

**MANUAL ON PROPERTY TAX EXEMPTION FOR NOT-FOR-PROFIT
CHARITIES SERVING THE ELDERLY**

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PREFACE

The purpose of this manual is to provide generalized guidance on trends in state income tax law to AAHSA members, who are charitable not-for-profit organizations that provide housing and other services to the elderly. The manual focuses primarily on how such organizations can protect the tax-exempt status of their real property and pitfalls to avoid that might jeopardize their exempt status.

This manual should not be cited or relied upon as a final authority on any tax issue. It is intended to be only a *starting place* for learning about tax issues that are relevant to AAHSA members. Tax laws vary considerably from jurisdiction to jurisdiction, and even within a single jurisdiction they can change over time. For nearly every principle cited in this manual, one or more jurisdictions can be found that follow a different rule. Therefore, while this manual may be used for generalized guidance, it should not be relied upon as providing definitive statements of the law or legal advice.

This manual focuses on property tax challenges that have been litigated in the courts and examines why some organizations have lost their property tax exemptions while others have survived such challenges. It should be remembered that even those organizations that prevailed in court were close enough to the line that state authorities sought to revoke their property tax exemptions, so caution should be exercised in using such organizations as models. Moreover, legal standards aside, state authorities vary widely in the aggressiveness of their enforcement.

Although in many respects the requirements for federal income tax exemption are less strict than those for state property tax exemption, this manual is meant to be a source

only for state property tax issues; AAHSA will publish a companion *Manual on Federal Income Taxation for Charities Serving the Elderly* that provides guidance on federal income tax. State income and franchise taxes are likewise outside the scope of this manual.

A note on terminology:

As used in this manual, except where otherwise specified, the word “organization” means “a nonprofit charitable organization.” For brevity, the term “nonprofit” is sometimes used in place of “not-for-profit.” The term “tax authorities” means “state and local assessors, tax boards, attorneys general, and other governmental entities that can seek revocation of an organization’s property tax exemption.” “Exempt” means “exempt from real property taxation.”

CHAPTER 1: OVERVIEW OF REQUIREMENTS FOR PROPERTY TAX EXEMPTION

A. Basic Requirements

§ 1-1. Generally

For charitable organizations that provide homes and services to the elderly, qualification for property tax exemption depends, broadly speaking, on the answers to two questions:

- (1) Is the property owner an exempt entity?
- (2) Is the property itself entitled to an exemption?

If the answer to either question is no, the property in question will not qualify for a property tax exemption.¹ “[T]he question of whether property is used for charitable purposes is fundamentally different from the question of whether the property-owning entity qualifies as a charitable organization.”² Therefore, even though a charitable organization may be exempt for income tax purposes (whether state or federal), does not necessarily mean that it will qualify for a property tax exemption.³ On the other hand, however, if the organization fails to qualify as an exempt entity for income tax purposes, it generally will not qualify for a property tax exemption, because the property owner must be an exempt entity.⁴

¹ *Smyth County Cmty. Hosp. v. Town of Marion*, 527 S.E.2d 401, 404 (Va. 2000); *Riverview Place, Inc. v. Cass County*, 448 N.W.2d 635, 640 (N.D. 1989); *Sioux Ctr. Cmty. Hosp. & Health Ctr. v. Bd. Of Rev. of Sioux County*, 720 N.W.2d 192 (Tbl.) (Iowa Ct. App. 2006) (unpublished opinion); George L. Blum, Annotation, *Nursing Homes as Exempt from Property Taxation*, 34 A.L.R. 5th 529 (1995; Supp. 2007).

² *Maplewood Cmty., Inc. v. Craig*, 607 S.E.2d 379, 390 (W.Va. 2004).

³ *Id.*; *Eden Retirement Ctr., Inc. v. Dep’t of Revenue*, 821 N.E.2d 240, 250 (Ill. App. Ct. 2004).

⁴ Some state and local jurisdictions accept the IRS’s standards for their own exemption determinations, at least for purposes of determining whether the organization itself qualifies as charitable. Frequently, federal income tax exemption under I.R.C. § 501(c)(3) is one among several prerequisites to granting exemption under state or local tax laws. I.R.M. 7.25.3.1.3.1 (Feb. 23, 1999; April 2005 update) As a general matter, however, the standard for property tax exemption is stricter than that for federal or state income tax exemption.

