lesser need. A court would need to consider whether to premise the exemption on whether the institution had a surplus and whether providing below-cost care constitutes charity. Clearly, courts are unequipped to handle these and many other unanswered questions. Simply put, these are matters for the Legislature.

*Wexford*, 474 Mich. at 213-14. Similarly, in *Medical Center Hospital of Vermont*, the taxing authority argued that the plaintiff hospital failed to prove that it dispensed an adequate amount of “free care.” *Med. Ctr. Hosp. of Vermont*, 152 Vt. at 616. The court squarely rejected this argument as impractical: “pegging charitability to a stated amount of free care rendered would not be workable in [determining] an organization's taxable status. Instead uncertainty would reign, with taxability determined on a yearly basis depending on economic factors not within the control of any one person

or organization." *Id.* at 616-17. Instead the court adopted the "better inquiry" of "whether health care was made available by the plaintiff to all who needed it, regardless of their ability to pay." *Id.* at 617. In fact, as recognized by the Michigan and Vermont courts, adopting a threshold requirement would be difficult to do and unworkable because non-profit companies cannot know how much free care they will render in any given year. *See Wexford*, 474 Mich. at 213-14; *Med. Ctr. Hosp. of Vermont*, 152 Vt. at 616.

Here, the BTA narrowly focused on the amount of completely "free care" DCI provides at the West Chester Clinic. This was error. By rejecting DCI's free care as "insufficient," the BTA implied that some level of free care *is* sufficient. Such a requirement is bad law. Viewing the totality of the circumstances, DCI's facilities — including the West Chester Clinic — have a commitment to charity that is well-established by the record. As shown above, in Propositions of Law Nos. I and II, DCI is a charitable institution and uses the West Chester Clinic for exclusively charitable purposes. DCI is entitled to a property tax exemption.

### CONCLUSION

This Court should reverse the BTA's Decision affirming the Tax Commissioner's denial of DCI's application for a real estate tax exemption. Correlatively, this Court should grant DCI a real estate tax exemption under both R.C. 5709.121 and R.C. 5709.12(B). The record conclusively demonstrates that DCI is entitled to the real estate tax exemption it seeks.

DCI is unquestionably a charitable institution. The BTA's Decision incorrectly conflated the R.C. 5709.121 and R.C. 5709.12(B) analyses, failing to analyze DCI as an institution. However, the undisputed facts show that, as an institution, DCI: (a) is a 501(c)(3) organization, (b) does not operate with a view to profit, (c) does not turn away any patient, (d) accepts indigent patients knowing that they cannot pay for the cost of services, (e) accepts Medicare and Medicaid without a cap which results in clinics, like the West Chester Clinic, being unprofitable, (f) uses any excess

profits for ESRD research and to fund patient treatments, (g) opens clinics in underserved and often unprofitable areas for patient benefit, (h) does not financially benefit any person or entity, except those suffering from ESRD, and (i) upon dissolution, will only benefit those suffering from ESRD or another charity. These facts conclusively demonstrate that DCI is a charitable institution. As such, under *Community Health Partners* and *Miracit*, its normal operations at the West Chester Clinic entitle it to exemption under R.C. 5709.121.

Moreover, the West Chester Clinic is the physical manifestation of DCI's charitable mission. It is only through clinics, like the West Chester Clinic, that DCI can fulfill its mission, providing charitable care to seriously ill patients. The West Chester Clinic's operations embody the charitable mission described in (a) - (i) above. In short, the West Chester Clinic's operations are themselves charitable, entitling DCI to exemption under R.C. 5709.12(B).

In affirming the Tax Commissioner's denial of DCI's exemption application, the BTA invented the idea that the Ohio real estate tax exemption statutes require a quantum of "free care" to be a charitable institution or use a property charitably. The statutes contain no such requirement. To affirm the BTA's Decision would usurp the power of the Legislature, rewriting the statutes to require some undefined quantum of some totally "free care", a concept the Legislature did not include or intend. Moreover, the BTA's Decision is a drastic departure from this Court's precedents in that this Court has never required that an applicant for real estate tax exemption demonstrate that it provided some level of "free care". In fact, the wide majority of other courts that have considered the question concluded that healthcare operations like DCI's are, in fact, charitable. These courts concluded that exemption does not require a demonstrated level of "free care".

Affirming the BTA's Decision could pose dire consequences for Ohio's charitable hospitals, among others. Without question, affirming the BTA's decision would reduce the resources available to charitable healthcare providers to treat less-fortunate Ohio residents. In addition to being based

on bad law, the BTA's Decision is bad policy - government reimbursements to charitable healthcare providers should not disqualify those providers from real estate tax exemption. DCI urges this Court to remain consonant with the holdings of nearly every other state supreme court considering the issue in finding that the acceptance of government reimbursements will not impair the charitable status of a healthcare provider that is in all respects a charity. DCI urges the Court to reverse the BTA's Decision.

Respectfully submitted,



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Sean P. Callan, COUNSEL OF RECORD

COUNSEL FOR APPELLANT DIALYSIS  
CLINIC, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been duly served upon the certified mail this 22nd day of March, 2009:

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ORIGINAL

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IN THE SUPREME COURT OF OHIO

DIALYSIS CLINIC, INC.,

Appellant,

-vs-

WILLIAM W. WILKINS,  
TAX COMMISSIONER OF OHIO,

Appellee.

Case No.

09-2310

On Appeal from the Ohio Board of Tax  
Appeals

Ohio Board of Tax Appeals  
Case No. 2006-H-2389

NOTICE OF APPEAL OF APPELLANT

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Counsel for Appellant  
Dialysis Clinic, Inc.

FILED  
DEC 23 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

Appellant Dialysis Clinic, Inc., hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Ohio Board of Tax Appeals entered in BTA Case No. 2006-H-2389 on November 24, 2009. This appeal is brought pursuant to Revised Code § 5717.04.

**ASSIGNMENTS OF ERROR**

The Ohio Board of Tax Appeals erred as follows:

1. The Ohio Board of Tax Appeals erred by finding that Appellant does not use the subject property for a charitable purpose as contemplated by Revised Code §§ 5709.12 and 5709.121.
2. The Ohio Board of Tax Appeals erred by finding that Appellant is not a "charitable institution" as described in Revised Code § 5709.121.
3. The Ohio Board of Tax Appeals erred in finding that the subject property is not exempt from taxation.

Respectfully submitted,

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This matter is considered by the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T."), and the record of the evidentiary hearing ("H.R.") held in this matter. The parties also provided legal arguments through briefs filed with the board.

DCI seeks exemption for one of its outpatient dialysis clinics located in West Chester, Ohio. In support of its exemption application, DCI's then-staff attorney Amy Wheeler submitted the following October 2006 correspondence to the commissioner, which states, in relevant part, as follows:

"DCI is a Tennessee non-profit, public benefit corporation qualified as a tax exempt organization under Section 501(c)(3) of the Internal Revenue Code. DCI's mission is to care for and rehabilitate patients suffering from chronic renal failure while constantly striving to improve the methods and quality of treatment. To this end, DCI operates approximately 195 outpatient dialysis clinics in 26 states, supports and participates in kidney-related research, and promotes professional and public education in this field of medicine. Each year, DCI sets aside a significant portion of its profits to be utilized for research \*\*\*. For its fiscal year ended September 30, 2005, DCI set aside \$13,622,000 for research on net profits of \$21,378,000.<sup>[1]</sup> Additionally, DCI operates a summer camp for children \*\*\* who have chronic renal failure or who have received a kidney transplant. The camp \*\*\* had 97 campers in June 2006.

"DCI opened its clinic \*\*\* in October 2003. The Facility has 14 dialysis stations and currently serves approximately 30 patients providing dialysis services three days per

<sup>1</sup> The record does not contain DCI's federal tax return in support of the referenced 2005 tax year, but does contain copies of returns for 2003 and 2004. S.T. at 19-45 and 46-72. DCI states it netted \$32,167,517 on revenues of \$514,053,981 for tax year 2004, with approximately \$6 million apparently listed for research expenses. S.T. at 46, 47, 59, 63. For tax year 2003, DCI states it netted \$6,306,492 on revenues of \$479,127,641, with \$7 million apparently listed for research expenses. S.T. at 19, 20, 33. The record provides no further details or support regarding these stated research expenses.

week. \*\*\* DCI is, and has always been, the sole occupant of the Facility.

"DCI receives reimbursement for the services it provides from three main sources: Medicare, Medicaid and private insurers. Sixty-two percent of the Facility's patients are covered by Medicare and nine percent are covered by Medicaid. For many Medicare and Medicaid patients, DCI writes off the patient's responsibility based on indigency in accordance with DCI policy.

"DCI is limited by federal and state laws in the ways in which it can provide charity care. Federal law prohibits healthcare providers from influencing patient choices of one provider over another by offering free items or services. Thus, DCI is not able to provide free items or services to patients who are eligible for Medicare and Medicaid. Because Medicare has a separate program for individuals with chronic renal failure, most patients are eligible for coverage. However, for those who are not eligible (mostly individuals who never worked or illegal aliens) or who have a waiting period before Medicare/Medicaid coverage begins, DCI does provide charity care. Amounts of charity care are kept at the local clinics and are not aggregated across the company. The Facility currently does not have any charity patients." S.T. at 114-115.

Attached to its exemption application is a copy of a 1995 amendment to DCI's restated charter, which states that the corporation's purpose is as follows:

"To operate dialysis clinics, to dialyze patients and to render such additional care as patients with chronic renal failure may require; to provide training and supplies to enable selected patients to undertake dialysis at home, and to do all acts and things necessary and incidental thereto.

"To receive and maintain a fund or funds of real and personal property or both, and to use and to apply the whole or any part of the income therefrom and the principal thereof exclusively for charitable, scientific or educational purposes related to kidney disease, either directly or by contributions to organizations that qualify as

exempt organizations under Section 501(c)(3) of the Internal Revenue Code and its regulations as they now exist or as they may be hereinafter amended.

"To conduct research relating to kidney disease, dialysis, and transplantation, and to do any act or thing which may promote the effective treatment of kidney disease." S.T. at 154.

In his final determination, the commissioner decided to review DCI's request for exemption pursuant to R.C. 5709.12(B), noting DCI failed to specify any statutory basis for exemption on its application. S.T. at 1, 120. The commissioner found DCI to be a non-profit institution, but not a charitable one, and concluded R.C. 5709.121 is, therefore, inapplicable. S.T. at 1-2. The commissioner looked at evidence of DCI's use of the subject and found "no evidence of charitable care provided at the property." The commissioner denied exemption, stating:

"It is noted that merely collecting Medicaid or Medicare reimbursements is not a charitable act, but is receiving full agreed payment under a guaranteed insurance payment for medical services. The Medicaid fees paid are ones agreed to between the health care provider and the Medicaid insurer. Such insured payments are no different than payments agreed to and paid under commercial insurance agreements, whereby the insurer may contract with the care provider to pay a lower fee for services than that charged to uninsured patients. Further, medical care does not become charitable merely because a medical billing is deemed uncollectible and written off; such action being no more than an accounting tool by which a company may offset its business losses. \*\*\* Therefore, the write-offs submitted for the subject property or those submitted for the entire DCI system are insufficient to determine the amount of indigent patients seen without regard to ability to pay." S.T. at 3-4.

In its notice of appeal, DCI asserts the commissioner erred by finding it was not a charitable institution, by finding that it does not use the subject property for a charitable purpose, and by finding that the property is not exempt from taxation.

At the hearing before this board, DCI presented two exhibits and the testimony of Mr. Lee Horn, in-house counsel for DCI, and Mr. Roy Dansro, DCI's regional administrator for the Cincinnati area. The Tax Commissioner presented five exhibits and two witnesses who work for the Ohio Department of Job and Family Services, Ms. Deborah Clement Saxe and Mr. Eric Edwards. Consistent with the facts as stated by his predecessor, Horn testified that DCI's mission is to provide treatment for end-stage renal disease without a profit motive. H.R. at 36, 101; S.T. at 153, 155, 158. He said DCI developed an indigence policy to satisfy Medicare requirements, which prohibit charging less for services than the amount charged to Medicare patients. H.R. at 39-40. To be considered under DCI's indigence policy, patients must complete a financial analysis form, which is then used to determine ability to pay.

The policy states: "DCI's indigence policy is not a charity or gift to patients. DCI retains all rights to refuse to admit and treat a patient who has no ability to pay." Appellant's Ex. 4 at 2. The policy further states "all patients are personally responsible to pay for the treatment and services that DCI provides them." *Id.* It explains that reasonable collection actions will be taken against those who do not pay, including court action. "DCI has an affirmative obligation to collect copays and deductibles per managed care contracts." *Id.* Finally, the stated purpose of the indigence policy is to:

“\*\*\* [E]stablish a uniform and equitable system to determine if a DCI patient is indigent such that DCI may deem certain charges for DCI's services provided to an indigent patient as an uncollectible bad debt. If DCI determines that a patient's indigence as established by this policy renders certain charges to that patient as uncollectible bad debt, then DCI may 'write-off' certain categories of charges to the patient as opposed to subjecting an indigent patient to reasonable collection efforts.” Appellant's Ex. 4 at 1.

Horn testified that the policy addresses “the requirement that we not charge or offer services to patients cheaper than the Medicare rate.” H.R. at 47. He further explained that indigent patients must first exhaust all possible insurance payment options before amounts owed will be considered under the policy. H.R. at 47, 70-71. If a patient qualifies under the indigence policy and is unable to pay for treatment, Horn testified that the patient will be billed for the outstanding amount and then, “after a certain amount of time,” DCI's accounts-receivable billing department will write off the charge as an uncollectible bad-debt expense from the accounts-receivable ledger. H.R. at 78-81, Appellant's Ex. 5.

Horn also testified as to the insurers that reimbursed DCI for services provided to patients during the period October 2006 to September 2007. H.R. at 90-101.<sup>2</sup> He said that on a company-wide basis, Medicare insured almost 75 percent of DCI patients for the 2006 to 2007 period. Horn obtained this percentage from a document he said he received from the company's controller, which also indicates private insurers covered 12.6 percent of DCI's patients, with Medicaid, HMOs, and the

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<sup>2</sup> He said he was unable to testify regarding insurers for the relevant exemption application period. *Id.*

Veteran's Administration insuring, respectively, 6.2, 5, and 1.3 percent of patients. Appellee's Ex. C. This exhibit also indicates that DCI provided 1,836,058 treatments per year to a monthly average of 13,082 patients, generating \$526,891,082 in charges.<sup>3</sup> Of this, 11,840 treatments per year were provided for a monthly average of 96 indigent patients with no insurance. Id. DCI characterized approximately \$6.7 million of the charges for this period as a "bad debt charity write off" for those patients insured by Medicare.<sup>4</sup>

Finally, Horn testified that DCI voluntarily agrees to accept patients insured by Medicare and Medicaid. H.R. at 119-120. He also said DCI did not conduct research or its summer camp at the subject facility in West Chester. H.R. at 132.

DCI's other witness, Dansro, manages the subject in West Chester, three other dialysis clinics located throughout the Cincinnati area in Walnut Hills, Western Hills, and Forest Park, as well as a clinic in Maysville, Kentucky. H.R. at 135. Dansro testified that DCI's dialysis service is the same as that of a for-profit provider, but DCI invests excess revenue toward construction of new clinics and research to combat kidney disease. H.R. at 141, 220. He cited \$1.7 million in research funding he said DCI gave to the University of Cincinnati Medical College from 2004 to 2008. H.R. at 142, 215-217. He said that while DCI does not turn away patients without the ability to pay, all DCI patients are referred to its clinics after being treated and

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<sup>3</sup> Of these total charges, Medicare and private insurers make up 55.8 and 31.7 percent, respectively. Id.

<sup>4</sup> See appellant's Ex. 5 at procedure 1001, attachment 1001A, cost code A101.

discharged from hospitals, so they rarely lack insurance.<sup>5</sup> H.R. at 139, 168. In fact, Dansro said all patients treated at the subject since it opened in late 2003 have had some type of insurance. H.R. at 172, 221-222. He testified that of the approximately 350 total patients at the five clinics he manages, presently between six and nine receive treatment without insurance or the ability to pay. H.R. at 173-174. However, it is unclear from Dansro's testimony how long any patient receives treatment without insurance since he also testified that DCI's social workers supervise these patients in applying for Medicare and Medicaid.<sup>6</sup> Id.

Finally, Dansro testified that clinics with fewer patients tend to lose money, such as the subject with 10 to 40 patients, while clinics with a higher volume tend to generate revenues in excess of expenses, such as Walnut Hills with 140 patients. H.R. at 152-156; 206-207. Based on data compiled by an employee under Dansro's supervision, the West Chester clinic generated \$552,488 in charges during 2004 with approximately 10 total patients and \$866,646 during 2005 with approximately 25 total patients. H.R. at 197-198, 221; Appellee's Ex. B. For these

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<sup>5</sup> For patients without insurance, Dansro testified that DCI's charge is \$800 per treatment. Private insurers have negotiated charges of \$175 to \$475 per treatment, with Medicaid-insured patients charged the maximum reimbursement amount of \$155 per treatment. While Medicare patients are responsible for a 20 percent copayment of the Medicare rate, which is \$160 per treatment, approximately 85 percent of DCI's Cincinnati area Medicare patients have a secondary insurer that covers the copayment. H.R. at 166-168, 183-186.

<sup>6</sup> Medicare established a special program to insure patients, regardless of age or income, who require dialysis due to end-stage renal disease, according to the testimony of the commissioner's witness, Eric Edwards, a Medicaid rules and policy expert for the Ohio Department of Job and Family Services. H.R. at 261-262, 269; S.T. at 115. He testified that patients can experience a one- to three-month long waiting period after completing a Medicare application before becoming eligible for benefits. Id.

two years combined, insurers were responsible for approximately \$1.4 million in charges, with approximately \$8,000 billed to patients. *Id.*

We begin our review by observing that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, 123. Consequently, it is incumbent upon a taxpayer challenging a determination of the Tax Commissioner to rebut that presumption. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135, 143; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138, 142. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215. When no competent and/or probative evidence is developed and properly presented to the board to establish that the commissioner's determination is "clearly unreasonable or unlawful," the determination is presumed to be correct. *Alcan Aluminum*, at 123.