Stated slightly less broadly, the two-prong test consists of four requirements:

- ✓ The organization itself must qualify as a nonprofit.
- ✓ The property must be owned by a nonprofit.
- ✓ The property must be *actually* used for charitable purposes.
- ✓ The property must be used “exclusively⁵” for charitable purposes.

Many nonprofit statutes also require that the property not be used for the purpose of profit in a private or commercial sense.⁶ However, even when a statute does not state this requirement expressly, it is ordinarily deemed to be implicit in the requirement that the organization be a nonprofit. Other requirements, such as “community benefit”⁷ and prohibitions against “private inurement”⁸ can be thought of as sub-parts of the above tests, although in some cases they are analyzed independently. In determining whether the requirements for property tax exemption are satisfied, courts often engage in a wide-ranging inquiry into “all the facts and circumstances,” examining a wide variety of factors to decide whether, on balance, the property in question should be exempt from taxation. The factors that recur in case after case are the subject of this manual.

§ 1-2. Legislative Grace

Even in the absence of specific recordkeeping requirements imposed by the government, organizations should maintain records that could serve as evidence in the event of a challenge to their tax-exempt status. The reason is that when such a challenge occurs, the burden of proof is on the organization. The following statement from a Wisconsin court is representative:

⁵ Although statutes often use the word “exclusively,” courts usually interpret the word to mean “primarily” or “predominately.” *E.g.*, *Smyth County Cmty. Hosp. v. Town of Marion*, 527 S.E.2d 401 (Va. 2000); 11-400 *California Real Estate Law & Practice* § 400.41 (MB 2006).

⁶ *E.g.*, Iowa Code § 427.1 (West 2007).

⁷ *See* Chapter 3.

⁸ *See* Treas. Reg. § 1.501(c)(3)-1 (as amended in 1990); *See also* Chapter 2 § 2-2a.

Taxation is the rule and exemption from taxation is the exception. Tax exemption statutes are matters of legislative grace and are to be strictly construed against the granting of an exemption The party claiming the exemption must show the property is clearly within the terms of the exception and any doubts are resolved in favor of taxability.⁹

If an organization's exempt status is challenged and the organization has not documented any evidence in support of its petition for exemption, the organization will likely be found non-exempt, even though the government's evidence may likewise be scant.¹⁰ For example, an organization should keep records that show specifically which charitable purposes any donations were used for. The importance of good record-keeping is illustrated in *Evangelical Lutheran Good Samaritan Society v. Board of Equalization of Latah County*, where the independent living portions of a continuing care retirement community (hereinafter CCRC) were denied an exemption because, *inter alia*, the organization failed to produce evidence to prove that it had expended any charitable donations on that facility.¹¹ Similarly, when a Minnesota assisted living facility was unable to produce any documentation to show that it had actually received any of the \$17,000 allegedly donated to it, or to show what portion of volunteer services performed for the facility had actually benefited its residents, the facility was judged not exempt.¹²

It is also advisable for nonprofits to maintain records that demonstrate specific steps they have taken to satisfy their states' statutory requirements for exemption. For more on documentation issues, see § 1-6, *infra*.

B. The Ownership Requirement

⁹ *Milwaukee Regional Med. Ctr., Inc. v. City of Wauwatosa*, 720 N.W.2d 161, 166-67 (Wis. Ct. App. 2006) (citing *Trustees of Ind. Univ. v. Town of Rhine*, 488 N.W.2d 128 (Wis. Ct. App. 1992)).

¹⁰ See, e.g., *ProMed Healthcare v. City of Kalamazoo*, 644 N.W.2d 47, 53 (Mich. Ct. App. 2002).

¹¹ *Evangelical Lutheran Good Samaritan Soc'y v. Bd. of Equalization of Latah County*, 804 P.2d 299 (Idaho 1990).

¹² *Cnty. Mem'l Home at Osakis, Minn., Inc. v. County of Douglas*, 573 N.W.2d 83, 87 (Minn. 1997).

§ 1-3. Generally

Most litigation over property tax exemption arises when state tax authorities judge that all or part of the property owned by a nonprofit is not being “actually” or “exclusively” used for charitable purposes. Sometimes, however, litigation arises over the ownership requirement, which states that the property for which exemption is sought must be owned by a nonprofit organization. The ownership requirement may be broken into two separate inquiries: (1) whether the organization qualifies as a nonprofit and (2) whether the property is *owned* by a nonprofit.