The rule in Ohio is that all real property is subject to taxation. R.C. 5709.01. Exemption from taxation is the exception to the rule. *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186. The burden of establishing that real property should be exempt is on the taxpayer. Exemption statutes must be strictly construed. *American Society for Metals v. Limbach* (1991), 59 Ohio St.3d 38, 40; *Faith Fellowship Ministries, Inc. v. Limbach* (1987), 32 Ohio St.3d 432; *White Cross Hospital Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199; *Goldman v. Robert E. Bentley Post* (1952), 158 Ohio St. 205; *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407; and *Willys-Overland Motors, Inc. v. Evatt* (1943), 141 Ohio St. 402.

In its appeal, DCI claims that the subject property should be exempt from taxation pursuant to R.C. 5709.12(B) and R.C. 5709.121. Under R.C. 5709.12(B), all “[r]eal and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation \*\*\*.” Thus, to grant an exemption under this section of the statute, it must be determined that (1) the property belongs to an institution, and (2) the property is being used exclusively for charitable purposes. *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405, 406-407. The phrase “used exclusively” has been interpreted by the court to mean primary use. *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, 120.

Moreover, if an institution is found to be “charitable,” it can then be held to a more relaxed standard of “exclusive charitable use” found in R.C. 5709.121. That statute provides:

“Real property and tangible personal property belonging to a charitable \*\*\* institution \*\*\* shall be considered as used exclusively for charitable \*\*\* purposes by such institution, \*\*\* if it meets one of the following requirements:

“(A) It is used by such institution, \*\*\* or by one or more other such institutions, the state, or political subdivisions under a lease, sublease, or other contractual arrangement:

“(1) As a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education there;

“(2) For other charitable, educational, or public purposes;

“(B) It is made available under the direction or control of such institution, \*\*\* for use in furtherance of or incidental

to its \*\*\* charitable \*\*\* purposes and not with a view to profit.”

Thus, in deciding whether property is exempt under the charitable use provisions of R.C. 5709.12(B) and 5709.121, the first determination is whether a charitable or noncharitable institution is seeking exemption. If the institution is noncharitable, its property may be exempt if it uses the property exclusively for charitable purposes. *Highland Park Owners, Inc.*, supra. If the institution is charitable, its property may be exempt if it uses the property exclusively for charitable purposes or it uses the property under the terms set forth in R.C. 5709.121.<sup>7</sup> *Olmsted Falls Bd. of Edn. v. Tracy* (1997), 77 Ohio St.3d 393, 396; *Episcopal Parish v. Kinney* (1979), 58 Ohio St.2d 199; *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199.

Furthermore, “[w]hen charges are made for the services being offered, we must consider the overall operation being conducted to determine whether the property is being used exclusively for charitable purposes.” *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 2004-Ohio-1749, at ¶36. “Whether an institution renders sufficient services to persons who are unable to afford them to be considered

<sup>7</sup> To determine whether property is exempt in accordance with R.C. 5709.121, “property must [1] be under the direction or control of a charitable institution or state or political subdivision, [2] be otherwise made available ‘for use in furtherance of or incidental to’ the institution’s ‘charitable \*\*\* or public purposes,’ and [3] not be made available with a view to profit.” *Cincinnati Nature Center v. Bd. of Tax Appeals* (1976), 48 Ohio St.2d 122, 125. “When considering R.C. 5709.121 and the question of whether a charitable institution uses its property in furtherance of or incidentally to its charitable purposes, this court focuses on the relationship between the actual use of the property and the purpose of the institution.” *Community Health Professionals, Inc. v. Levin*, 113 Ohio St.3d 432, 2007-Ohio-2336, at 21.

as making charitable use of property must be determined on the totality of the circumstances; there is no absolute percentage." *Id.* at ¶39.

While the General Assembly has not defined what activities of an institution constitute charitable purposes, the Supreme Court of Ohio held in *Planned Parenthood Assn. of Columbus, Inc. v. Tax Commr.* (1966), 5 Ohio St.2d 117, paragraph one of the syllabus, that:

"[I]n the absence of a legislative definition, 'charity,' in the legal sense, is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity."

In the present matter, we first find that DCI does not qualify for exemption under R.C. 5709.12(B) as an institution that uses the property exclusively for charitable purposes. *Highland Park Owners, Inc.*, *supra*. As DCI concedes, it provides no free or charitable service at the subject property. Consequently, for DCI to qualify for exemption, it must be found that DCI is the type of institution permitted the broader definition of "exclusive charitable use" found under R.C. 5709.121, where the threshold requirement is that the property owner be a charitable or educational institution, state or political subdivision. *True Christianity Evangelism v. Tracy* (1999), 87 Ohio St. 3d 48, 50. Although the record indicates DCI is a not-for-profit corporation that may operate the subject property without a view to profit, we are unable to find that DCI is a charitable institution.

When we look at the "relationship between the actual use of the property and the purpose of the institution," *Community Health Professionals, Inc.*, supra, we find DCI does not use the subject property in furtherance of or incidently to its charitable purpose because it conducts no charitable activity at the clinic. Instead, like the operations of a for-profit corporation, it charges all patients for dialysis services, voluntarily enters contracts with government and private insurers to set charges for the provision of these services, and does not donate any of its services without charge or at a reduced charge. The only distinction we can find between DCI's clinics and for-profit dialysis clinics is the manner in which a portion of excess revenue is used. From the limited record, it appears that the owner's intent is to raise funds from its clinic operations to apply in part toward further clinic development and alleged research.<sup>8</sup> However, any charitable purpose based on this use is vicarious. "It is only the use of property in charitable pursuits that qualifies for tax exemption, not the utilization of receipts or proceeds that does so." *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, 566. See, also, *Seven Hills Schools*, supra; *Vick v. Cleveland Memorial Medical Foundation* (1965), 2 Ohio St.2d 30, 33.

Further, DCI explicitly states that its "indigence policy is not a charity or gift to patients. DCI retains all rights to refuse to admit and treat a patient who has no ability to pay." Appellant's Ex. 4 at 2. The policy also states "all patients are personally responsible to pay for the treatment and services that DCI provides them."

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<sup>8</sup> Other than the bare information reported on corporate tax returns and witness testimony regarding one donation to the University of Cincinnati, we find no evidence regarding research or contributions by DCI. See footnote 1, supra; H.R. at 142.

Id. If payment is not received for services provided, then DCI pursues collection action, including court action, which presumably means obtaining judgment and recording a lien against non-paying patients. While DCI characterizes as charity its accounting practice of eventually writing off a portion of some patient charges deemed uncollectible bad debt, we find no evidence of DCI acting as a donor at any time by relinquishing its legal right to payment from patients for services provided.

In an Illinois tax exemption case involving a hospital, *Provena Covenant Med. Center v. Dept. of Revenue* (August 26, 2008), 384 Ill. App.3d 734, the court discusses the relationship between charity and gift giving as follows:

“‘Charity’ is an act of kindness or benevolence. There is nothing particularly kind or benevolent about selling somebody something. ‘Charity’ is ‘generosity and helpfulness[,] esp[ecially] toward the needy or suffering’ (Merriam-Webster’s Collegiate Dictionary 192 (10th ed. 2000)) – not merely helpfulness, note, but generosity. ‘Generosity’ means ‘liber[ality] in giving.’ Merriam-Webster’s Collegiate Dictionary 484 (10th ed. 2000). To be charitable, an institution must give liberally. Removing giving from charity would debase the meaning of charity, and we resist such an assault upon language. See C. Borek, Decoupling Tax Exemption for Charitable Organizations, 31 Wm. Mitchell L. Rev. 183, 187 (2004) (“the ‘legal’ meaning [of ‘charitable’] has so stretched the term beyond its etymological boundaries as to render the concept vacant, unoccupied by any useful legal notion of what ‘charitable’ means”).

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“[A] gift is, by definition, free goods or services: ‘something voluntarily transferred by one person to another without compensation’ (Merriam-Webster’s Collegiate Dictionary 491 (10th ed. 2000)). Defining ‘gift’ in any other way would do violence to the meaning of the word. One can make a gift by charging nothing at

all. Or one can make a gift by undercharging a person, that is, charging less than one's cost (using cost as a baseline prevents the creation of an artificial gift through inflation of prices (37 Loy. U. Chi. L.J. at 511-12)), and in that case, part of the goods or services is given without compensation. \*\*\*. Provena quotes [a case that states]: 'Charity,' in law, is not confined \*\*\* to mere almsgiving.' That is true. But it is confined to giving. Charity is a gift, and one can give a gift to a rich person as well as to a poor person, the object being 'the improvement and promotion of the happiness of man.' \*\*\* Regardless of whether the recipient of the goods or services is rich or poor or somewhere in between, it is nonsensical to say one has given a gift to that person, or that one has been charitable, by billing that person for the full cost of the goods or services – whether the goods or services be medical or otherwise. For a gift (and, therefore, charity) to occur, something of value must be given for free." *Id.* at 25-26 (internal case citations omitted).

Based on a review of the record, we find no evidence quantifying any meaningful act of DCI "giving" anything to patients. *Planned Parenthood Assn. of Columbus, Inc.*, *supra*. Again, DCI concedes it provides no free or charitable service at the subject property. DCI's policy states that it "retains all rights to refuse to admit and treat a patient who has no ability to pay." Even if DCI agrees to temporarily provide treatment to a patient without the ability to pay, it appears that it does so with the expectation that the patient will qualify for some type of insurance and payments will soon begin. *Id.*

As to the alleged charitable Medicare write-offs, the record provides no evidence as to the relevant application year. Instead, in 2006 to 2007, DCI generated \$526,891,082 in charges and characterized approximately \$6.7 million, or 1.27 percent, of these charges as a "bad debt charity write off" for those patients insured by

Medicare. However, we are unable to find these write offs charitable since federal law expressly prohibits DCI from providing charitable care to patients insured by Medicare. Reply brief at 10.

Further, even if we were to accord this evidence any weight, since DCI presented no evidence as to actual costs, we are unable to determine from the record whether the amounts written off were anything more than simply excess charges over costs. And finally, even if we were to accept DCI's position as to the written-off bad debt, we would find 1.27 percent to be insufficient to meet the charitable service standards required for exemption. See, for example, *Bethesda Healthcare, Inc.*, supra. That finding would be buttressed by the fact that DCI provided, subject to its indigence policy, a monthly average of 96 uninsured indigent patients with less than one percent (.64 percent) of the 1,836,058 total dialysis treatments provided that year to a monthly average of 13,082 patients. We would also find this company-wide amount deficient. Consequently, we are unable to find DCI acts as a donor "without hope or expectation, if not with positive abnegation, of gain or profit." *Planned Parenthood Assn. of Columbus, Inc.*, supra.

While the alleged research efforts of this organization may be laudable and while the individuals availing themselves of the dialysis services provided certainly benefit, DCI is not providing its services without an expectation that it will be compensated. Thus, DCI is not a charitable organization and the subject property is not entitled to exemption from taxation. Accordingly, it is the decision and order of

the Board of Tax Appeals that the Tax Commissioner's final determination must be,  
and is, affirmed.

I hereby certify the foregoing to be a true  
and complete copy of the action taken by  
the Board of Tax Appeals of the State of  
Ohio and entered upon its journal this  
day, with respect to the captioned matter.



Sally F. Van Meter, Board Secretary



# FINAL DETERMINATION

Date: OCT 25 2006

Dialysis Clinic Inc.  
c/o Administrator  
1633 Church Street, #500  
Nashville, TN 37203

Re: DTE No.: JE 4491  
Auditor's No.: 04-02  
County: Butler  
School District: Lakota SD  
Parcel Number: M5620-441-000-008

This is the final determination of the Tax Commissioner on an application for exemption of real property from taxation filed on December 22, 2003. The applicant seeks exemption of real property from taxation for the tax year 2004.

The applicant, Dialysis Clinic, Inc. ("DCI") is a Tennessee non-profit corporation organized to provide dialysis care to patients diagnosed with chronic renal failure. It is noted that, while the applicant is a nonprofit institution, there is not sufficient evidence to indicate that it is a charitable one. DCI operates approximately 195 outpatient facilities in 26 states, generating about \$479 million dollars (\$479,528,956) in gross revenue from its activities. The subject facility ("Facility") is approximately 9,846 sq. ft. and has 14 dialysis stations used to serve about 30 patients, providing treatment three days per week on average. The DCI receives reimbursement for its services through Medicare, Medicaid and private insurers. While DCI provides funding for research and charitable services at other locations throughout the country, it states that no charitable services are provided at the subject property facility.

The applicant has not requested exemption review under any applicable statutory provision. Since the applicant is a non-profit entity, exemption will be reviewed under the provisions of R.C. 5709.12(B). In *Episcopal Parish v. Kinney* (1979), 58 Ohio St. 2d 199, the Supreme Court defined the charitable use provisions of R.C. 5709.12 and R.C. 5709.121 as follows:

R.C. 5709.12 states "\*\*\* real and tangible personal property belonging to an institution that is used exclusively for charitable purposes shall be exempt from taxation." \*\*\* The legislative definition of exclusive charitable use found in R.C. 5709.121, however, applies only to property "belonging to, 'i.e. owned by' a charitable or educational institution, or the state or a political subdivision."

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R.C. 5709.12(B), then, applies to property owned by an institution and used exclusively for a charitable purpose and R.C. 5709.121, "while not itself granting an exemption", states that property owned by a charitable, educational or public entity, and used exclusively for a purpose as defined by that section is to be considered as property used for a charitable purpose. The Court stated that one cannot apply the definition of exclusive charitable use found in R.C. 5709.121, to property owned by non-charitable entities. See, *Bethesda Healthcare, Inc. v. Willins* (2004), 101 Ohio St.3d 420. As well, the Court held that a "private, profit-making venture does not use property exclusively for charitable purposes". *Highland Park Owners, Inc. v. Tracy* (1994), 71 Ohio St.3d 405.

As stated above, even though the Clinic may be a not for profit entity, it is more in the nature of a medical practice and would not qualify under RC 5709.121. For example, if a group of attorneys organized as a non-profit entity, billing for services while doing a modicum of pro bono work while paying high salaries to the group members, the mere fact of non-profit status would not make the law practice a charity. See *True Christianity Evangelism v. Tracy* (2001) 91 Ohio St. 3d 117; *Thomaston Woods Limited Partnership v. Lawrence* (Jun. 15, 2001), BTA No. 99-L-551. Therefore in order to be entitled to exemption under R.C. 5709.12(B), two requirements must be met: (1) the property must belong to a non-profit institution, and (2) the property must be used exclusively for charitable purposes. *Highland Park*, supra. The criterion for exemption from taxation is the use of property exclusively for charitable purposes by the non-profit owner of that property. Here the property is owned by a non-profit Clinic and used to generate revenue through insurance reimbursements for services rendered, much like a physician's practice or commercial laboratory. In *The Lutheran Book Shop v. Bowers* (1955), 164 Ohio St. 359 the Court affirmed denial of property owned by a non-profit corporation that operated "in competition with commercial concerns in the same line \*\*\* even though such corporation be one formed not for profit". In fact, the deed contains a restrictive covenant between University Pointe Development LLC, UC Physicians LLC and DCI, the medical services provided by DCI are defined in a commercial light. The revenue generated at the Facility is not in the record, but the facts available show that patients are charged or billed much the same as other commercial medical practices, through private insurers, including Medicaid and Medicare. There is no evidence of charitable care provided at the property.

The providing of health services is not a charitable activity per se. In *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, the Supreme Court held "it is only the use of property in charitable pursuits that qualifies for tax exemption." A charitable health facility should have as its primary purpose the provision of health services to those in need without regard to ability to pay, and such facility must provide its services to indigent patients and to the public generally. *Vick v. Cleveland Memorial Medical Foundation* (1965), 2 Ohio St.2d 30. Health facilities have been denied exemption where the number of nonpaying or charitable patients was decidedly in the minority. *Lincoln Memorial Hospital v. Warren* (1968), 13 Ohio St.2d 109. The case law states that providing health care to indigent persons without regard to ability to pay, or charitable care, is a primary function of a hospital and a factor in determining exemption for a medical facility.

Therefore the question of tax exempt status is determined by the actual use of the property at issue. *Lions Club Foundation of Cortland, Ohio, Inc. v. Limbach* (Jan. 11, 1988), BTA No. 85-G-112. The Board of Tax Appeals noted that although an applicant's "activities are

commendable and perhaps sufficient to justify an IRS exemption, they do not qualify for an exemption under R.C. 5709.12 which requires exclusive charitable use of the property.” *Id.* Therefore the subject property will be reviewed on the merits of the use of said property by the applicant. With respect to review of the Facility as part of the whole DCI system, Justice Stern held in a concurrence that while “convenient proximity of the office building to the hospital improves and facilitates patient care \*\*\* [this is the] result, not of the use to which the medical facility is put but of the physical location of the building. \*\*\* The tax exempt status of property cannot primarily depend upon its geographical location. Appellant’s medical facility is used to provide office space for the private [medical] practice of [the applicant].\*\*\* This use is not ‘in furtherance of or incidental to’ appellant’s charitable purpose of operating a hospital ...” *White Cross Hospital Ass’n v. Board of Tax Appeals*, (1974), 38 Ohio St. 2d 199.

The Ohio Supreme Court characterized the underlying reasoning for the exemption of charitable hospitals as follows: “the rationale justifying a tax exemption is that there is a present benefit to the general public from the operation of the charitable institution sufficient to justify the loss of tax revenue”. *White Cross Hospital*, *supra*. Property where only a small percentage of care is given without regard to ability to pay “does not connote significant charitable activity” and does not meet the requirements for exemption. See, *Bethesda Healthcare, Inc. v. Wilkins* (2004) 101 Ohio St.3d 420. Property is not used for a charitable purpose where only about one to two percent of persons considered charity cases were provided services by the applicant while the remainder of patients paid fees for services. *Kaiser Foundation Health Plan of Ohio v. Limbach* (Jun. 8, 1990), BTA Case No. 87-A-228, unreported. Here, there is no evidence that any patients are treated without regard to ability to pay the fees. *Vick v. Cleveland*, *supra*; *Jewish Community Center of Cleveland v. Limbach* (Jun. 30, 1992), BTA Case No. 88-A-124. Without a showing of significant charitable care at the Facility, DCI is not seen as providing sufficient charitable care to warrant an exemption.