§ 1-4. The Organization Must be a Nonprofit

The organization seeking a property tax exemption must be a nonprofit. Whether an organization’s *motive* is to earn a profit and what it *does* with any profits are more important than whether its revenues exceed its operating expenses.¹³ The hallmark of a nonprofit organization is that it satisfies the “non-distribution constraint:” it is “barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees.”¹⁴ Although the non-distribution constraint is not violated when an organization pays reasonable salaries to its employees, the rule does prohibit organizations from paying excessive salaries, and from passing net revenues to

¹³ See James J. Fishman & Stephen Schwarz, *Non Profit Organizations: Cases & Materials*, at 3 (3d ed. 2006). See also Chapter 2 § 2-2.

¹⁴ E.g., Wash. Rev. Code Ann. § 24.03.030 (West 2007) (A nonprofit corporation “[s]hall not have or issue shares of stock; [nor] make any disbursement of income to its members, directors or officers; [nor] loan money or credit to its officers or directors; [but the organization] may pay compensation in a reasonable amount to its members, directors or officers for services rendered.”). See also James J. Fishman & Stephen Schwarz, *Non Profit Organizations: Cases & Materials*, at 3 (3d ed. 2006) (citing Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 Yale L.J. 837, 840 (1980)).

shareholders.¹⁵ The nondistribution constraint is analogous to the prohibitions on “private inurement” and “private benefit” in federal income tax law.¹⁶

In some jurisdictions, the requirement that the organization claiming exemption be a nonprofit entity is deemed to be satisfied automatically if the organization qualifies for exemption under Internal Revenue Code section 501(c)(3).¹⁷ In Kansas, for example, if an organization is exempt under IRS standards for charities serving the elderly,¹⁸ the property the organization uses for its exempt purposes will generally qualify for a state tax exemption with little additional inquiry.¹⁹ States like Kansas, however, are the exception rather than the rule. Typically, organizations must meet the IRS standards for exemption under section 501(c)(3) *in addition to* more stringent state requirements.²⁰

a. Defining “charitable institution”

In many states, an organization seeking a property tax exemption must have charitable purposes: it must be “benevolent,” a “charitable” nonprofit, or “established to provide some public benefit or to fill some public need.”²¹ In *Wexford Medical Group v. City of Cadillac*,²² a case focusing on the nature of an organization itself under the ownership requirement (rather than on the use of the property), Michigan’s highest court identified the following factors for determining whether an organization is charitable:

- (1) A "charitable institution" must be a nonprofit institution.
- (2) A "charitable institution" is one that is organized chiefly, if not solely, for charity.

¹⁵ *Med. Ctr. Hosp. of Vt., Inc. v. City of Burlington*, 566 A.2d 1352, 1357 (Vt. 1989).

¹⁶ See generally I.R.C. § 501(c)(3) (2006); Treas. Reg. § 1.501(c)(3)-1 (as amended in 1990). See also Chapter 1 § 1-9c.

¹⁷ E.g., 35 Ill. Comp. Stat. 200/15-65 (2007).

¹⁸ I.R.C. § 501(c)(3) (2006), as interpreted by Rev. Rul. 72-124, 1972-1 I.R.B. 145 (1972).

¹⁹ See, e.g., *Presbyterian Manors, Inc. v. Douglas County, Kan.*, 998 P.2d 88 (Kan. 2000).

²⁰ See I.R.M. 7.25.3.1.3.1 (Feb. 23, 1999; April 2005 update).

²¹ See, e.g., case cited *supra* note 11.

²² *Wexford Medical Group v. City of Cadillac*, 713 N.W.2d 734 (Mich. 2006).

(3) A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.

(4) A "charitable institution" brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.

(5) A "charitable institution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance.

(6) A "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year.²³

Other states have more stringent standards, which may be reflected in the actual language of a statute or in judicial constructions of statutory language. In Pennsylvania, for instance, a charitable organization must "operate entirely free from profit motive" as well as "advance a charitable purpose," "relieve the government of some of its burden," "donate or render gratuitously a substantial portion of its services," and benefit "a substantial and indefinite class of persons who are legitimate subjects of charity."²⁴ In Minnesota, one factor is whether the stated purpose of the undertaking is "to be helpful to others without immediate expectation of material reward."²⁵ Other Minnesota factors are:

(1) whether the entity involved is supported by donations and gifts in whole or in part;

(2) whether the recipients of the "charity" are required to pay for the assistance received in whole or in part (For this factor, courts look at

²³ *Id.*

²⁴ *In re St. Margaret Seneca Place v. Bd. of Prop. Assessment, Appeals & Review, County of Allegheny*, 640 A.2d 380 (Pa. 1994).

²⁵ *Volunteers of Am. Assisted Living v. County of Hennepin*, No. TC-24677, 1999 WL 200684 (Minn. T.C. March 23, 1999).

whether residents receive the housing at considerably less than market value or cost);

(3) whether the income received from . . . produces a profit to the charitable institution;

(4) whether the beneficiaries of the "charity" are restricted or unrestricted and, if restricted, whether the class of persons to whom the charity is made available is one having a reasonable relationship to the charitable objectives; and

(5) whether dividends, in form or substance, or assets upon dissolution are available to private interests.²⁶

In Virginia, a charitable institution is exempt if its "dominant purpose" is "not to obtain revenue or profit," and any revenue-earning activities "promote the purposes for which the [charity] was established" and are "incidental thereto."²⁷ For instance, under this test, a hospital could qualify as a charitable organization even if some of its property is used to generate revenue (by leasing office space, for example) so long as its purpose is to promote charitable purposes, rather than to earn a profit.²⁸

There is general agreement among courts that charity is "not confined to mere almsgiving or the relief of poverty and distress, but . . . embraces the improvement and promotion of the happiness of man."²⁹ However, there is no consensus regarding precisely *how* removed from "almsgiving" a charity may be.³⁰ Some states have followed the lead of the IRS, recognizing that the provision of housing or services to the elderly—so long as such services are specially tailored to address the unique types of distress that

²⁶ *Id.*

²⁷ *Smyth County Cmty. Hosp. v. Town of Marion*, 527 S.E.2d 401, 404 (Va. 2000).

²⁸ *Id.*

²⁹ *E.g., Fifield Manor v. County of Los Angeles*, 10 Cal. Rptr. 242 (Cal. Ct. App. 1961).

³⁰ *Compare id* at 254. ("[A] home for the aged which caters to wealthy persons and furnishes them those services and care needed by the old and infirm, rich or poor, does not cease to be a charitable institution so long as its charges do not yield more than actual cost of operation") *with Maplewood Cmty., Inc. v. Craig*, 607 S.E.2d 379, 391 (W. Va. 2004) (holding that the provision of low-cost housing for the elderly does not entitle a facility to a property tax exemption when residents can generally afford to pay for such accommodations).

accompany old age—can be a charitable purpose in itself, even if the particular elderly persons being served are not poor.³¹ In other jurisdictions, however, the “mere” provision of residence and care for elderly persons without special regard for whether they are also “destitute, afflicted, or otherwise unfortunate” may not entitle a facility to a property tax exemption.³²

b. “Charitable” Purposes Contrasted with “Public Health” Purposes

In some jurisdictions, “public health purposes” is an independent basis for tax exemption, apart from “charitable purposes.”³³ Thus, even though an organization’s property is deemed not to advance “charitable” purposes” other than promotion of public health, it may nevertheless qualify for an exemption.³⁴ The availability of the “public health” basis for exemption depends on state statutory law. Whether this basis for exemption is available often depends on the level of care provided in the particular type of facility. Thus, skilled nursing facilities are likely to qualify for exemption on the basis of “public health,” while independent living facilities might not. The distinction between the “charitable” and “public health” bases for exemption is complicated because the promotion of public health, besides being an independent basis for exemption, is also a sub-category of “charity.”³⁵

³¹ *E.g., Southminster, Inc. v. Justus*, 459 S.E.2d 793, 795 (N.C. Ct. App. 1995); Rev. Rul. 72-124, 1972-1 I.R.B. 145 (1972); Rev. Rul. 79-18, 1979-1 C.B. 194 (1979).

³² *City of Richmond v. Va. United Methodist Homes, Inc.*, 509 S.E.2d 504 (Va. 1999).

³³ Compare Mich. Comp. Laws Ann. §211.7o (West 2007) (“charitable institution”) with § 211.7r (“public health purposes”) (discussed in *Wexford Med. Group v. City of Cadillac*, 713 N.W.2d 734, 739-40 (Mich. 2006)).

³⁴ See generally James J. Fishman & Stephen Schwarz, *Non Profit Organizations: Cases & Materials*, at 356-74 (3d ed. 2006).

³⁵ See Rev. Rul. 69-545, 1962-2 C.B. 117 (1969) (citing *Restatement (Second) of Trusts* §§ 368, 372; IV Scott on Trusts §§ 368, 372 (3d ed. 1967)); See also *E. Kentucky Welfare Rights Org. v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976).