It is noted that merely collecting Medicaid or Medicare reimbursements is not a charitable act, but is receiving full agreed payment under a guaranteed insurance payment for medical services. The Medicaid fees paid are ones agreed to between the health care provider and the Medicaid insurer. Such insured payments are no different than payments agreed to and paid under commercial insurance agreements, whereby the insurer may contract with the care provider to pay a lower fee for services than that charged to uninsured patients. Further, medical care does not become charitable merely because a medical billing is deemed uncollectible and written off; such action being no more than an accounting tool by which a company may offset its business losses. See *Missionary Church, Ohio District, Inc / d.b.a. Hilty Memorial Home v. Limbach* (Mar. 19, 1993), BTA No. 90-A-504 wherein the Board held that “operating at a loss, in and of itself, does not necessarily equate to operating as a non-profit or charitable organization”. Even where an applicant’s goal for its facility is to merely “break even” on its expenses, the Board held that exemption is not warranted where only a few patients “receive reduced rate care or free care if their ability to pay was limited”. *Id.* The Ohio Supreme Court has described a charitable hospital facility as one “where services and assistance are given the sick, injured and ailing, with open doors and benevolent concern for the afflicted souls who lack the ability to pay for the attentions they receive”. *Cleveland Osteopathic Hospital v. Zangerle* (1950), 153 Ohio St. 222. Therefore, the write-offs submitted for the subject property or those submitted for the entire DCI

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system are insufficient to determine the amount of indigent patients seen without regard to ability to pay. *Bethesda Healthcare, Inc.* supra.

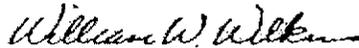
Even where an applicant's goal for its facility is to merely "break even" on its expenses, the Board held that exemption is not warranted where only a few patients "receive reduced rate care or free care if their ability to pay was limited". *Hilty*, supra. In light of the above cases, the write-offs submitted for the subject property or those submitted for the health care system are insufficient to determine the amount of indigent patients actually seen without regard to ability to pay. *Bethesda Healthcare, Inc.* supra. Here the record reflects that there is no charitable care provided at the property, and the property is used to generate revenue. *Zindorf v. The Otterbein Press* (1941), 138 Ohio St. 287.

The Tax Commissioner finds that the property described in the application is not entitled to be exempt from taxation and the application is therefore denied for reasons set forth above.

The Tax Commissioner further orders that all penalties charged for the 2005 and 2004 tax years be remitted.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. NOTICE WILL BE SENT PURSUANT TO R.C. 5715.27 TO THE COUNTY AUDITOR. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED, AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL



WILLIAM W. WILKINS  
TAX COMMISSIONER

/s/ William W. Wilkins

William W. Wilkins  
Tax Commissioner

Docket No. 107328.

**IN THE  
SUPREME COURT  
OF  
THE STATE OF ILLINOIS**

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PROVENA COVENANT MEDICAL CENTER *et al.*, Appellants,  
v. THE DEPARTMENT OF REVENUE *et al.*, Appellees.

*Opinion filed March 18, 2010.*

JUSTICE KARMEIER delivered the judgment of the court, with opinion.

Chief Justice Fitzgerald and Justice Thomas concurred in the judgment and opinion.

Justice Burke concurred in part and dissented in part, with opinion, joined by Justice Freeman.

Justices Kilbride and Garman took no part in the decision.

**OPINION**

The central issue in this case is whether Provena Hospitals established that it was entitled to a charitable exemption under section 15-65 of the Property Tax Code (35 ILCS 200/15-65 (West 2002)) for the 2002 tax year for various parcels of real estate it owns in Urbana. The Director of Revenue determined that it had not and denied the exemption. Provena Hospitals then filed a complaint for administrative review in the circuit court of Sangamon County. Following a hearing, the circuit court determined that Provena Hospitals was entitled to both a charitable and religious exemption (35 ILCS 200/15-40(a)(1) (West 2002)). The Department of Revenue appealed. The appellate court found the Department's arguments to

be meritorious and reversed the judgment of the circuit court. 384 Ill. App. 3d 734. We granted Provena Hospitals' petition for leave to appeal. 210 Ill. 2d R. 315. We subsequently allowed the American Hospital Association, the Illinois Hospital Association, and the Catholic Health Association of the United States and related organizations to file friend of the court briefs in support of Provena Hospitals. We also granted leave to the Center for Tax and Budget Accountability and the Legal Assistance Foundation of Metropolitan Chicago to file friend of the court briefs in support of the Department of Revenue. For the reasons that follow, we now affirm the judgment of the appellate court upholding the decision by the Department of Revenue to deny the exemption.

#### BACKGROUND

The appellant property owner and taxpayer in this case is Provena Hospitals. Provena Hospitals is one of four subsidiaries of Provena Health, a corporation created when the Servants of the Holy Heart and two other groups affiliated with the Roman Catholic Church merged their health-care operations.<sup>1</sup> Provena Hospitals was formed through the consolidation of four Catholic-related health-care organizations and is organized as a not-for-profit corporation under the laws of Illinois. The articles of consolidation for Provena Hospitals state that the purpose of the corporation is to "coordinate the activities of Provena Hospitals' subsidiaries or other organizations that are affiliated with Provena Hospitals as they pursue their religious, charitable, educational and scientific purposes" and "to offer at all times high quality and cost effective healthcare and human services to the consuming public."

Provena Hospitals is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. §501(c)(3))

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<sup>1</sup>According to Provena Health's table of organization, its other three units are Provena Senior Services, which operates numerous nursing homes and adult care facilities; Provena Home Care; and Provena Ventures, which consists of Provena Properties and Provena Enterprises. Provena Enterprises, in turn, is comprised of Medicentre Laboratories and Bennett Operating Company.

(1988)). The Illinois Department of Revenue has also determined that the corporation is exempt from this state's retailers' occupation tax (see 35 ILCS 120/1 *et seq.* (West 2002)), service occupation tax (see 35 ILCS 115/1 *et seq.* (West 2002)), use tax (see 35 ILCS 105/1 *et seq.* (West 2002)), and service use tax (see 35 ILCS 110/1 *et seq.* (West 2002)). In addition, the Illinois Attorney General has concluded that the corporation "meets the qualifications of Section 3(a) of 'An Act to Regulate Solicitation and Collection of Funds for Charitable Purposes' [225 ILCS 460/3(a) (West 2002)] and Section 4 of 'The Charitable Trust Act' [760 ILCS 55/1 (West 2002)]" and constitutes a religious organization exempt from filing annual financial reports under those statutes.

Provena Hospitals owns and operates six hospitals, including Provena Covenant Medical Center (PCMC), a full-service hospital located in the City of Urbana. PCMC was created through the merger of Burnham City Hospital and Mercy Hospital. It is one of two general acute care hospitals in Champaign/Urbana and serves a 13-county area in east central Illinois. The services it provides include a 24-hour emergency department; a birthing center; intensive care, neonatal intensive care, and pediatrics units; surgical, cardiac care, cancer treatment, rehabilitation and behavioral health services; and home health care, including hospice. It offers case management services to assist older persons to remain in their homes and runs various support groups and health-related classes. It also provides smoking cessation clinics and screening programs for high cholesterol and blood pressure as well as pastoral care.

PCMC maintains between 260 and 268 licensed beds. Each year it admits approximately "10,000 inpatients and 100,000 outpatients." Some 60% of its inpatient admissions originate through the hospital's emergency room, which treats some 27,000 visitors annually.

PCMC provides an emergency department because it is required to do so by the Hospital Emergency Service Act (210 ILCS 80/0.01 *et seq.* (West 2002)). Where emergency room services are offered, a certain level of health care is required to be provided to every person who seeks treatment there. That is so as a matter of both state (210 ILCS 80/1 (West 2002); see also 210 ILCS 70/1 (West 2002)) and federal (42 U.S.C. §1395dd) law.

Staffing PCMC are approximately 1,000 employees, 400

volunteers and 200 physicians. The physicians are not employed or paid by the hospital. They are merely credentialed to provide services there in exchange for paying \$50 per year in dues to the hospital's library fund, and agreeing to serve on hospital committees and to be on call to attend patients without their own physicians. With respect to the emergency department, PCMC contracts with a for-profit private company to provide the necessary physicians. The company, not the hospital, bills patients and any third-party payors directly for emergency room services. The company likewise pursues payment of those bills independently from PCMC.

Just as PCMC relies on private physicians to fill its medical staff, it utilizes numerous third-party providers to furnish other services at the hospital. Among these are pharmacy, laundry, MRI/CT and lab services, and staffing for the rehabilitation and cardiovascular surgery programs. The company providing lab services is one of the businesses owned by Provena Enterprises, a Provena Health subsidiary. It is operated for profit.

Provena Hospitals' employees do not work gratuitously. Everyone employed by the corporation, including those with religious affiliations, are paid for their services. Compensation rates for senior executives are reviewed annually and compared against national surveys. Provena Health "has targeted the 75th percentile of the market for senior executive total cash compensation."

According to the record, PCMC's inpatient admissions encompass three broad categories of patients: those who have private health insurance, those who are on Medicare or Medicaid, and those who are "self pay (uninsured)." PCMC has agreements with some private third-party payers which provide for payment at rates different from "its established rates." The payment amounts under these agreements cover the actual costs of care. The amounts PCMC receives from Medicare and Medicaid are not sufficient to cover the costs of care. Although PCMC has the right to collect a certain portion of the charges directly from Medicare and Medicaid patients and has exercised that right, there is still a gap between the amount of payments received and the costs of care for such patients. For 2002, PCMC calculated the difference to be \$7,418,150 in the case of Medicare patients and \$3,105,217 for Medicaid patients.

PCMC was not required to participate in the Medicare and

Medicaid programs, but did so because it believed participation was "consistent with its mission." Participation was also necessary in order for Provena Hospitals to qualify for tax exemption under federal law. In addition, it provided the institution with a steady revenue stream.

During 2002, Provena Hospitals' "net patient service revenue" was \$713,911,000, representing approximately 96.5% of the corporation's total revenue. No findings were made regarding the precise source of the remainder of its revenue. Provena Hospitals' "expenses and losses" exceeded its "revenue and gains" during this period by \$4,869,000. In other words, the corporation was in the red. The following year, this changed. The corporation's revenue and gains exceeded its expenses and losses by \$10,548,000.

Of Provena Hospitals' "net patient service revenue" for 2002, \$113,494,000, or approximately 16%, was generated by PCMC. Unlike its parent, PCMC realized a net gain of income over "expenses and losses" of \$2,165,388 for that year. This surplus existed even after provision for uncollectible accounts receivable (*i.e.*, bad debt) in the amount of \$7,101,000. Virtually none of PCMC's income was derived from charitable contributions. The dollar amount of "unrestricted donations" received by PCMC for the year ending Dec. 31, 2002, was a mere \$6,938.

PCMC experienced a modest net loss in 2003. The record discloses, however, that Provena Hospitals' auditors showed accrued property tax liabilities in the amount of \$1.1 million per year for both 2002 and 2003 in the accounts payable and accrued expenses portions of the 2003 balance sheet. Had only the 2003 property tax been posted against the revenue and gains for 2003, that year would also have shown a net gain for PCMC.

In years when PCMC realizes a net gain, the gain is "reinvested in order to sustain and further [the corporation's] charitable mission and ministry." No findings were made regarding how much of the reinvestment occurs at PCMC and how much is allocated to other aspects of Provena Hospitals' operations. Nor were specific findings made regarding the particular purposes to which the reinvested funds were put. The record indicates, however, that PCMC "generally needs approximately two to four million dollars in margin each year to replace broken items and fix non-operating equipment."

In 2002, PCMC budgeted \$813,694 for advertising and advertised in newspapers, phone directories, event playbills, and Chamber of Commerce publications; on television and radio; and through public signage. Its also advertised using "booths, tables, and/or tents at community health or nonprofit fundraising events; sponsorship of sports teams and other community events; and banner advertisements at sponsored community events." The ads taken out by PCMC in 2002 covered a variety of matters, including employee want ads. None of its ads that year mentioned free or discounted medical care.<sup>2</sup>

While not mentioned in PCMC's advertisements, a charity care policy was in place at the hospital, and the parties stipulated that PCMC's staff made "outreach efforts to communicate the availability of charity care and other assistance to patients." The charity care policy, which was shared with at least one other hospital under Provena Hospitals' auspices, provided that the institution would "offer, to the extent that it is financially able, admission for care or treatment, and the use of the hospital facilities and services regardless of race, color, creed, sex, national origin, ancestry or ability to pay for these services."<sup>3</sup>

The charity policy was not self-executing. An application was required. Whether an application would be granted was determined by PCMC on a case-by-case basis using eligibility criteria based on federal poverty guidelines. A sliding scale was employed. Persons whose income was below the guidelines were eligible for "a 100%

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<sup>2</sup>In subsequent years, Provena Hospitals altered its advertisements and increased its efforts to communicate the availability of charity care to patients. The case before us is concerned only with the situation as of 2002. With respect to that time period, the Director of Revenue bluntly concluded that "the record does not show that [PCMC] made any material effort to publicize the availability of charity care to those who were most in need of it."

<sup>3</sup>Of course, to the extent this policy addresses racial and other forms of noneconomic discrimination, it does not concern "charity" at all as we use that term today. Treating all persons equally regardless of such factors as race, religion or gender is no longer considered a matter of grace. In most situations, it is a legal requirement.

reduction from the patient portion of the billed charges.” Persons whose income was not more than 125% of the guidelines could qualify for a 75% reduction. With an income level not more than 150% of the guidelines the discount fell to 50%. At an income level not more than 200% of the guidelines, the potential reduction was 25%.<sup>4</sup> Eligibility was also affected by the value of an applicant’s assets. Patients who qualified based on low income might nevertheless be rendered ineligible if the equity in their principal residence exceeded \$10,000 or they held other assets valued at more than \$5,000.

PCMC’s policy specified that the hospital would give a charity care application to anyone who requested one, but it was the patient’s responsibility to provide all the information necessary to verify income level and other requested information. To verify income, a patient was required to present documentation “such as check stubs, income tax returns, and bank statements.”

PCMC believed that its charity care program should be the payer of last resort. It encouraged patients to apply for charity care before receiving services, and if a patient failed to obtain an advance determination of eligibility under the program, normal collection practices were followed. PCMC would look first to private insurance, if there was any; then pursue any possible sources of reimbursement from the government. Failing that, the hospital would seek payment from the patient directly.

Short-term collection matters were handled by Provena Hospitals’ “Extended Business Office.” Staffed by a small group of employees in Joliet, the Extended Business Office would typically make three or four phone calls and send three or four statements to patients owing outstanding balances.<sup>5</sup> If a balance remained unpaid following such

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<sup>4</sup>Uninsured patients appear to have been billed for services at PCMC’s full “established” rates. Using Provena Hospitals’ figures, its actual cost of service was only about 47% of the price it charged such patients. As a result, the corporation could still garner a surplus in cases where it conferred discounts at the 25% and 50% levels.

<sup>5</sup>Provena Hospitals’ explanation for utilizing collection agencies was that its own financial system “[did] not have a mechanism for sending

efforts, which typically did not extend beyond three months, Provena Hospitals would treat the account as "bad debt" and refer it to a collection agency. From time to time, the collection agencies would seek and were given authorization to pursue legal action against an account "on which, over the course of several months, the agency had not received any response, cooperation or payment from the patient." Provena Hospitals' decision as to whether to pursue legal action against a patient depended on review of the particular account. During 2002, it did not have a blanket policy requiring referral to a collection attorney in every case.

The fact that a patient's account had been referred to collection did not disqualify the patient from applying to the charity care program. Applications would be considered "[a]t any time during the collection process." PCMC had financial counselors to assist patients with paying outstanding balances and review all payment options with them. The counselors helped patients seek and qualify for financial assistance from other sources. Where a patient was given an application for charity care but failed to return it, the counselors would send letters and call the patients to remind them to do so.

During 2002, the amount of aid provided by Provena Hospitals to PCMC patients under the facility's charity care program was modest. The hospital waived \$1,758,940 in charges, representing an actual cost to it of only \$831,724. This was equivalent to only 0.723% of PCMC's revenues for that year and was \$268,276 less than the \$1.1 million in tax benefits which Provena stood to receive if its claim for a property tax exemption were granted.<sup>6</sup>

The number of patients benefitting from the charitable care program was similarly small. During 2002, only 302 of PCMC's

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statements to patients on a long-term basis."

<sup>6</sup>The disparity between the amount of free or discounted care dispensed and the amount of property tax that would be saved through receipt of a charitable exemption is in no way unique to the case before us here. Excluding bad debt, "the amount of uncompensated care provided by as many as three-quarters of nonprofit hospitals is less than their tax benefits." J. Colombo, *Federal and State Tax Exemption Policy, Medical Debt and Healthcare for the Poor*, 51 St. Louis L.J. 433, 433 n.2 (2007).

10,000 inpatient and 100,000 outpatient admissions were granted reductions in their bills under the charitable care program. That figure is equivalent to just 0.27% of the hospital's total annual patient census.

The PCMC complex is comprised of 43 separate real estate parcels. The main PCMC hospital building consists of parcels bearing the parcel identification numbers 91-21-07-404-001 through 91-21-07-404-010 and measures 395,685 square feet. Of this, 795 square feet (0.2% of the total) are used for the outpatient pharmacy; 1,592 square feet (0.4%) are devoted to the gift shop; 3,933 square feet (0.99%) are leased to the Board of Trustees of the University of Illinois; and 9,319 square feet (2.4%) are occupied by the hospital's emergency department. An additional 22,065 square feet (5.6%) is leased to for-profit entities or otherwise used for purposes which, the parties agree, render the space ineligible for any real estate tax exemption.

In addition to the main hospital building, the PCMC complex includes a parking garage, which consists of parcels numbered 91-21-07-408-001 through 91-21-07-408-011; a cancer center, consisting of parcels 91-21-07-403-006 through 91-21-07-403-009; the cancer center's parking lot, which includes parcels 91-21-07-403-001 through 91-21-07-403-005; the Crisis Nursery of Champaign/Urbana, which occupies parcels 91-21-07-407-001 through 91-21-07-407-003; and the Crisis Center's parking lot, situated on parcel 91-21-07-407-004. The complex also includes six additional parking lots: B, which is on parcel 46-21-07-336-001; C, which consists of parcel 46-21-07-338-006; D, which is located on parcel 46-21-07-337-006; E, which is on a parcel identified as 91-21-07-408-012; H, which includes parcels numbered 46-21-07-336-002 and 46-21-07-336-003; and a lot for PCMS employees covering parcels 91-21-07-409-18, 91-21-07-409-19, and 91-21-07-409-23.

Provena Hospitals applied to the Champaign County board of review to exempt all 43 of the parcels in the PCMC complex from property taxes for 2002. Exemption was requested under section 15-65(a) of the Property Tax Code (35 ILCS 200/15-65(a) (West 2002)) on the grounds that the parcels were owned by an institution of public charity and that the property was "actually and exclusively used for charitable or beneficent purposes, and not leased or

otherwise used with a view to profit.” The board of review recommended this application be denied. The Illinois Department of Revenue agreed and denied the application in February of 2004, ruling that the property “was not in exempt ownership” and “not in exempt use.”