Whether a tax exemption is viewed as being based on “charity” or “public health” can affect which corresponding duties attach. For instance, a court may frown more upon the fact that a “charitable” nursing home consistently earns substantial profits than if the same facility were analyzed as a “public health” provider. On the other hand, the “community benefit” requirement—the requirement that an organization provide a minimum amount of free or subsidized care—has traditionally been applied in the context of hospitals and other “public health” organizations. Therefore, if a facility’s property tax exemption is based on its status as a “public health” organization, it is more likely to be held to “community benefit” requirements, which are frequently awkward to apply to elderly housing facilities.

In practice, it is difficult to say which basis for exemption is more advantageous to elderly housing organizations. This is especially true because courts do not always keep the requirements for each type of exemption separate and distinct in their legal analyses. For example, regardless of whether a court invokes the term “community benefit,” it may impose substantially the same requirements using the language like “affordability”³⁶ or “relief of governmental burdens.”³⁷

§ 1-5. The Property Must be *Owned* by a Nonprofit

The property for which exemption is sought must be owned by a nonprofit entity. Although the property must be owned by *some* exempt entity, however, it is not necessarily required that the exempt owner be the *same* entity that manages the property (or facility).³⁸ For example, in some jurisdictions it is possible for an organization to satisfy the “ownership requirement” under the doctrine of “*beneficial*

³⁶ See Chapter 2 §§ 2-3, 2-4.

³⁷ See Chapter 4 § 4.2.

³⁸ E.g., Cal. Rev. & Tax Code § 214(a)(1) (2007).

ownership” when it leases the property from another entity—³⁹ particularly when the lessor is a governmental agency or other tax-exempt entity.⁴⁰

§ 1-6. Documentation issues

a. Articles of Organization and Bylaws

A charitable nonprofit’s articles of incorporation or charter (also called the “articles of organization”) must dedicate the organization to exempt purposes, and, in many states, to *charitable* purposes. Some states, such as Indiana and Kansas, mirror the Internal Revenue Code in recognizing that “relief of the distress of the elderly” is a charitable purpose in itself, regardless of whether the elderly beneficiaries are poor.⁴¹ Many other states, however, require that the charter specifically commit the institution to serving at least some persons who have special health or financial needs.⁴²

An example of the latter approach is *City of Richmond v. Virginia United Methodist Homes, Inc.*, in which a CCRC was held not exempt on account of a defect in its charter’s statement of charitable purpose.⁴³ As a threshold to the ultimate question of whether the property was being used for charitable purposes, the court asked whether the organization itself qualified as an exempt entity.⁴⁴ The court decided that the organization was not exempt under a statute that granted exempt status for “asylums” because the organization had amended its charter, changing its class of intended charitable beneficiaries from “the aged *and infirm and needy* persons” to simply “aging

³⁹ See *Milwaukee Regional Med. Ctr., Inc. v. City of Wauwatosa*, 720 N.W.2d 161 (Wis. Ct. App. 2006).

⁴⁰ See *id.*; *Tri-Cities Children’s Ctr., Inc. v. Alameda County Bd. of Supervisors*, 212 Cal. Rptr. 541, 543-44 (Cal. Ct. App. 1985) (finding leasehold interest in parcel of public property exempt from property taxes).

⁴¹ *Wittenberg Lutheran Village Endowment Corp. v. Lake County Property Tax Assessment Bd. of Appeals*, 782 N.E.2d 483 (Ind. T.C. 2003); *In re Applications of Kansas Christian Home*, 2 P.3d 168 (Kan. 2000).

⁴² E.g., *Miriam Osborn Mem’l Home Ass’n v. Assessor of Rye*, 2006 NY Slip Op. 52461(U), 2006 WL 3836719 (Tbl.) (N.Y. Sup. Ct. Dec. 30, 2006); see also case cited *supra* note 2.

⁴³ See case cited *supra* note 32.