As suggested earlier in this opinion, the tax to which the disputed property was subject totaled approximately \$1.1 million. In March of 2004, PCMC paid that sum, under protest, to the treasurer of Champaign County.<sup>7</sup> It then filed a timely petition for a hearing on the exemption decision pursuant to section 8-35(b) of the Property Tax Code (35 ILCS 200/8-35(b) (West 2002)). The parties subsequently realized that because PCMC itself is not a legal “person,” the exemption request should be treated as if it had been submitted by Provena Hospitals, which holds title to the 43 parcels at issue here. Because the parties agree that Provena Hospitals is the proper party to seek the exemption, we shall consider it to be the true applicant, as did the appellate court. 384 Ill. App. 3d 734.

In requesting a hearing on denial of the exemption, counsel for Provena Hospitals asserted that it could provide “clear evidence that it is a charitable organization entitled to charitable exemptions for the subject properties in accordance with section 15-65 of the Property Tax Code (35 ILCS 200/15-65 (West 2002)), Illinois case law and exemption determinations made by [the Department of Revenue] for other charitable institutions.” Initially, no claim was made that any of the 43 subject properties might also qualify for exemption under section 15-40 of the Property Tax Code (35 ILCS 200/15-40 (West 2002)), which pertains to property used exclusively for “religious purposes,” “school and religious purposes,” or “orphanages,” or that they might be exempt from property tax under any other provision of Illinois law. Later in the proceedings, however, Provena Hospitals asserted that the evidence “also conclusively establishes that [the] property also qualifies for exemption based on religious use.”

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<sup>7</sup>Provena Hospitals subsequently managed to obtain a refund of the tax pending this appeal. The propriety of that refund is the subject of a separate appeal, and Provena has acknowledged that it could be ordered to repay any taxes legally levied against it.

After a lengthy hearing at which voluminous evidence was presented, the administrative law judge (ALJ) assigned to the case recommended that 94.4% of the subject parcels be granted a charitable exemption. She did not address and made no findings regarding Provena Hospitals' alternate claim for a religious exemption.

The Director of Revenue rejected the ALJ's recommendation. He believed that under the evidence and the law, Provena Hospitals had failed to meet its burden of establishing that the property at issue here qualified for a charitable exemption. The Director further concluded that the property did not qualify for a religious exemption under section 15-40 of the Property Tax Code (35 ILCS 200/15-40 (West 2002)).<sup>8</sup>

The circuit court of Sangamon County disagreed with the Director on both counts. In a written order entered on administrative review pursuant to the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2002)), the circuit court held that Provena Hospitals was entitled to both a charitable tax exemption and a religious tax exemption for the subject parcels. As noted earlier in this opinion, the appellate court subsequently reversed. Rejecting the circuit court's view, it held that the Director's decision to deny Provena Hospitals either a charitable or religious exemption for the disputed property was not clearly erroneous. 384 Ill. App. 3d 734. It is in this posture that the matter now comes before our court.

#### ANALYSIS

The parcels of real estate at issue in this case are all located in Champaign County, which has fewer than 3 million inhabitants. In

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<sup>8</sup>In turning down Provena Hospitals' claim for a religious exemption, the Director wrote that he was concurring "with the ALJ's recommendation that the property does not qualify for the religious purpose exemption." Because the ALJ did not address the religious purpose exemption, this was obviously a misstatement by the Director. It is evident, however, that the Director did not believe that the hospital complex was entitled to a property tax exemption under any of the bases claimed, including use for religious purposes, and his decision is the one under review.

such counties, applications for exemption from property tax are made, in the first instance, to the county board of review or board of appeals. See 35 ILCS 200/15-5, 16-70 (West 2002). The county board's decision, however, is not final except as to homestead exemptions. With applications for all other exemptions, the matter is forwarded to the Department of Revenue for a determination as to "whether the property is legally liable to taxation." 35 ILCS 200/16-70 (West 2002). The Department of Revenue's procedures with respect to exemption decisions are governed by section 8-35 of the Property Tax Code (35 ILCS 200/8-35 (West 2002)), and such decisions by the Department are subject to judicial review in accordance with the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2002)). 35 ILCS 200/8-40 (West 2002).

When an appeal is taken to the appellate court following entry of judgment by the circuit court on administrative review, it is the decision of the administrative agency, not the judgment of the circuit court, which is under consideration. See *Anderson v. Department of Professional Regulation*, 348 Ill. App. 3d 554, 560 (2004). Similarly, when we grant leave to appeal from a judgment of the appellate court in an administrative review case, as we did here, it is the final decision of the administrative agency, not the judgment of the circuit court or the appellate court, which is before us. *Wade v. City of North Chicago Police Pension Board*, 226 Ill. 2d 485, 504 (2007); *Sangamon County Sheriff's Department v. Illinois Human Rights Comm'n*, 233 Ill. 2d 125, 136 (2009).

Judicial review of administrative decisions is subject to important constraints regarding the issues and evidence that may be considered. If an argument, issue, or defense was not presented in the administrative proceedings, it is deemed to have been procedurally defaulted and may not be raised for the first time before the circuit court. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 213 (2008). In addition, "[t]he findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct" and "[n]o new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court." 735 ILCS 5/3-110 (West 2002). Consistent with these statutory mandates, we have held that "it is not a court's function on

administrative review to reweigh evidence or to make an independent determination of the facts.” *Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund*, 234 Ill. 2d 446, 463 (2009). When an administrative agency’s factual findings are contested, the court will only ascertain whether such findings of fact are against the manifest weight of the evidence. *Cook County Republican Party v. Illinois State Board of Elections*, 232 Ill. 2d 231, 244 (2009).

The standard of review is different when the only point in dispute is an agency’s conclusion on a point of law. There, the decision of the agency is subject to *de novo* review by the courts.<sup>9</sup> Yet a third standard governs when the dispute concerns the legal effect of a given set of facts, *i.e.*, where the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard. In such cases, which we have characterized as involving a mixed question of law and fact, an agency’s decision is reviewed for clear error. *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 273 (2009).

In the case before us now, the historical facts are not disputed and the governing legal principles are well established. The sole question is whether, under the facts present here, the real property at issue in this case qualifies for an exemption from taxation under the Property Tax Code (35 ILCS 200/1–1 *et seq.* (West 2002)). Under the standards just discussed, this presents a mixed question of law and fact and will therefore be set aside only if clearly erroneous. See *Swank v. Department of Revenue*, 336 Ill. App. 3d 851, 861 (2003); *Metropolitan Water Reclamation District of Greater Chicago*, 313 Ill. App. 3d at 475. This standard is “significantly deferential.” See *LeaderTreks, Inc. v. Department of Revenue*, 385 Ill. App. 3d 442, 446 (2008). An administrative decision will be set aside as clearly

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“Even where review is *de novo*, an agency’s construction is entitled to substantial weight and deference. Courts accord such deference in recognition of the fact that agencies make informed judgments on the issues based upon their experience and expertise and serve as an informed source for ascertaining the legislature’s intent. See *Metropolitan Water Reclamation District of Greater Chicago v. Department of Revenue*, 313 Ill. App. 3d 469, 475 (2000).

erroneous only when the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Exelon Corp.*, 234 Ill. 2d at 273. For reasons we shall now explain, this is not such a case.

Under Illinois law, taxation is the rule. Tax exemption is the exception. All property is subject to taxation, unless exempt by statute, in conformity with the constitutional provisions relating thereto. Statutes granting tax exemptions must be strictly construed in favor of taxation (*Board of Certified Safety Professionals of the Americas, Inc. v. Johnson*, 112 Ill. 2d 542, 547 (1986)), and courts have no power to create exemption from taxation by judicial construction (*City of Chicago v. Illinois Department of Revenue*, 147 Ill. 2d 484, 491 (1992)).

The burden of establishing entitlement to a tax exemption rests upon the person seeking it. *City of Chicago v. Illinois Department of Revenue*, 147 Ill. 2d at 491. The burden is a very heavy one. The party claiming an exemption must prove by clear and convincing evidence that the property in question falls within both the constitutional authorization and the terms of the statute under which the exemption is claimed. See *Streeterville Corp. v. Department of Revenue*, 186 Ill. 2d 534, 539-40 (1999) (Harrison, J., dissenting, joined by McMorro, J.). A basis for exemption may not be inferred when none has been demonstrated. To the contrary, all facts are to be construed and all debatable questions resolved in favor of taxation (*Follett's Illinois Book & Supply Store, Inc. v. Isaacs*, 27 Ill. 2d 600, 606 (1963)), and every presumption is against the intention of the state to exempt property from taxation (*Reeser v. Koons*, 34 Ill. 2d 29, 36 (1966)). If there is any doubt as to applicability of an exemption, it must be resolved in favor of requiring that tax be paid. *Streeterville Corp. v. Department of Revenue*, 186 Ill. 2d at 539 (Harrison, J., dissenting, joined by McMorro, J.).

As noted earlier in this opinion, Provena Hospitals has been granted a tax exemption by the federal government. There is no dispute, however, that tax exemption under federal law is not dispositive of whether real property is exempt from property tax under Illinois law. See *Eden Retirement Center, Inc. v. Department of Revenue*, 213 Ill. 2d 273, 291 (2004). Similarly, the fact that Provena Hospitals is exempt from state retailers' occupation, service

occupation, use and service use taxes does not mean that the corporation must likewise be granted an exemption from paying tax on the real property it owns. *People ex rel. County Collector v. Hopedale Medical Foundation*, 46 Ill. 2d 450, 464 (1970); *Willows v. Munson*, 43 Ill. 2d 203, 209 (1969); see *Institute of Gas Technology v. Department of Revenue*, 289 Ill. App. 3d 779, 785 (1997).

Authority to exempt certain real property from taxation emanates from article IX, section 6, of the 1970 Illinois Constitution (Ill. Const. 1970, art. IX, §6). Section 6 provides that the General Assembly may, by law, exempt from taxation property owned by “the State, units of local government and school districts” and property “used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes.” Ill. Const. 1970, art. IX, §6.

Section 6 is not self-executing. It merely authorizes the General Assembly to enact legislation exempting certain property from taxation. *Chicago Patrolmen’s Ass’n v. Department of Revenue*, 171 Ill. 2d 263, 269 (1996). The General Assembly is not required to exercise that authority. Where it does elect to recognize an exemption, it must remain within the limitations imposed by the constitution. No other subjects of property tax exemption are permitted. The legislature cannot add to or broaden the exemptions specified in section 6. *Chicago Bar Ass’n v. Department of Revenue*, 163 Ill. 2d 290, 297 (1994).

While the General Assembly has no authority to grant exemptions beyond those authorized by section 6, it “may place restrictions, limitations, and conditions on [property tax] exemptions as may be proper by general law.” *North Shore Post No. 21 of the American Legion v. Korzen*, 38 Ill. 2d 231, 233 (1967). In accordance with this power, the legislature has elected to impose additional restrictions with respect to section 6’s charitable exemption. Pursuant to section 15-65 of the Property Tax Code (35 ILCS 200/15-65 (West 2002)), eligibility for a charitable exemption requires not only that the property be “actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit,” but also that it be owned by an institution of public charity or certain other entities, including “old people’s homes,” qualifying not-for-profit health maintenance organizations, free public libraries and

historical societies. *Chicago Patrolmen's Ass'n v. Department of Revenue*, 171 Ill. 2d at 270.

In *Methodist Old Peoples Home v. Korzen*, 39 Ill. 2d 149, 156-57 (1968), we identified the distinctive characteristics of a charitable institution as follows: (1) it has no capital, capital stock, or shareholders; (2) it earns no profits or dividends but rather derives its funds mainly from private and public charity and holds them in trust for the purposes expressed in the charter; (3) it dispenses charity to all who need it and apply for it; (4) it does not provide gain or profit in a private sense to any person connected with it; and (5) it does not appear to place any obstacles in the way of those who need and would avail themselves of the charitable benefits it dispenses. *Methodist Old Peoples Home v. Korzen*, 39 Ill. 2d at 157. For purposes of applying these criteria, we defined charity as "a gift to be applied \*\*\* for the benefit of an indefinite number of persons, persuading them to an educational or religious conviction, for their general welfare-or in some way reducing the burdens of government." *Methodist Old Peoples Home v. Korzen*, 39 Ill. 2d at 156-57.

This court has held, on several occasions, that a "hospital not owned by the State or any other municipal corporation, but which is open to all persons, regardless of race, creed or financial ability," qualifies as a charitable institution under Illinois law provided certain conditions are satisfied. See *People ex rel. Cannon v. Southern Illinois Hospital Corp.*, 404 Ill. 66, 69-70 (1949). There is, however, no blanket exemption under the law for hospitals or health-care providers. Whether a particular institution qualifies as a charitable institution and is exempt from property tax is a question which must be determined on a case-by-case basis. See *Coyne Electrical School v. Paschen*, 12 Ill. 2d 387, 394 (1957).

Provena Hospitals clearly satisfies the first of the factors identified by this court in *Methodist Old Peoples Home v. Korzen* for determining whether an organization can be considered a charitable institution: it has no capital, capital stock, or shareholders. Provena Hospitals also meets the fourth *Korzen* factor. It does not provide gain or profit in a private sense to any person connected with it. While the record focused on PCMC rather than Provena Hospitals, it was assumed by all parties during the administrative proceedings that Provena Hospitals' policies in this regard were the same as those of

PCMC, and it was stipulated that PCMC diverted no profits or funds to individuals or entities for their own interests or private benefit.

The Director correctly points out that PCMC subcontracted many of its operations to third-party providers, including pharmacy, laboratory, laundry and MRI/CT services; the entire emergency department; and the management, administration, and staffing of rehabilitation and cardiovascular surgery programs. One of those third-party providers, the one which furnished lab services to PCMC, was actually owned by Provena Health, Provena Hospitals' parent, and was operated on a for-profit basis. While all of the third-party providers were subject to a conflict of interest policy designed "to prevent private inurement and other conduct that may be inimical to [the organization's] mission," no evidence was presented that any of them were themselves charities or operated on anything other than a for-profit basis. This, however, is not dispositive.

The fact that an organization contracts with third-party, for-profit providers for ancillary services does not, in itself, preclude the organization from being characterized as an institution of charity within the meaning of section 15-65 of the Property Tax Code (35 ILCS 200/15-65 (West 2002)). Virtually all charities must contract with for-profit vendors to one degree or another in order to carry on their operations and perform their charitable functions. See J. Colombo, *Hospital Property Tax Exemption in Illinois: Exploring the Policy Gaps*, 37 Loy. U. Chi. L.J. 493, 521-22 (2006). The real concern is whether any portion of the money received by the organization is permitted to inure to the benefit of any private individual engaged in *managing* the organization. The authority cited by the *Korzen* case with respect to the prohibition against private gain or profit so holds. See *Sisters of the Third Order of St. Francis v. Board of Review*, 231 Ill. 317, 321 (1907). No private enrichment of that type is evident in this case.

While *Korzen* factors one and four thus tilt in favor of characterizing Provena Hospitals as a charitable institution, application of the remaining factors demonstrates that the characterization will not hold. Provena Hospitals plainly fails to meet the second criterion: its funds are not derived mainly from private and public charity and held in trust for the purposes expressed in the charter. They are generated, overwhelmingly, by providing medical

services for a fee. While the corporation's consolidated statement of operations for 2002 ascribes \$25,282,000 of Provena Hospitals' \$739,293,000 in total revenue to "other revenue," that sum represents a mere 3.4% of the Provena's income, and no showing was made as to how much, if any, of it was derived from charitable contributions. The only charitable donations documented in this case were those made to PCMC, one of Provena Hospitals' subsidiary institutions, and they were so small, a mere \$6,938, that they barely warrant mention.

Provena Hospitals likewise failed to show by clear and convincing evidence that it satisfied factors three or five, namely, that it dispensed charity to all who needed it and applied for it and did not appear to place any obstacles in the way of those who needed and would have availed themselves of the charitable benefits it dispenses. While the record is filled with details regarding PCMC's operations, PCMC is but one of numerous institutions owned and operated by Provena Hospitals. It does not hold title to any of the property for which an exemption is sought. The actual owner is Provena Hospitals. As the Director of Revenue expressly concluded, however, "the record contains no information as to Provena Hospitals' charitable expenditures in 2002." *Department of Revenue v. Provena Covenant Medical Center*, No. 04-PT-0014, slip op. at 15 (2004). The Director reasoned that without such information, it is simply "not possible to conclude that the true owner of the property is a charitable institution as required by Illinois law." *Department of Revenue v. Provena Covenant Medical Center*, No. 04-PT-0014, slip op. at 15 (2004). We fully agree. The appellate court was therefore correct when it concluded that this aspect of the Department's decision was not clearly erroneous. See 384 Ill. App. 3d at 750.

As detailed earlier in this opinion, eligibility for a charitable exemption under section 15-65 of the Property Tax Code (35 ILCS 200/15-65 (West 2002)) requires not only charitable ownership, but charitable use. Specifically, an organization seeking an exemption under section 15-65 must establish that the subject property is "actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit." 35 ILCS 200/15-65 (West 2002). When the law says that property must be "exclusively used" for charitable or beneficent purposes, it means that

charitable or beneficent purposes are the primary ones for which the property is utilized. Secondary or incidental charitable benefits will not suffice, nor will it be enough that the institution professes a charitable purpose or aspires to using its property to confer charity on others. “[S]tatements of the agents of an institution and the wording of its governing legal documents evidencing an intention to use its property exclusively for charitable purposes will not relieve such institution of the burden of proving that its property actually and factually is so used.” *Methodist Old Peoples Home v. Korzen*, 39 Ill. 2d at 157.

In rejecting Provena Hospitals’ claim for exemption, the Department determined that the corporation also failed to satisfy this charitable use requirement. As with the issue of charitable ownership, the appellate court concluded that this aspect of the Department’s decision was not clearly erroneous. Again we agree.

In explaining what constitutes charity, *Methodist Old Peoples Home v. Korzen*, 39 Ill. 2d at 156-57, applied the definition adopted by our court more than a century ago in *Crerar v. Williams*, 145 Ill. 625 (1893). We held there that

“ ‘charity, in a legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burthens of government.’ ” *Crerar v. Williams*, 145 Ill. at 643, quoting *Jackson v. Phillips*, 96 Mass. 539, 556 (1867).