⁴⁴ *Id.*

persons.”⁴⁵ The court reasoned that because the term “aging persons” does not necessarily include disabled, afflicted, or needy persons, which the term “asylum” implies, the organization was not an exempt entity, and thus could not satisfy the “ownership requirement” for property tax exemption.⁴⁶

The State of Texas follows a similar approach, requiring that charities make their facilities available to financially needy persons. Texas recognizes the following as charitable purposes:

- providing medical care without regard to the beneficiaries’ ability to pay;
- providing support to elderly persons or the handicapped without regard to the beneficiaries’ ability to pay; [and]
- providing permanent housing and related social, health care, and educational facilities for persons who are 62 years of age or older without regard to the residents’ ability to pay.⁴⁷

The first charitable purpose recognized by the Texas standard, “providing medical care,” is often invoked in the case of “health care providers” or “hospital organizations,” categories which often include nursing homes.⁴⁸ In many jurisdictions, health care organizations are deemed to satisfy the charitable *purpose* requirement almost categorically.⁴⁹ Of course, hospitals and nursing homes, like any nonprofit organizations, can lose their nonprofit status if they engage in *conduct* prohibited under IRC section

⁴⁵ *Id.* at 505, 509 (emphasis added).

⁴⁶ *Id.* at 509.

⁴⁷ *Baptist Memorials Geriatric Ctr. v. Tom Green County Appraisal Dist.*, 851 S.W.2d 938, 941-42 (Tex. App. 1993) (citing statute). For more on the accessibility of facilities to low-income persons, see Chapter 2 §§ 2-3, 2-4.

⁴⁸ *E.g.*, N.Y. Pub. Health Law § 281(1).

⁴⁹ See Fishman & Schwartz, *supra* note 34, at 357-64.

501(c)(3) and corresponding state requirements, such as private inurement, or distributions of profits to insiders.⁵⁰

The charter should also include prohibitions against private inurement and provisions for disposition of assets upon dissolution. The rule for dissolution under both federal tax law and most states' laws is that the organization's assets must be irrevocably dedicated to charitable purposes upon dissolution; they must not benefit private interests in "form or substance."⁵¹

b. Documentation of Charity Care and Non-Eviction Policies

Even in states that do not absolutely require the dispensation of "charity care"—⁵² free or subsidized services to the indigent—documented evidence that an organization has provided it so can weigh heavily in favor of exemption. At a minimum, organizations should have a policy stating that they will not evict any resident who becomes unable to pay monthly fees.⁵³ Regardless of whether a particular state requires such a policy, the IRS does require it, at least for organizations whose federal tax exemptions are based on the charitable purpose of service to the elderly.⁵⁴ Moreover, a loss of exemption under IRS standards can result in a subsequent loss of state tax exemption because states often require exemption under IRC section 501(c)(3) as a threshold requirement for property tax exemption.⁵⁵

⁵⁰ *E.g., Care Initiatives v. Bd. of Review of Union County, Iowa*, 500 N.W.2d 14 (Iowa 1993) (nursing home not exempt when, *inter alia*, it had surrendered almost all control of the organization to a for-profit management company).

⁵¹ *See, e.g.,* case cited *supra* note 25.

⁵² Chapter 3.

⁵³ *E.g. Toledo Jewish Home for the Aged, Inc. v. Limbach*, 559 N.E.2d 451, 453 (Ohio 1990) ("Retaining the right to evict upon failure to pay, even though that right is not exercised . . . defeats the exemption.").

⁵⁴ Rev. Rul. 72-124, 1972-1 I.R.B. 145 (1972).

⁵⁵ *See* rule cited *supra* note 20.

It is not sufficient for an organization simply to deliver charity care or to never evict residents for inability to pay; the organization must *obligate* itself to do so.⁵⁶ Generally, it is advisable for organizations to incorporate such obligations into their charters or bylaws rather than into their contracts with residents. The reason is that when such obligations are incorporated into residents' contracts, there is a danger that tax authorities might deem the obligations to result from a *quid pro quo* agreement: admission to the facility in exchange for a promise of future charity care or non-eviction.⁵⁷ *Quid pro quo* agreements are likely to be deemed commercial in nature rather than charitable.⁵⁸ One of the most serious threats to the tax-exempt status of a charity is the possibility that tax authorities will find that the organization resembles a commercial business more than a charitable institution.

Conversely, it may not be sufficient to have a charity care *policy* if little charity care is actually dispensed. Many charities have lost their tax exemptions on this basis. For example, in *Eden Retirement Center*, an Illinois court found that although the organization's bylaws provided that certain fees could be waived, this had almost never

⁵⁶ See case cited *supra* note 53 at 453; *Christian Research Inst. v. Town of Dover*, 5 N.J.Tax 376, (N.J. Tax Ct. 1983) (nursing home and retirement center not exempt because, *inter alia*, charter and bylaws did not *obligate* it to keep residents who became unable to pay—even though the organization had never *actually* evicted anyone for inability to pay); See also *United Church of Christ v. Town of W. Hartford*, 539 A.2d 573, 579-80 (Conn. 1988); *Plymouth Place, Inc. v. Tully*, 370 N.E.2d 56 (Ill. App. Ct. 1977) (nursing home not exempt because, *inter alia*, the organization's bylaws did not *mandate* acceptance of any applicants who could not afford the required fees—even though the nursing home, in practice, did admit some indigents at its own discretion).