Following *Crerar*, we explained that “[t]he reason for exemptions in favor of charitable institutions is the benefit conferred upon the public by them, and a consequent relief, to some extent, of the burden upon the State to care for and advance the interests of its citizens.” *People v. Young Men’s Christian Ass’n of Chicago*, 365 Ill. 118, 122 (1936). See also *People ex rel. Carr v. Alpha Pi of Phi Kappa Sigma Educational Ass’n of the University of Chicago*, 326 Ill. 573, 578 (1927) (“The reason for exempting certain property from public taxes arises from the fact that such property, in its use for charitable

purposes, tends to lessen the burdens of government and to affect the general welfare of the public"). Our court continues to apply this rationale. See *Quad Cities Open, Inc. v. City of Silvis*, 208 Ill. 2d 498, 509-10 (2004).

Conditioning charitable status on whether an activity helps relieve the burdens on government is appropriate. After all, each tax dollar lost to a charitable exemption is one less dollar affected governmental bodies will have to meet their obligations directly. If a charitable institution wishes to avail itself of funds which would otherwise flow into a public treasury, it is only fitting that the institution provide some compensatory benefit in exchange. While Illinois law has never required that there be a direct, dollar-for-dollar correlation between the value of the tax exemption and the value of the goods or services provided by the charity, it is a *sine qua non* of charitable status that those seeking a charitable exemption be able to demonstrate that their activities will help alleviate some financial burden incurred by the affected taxing bodies in performing their governmental functions.

Our state and federal governments have both undertaken to provide health care for individuals meeting various criteria. To the extent Provena Hospitals' operations help reduce the burdens faced by those levels of government in providing health care, it may therefore be appropriate for Provena Hospitals to qualify for state and federal tax exemptions. Those taxes, however, are not at issue here, and we make no ruling regarding them. The case before us is concerned solely with Provena Hospitals' eligibility for a *property tax* exemption for the 43 parcels of real estate in the PCMC complex. If permitted, that exemption would result in the loss of tax revenue by the following taxing districts: Champaign County, Champaign County Forest Preserve District, Community College District 505, Unit School District 116, Urbana Corporation, Cunningham Township, Urbana-Champaign Sanitary District, Urbana Park District, Champaign-Urbana Mass Transit District, and Champaign-Urbana Public Health District. The record is devoid of findings regarding any of these taxing bodies or the services and support they provide to Champaign County residents. As a result, we have no way to judge how, if at all, Provena Hospitals' use of its PCMC property in 2002 lessened the burdens those bodies would otherwise have been

required to bear.<sup>10</sup>

We further note that even if there were evidence that Provena Hospitals used the PCMC property to provide the *type* of services which the local taxing bodies might find helpful in meeting their obligations to the citizenry of Champaign County, that still would not suffice, in itself, to meet this requirement. The *terms* of the service also make a difference. As the appellate court correctly recognized, “ ‘services extended \*\*\* for value received \*\*\* do not relieve the [s]tate of its burden.’ ” 384 Ill. App. 3d at 744, quoting *Willows v. Munson*, 43 Ill. 2d 203, 208 (1969).

The situation before us here stands in contrast to *People ex rel. Cannon v. Southern Illinois Hospital Corp.*, 404 Ill. 66 (1949). In that case, the hospital seeking the charitable exemption adduced evidence showing that the county in question did undertake to provide treatment for indigent residents. The hospital charged the county deeply discounted rates to treat those patients. Moreover, because the hospital was the only one in the area, the court reasoned that its acceptance of relief patients relieved the government from having to transport and pay for the treatment of those patients elsewhere. *People ex rel. Cannon*, 404 Ill. at 73-74. As a result, the hospital's operations could be said to reduce a burden on the local taxing body. No such conclusion was made or could be made based on the record in this case.

Even if Provena Hospitals were able to clear this hurdle, there was ample support for the Department of Revenue's conclusion that Provena failed to meet its burden of showing that it used the parcels in the PCMC complex actually and exclusively for charitable purposes. As our review of the undisputed evidence demonstrated, both the number of uninsured patients receiving free or discounted care and the dollar value of the care they received were *de minimus*.

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<sup>10</sup>In reaching this conclusion, we do not mean to suggest that Provena Hospitals' entitlement to a charitable property tax exemption was dependent on its ability to show that its use of the PCMC parcels reduced the burden on each of the affected taxing districts. It was, however, required to demonstrate that its use of the property helped alleviate the financial burdens faced by the county or at least one of the other entities supported by the county's taxpayers.

With very limited exception, the property was devoted to the care and treatment of patients in exchange for compensation through private insurance, Medicare and Medicaid, or direct payment from the patient or the patient's family.

To be sure, Provena Hospitals did not condition the receipt of care on a patient's financial circumstances. Treatment was offered to all who requested it, and no one was turned away by PCMC based on their inability to demonstrate how the costs of their care would be covered. The record showed, however, that during the period in question here, Provena Hospitals did not advertise the availability of charitable care at PCMC. Patients were billed as a matter of course, and unpaid bills were automatically referred to collection agencies. Hospital charges were discounted or waived only after it was determined that a patient had no insurance coverage, was not eligible for Medicare or Medicaid, lacked the resources to pay the bill directly, and could document that he or she qualified for participation in the institution's charitable care program. As a practical matter, there was little to distinguish the way in which Provena Hospitals dispensed its "charity" from the way in which a for-profit institution would write off bad debt. Under similar circumstances, our appellate court has consistently refused to recognize a medical facility's actions as the bestowal of charity within the meaning of section 15-65 of the Property Tax Code (35 ILCS 200/15-65 (West 2002)). See *Riverside Medical Center v. Department of Revenue*, 342 Ill. App. 3d 603, 608-09 (2003); *Alivio Medical Center v. Department of Revenue*, 299 Ill. App. 3d 647, 651-52 (1998); *Highland Park Hospital v. Department of Revenue*, 155 Ill. App. 3d 272, 280-81 (1987). The appellate court's decision in the present case is in accord with this line of precedent.

The minimal amount of charitable care dispensed by Provena Hospitals at the PCMC complex cannot be rationalized on the grounds that the area's residents did not require additional services. For one thing, the argument that there really was no demand for additional charitable care in Champaign County is one that Provena Hospitals cannot comfortably make. That is so because such a contention, if true, would bring into question the veracity of the corporation's claim that it is committed to the values of the Catholic health-care ministry PCMC was purportedly obligated to advance.

One of those values was that the institution was to

“distinguish itself by service to and advocacy for those people whose social condition puts them at the margins of our society and makes them vulnerable to discrimination: the poor[,] the uninsured and the underinsured.”

If the number of poor, uninsured and underinsured residents of Champaign County was as insignificant as PCMC's charitable care program reflects, the opportunities for Provena Hospitals to further its mission there would be virtually nonexistent. And if the opportunities were so limited, it is difficult to understand why Provena Hospitals would continue to devote its resources to serving that community. The only plausible explanation would be that its principle purposes in operating PCMC were, in reality, more temporal than it professes.

The argument is problematic for other reasons as well. Federal census figures show that approximately 13.4% of Champaign County's more than 185,000 residents have incomes below the federal poverty guidelines. That amounts to nearly 25,000 people. In addition, nearly 20,000 county residents are estimated to be without any health-care coverage. There is no reason to believe that these groups of indigent and/or uninsured citizens are any healthier than the population at large. To the contrary, experience teaches that such individuals are likely to have significant unmet health-care needs. If Provena Hospitals were truly using the PCMC complex exclusively for charitable purposes, one would therefore expect to see a significant portion of its annual admissions served by Provena Hospitals' charitable care policy. Instead, as we have noted, a mere 302 of its 110,000 admissions received reductions in their bills based on charitable considerations.

Further undermining Provena Hospitals' claims of charity is that even where it did offer discounted charges, the charity was often illusory. As described earlier in this opinion, uninsured patients were charged PCMC's "established" rates, which were more than double the actual costs of care. When patients were granted discounts at the 25% and 50% levels, the hospital was therefore still able to generate a surplus. In at least one instance, the discount was not applied until after the patient had died, producing no benefit to that patient at all. Moreover, it appears that in every case when a "charitable" discount was granted or full payment for a bill was otherwise not received, the

corporation expected the shortfall to be offset by surpluses generated by the higher amounts it was able to charge other users of its facilities and services. Such "cross-subsidies" are a pricing policy any fiscally sound business enterprise might employ. We cannot fault Provena Hospitals for following this strategy, and there is no question that an institution is not ineligible for a charitable exemption simply because those patients who are able to pay are required to do so. *Sisters of the Third Order of St. Francis v. Board of Review*, 231 Ill. 317, 321 (1907). We note merely that such conduct is in no way indicative of any form of charitable purpose or use of the subject property.<sup>11</sup>

The minimal amount of free and discounted care provided at the PCMC cannot be excused under the theory that aid to indigent persons is not a prerequisite to charity. In the context of municipal taxation, we recently reaffirmed that, under Illinois law, charity "is not confined to the relief of poverty or distress or to mere almsgiving" but may also include gifts to the general public use from which the rich as well as to the poor may benefit. *Quad Cities Open, Inc. v. City of Silvis*, 208 Ill. 2d 498, 510-11 (2004), quoting *People v. Young Men's Christian Ass'n of Chicago*, 365 Ill. 118, 122 (1936). It is a fundamental principle of law, however, that a gift is "a voluntary, gratuitous transfer of property by one to another," and that "[i]t is essential to a gift that it should be without consideration." *Martin v. Martin*, 202 Ill. 382, 388 (1903). When patients are treated for a fee, consideration is passed. The treatment therefore would not qualify as a gift. If it were not a gift, it could not be charitable.

Provena Hospitals argues that the amount of free and discounted care it provides to self-pay patients at the PCMC complex is not an accurate reflection of the scope of its charitable use of the property. In its view, its treatment of Medicare and Medicaid patients should also be taken into account because the payments it receives for

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<sup>11</sup>Some commentators have been more pointed in assessing the charitable nature of this practice. See M. Bloche, *Health Policy Below the Waterline: Medical Care and the Charitable Exemption*, 80 Minn. L. Rev. 299, 355 (1995) ("the imagery of charity rings hollow when it comes to hospitals" because, most obviously, "the free care provided by nonprofit hospitals is financed largely by private payers, who are hardly inspired by donative benevolence").

treating such patients do not cover the full costs of care. As noted earlier in this opinion, however, participation in the Medicare and Medicaid is not mandatory. Accepting Medicare and Medicaid patients is optional. While it is consistent with Provena Hospitals' mission, it also serves the organization's financial interests. In exchange for agreeing to accept less than its "established" rate, the corporation receives a reliable stream of revenue and is able to generate income from hospital resources that might otherwise be underutilized. Participation in the programs also enables the institution to qualify for favorable treatment under federal tax law, which is governed by different standards.

Mindful of such considerations, our appellate court has held that discounted care provided to Medicare and Medicaid patients is not considered charity for purposes of assessing eligibility for a property tax exemption. See *Riverside Medical Center v. Department of Revenue*, 342 Ill. App. 3d at 610; see also *Alivio Medical Center v. Department of Revenue*, 299 Ill. App. 3d at 651-52 (charitable real estate exemption denied to medical center where, *inter alia*, most of the center's revenue was derived from patient fees and the majority of those fees were Medicaid payments). Similarly, the Catholic Health Association of the United States, one of the signatories to a friend of the court brief filed in this case in support of Provena Hospitals, does not include shortfalls from Medicaid and Medicare payments in its definition of charity. Provena Health itself adopted this view. The consolidated financial statements and supplementary information it prepared for itself and its affiliates for 2001 and 2002 did not identify any costs or charges incurred by PCMC in connection with subsidizing Medicaid or Medicare patients in its explanation of "charity care." That being so, it can scarcely complain that such costs and charges should have been included by the Department in evaluating Provena Hospitals' charitable contributions.<sup>12</sup>

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<sup>12</sup>It would, in fact, be anomalous to characterize services provided to Medicare and Medicaid patients as charity. That is so because, as the Department correctly points out, charity is, by definition, a type of gift and gifts, as we have explained, must, by definition, be gratuitous. Hospitals do not serve Medicare and Medicaid patients gratuitously. They are paid to do so.

Provena Hospitals asserts that assessment of its charitable endeavors should also take into account subsidies it provides for ambulance service, its support of the crisis nursery, donations made to other not-for-profit entities, volunteer initiatives it undertakes, and support it provides for graduate medical education, behavioral health services, and emergency services training. This contention is problematic for several reasons. First, while all of these activities unquestionably benefit the community, community benefit is not the test. Under Illinois law, the issue is whether the property at issue is used exclusively for a charitable purpose.<sup>13</sup>

Provena Hospitals' decision to make charitable contributions to other not-for-profit entities does not demonstrate an exclusively charitable use of the PCMC complex. Indeed, it tells us nothing about the use of the property at all. It is relevant only with respect to the question of how Provena Hospitals elected to disburse funds generated by the facility. That, however, is not dispositive. The critical issue is the use to which the property itself is devoted, not the use to which income derived from the property is employed. See *City of Lawrenceville v. Maxwell*, 6 Ill. 2d 42, 49 (1955); see also *People ex rel. Goodman v. University of Illinois Foundation*, 388 Ill. 363,

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<sup>13</sup>Illinois' charity requirements distinguish our property tax exemption standards from the requirements a hospital must meet in order to qualify for tax-exempt status under the Internal Revenue Code. When the Medicare and Medicaid programs were being established in the late 1960s, there was concern that many hospitals would lose their federal tax exempt status because there would no longer be sufficient demand for charity care to satisfy IRS requirements. In response, the IRS loosened its previous standards, under which hospitals were required to provide financial assistance to those who could not afford to pay for services, and began to measure a hospital's eligibility for tax exemption by utilizing other "community benefit" factors. Adoption of this community benefit standard "abandoned charity care as the touchstone of exemption at the federal level." See 37 Loy. U. Chi. L.J. at 497. Illinois has not adopted this approach. Although our General Assembly now requires certain hospitals in Illinois to file annual "community benefits plans" with the Illinois Attorney General's office (see 210 ILCS 76/1 *et seq* (West 2006)) that requirement is not part of the Property Tax Code and does not purport to alter Illinois law with respect to property tax exemptions.

374 (1944) ("the test [is] the present use of the property rather than the ultimate use of the proceeds derived from the property sought to be exempted").<sup>14</sup>

With respect to the ambulance subsidy, the costs for most patients who were transported by ambulance appear to have been covered by third-party insurers. The deficit claimed by Provena may therefore result primarily from the reduced rates insurers are allowed to pay, something which clearly would not qualify as charitable in nature. How much, if any, is attributable to free or discounted service provided to those who could not afford to pay is not apparent from the record.<sup>15</sup> We further note (1) that there is no evidence that any of the 43 parcels for which an exemption is sought was ever used directly or indirectly for the ambulance service, and (2) that the ambulance service provided noncharitable benefits to the institution. It complemented PCMC's emergency room, which it was required by law to provide and which was operated by a for-profit corporation, and enhanced PCMC's ability to fill its beds and cover its fixed costs.

The volunteer classes and services cited by Provena Hospitals included such items as free health screenings, wellness classes, and classes on handling grief. Again, while beneficial to the community, they were not necessarily charitable. Private for-profit companies frequently offer comparable services as a benefit for employees and customers and a means for generating publicity and goodwill for the organization.<sup>16</sup>

The behavioral health subsidy listed by Provena Hospitals

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<sup>14</sup>Even as to the nature of Provena Hospitals, the donations tell us little. Charitable contributions, after all, can be made by anyone. They are not the exclusive or even the primary domain of charitable organizations.

<sup>15</sup>We do know from testimony presented by PCMC's chief financial officer at the administrative hearing that none of it involved Medicaid or Medicaid patients.

<sup>16</sup>That such programs can serve as an effective advertising tool was well understood by PCMC's management, which explained that part of the reason for the programs they offered was to let the community know "where they can go for services if they need more health care."

involved operation of two shelters, one primarily for adult men and the other for runaway teens. These shelters do not appear to have been located on the PCMC complex, and the connection between the medical services offered at PCMC and the operation of the shelters was not explained. So far as we can tell, the only relationship between the PCMC complex and the shelters is that PCMC's owner helped support the shelters financially. As in the case of donations to other charitable organizations, however, that does not demonstrate that the subject property is used exclusively for charitable purposes.

The amount Provena Hospitals devoted to emergency medical services suffers from similar problems. These services, which were described as training "prehospital responders and providers in how to most effectively respond to patients in need as they are responding and transporting those patients to the hospital," are furnished to "about 175 different agencies throughout Central Illinois." There is no indication that any of that training actually occurs on the premises of the PCMC complex. Indeed, from the record before us, we cannot tell whether any of this training even occurs in Champaign County.

Provena Hospitals' reliance on this expense is problematic for other reasons as well. None of the taxing bodies affected by the exemption sought by Provena here is claimed to be responsible for training health-care professionals, and they are certainly not responsible for training health-care professionals outside their jurisdictions. As a result, Provena Hospitals' decision to support this training does not relieve any of these taxing bodies of any burden they would otherwise be required to bear. Another key element for charity eligibility is therefore absent. We further note that the decision to train "prehospital responders and providers" is not necessarily altruistic. In a competitive health-care environment, it may be an effective means for increasing awareness of the hospital, encouraging others outside the immediate community to use its services.

Provena Hospitals' reliance on expenses associated with the medical residency program is also problematic. The record indicates that the program is run by the University of Illinois and that Provena Hospitals receives reimbursement for participating in it. Although the corporation apparently does not believe that the reimbursement covers the full actual costs of its affiliation with the residency program, PCMC's president and chief operating officer, who testified

about this item at the administrative hearing, did not explain how the claimed shortfall was computed. We note, moreover, that in addition to generating direct payments from the University, Provena Hospitals' participation in the program unquestionably adds to PCMC's prestige and enables it to supplement its medical staff with well-trained, if inexperienced, physicians. While we cannot exclude the possibility that there is some charity in this relationship, it is difficult to know in which direction such charity flows, from Provena Hospitals to the University of Illinois or vice versa.