⁵⁷ See, e.g., *Menno Haven, Inc. v. Franklin County Bd. of Assessment and Revision of Taxes*, 919 A.2d 333 (Pa. Commw. Ct. 2007); see also case cited *supra* note 32. *But cf.* *United Church of Christ v. Town of W. Hartford*, 539 A.2d 573 at 579 (holding that it was not enough to simply have a practice of providing charity care when the organization did not legally obligate itself “to the residents themselves”).

⁵⁸ *Id.*; *Miriam Osborn Mem'l Home Ass'n v. Assessor of Rye*, 2006 NY Slip Op. 52461(U), 2006 WL 3836719 (Tbl.) (N.Y. Sup. Ct. Dec. 30, 2006) (“Where quid pro quo permeates the entire operation . . . where material reciprocity exists-then charity does not.”) (citing *United Presbyterian Ass'n v. Bd. of County Comm'rs of Jefferson County*, 448 P.2d 967 (Colo. 1968)).

happened.⁵⁹ Nor was it sufficient that the organization allowed residents to defer payment of entrance fees when the organization never actually waived the fees.⁶⁰ The retirement center lost its tax exemption.⁶¹ Courts in other jurisdictions have reached similar results.⁶² The total dollar amount of charity care dispensed, however, is generally not dispositive if other factors weigh in favor of a finding that the organization's true purposes are charitable. In one case, for example, an organization was held exempt even though the dollar value of the charity care it had dispensed during a two-year period was only \$2500, when the facility had a policy of accepting any applicant without regard for his or her source of funding.⁶³

The amount and manner of distribution of free and subsidized care should not be left to the unrestricted discretion of a facility's officers. Courts tend to look more favorably upon organizations that use a mechanical, formulaic approach, such as a sliding scale, for determining which applicants or residents qualify for free or subsidized care.⁶⁴

Courts may also look less favorably upon organizations that fail to make their charity care policies known to residents, applicants, and the public. If an organization has a charity care policy but keeps it secret, the result may be that little charity care is actually dispensed, or that courts will suspect the organization of insincerity in its

⁵⁹ *Eden Retirement Ctr., Inc. v. Dep't of Revenue*, 821 N.E.2d 240 (Ill. 2004).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See, e.g.*, case cited *supra* note 25 (although the organization had a charity care policy and subsidy fund, charity care had never actually been dispensed because all the residents could afford to pay, and the policy was not communicated to residents other than in the residency agreement); *In re Town of Wolfboro*, 879 A.2d 1137 (N.H. 2005) (Although independent living elderly housing complex had a charity care policy, it was not sufficient because it (a) did not contain clear criteria for determining who would receive the subsidies, (b) there was no allotted source for funding subsidies, and (c) no resident had ever actually received a subsidy); *In re Appeal of Capital Extended Care*, 609 A2d 896 (Pa. Commw. Ct. 1992) (personal care home not exempt when no resident had ever been unable to pay monthly fees).

⁶³ *See* case cited *supra* note 22.

⁶⁴ *See, e.g., Sioux Ctr. Cmty. Hosp. & Health Ctr. v. Bd. of Rev. of Sioux County*, 720 N.W.2d 192 (Tbl.), 2006 WL 1230012 (Iowa Ct. App. April 26, 2006) (unpublished opinion).

charitable purposes. For example, a Texas organization that operated a hospital, nursing facility, and residential complex for the elderly was found non-exempt when the organization “never advertised its services as being available to the community regardless of financial status” and there was no evidence that any services actually *were* provided without regard for ability to pay.⁶⁵

More information on charity care requirements can be found in subsequent sections of this manual.

c. Licensing

Organizations are advised to ensure that any required state and local licenses are up to date *for each part of the facility*. Ensuring that this is done will help to protect against pitfalls like the one an Ohio nursing home encountered in *West Side Deutscher Frauen Verein v. Tracy*.⁶⁶ In that case, the operator of the nursing home had fulfilled all licensing requirements until the time it constructed a new addition to the facility to increase bed space, but it did not seek a license specifically for the new addition for approximately two years.⁶⁷ The court held that the organization was not entitled to a property tax exemption for the new addition and its attached land during those two years, even though the organization had satisfied all licensing requirements for the main facility.⁶⁸

C. Requirements Relating to the Property Itself: Actual and Exclusive Use

§ 1-7. Generally

⁶⁵ See, e.g., *Baptist Memorials Geriatric Ctr. v. Tom Green County Appraisal Dist.*, 851 S.W.2d 938 at 945-46 (Tex. App. 1993) (emphasizing that all comparable units rented for the same rate without regard to ability to pay, all tenants paid that amount, and only one tenant's rent had not been collected).