That leaves only the \$25,851 Provena Hospitals attributes to crisis nursery services and support. The nursery services to which Provena Hospitals refers are provided by the Crisis Nursery in Urbana. Crisis Nursery is a separate not-for-profit entity. Although some PCMC employees serve on its board of directors, it has no corporate affiliation with PCMC or Provena Health. Crisis Nursery paid to construct the facilities it uses and maintains its own staff. The land on which its facilities are situated is, however, owned by Provena Health. Provena Health allows Crisis Nursery use of the land under a long-term lease for a nominal rent of \$1 per year. Provena also furnishes various in-kind services to the nursery including telephone service, utilities, building and grounds maintenance, laundry, meals, occasional medical consultations for children using the nursery, and meeting space at PCMC for meetings and other events. In addition, Provena Hospitals periodically helps sponsor fund raising events held by the Crisis Nursery.

As its name implies, the Crisis Nursery provides a temporary haven for young children whose families are experiencing some form of crisis. When parents reach the point, for whatever reason, that they are incapable of caring for their children or pose a threat to their children's well-being, the Crisis Nursery will take the child in temporarily. It sometimes also admits children when mothers who are making the transition from welfare to the work force need child assistance in order to manage their work schedules. The goal, always, is to protect children from situations in which they may be at heightened risk of abuse or neglect.

The Crisis Nursery is designed for infants and children up to age five. The facility allows children to stay overnight, if necessary, for up to three days, though longer stays are sometimes permitted. During

these stays, the Crisis Nursery feeds and bathes the children and provides them with "developmentally appropriate activities." Post-visit family support services are offered in order to help improve parenting skills and stabilize children's home environments. The Crisis Nursery also serves as a conduit for various social services for poor families and children in need.

Of the 43 real estate parcels involved in this, the four utilized by the Crisis Nursery may have the strongest claim on being used exclusively for charitable purposes. Even if we assume an exclusive charitable use to have been established, however, it would not aid Provena Hospitals' position. Charitable use of these four parcels would not, under any legal theory, be sufficient to also confer a charitable exemption on the remaining 39 parcels comprising the PCMC complex. Moreover, even as to these four parcels, the claim for exemption must fail. That is so because a critical qualification for the exemption is absent. For the reasons set forth earlier in this opinion, Provena Hospitals, the actual owner of the four parcels, failed to meet its burden of establishing that it is a charitable institution. Without charitable ownership as well as charitable use, no exemption is permitted. The Department of Revenue was therefore correct when it denied Provena Hospitals' request for a charitable exemption as to any of the 43 parcels comprising the PCMC complex.

We likewise find no error in the Department of Revenue's rejection of Provena Hospitals' request for a religious exemption under section 15-40(a)(1) of the Property Tax Code (35 ILCS 200/15-40(a)(1) (West 2002)). To qualify for an exemption under that statute, the property in question must be used exclusively for religious purposes. There is no all-inclusive definition of religious purpose for tax cases. Whether an entity has been organized and operated exclusively for religious purposes is determined from its charter, bylaws, and actual method and facts relating to its operation. See *Fairview Haven v. Department of Revenue*, 153 Ill. App. 3d 763, 774 (1987), citing *Scripture Press Foundation v. Annunzio*, 414 Ill. 339, 349 (1953). As with the claim for a charitable exemption, it was Provena Hospitals' burden to show, by clear and convincing evidence, that it satisfied these requirements. As with its claim for a charitable exemption, it failed to do so.

Provena Hospitals' claim to a religious exemption is founded largely on the proposition that it is, itself, a ministry of the Catholic Church. A threshold problem with this argument is that the facts cited to support it pertain to PCMC, not Provena Hospitals. According to evidence presented in the administrative proceeding, which we cited earlier in this opinion, the articles of consolidation adopted when Provena Hospitals was formed state that its purpose is to "coordinate the activities of Provena Hospitals' subsidiaries or other organizations that are affiliated with Provena Hospitals as they pursue their religious, charitable, educational and scientific purposes" and "to offer at all times high quality and cost effective healthcare and human services to the consuming public." While there is plainly a religious component to this mission, advancing religion is not identified as the corporation's dominant purpose.

Provena Hospitals suggests that we cure this evidentiary problem by imputing the religious values underlying the church's support of PCMC to Provena Hospitals itself. But we can no more do that than we could deem the corporation a charity based on what PCMC alone did. Such a course would require that we resolve facts and debatable questions in favor of exemption. The law requires just the opposite.

Even if Provena Hospitals could overcome this obstacle, its claim to a religious exemption for the 43 parcels at issue in this case would fail. Religious purpose is not determined solely by the professed motives or beliefs of the property's owner. A court must also take into account the facts and circumstances regarding how the property is actually used. See *People ex rel. McCullough v. Deutsche Evangelisch Lutherische Jehovah Gemeinde Ungeaenderter Augsburgischer Confession*, 249 Ill. 132, 136 (1911). As the appellate court recently observed, intentions are not enough. We must ask whether, in actuality or practice, the building is used primarily for a religious purpose. "In a sense, everything a deeply devout person does has a religious purpose," the court explained,

"[b]ut if that formulation determined the exemption from property taxes, religious identity would effectively be the sole criterion. A church could open a restaurant, for instance, and because waiters attempted to evangelize customers while taking their orders, the restaurant would be exempt. But the operation of a restaurant is not necessary for evangelism and

religious instruction, although, like any other social activity, it can provide the occasion for those religious purposes.” See *Faith Builders Church, Inc. v. Department of Revenue*, 378 Ill. App. 3d 1037, 1046 (2008) (denying a religious exemption for property used by a church group for a fee-based day-care center serving infants, toddlers and preschool children).

In this case, the record clearly established that the primary purpose for which the PCMC property was used was providing medical care to patients for a fee. Although the provision of such medical services may have provided an opportunity for various individuals affiliated with the hospital to express and to share their Catholic principles and beliefs, medical care, while potentially miraculous, is not intrinsically, necessarily, or even normally religious in nature. We note, moreover, that no claim has been made that operation of a fee-based medical center is in any way essential to the practice or observance of the Catholic faith.

Provena Hospitals argues that religious institutions alone have the right to assess the religious nature of their activities and that courts may not second-guess those assessments without violating constitutional guarantees regarding the free exercise of religion (see Ill. Const. 1970, art. I, §3; U.S. Const., amend. I). If Provena Hospitals’ argument were valid, it would mean that the church rather than the judiciary is the ultimate arbiter of when and under what circumstances church property is exempt from taxation under the constitution and statutes of the State of Illinois. Provena Hospitals has not cited any authority to support such a claim, nor was it raised by Provena Hospitals in its petition for leave to appeal. It is therefore not properly before us. See *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 301 (2006); *People v. Whitfield*, 228 Ill. 2d 502, 509 (2007).

#### CONCLUSION

For the foregoing reasons, the Department of Revenue properly denied the charitable and religious property tax exemptions requested by Provena Hospitals in this case. The judgment of the appellate court reversing the circuit court and upholding the Department’s decision is therefore affirmed.

*Affirmed.*

JUSTICES KILBRIDE and GARMAN took no part in the consideration or decision of this case.

JUSTICE BURKE, concurring in part and dissenting in part:

I join that portion of the plurality opinion affirming the Director's decision that Provena failed to demonstrate it was a charitable institution based on the inadequacy of the record in this case. Slip op. at 16-18.

I also join that portion of the plurality opinion affirming the Director's decision that Provena failed to demonstrate it was entitled to a religious exemption based again on the lack of sufficient evidence in the record. Slip op. at 30-32.

I write separately, however, because I cannot join that portion of the plurality opinion addressing charitable use.

Without citation to authority, the plurality holds that Provena Hospital's use of the property in 2002 was not a "charitable use" because the charity care provided was *de minimus*. Specifically, the plurality concludes that "there was ample support for the Department of Revenue's conclusion that Provena failed to meet its burden of showing that it used the parcels in the PCMC complex actually and exclusively for charitable purposes. As our review of the undisputed evidence demonstrated, both the number of uninsured patients receiving free or discounted care and the dollar value of the care they received were *de minimus*." Slip op. at 21. I disagree with this rationale. By imposing a quantum of care requirement and monetary threshold, the plurality is injecting itself into matters best left to the legislature.

The legislature did not set forth a monetary threshold for evaluating charitable use. We may not annex new provisions or add conditions to the language of a statute. *Hines v. Department of Public Aid*, 221 Ill. 2d 222, 231 (2006). Yet, this is exactly what the plurality does. The Michigan Supreme Court in *Wexford Medical Group v. City of Cadillac*, 474 Mich. 192, 713 N.W.2d 734 (2006), aptly set out this principle. In *Wexford*, the court held that "there can be no threshold [dollar amount of free medical services provided] imposed

under the statute. The Legislature provided no measuring device with which to gauge an institution's charitable composition, and we cannot presuppose the existence of one. To say that an institution must devote a certain percentage of its time or resources to charity before it merits a tax exemption places an artificial parameter on the charitable institution statute that is unsanctioned by the Legislature." *Wexford*, 474 Mich. at 213, 713 S.W.2d at 745.

Not only did the *Wexford* court reject a monetary threshold because it was not provided for in the statute, the court also believed it would be unwise to impose such a requirement, finding that such a requirement "would be, by its very nature, quite arbitrary." *Wexford*, 474 Mich. at 213, 713 S.W.2d at 745. In addition, the court stated:

"As petitioner aptly pointed out, there are multiple reasons why inventing legislative intent in this regard would be ill-advised and most unworkable. In fact, the difficulties with formulating a monetary threshold illuminate why setting one is the Legislature's purview, not the courts'. To set such a threshold, significant questions would have to be grappled with. For instance, a court would have to determine how to account for the indigent who do not identify themselves as such but who nonetheless fail to pay. A court would have to determine whether facilities that provide vital health care should be treated more leniently than some other type of charity because of the nature of its work, or even if a health care provider in an underserved area, such as petitioner, is more deserving of exemption than one serving an area of lesser need. A court would need to consider whether to premise the exemption on whether the institution had a surplus and whether providing below-cost care constitutes charity. Clearly, courts are unequipped to handle these and many other unanswered questions. Simply put, these are matters for the Legislature." *Wexford*, 474 Mich. at 214, 713 S.W.2d at 745-46.

The *Wexford* court concluded: "[I]t does not follow that an institution must present evidence of a particular level of charitable care because there is no such threshold level contained in the statute. And we refuse to create one." (Emphasis omitted.) *Wexford*, 474 Mich. at 220, 713 S.W.2d at 748.

Similarly, in *Medical Center Hospital of Vermont, Inc. v. City of Burlington*, 152 Vt. 611, 566 A.2d 1352 (1989), the Vermont Supreme Court, in rejecting the taxing authority's argument that the amount of free care dispensed must exceed revenues, concluded there was nothing in any Vermont case that required an institution to dispense any free care to qualify as charitable for purposes of the charitable property tax exemption. *Medical Center Hospital of Vermont*, 152 Vt. at 616, 566 A.2d at 1354. In fact, the court had previously held that "[t]he fact that none of its patients are cared for without charge does not deprive [an institution] of its charitable feature." [Citation.] (Emphasis omitted.) *Medical Center Hospital of Vermont*, 152 Vt. at 616, 566 A.2d at 1355. The court further concluded, "[T]his state has never required a certain percentage of free care to be rendered before finding an organization to be a tax-exempt charity \*\*\*." *Medical Center Hospital of Vermont*, 152 Vt. at 616, 566 A.2d at 1355. The court declared: "In our opinion, pegging charity to a stated amount of free care rendered would not be workable in determining an organization's taxable status. Instead, uncertainty would reign \*\*\*." *Medical Center Hospital of Vermont*, 152 Vt. at 616, 566 A.2d at 1355. Rather, "[t]he better inquiry, it seems to us, is the one used by the trial court in this case: whether health care was made available by the plaintiff to all who needed it, regardless of their ability to pay." *Medical Center Hospital of Vermont*, 152 Vt. at 617, 566 A.2d at 1355.

In addition to the difficulties in formulating a monetary threshold pointed out by the *Wexford* court, the *Medical Center* court noted another problem that would be encountered if a quantum approach is imposed—uncertainty. Specifically, taxability would necessarily be determined on a year to year basis, depending upon economic factors which are not in the control of an organization. *Medical Center Hospital of Vermont*, 152 Vt. at 617, 566 A.2d at 1355. The court stated: "As plaintiff pointed out at trial, if the economy in the Burlington area were to fall off dramatically and unemployment to soar, fewer people would be covered by health care insurance through employers and, consequently, more free care would be rendered to those in need. Should the economy make a turnaround the following year, the amount of free care given might fall again should unemployment levels drop." *Medical Center Hospital of Vermont*,

152 Vt. at 617 n.3, 566 A.2d at 1355 n.3. See also *City of Richmond v. Richmond Memorial Hospital*, 202 Va. 86, 90, 116 S.E.2d 79, 81-82 (1960) ("A tax exemption cannot depend upon any such vague and illusory concept as the percentage of free service actually rendered. This would produce chaotic uncertainty and infinite confusion, permitting a hodgepodge of views on the subject. Thus there would be no certainty nor uniformity in the application of the section involved").

I find these authorities persuasive, I do not believe this court can, under the plain language of section 15-65, impose a quantum of care or monetary requirement, nor should it invent legislative intent in this regard. Setting a monetary or quantum standard is a complex decision which should be left to our legislature, should it so choose. The plurality has set a quantum of care requirement and monetary requirement without any guidelines. This can only cause confusion, speculation, and uncertainty for everyone: institutions, taxing bodies, and the courts. Because the plurality imposes such a standard, without any authority to do so, I cannot agree with it.

I also disagree with the plurality's conclusion that Provena Hospitals was "required to demonstrate that its use of the property helped alleviate the financial burdens faced by the county or at least one of the other entities supported by the county's taxpayers." Slip op. at 20 n.10. Alleviating some burden on government is the reason underlying the tax exemption on properties, not the test for determining eligibility. Despite acknowledging this (slip op. at 19-20), the plurality converts this rationale into a condition of charitable status. I neither agree with this, nor do I believe that Provena Hospitals failed to show it alleviated some burden on government.

In *Wexford*, the court, similar to the plurality, defined charity as:

" [Charity] \*\*\* [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.' " *Wexford*, 474 Mich. at 211, 713 N.W.2d at

744, quoting *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc. v. Sylvan Township*, 416 Mich. 340, 348-49, 330 N.W.2d 682, 686 (1982), quoting *Jackson v. Phillips*, 96 Mass. 539, 556 (1867).

See slip op. at 19, quoting *Crerar v. Williams*, 145 Ill. at 643, quoting *Jackson v. Phillips*, 96 Mass. 539, 556 (1867).

The Michigan court then concluded: "Implicit in the definition is that relieving bodies from disease or suffering is lessening the burden of government." (Emphasis omitted.) *Wexford*, 474 Mich. at 219, 713 N.W.2d at 748. That court specifically held that "petitioner does not have to prove that its actions lessen the burden of government. Rather, it has to prove, as it did, that it 'reliev[es] their bodies from disease, suffering or constraint,' which is, by its nature, a lessening of the burden of government." *Wexford*, 474 Mich. at 219, 713 N.W.2d at 748. I believe the Michigan Supreme Court's conclusion is correct. While "lessening the burden of government" is a component of the definition of charity, it is inextricably tied to the public policy justifying the exemption itself and is not a requirement for demonstrating entitlement to the exemption. The plurality here errs in requiring Provena Hospitals to specifically demonstrate some burden of government it relieved. There is no such requirement.

For the above reasons, I cannot join in the charitable use portion of the plurality opinion. I note that the discussion of charitable use does not command a majority of the court and, therefore, is not binding under the doctrine of *stare decisis*.

JUSTICE FREEMAN joins in this partial concurrence and partial dissent.

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**C**

**CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.**

Court of Appeals of Ohio, Tenth District, Franklin County.

**MIRACIT DEVELOPMENT CORPORATION,**  
Appellant-Appellant,

v.

Thomas M. ZAINO, Tax Commissioner of Ohio et al., Appellees-Appellees.

No. 04AP-322.

March 10, 2005.

**Background:** Nonprofit corporation appealed decision of Board of Tax Appeals affirming tax commissioner's denial of tax exempt status to certain of its real property.

**Holding:** The Court of Appeals, Lazarus, J., held that real property leased by nonprofit corporation to another nonprofit corporation for operation of a day care center was put to a charitable use, and thus property qualified for tax exemption status.

Reversed and remanded.

West Headnotes

[1] Taxation 371 2382

371 Taxation

371III Property Taxes

371III(F) Exemptions

371III(F)2 Proceedings to Establish and Enforce Exemption

371k2376 Judicial Review and Intervention

371k2382 k. Matters Considered; Scope of Issues. Most Cited Cases  
Court of Appeals would address on appeal Board of

Tax Appeals' finding that the institution to which nonprofit corporation leased its real property did not use the property for a charitable purpose, even though nonprofit corporation did not address issue in its brief, where counsel for nonprofit corporation, pursuant to Court's questioning, addressed issue at oral argument, and counsel for tax commissioner addressed the issue both in her brief and at oral argument; tax commissioner was not prejudiced by nonprofit corporation's belated argument. R.C. § 5709.121(A)(2).

[2] Taxation 371 2342

371 Taxation

371III Property Taxes

371III(F) Exemptions

371III(F)1 In General

371k2337 Charitable or Benevolent Institutions, and Property Used for Charitable Purposes in General

371k2342 k. Property Leased or Otherwise Used for Profit. Most Cited Cases

Real property leased by nonprofit corporation to another nonprofit corporation for operation of a day care center, which was established with objective of revitalizing an economically depressed neighborhood and assisting economically disadvantaged families, was put to a charitable use, and thus property qualified for tax exemption status, even though Title XX families and private pay families were charged the same tuition, and a sliding fee scale was not offered to accommodate disparate income levels of those families who did not qualify for Title XX funds, where a large percentage, between 50 and 75 percent, of those utilizing the day care center were Title XX qualified families. Social Security Act, § 2001 et seq., 42 U.S.C.A. § 1397 et seq; R.C. § 5709.121(A)(2).

Appeal from the Board of Tax Appeals. Theodore Scott, Jr., for appellant.

Jim Petro, Attorney General, and Janyce C. Katz,

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for appellee Thomas M. Zaino, Tax Commissioner.

Rich, Crites & Wesp, and Mark Gillis, for appellee Board of Education.

#### OPINION

LAZARUS, J.

\*1 {¶ 1} Appellant, Miracit Development Corporation, Inc. ("Miracit"), appeals the decision of the Board of Tax Appeals ("BTA") denying tax exempt status to certain real property owned by Miracit. For the reasons that follow, we reverse the decision of the BTA and remand the matter for further proceedings.

{¶ 2} Miracit is an Ohio nonprofit corporation originally formed by the Living Faith Apostolic Church as a faith-based community development corporation and is recognized by the Internal Revenue Service ("IRS") as a 501(c)(3) organization. The specific purpose of Miracit, as set forth in its articles of incorporation, is to "assist and promote the well-being of the residents of deteriorated and economically depressed neighborhoods in the Columbus inner city" by engaging in such activities as housing development and redevelopment, economic development, job training, and recreational improvements. In furtherance of that goal, Miracit formed an independent nonprofit corporation, FCI, Too, Inc., ("FCI, Too"), the express purpose of which, as set forth in FCI, Too's articles of incorporation, is to operate a day care center for children. FCI, Too is also recognized by the IRS as a 501(c)(3) organization.

{¶ 3} On January 12, 2001, Miracit purchased an existing day care facility in the revitalization area. FCI, Too leased the property from Miracit in order to operate the day care center. The five-year lease agreement required FCI, Too to pay Miracit annual rent of \$60,000 in year one, \$64,000 in years two and three, and \$68,000 in years four and five.

{¶ 4} In December 2001, Miracit filed an application seeking real property tax exemption for the day care facility for tax year 2001 and remission of taxes and penalties for tax year 2000; however, the application was not received by the tax commissioner until January 8, 2002. As Miracit failed to specify in the application the statutory basis under which it sought exemption, the commissioner considered R.C. 5709.12 and 5709.121 as possible grounds for exemption. Because Miracit did not own the property as of the 2001 tax lien date, January 1, the commissioner determined that he could not consider the exemption for 2001 or prior tax years; accordingly, he considered the exemption for tax year 2002 only. The commissioner ultimately concluded that the property was not entitled to exemption.

{¶ 5} Thereafter, Miracit appealed the commissioner's decision to the BTA and, on June 25, 2003, a hearing was conducted on the matter. On February 27, 2004, the BTA affirmed the commissioner's decision denying the exemption for 2002.

{¶ 6} Miracit appeals the BTA's determination and sets forth the following ten assignments of error:

1. The Board of Tax Appeal erred to the prejudice of appellant when it determined, as a matter of law, or issue of fact, that the day care facility in question is not charitable as that concept has been construed under section 57.09.121(A)(2) [sic] of the Ohio Revised Code.

\*2 2. The Board of Tax Appeal erred to the prejudice of the appellant when it determined, as a matter of law, or issue of fact, that the real property at issue was not used by Miracit, or by another institution under a contract with Miracit, for a charitable and/or public purpose.

3. The Board of Tax Appeal erred to the prejudice of the Appellant when it determined, as a matter of law, or issue of fact, that the real property at issue was not made available to FCI, Too, Inc. for the limited purpose of furtherance of one of Miracit's

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goals-creation of a day care for low income residences [sic].

4. The Board of Tax Appeal erred to the prejudice of the Appellant when it determined, as a matter of law, or issue of fact, that the lease between Miracit and FCI, Too, Inc. was for profit.

5. The Board of Tax Appeal erred to the prejudice of the Appellant when it determined, as a matter of law, or issue of fact, that the lease at issue was a traditional commercial lease rather than merely a vehicle to pay the mortgage and related property expense.

6. The Board erred to the prejudice of the Appellant when it determined, as a matter of law, or issue of fact, that the lease at issue generated rental income.

7. The Board of Tax Appeal erred in that it failed to give proper weight to the evidence offered by Miracit regarding the nature and scope of the lease at issue.

8. The Board of Tax Appeal erred in that its decision is not supported by applicable legal authority and said decision is not based on relevant, creditable [sic] and reliable facts.

9. The Board of Tax Appeal erred in that its decision is unreasonable, arbitrary, and capricious, exceeds its power, and is against the manifest weight of evidence.

10. The Board of Tax Appeal erred in that its decision is an abuse of its discretion.

{¶ 7} Miracit concedes in its brief that its ten assignments of error are interrelated and essentially present one argument; accordingly, we will address the assignments of error together. In essence, Miracit argues that the BTA erred in denying tax exempt status to the day care facility under R.C. 5709.12 and 5709.121. An appellate court may reverse a decision of the BTA only "when it affirmatively appears from the record that such decision is unreasonable or unlawful." *Witt Co. v. Hamilton*

*Cry. Bd. of Revision* (1991), 61 Ohio St.3d 155, 157, 573 N.E.2d 661. It is not the function of an appellate court to substitute its judgment for that of the BTA on factual issues. *Bethesda Healthcare, Inc. v. Wilkins*, 101 Ohio St.3d 420, 806 N.E.2d 142, 2004-Ohio-1749, at ¶ 18. However, the BTA's factual determinations must be supported by sufficient probative evidence. *Id.*, citing *Hawthorn Melody, Inc. v. Lindley* (1981), 65 Ohio St.2d 47, 417 N.E.2d 1257, syllabus.

{¶ 8} In Ohio, all real property is subject to taxation, except that which is expressly exempted. R.C. 5709.01(A). The General Assembly's authority to exempt property is derived from Section 2, Article XII of the Ohio Constitution, which provides, in relevant part, that "[w]ithout limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt \* \* \* institutions used exclusively for charitable purposes \* \* \*." The rationale justifying the granting of an exemption is that "there is a present benefit to the general public from the operation of the charitable institution sufficient to justify the loss of tax revenue." *White Cross Hosp. Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St.2d 199, 201, 311 N.E.2d 862. Exemption from taxation is the exception to the general rule, and statutes granting exemptions must be strictly construed. *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186, 503 N.E.2d 163. The burden rests with the party claiming an exemption to demonstrate that the property qualifies for the exemption. *True Christianity Evangelism v. Zaino* (2001), 91 Ohio St.3d 117, 118, 742 N.E.2d 638, citing *OCLC Online Computer Library Center, Inc. v. Kinney* (1984), 11 Ohio St.3d 198, 201, 464 N.E.2d 572.

\*3 {¶ 9} R.C. 5709.12(B) states, in pertinent part:

\* \* \* Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation \* \* \*.

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{¶ 10} R.C. 5709.121 provides:

Real property and tangible personal property belonging to a charitable or educational institution or to the state or a political subdivision, shall be considered as used exclusively for charitable or public purposes by such institution, the state, or political subdivision if it meets one of the following requirements:

(A) It is used by such institution, the state, or political subdivision, or by one or more other such institutions, the state, or political subdivisions under a lease, sublease, or other contractual arrangement;

(1) As a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education therein;

(2) For other charitable, educational, or public purposes;

(B) It is made available under the direction or control of such institution, the state, or political subdivision for use in furtherance of or incidental to its charitable, educational, or public purposes and not with the view to profit.

{¶ 11} The Ohio Supreme Court explained the interplay between the foregoing statutes in *Episcopal Parish of Christ Church, Glendale v. Kinney* (1979), 58 Ohio St.2d 199, 389 N.E.2d 847, wherein the court approved the concurring opinion of Justice Stern in *White Cross*, supra, at 203-204, 311 N.E.2d 862:

Initially, it is important to observe that, although R.C. 5709.121 purports to define the words used exclusively for "charitable" or "public" purposes, as those words are used in R.C. 5709.12, the definition is not all-encompassing. R.C. 5709.12 states: " \* \* \* Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation." Thus, any institution, irrespective of its charitable or non-charitable character, may take advantage of a tax

exemption if it is making exclusive charitable use of its property. See *Wehrle Foundation v. Evatt* (1943), 141 Ohio St. 467, 49 N.E.2d 52. The legislative definition of exclusive charitable use found in R.C. 5709.121, however, applies only to property "belonging to," i.e., owned by, a charitable or educational institution, or the state or a political subdivision. The net effect of this is that R.C. 5709.121 has no application to noncharitable institutions seeking tax exemption under R.C. 5709.12. Hence, the first inquiry must be directed to the nature of the institution applying for an exemption. \* \* \*

In my view, the overall purpose of R.C. 5709.121 is to declare that the ownership and use of property need not coincide for that property to be tax exempt. If a qualified institution, or governmental unit, owns property, that property is exempt from taxation if (1) the institution or governmental unit itself uses the property as specified in R.C. 5709.121(A)(1) or (A)(2); (2) the institution or governmental unit contractually allows another qualified institution or governmental unit to use the property as specified in R.C. 5709.121(A)(1) or (A)(2); or, (3) the institution or governmental unit makes the property available to anyone besides another qualified institution or governmental unit, for a nonprofit use that is in furtherance of, or incidental to the owner-institution's (or owner-governmental unit's) charitable purposes. \* \* \*

\*4 {¶ 12} Summarizing Justice Stern's opinion, the court, in *Olmsted Falls Bd. of Edn. v. Tracy* (1997), 77 Ohio St.3d 393, 396, 674 N.E.2d 690, stated:

Thus, in deciding whether property is exempt under the charitable use provisions of R.C. 5709.12 and 5709.121, tax authorities must first determine whether the institution seeking exemption is a charitable or noncharitable institution. If the institution is noncharitable, its property may be exempt if it uses the property exclusively for charitable purposes. If the institution is charitable, its property may be exempt if it uses the property exclusively for charitable purposes or it uses the property under the terms set forth in R.C. 5709.121.

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{¶ 13} In the instant case, without making an express determination as to whether Miracit is a charitable or noncharitable institution, the commissioner found that the challenged property did not qualify for tax exempt status under R.C. 5709.12 because Miracit used the property "for the non-exempt purpose of generating revenue through commercial leasing." The commissioner further found that the property was not exempt under R.C. 5709.121(B), as it was "used with a view to profit as evidenced by the lease and rental charge."

{¶ 14} At the June 25, 2003 hearing before the BTA, Sharon Francis, the program director for Miracit, testified that Miracit obtained funding for the day care project from the city of Columbus and a local bank which was utilized to acquire the property and provide start-up capital for FCI, Too to operate the day care center. She further testified that Miracit and FCI, Too kept separate books and records. She also stated that rent payments made by FCI, Too under the lease agreement were utilized by Miracit solely to repay the debt incurred in acquiring the property.

{¶ 15} Ms. Francis also testified that although the day care center was established primarily to serve economically disadvantaged families through Title XX funding, the center actually served both Title XX families and private pay families and the tuition fees charged were the same for both groups. She further stated that she was unaware of any restrictions as to the minimum percentage of Title XX qualified clients the center was required to serve. However, she noted that the center primarily served low income clients. She initially stated that "better than 50 percent" of the families served by the day care center were Title XX qualified. (Tr. 14.) When asked to provide more detail as to the ratio of Title XX to private pay families, Ms. Francis estimated that "at least 75 percent" of the center's clients were Title XX qualified. (Tr. 26.)

{¶ 16} In its decision filed after the hearing, the BTA noted that the commissioner failed to make the threshold determination required by R.C.

5709.12 and 5709.121 as to whether Miracit is a charitable or noncharitable institution. The BTA found that Miracit qualified as a charitable institution; however, the BTA concluded that the property could not be granted exemption under R.C. 5709.121(A)(2) because the evidence did not support a finding that FCI, Too, the institution to whom Miracit leased the property, used the property for a charitable purpose. More particularly, the BTA found at pages 8 and 9 of the decision:

\*5 In the present matter, testimony presented at hearing indicated that the day care facility served the neighborhood population, received the majority of its funding from governmental agencies, and charged private-pay parents no more than subsidized parents. However, testimony further indicated that there existed no established criteria as to who qualified as low income. Further, testimony was inconsistent regarding the percentage of low-income families served by the day care facility. \* \* \* [T]he board does not find that the use of a day care is in and of itself a charitable activity. The appellant has not demonstrated that the day care facility in question is "charitable" as that concept has been construed under R.C. 5709.121(A)(2).

{¶ 17} As previously noted, Miracit contends the BTA erred in denying tax exempt status to the day care facility under R.C. 5709.12 and 5709.121. The BTA found that Miracit was a charitable institution, and that finding has not been challenged; thus, the property belonged to a charitable institution. However, Miracit's brief fails to address the issue upon which the BTA made its determination-whether FCI, Too, the institution to whom Miracit leased the property, used the property for a "charitable purpose" pursuant to R.C. 5709.121(A)(2). Instead, Miracit addresses an issue that was never considered by the BTA-whether Miracit's use of the property was to generate income for Miracit through its commercial lease with FCI, Too. Miracit contends the lease was not intended to generate a profit, did not generate a profit, and was merely a mechanism through which FCI, Too reim-

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bursed Miracit for expenses related to financing the purchase of the day care facility.

{¶ 18} In support of this argument, Miracit relies on two Ohio Supreme Court cases, *Bd. of Educ. of the South-Western City Schools v. Kinnney* (1986), 24 Ohio St.3d 184, 494 N.E.2d 1109, and *Whitehouse v. Tracy* (1995), 72 Ohio St.3d 178, 648 N.E.2d 503. In *South-Western City Schools*, the city of Columbus owned a golf course which included a clubhouse containing, among other things, a snack shop, a pro shop, and an efficiency apartment. The city leased the snack shop to a private concessioner for 22 percent of its gross profits. The course pro was a city employee who was paid a small salary and drew the balance of his income from the sale of pro-shop merchandise. The city rented the efficiency apartment to a non-city employee for \$80 per month.

{¶ 19} The school board challenged the tax-exempt status of the golf course under R.C. 5709.08, which provides, in pertinent part that "public property used exclusively for a public purpose, shall be exempt from taxation." The school board argued that the property was not used exclusively for a public purpose because the snack shop and pro shop were operated to generate a profit for private concerns and the efficiency apartment was operated to the benefit of a private person. Guided by the definition of the term "exclusively" as set forth in R.C. 5709.121(B), the court held that the renting of the efficiency apartment did not violate the "exclusively for a public purpose" requirement of R.C. 5709.08 because the purpose for renting the apartment, that is, to insure that someone would be at the golf course during evening hours to deter vandalism and other damage to the property, was incidental to the course's public purpose and not with a view to profit. The court further held that the operation of the pro shop and snack shop did not violate the "exclusively for a public purpose" requirement of R.C. 5709.08 because nothing in the record suggested that the profit realized by the course pro or concessioner was anything other than trivial and

inconsequential. Accordingly, the court concluded that the golf course should retain its tax exempt status.

\*6 {¶ 20} In *Whitehouse*, the village of Whitehouse owned a water well-field from which it drew water to provide to its residents. The village allowed a local farmer who farmed adjacent land to grow crops on a portion of the well-field. The village and the farmer had no lease or other written contract defining their relationship. The village collected no rent from the farmer, and the farmer was not obligated to share proceeds from his use of the land with the village. It was undisputed that permitting the farmer to plant the well-field saved the village mowing and maintenance expenses on the segments of the field not occupied by the village's operations. It was also undisputed that the farmer earned only a minimal profit from his farming.

{¶ 21} The village claimed exemption for the entire well-field under R.C. 5709.08. The tax commissioner argued that the property was not used exclusively for a public purpose because a private citizen farmed the property for his own profit. In contrast, the village contended that the farming was an incidental use performed for maintaining the well-field and should not bar exemption.

{¶ 22} The court recognized the general rule that whenever public property is used by a private citizen for a private purpose, that use generally prevents exemption. However, the court noted that in some situations, a non-public use could be so incidental and de minimis that the use did not defeat an R.C. 5709.08 exemption. The court held that when the private use of land is sufficiently incidental, the land may be characterized as "used exclusively for a public purpose." In so holding, the court cited *Southwestern City Schools*, supra, for the proposition that when public property is leased to a private individual or concern, the non-public use of the property must be more than incidental before the exclusive public purpose requirement of R.C. 5709.08 will be violated.

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{¶ 23} The court noted that although the record supported a clear inference that the farmer was profiting at least minimally from the use of the land, the record also revealed that the village had effectively retained full control over the use of the property and that the village's assertion that it allowed the farmer to farm part of the well-field solely to save mowing and maintenance expenses was unrefuted. The court concluded that the minimal non-public use of the property was insufficient to defeat the R.C. 5709.08 exemption.

{¶ 24} Both these cases address whether a private citizen's for-profit use of public property prohibits tax exemption of the property under R.C. 5709.08, the statute granting exemption for government and public property. The instant case does not concern R.C. 5709.08, as neither government nor public property is at issue. Further, to the extent that the cases rely upon the definition of "exclusively" set forth in R.C. 5709.121(B), we note that that definition is not applicable to the instant case. As noted by the BTA, R.C. 5709.121(A)(2) is the statute applicable here. Accordingly, Miracit's reliance on *South-Western City Schools* and *Whitehouse* to support the argument set forth in its brief is misplaced.

\*7 [1] {¶ 25} Although Miracit's brief does not specifically address the BTA's finding that the property was not entitled to exemption under R.C. 5709.121(A)(2), counsel for Miracit, pursuant to this court's questioning, addressed the issue at oral argument. As counsel for the tax commissioner addressed the pertinent issue both in her brief and at oral argument, the tax commissioner was not prejudiced by counsel for Miracit's belated argument. Accordingly, we will address whether the BTA's decision was unreasonable or unlawful.

[2] {¶ 26} As noted previously, under R.C. 5709.121(A)(2), property owned by a charitable institution may be leased to another institution and still qualify for a charitable exemption if the institution leasing the property uses the property for charitable purposes. In its decision, the BTA determined that FCI, Too did not use the property for a charit-

able purpose because: (1) private pay families were charged no more than subsidized families, (2) there was no established criteria for determining qualification for subsidized funding, and (3) testimony was inconsistent regarding the percentage of low-income families served by the day care center. Further, at oral argument, counsel for the tax commissioner argued that although the center had made arrangements for funding for qualified individuals through Title XX funds, no other plan existed for families to receive reduced rate care if their ability to pay was limited. In other words, there was no evidence of a sliding fee scale to accommodate disparate income levels of those families who did not qualify for Title XX funds.

{¶ 27} Although the term "charitable purpose" has not been legislatively defined for purposes of determining property tax exemption, the Ohio Supreme Court's definition of "charity" set forth in *Planned Parenthood Assn. v. Tax Commr.* (1966), 5 Ohio St.2d 117, 214 N.E.2d 222, paragraph one of the syllabus, has been utilized in numerous property tax exemption cases:

In the absence of a legislative definition, "charity," in the legal sense is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity.

See, e.g., *Bethesda*, supra, at ¶ 32; *True Christianity Evangelism*, supra, at 119-120, 742 N.E.2d 638; *Case Western Reserve Univ. v. Tracy* (1999), 84 Ohio St.3d 316, 320, 703 N.E.2d 1240; *Olmsted Falls Bd. of Educ.*, supra; *Herb Society of America, Inc. v. Tracy* (1994), 71 Ohio St.3d 374, 376, 643 N.E.2d 1132.

{¶ 28} It is against this definition that FCI, Too's use of the property must be measured to determine

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if it constitutes a charitable purpose.

{¶ 29} In *Bethesda*, supra, the applicant sought tax exemption for a property it leased to itself that included a fitness center. The fitness center had 5400 members and made available eight full scholarships to persons who were unable to afford the membership fees. The center also made partial scholarships available, but no evidence was presented as to the number of partial scholarships. The BTA did not exempt the fitness center because it determined that it was being used as a private health facility for the exclusive use of paying members and that such use bore no functional relationship to any charitable purpose of its owner.

\*8 {¶ 30} In reviewing the BTA's decision, the court noted that the first question to be considered was "whether payment for the services received negates the charitable nature of an institution's activities." *Bethesda* at ¶ 33. Relying on its previous holding in *Planned Parenthood Assn.*, supra, paragraph three of the syllabus, "[t]hat one or more persons receiving the benefits of a charitable institution have the means, in whole or in part, to purchase those benefits in the market place or that some consideration is exacted from them on receipt of the benefits does not detract from the charitable character of the institution," the *Bethesda* court determined that "the mere fact that a charge is made for use of the Fitness Center does not in and of itself negate consideration of the use being a charitable use." *Id.* at ¶ 35, 806 N.E.2d 142.

{¶ 31} The court further noted language employed in *College Preparatory School for Girls of Cincinnati v. Evatt* (1945), 144 Ohio St. 408, 59 N.E.2d 142, a case involving tax exemption of a school:

\* \* \* [W]here a school is operated to give service to the public generally, and is available to some without charge, the fact that tuition in a substantial amount is paid by others does not destroy the charitable character, so long as it extends charitable benefits to members of the public at large to an extent consistent with the continued operation of the

school. It is upon this recognition of its obligation that its charitable character is determined.

*Id.* at 412, 59 N.E.2d 142, quoting *O'Brien v. Physicians' Hospital Ass'n.* (1917), 96 Ohio St. 1, 116 N.E. 975.

{¶ 32} The court noted, however, that "when charges are made for the services being offered, we must consider the overall operation being conducted to determine whether the property is being used exclusively for charitable purposes." *Bethesda* at ¶ 35. To that end, the court adopted the following language from *Cleveland Osteopathic Hosp. v. Zangerle* (1950), 153 Ohio St. 222, 225-226, 91 N.E.2d 261, an exemption case involving a hospital:

It seems obvious that no single test is dispositive of whether a hospital, for example, is being conducted *exclusively* as a charitable project. All the facts in each individual case must be assembled and examined in their entirety and the substance of the scheme or plan of operation exhibited thereby will determine whether the institution involved is entitled to have its property freed from taxes.

(Emphasis sic.)

{¶ 33} Upon examination of the facts in the case before it, the *Bethesda* court noted that only eight full scholarships and an unknown number of partial scholarships were given to persons who could not otherwise afford the membership fees for the fitness center, and that the number of full scholarships given amounted to only one tenth of one percent of the total membership. The court determined that the small number of members able to use the fitness center without payment of membership did not indicate a charitable use. However, in so finding, the court stated that "[w]hether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable use of property must be determined on the totality of the circumstances; there is no absolute percentage." *Id.* at ¶ 39, 806 N.E.2d 142.

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\*9 {¶ 34} In the instant case, we recognize that operation of a day care center does not define whether the property is being put to a charitable use. However, in this case, the day care center was established to further Miracit's objective of revitalizing an economically depressed neighborhood in Columbus' inner city and assisting the economically disadvantaged residents of that neighborhood. Under *Bethesda*, the fact that FCI, Too charges Title XX families and private pay families the same tuition and does not offer a sliding fee scale to accommodate disparate income levels of those families who do not qualify for Title XX funds is of no consequence. Further, in contrast to *Bethesda*, evidence presented at the hearing establishes that a large percentage, between 50 and 75 percent, of those utilizing the day care center are Title XX qualified families.

{¶ 35} Since Miracit's real property is used in a consonant manner under applicable controlling criteria regarding charitable purposes, such property qualifies for tax exemption status under R.C. 5709.121(A)(2). Thus, we conclude that the BTA's decision denying Miracit's property tax exempt status is unreasonable. Accordingly, Miracit's assignments of error are sustained. The decision is reversed and the case is remanded to the Board of Tax Appeals for further proceedings consistent with this opinion.

*Judgment reversed and remanded.*

SADLER and FRENCH, JJ., concur.  
Ohio App. 10 Dist., 2005.  
Miracit Dev. Corp. v. Zaino  
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## C

Baldwin's Ohio Revised Code Annotated Currentness

Constitution of the State of Ohio (Refs & Annos)

▣ Article XII. Finance and Taxation (Refs & Annos)

→ **O Const XII Sec. 2 Property taxation by uniform rule; ten-mill limitation; homestead valuation reduction; exemptions**

No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value, except that laws may be passed to reduce taxes by providing for a reduction in value of the homestead of permanently and totally disabled residents, residents sixty-five years of age and older, and residents sixty years of age or older who are surviving spouses of deceased residents who were sixty-five years of age or older or permanently and totally disabled and receiving a reduction in the value of their homestead at the time of death, provided the surviving spouse continues to reside in a qualifying homestead, and providing for income and other qualifications to obtain such reduction. Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

## CREDIT(S)

(1990 HJR 15, am. eff. 1-1-91; 1974 HJR 59, am. eff. 1-1-75; 1970 SJR 8, am. eff. 1-1-71; 115 v Pt 2, 446, am. eff. 1-1-34; 113 v 790, am. eff. 1-1-31; 107 v 774, am. eff. 1-1-19; 1912 constitutional convention, am. eff. 1-1-13; 97 v 652, am. eff. 1-1-06; 1851 constitutional convention, adopted eff. 9-1-1851)

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**C**

## Baldwin's Ohio Revised Code Annotated Currentness

## Title LVII. Taxation

## ▣ Chapter 5709. Taxable Property--Exemptions (Refs &amp; Annos)

## ▣ Miscellaneous Exemptions

→ **5709.12 Exemption of property used for charitable purposes**

(A) As used in this section, "independent living facilities" means any residential housing facilities and related property that are not a nursing home, residential care facility, or adult care facility as defined in division (A) of section 5701.13 of the Revised Code.

(B) Lands, houses, and other buildings belonging to a county, township, or municipal corporation and used exclusively for the accommodation or support of the poor, or leased to the state or any political subdivision for public purposes shall be exempt from taxation. Real and tangible personal property belonging to institutions that is used exclusively for charitable purposes shall be exempt from taxation, including real property belonging to an institution that is a nonprofit corporation that receives a grant under the Thomas Alva Edison grant program authorized by division (C) of section 122.33 of the Revised Code at any time during the tax year and being held for leasing or resale to others. If, at any time during a tax year for which such property is exempted from taxation, the corporation ceases to qualify for such a grant, the director of development shall notify the tax commissioner, and the tax commissioner shall cause the property to be restored to the tax list beginning with the following tax year. All property owned and used by a nonprofit organization exclusively for a home for the aged, as defined in section 5701.13 of the Revised Code, also shall be exempt from taxation.

(C)(1) If a home for the aged described in division (B)(1) of section 5701.13 of the Revised Code is operated in conjunction with or at the same site as independent living facilities, the exemption granted in division (B) of this section shall include kitchen, dining room, clinic, entry ways, maintenance and storage areas, and land necessary for access commonly used by both residents of the home for the aged and residents of the independent living facilities. Other facilities commonly used by both residents of the home for the aged and residents of independent living units shall be exempt from taxation only if the other facilities are used primarily by the residents of the home for the aged. Vacant land currently unused by the home, and independent living facilities and the lands connected with them are not exempt from taxation. Except as provided in division (A)(1) of section 5709.121 of the Revised Code, property of a home leased for nonresidential purposes is not exempt from taxation.

(2) Independent living facilities are exempt from taxation if they are operated in conjunction with or at the same site as a home for the aged described in division (B)(2) of section 5701.13 of the Revised Code; operated by a corporation, association, or trust described in division (B)(1)(b) of that section; operated exclusively for the benefit of members of the corporation, association, or trust who are retired, aged, or infirm; and provided to those members without charge in consideration of their service, without compensation, to a charitable, religious, fraternal, or educational institution. For the purposes of division (C)(2) of this section, "compensation" does not

include furnishing room and board, clothing, health care, or other necessities, or stipends or other de minimis payments to defray the cost thereof.

(D)(1) A private corporation established under federal law, defined in 36 U.S.C. 1101, Pub. L. No. 102-199, 105 Stat. 1629, as amended, the objects of which include encouraging the advancement of science generally, or of a particular branch of science, the promotion of scientific research, the improvement of the qualifications and usefulness of scientists, or the increase and diffusion of scientific knowledge is conclusively presumed to be a charitable or educational institution. A private corporation established as a nonprofit corporation under the laws of a state, that is exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code of 1986, 100 Stat. 2085, 26 U.S.C.A. 1, as amended, and has as its principal purpose one or more of the foregoing objects, also is conclusively presumed to be a charitable or educational institution.

The fact that an organization described in this division operates in a manner that results in an excess of revenues over expenses shall not be used to deny the exemption granted by this section, provided such excess is used, or is held for use, for exempt purposes or to establish a reserve against future contingencies; and, provided further, that such excess may not be distributed to individual persons or to entities that would not be entitled to the tax exemptions provided by this chapter. Nor shall the fact that any scientific information diffused by the organization is of particular interest or benefit to any of its individual members be used to deny the exemption granted by this section, provided that such scientific information is available to the public for purchase or otherwise.

(2) Division (D)(2) of this section does not apply to real property exempted from taxation under this section and division (A)(3) of section 5709.121 of the Revised Code and belonging to a nonprofit corporation described in division (D)(1) of this section that has received a grant under the Thomas Alva Edison grant program authorized by division (C) of section 122.33 of the Revised Code during any of the tax years the property was exempted from taxation.

When a private corporation described in division (D)(1) of this section sells all or any portion of a tract, lot, or parcel of real estate that has been exempt from taxation under this section and section 5709.121 of the Revised Code, the portion sold shall be restored to the tax list for the year following the year of the sale and, except in connection with a sale and transfer of such a tract, lot, or parcel to a county land reutilization corporation organized under Chapter 1724. of the Revised Code, a charge shall be levied against the sold property in an amount equal to the tax savings on such property during the four tax years preceding the year the property is placed on the tax list. The tax savings equals the amount of the additional taxes that would have been levied if such property had not been exempt from taxation.

The charge constitutes a lien of the state upon such property as of the first day of January of the tax year in which the charge is levied and continues until discharged as provided by law. The charge may also be remitted for all or any portion of such property that the tax commissioner determines is entitled to exemption from real property taxation for the year such property is restored to the tax list under any provision of the Revised Code, other than sections 725.02, 1728.10, 3735.67, 5709.40, 5709.41, 5709.62, 5709.63, 5709.71, 5709.73, 5709.78, and 5709.84, upon an application for exemption covering the year such property is restored to the tax list filed under section 5715.27 of the Revised Code.

(E) Real property held by an organization organized and operated exclusively for charitable purposes as described under section 501(c)(3) of the Internal Revenue Code and exempt from federal taxation under section 501(a) of the Internal Revenue Code, 26 U.S.C.A. 501(a) and (c)(3), as amended, for the purpose of constructing or rehabilitating residences for eventual transfer to qualified low-income families through sale, lease, or land installment contract, shall be exempt from taxation.

The exemption shall commence on the day title to the property is transferred to the organization and shall continue to the end of the tax year in which the organization transfers title to the property to a qualified low-income family. In no case shall the exemption extend beyond the second succeeding tax year following the year in which the title was transferred to the organization. If the title is transferred to the organization and from the organization to a qualified low-income family in the same tax year, the exemption shall continue to the end of that tax year. The proportionate amount of taxes that are a lien but not yet determined, assessed, and levied for the tax year in which title is transferred to the organization shall be remitted by the county auditor for each day of the year that title is held by the organization.

Upon transferring the title to another person, the organization shall file with the county auditor an affidavit affirming that the title was transferred to a qualified low-income family or that the title was not transferred to a qualified low-income family, as the case may be; if the title was transferred to a qualified low-income family, the affidavit shall identify the transferee by name. If the organization transfers title to the property to anyone other than a qualified low-income family, the exemption, if it has not previously expired, shall terminate, and the property shall be restored to the tax list for the year following the year of the transfer and a charge shall be levied against the property in an amount equal to the amount of additional taxes that would have been levied if such property had not been exempt from taxation. The charge constitutes a lien of the state upon such property as of the first day of January of the tax year in which the charge is levied and continues until discharged as provided by law.

The application for exemption shall be filed as otherwise required under section 5715.27 of the Revised Code, except that the organization holding the property shall file with its application documentation substantiating its status as an organization organized and operated exclusively for charitable purposes under section 501(c)(3) of the Internal Revenue Code and its qualification for exemption from federal taxation under section 501(a) of the Internal Revenue Code, and affirming its intention to construct or rehabilitate the property for the eventual transfer to qualified low-income families.

As used in this division, "qualified low-income family" means a family whose income does not exceed two hundred per cent of the official federal poverty guidelines as revised annually in accordance with section 673(2) of the "Omnibus Budget Reconciliation Act of 1981," 95 Stat. 511, 42 U.S.C.A. 9902, as amended, for a family size equal to the size of the family whose income is being determined.

(F) Real property held by a county land reutilization corporation organized under Chapter 1724. of the Revised Code shall be exempt from taxation. Notwithstanding section 5715.27 of the Revised Code, a county land reutilization corporation is not required to apply to any county or state agency in order to qualify for the exemption.

The exemption shall commence on the day title to the property is transferred to the corporation and shall continue to the end of the tax year in which the instrument transferring title from the corporation to another owner is recorded, if the use to which the other owner puts the property does not qualify for an exemption under this section or any other section of the Revised Code. If the title to the property is transferred to the corporation and from the corporation in the same tax year, the exemption shall continue to the end of that tax year. The proportionate amount of taxes that are a lien but not yet determined, assessed, and levied for the tax year in which title is transferred to the corporation shall be remitted by the county auditor for each day of the year that title is held by the corporation.

Upon transferring the title to another person, the corporation shall file with the county auditor an affidavit affirming that the title was transferred to such other person and shall identify the transferee by name. If the corporation transfers title to the property to anyone that does not qualify or the use to which the property is put does not qualify the property for an exemption under this section or any other section of the Revised Code, the exemption, if it has not previously expired, shall terminate, and the property shall be restored to the tax list for the year following the year of the transfer. A charge shall be levied against the property in an amount equal to the amount of additional taxes that would have been levied if such property had not been exempt from taxation. The charge constitutes a lien of the state upon such property as of the first day of January of the tax year in which the charge is levied and continues until discharged as provided by law.

In lieu of the application for exemption otherwise required to be filed as required under section 5715.27 of the Revised Code, a count land reutilization corporation holding the property shall, upon the request of any county or state agency, submit its articles of incorporation substantiating its status as a county land reutilization corporation.

#### CREDIT(S)

(2008 S 353, eff. 4-7-09; 2005 H 66, eff. 6-30-05; 2002 H 416, eff. 9-6-02; 2001 H 405, eff. 12-13-01; 1999 H 194, eff. 11-24-99; 1995 H 117, eff. 9-29-95; 1993 H 281, eff. 7-2-93; 1992 H 782; 1989 H 253; 1987 S 21; 132 v S 207; 1953 H 1; GC 5353)

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Title LVII. Taxation

☞ Chapter 5709. Taxable Property--Exemptions (Refs &amp; Annots)

☞ Miscellaneous Exemptions

→ **5709.121 Certain property declared to be used exclusively for charitable or public purposes**

(A) Real property and tangible personal property belonging to a charitable or educational institution or to the state or a political subdivision, shall be considered as used exclusively for charitable or public purposes by such institution, the state, or political subdivision, if it meets one of the following requirements:

(1) It is used by such institution, the state, or political subdivision, or by one or more other such institutions, the state, or political subdivisions under a lease, sublease, or other contractual arrangement:

(a) As a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education therein;

(b) For other charitable, educational, or public purposes.

(2) It is made available under the direction or control of such institution, the state, or political subdivision for use in furtherance of or incidental to its charitable, educational, or public purposes and not with the view to profit.

(3) It is used by an organization described in division (D) of section 5709.12 of the Revised Code. If the organization is a corporation that receives a grant under the Thomas Alva Edison grant program authorized by division (C) of section 122.33 of the Revised Code at any time during the tax year, "used," for the purposes of this division, includes holding property for lease or resale to others.

(B)(1) Property described in division (A)(1)(a) of this section shall continue to be considered as used exclusively for charitable or public purposes even if the property is conveyed through one conveyance or a series of conveyances to an entity that is not a charitable or educational institution and is not the state or a political subdivision, provided that all of the following conditions apply with respect to that property:

(a) The property has been listed as exempt on the county auditor's tax list and duplicate for the county in which it is located for the ten tax years immediately preceding the year in which the property is conveyed through one conveyance or a series of conveyances;

(b) The owner to which the property is conveyed through one conveyance or a series of conveyances leases the property through one lease or a series of leases to the entity that owned or occupied the property for the ten tax years immediately preceding the year in which the property is conveyed or an affiliate of such prior owner or occupant;

(c) The property includes improvements that are at least fifty years old;

(d) The property is being renovated in connection with a claim for historic preservation tax credits available under federal law;

(e) The property continues to be used for the purposes described in division (A)(1)(a) of this section after its conveyance; and

(f) The property is certified by the United States secretary of the interior as a "certified historic structure" or certified as part of a certified historic structure.

(2) Notwithstanding section 5715.27 of the Revised Code, an application for exemption from taxation of property described in division (B)(1) of this section may be filed by either the owner of the property or its occupant.

(C) For purposes of this section, an institution that meets all of the following requirements is conclusively presumed to be a charitable institution :

(1) The institution is a nonprofit corporation or association, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(2) The institution is exempt from federal income taxation under section 501(a) of the Internal Revenue Code;

(3) The majority of the institution's board of directors are appointed by the mayor or legislative authority of a municipal corporation or a board of county commissioners, or a combination thereof;

(4) The primary purpose of the institution is to assist in the development and revitalization of downtown urban areas.

CREDIT(S)

(2008 H 458, eff. 12-30-08; 2008 H 562, eff. 9-23-08; 2005 H 66, eff. 6-30-05; 2001 H 405, eff. 12-13-01; 1992 H 782, eff. 4-8-93; 1969 H 817)

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