⁶⁶ *West Side Deutscher Frauen Verein v. Tracy*, 676 N.E.2d 895 (Ohio 1997).

⁶⁷ *Id.*

⁶⁸ *Id.*

Most jurisdictions require that the property for which exemption is sought be “actually and exclusively” used for exempt purposes.⁶⁹ Some states require that the property must be used actually and exclusively for “religious, hospital, scientific, or charitable” purposes.⁷⁰ The requirements of actual and exclusive use focus on the use of the property itself, and are treated as separate from the requirement that the property must be owned by an entity that is itself exempt.⁷¹

§ 1-8. Actual Use

Property is not exempt merely because it is owned and used by a charitable organization; the property must actually be used for exempt purposes.⁷² In the words of one court, “[t]he charity not only must actually use the property but must actually use the property in furtherance of its charitable purpose.”⁷³ Moreover, if an organization operates multiple facilities situated on multiple parcels of land, the charitable nature of the operation *as a whole* is generally deemed probative only to the question of whether the organization satisfies the “ownership” requirement; the “actual use” requirement may focus on the use of each parcel individually.⁷⁴ Accordingly, the Pennsylvania Constitution permits property tax exemptions only for “that portion of real property of [a charitable] institution which is actually and regularly used for the purposes of the institution.”⁷⁵

⁶⁹ See, e.g., case cited *supra* note 59.

⁷⁰ E.g. Cal. Rev. & Tax Code § 214(a) (2007).

⁷¹ See case cited *supra* note 65, at 940 (“Findings of ownership and use by a charitable organization are not sufficient; the charity also must use the property for its charitable purposes.”).

⁷² Cal. Rev. & Tax Code § 214(a)(3) (2007).

⁷³ See case cited *supra* note 65 (citation omitted).

⁷⁴ E.g., *id.* at 945. *But see* Chapter 1 § 1-9b.

⁷⁵ Pa. Const. Art. VIII, § 2(a)(v). *But cf.* *Alliance Home of Carlisle, Pa. v. Bd. of Assessment Appeals*, 919 A.2d 206 (Pa. 2007) (applying “whole institution” analysis to CCRC, and finding it exempt).

The mere fact that property is owned by an exempt organization is not enough to satisfy the “actual use” requirement.⁷⁶ The actual use requirement is frequently invoked when state tax authorities determine that property is not “actually” being used to dispense charity, even though the organization may be a nonprofit, and even though it may have a charity care policy.⁷⁷ In a Tennessee case, for example, a religious organization that operated a CCRC-like facility was found non-exempt on the grounds that its activities were not *actually* charitable.⁷⁸ The court held that even though the organization itself might be exempt, the *facility* was not entitled to a property tax exemption because the services it provided were not charitable because they did not cater to low-income people.⁷⁹

Mere intended use does not satisfy the actual use requirement.⁸⁰ “It is the actual use being made of the property on the tax day which is determinative, not the use intended for the future.”⁸¹ Thus, when a building is under construction and it is evident that it will be used for exempt purposes, a property tax exemption generally will not apply until actual use commences.⁸² However, some jurisdictions recognize a “continued character exception” to the actual use rule for buildings under construction.⁸³ Under the continued character exception, property which was exempt prior to reconstruction, and

⁷⁶ *Id.*; see also case cited *supra* note 65, at 944.

⁷⁷ This may seem an obvious application of the “actual use” requirement, but it should be distinguished from the requirement that property be *presently* used for exempt purposes, discussed in the following paragraph.

⁷⁸ *Christian Home for the Aged, Inc. v. Tenn. Assessment Appeals Comm’n*, 790 S.W.2d 288 (Tenn. Ct. App. 1990).

⁷⁹ *Id.*

⁸⁰ *Christward Ministry v. County of San Diego*, 76 Cal. Rptr. 854, 858 (Cal. Ct. App. 1969).

⁸¹ *United Church of Christ v. Town of W. Hartford*, 539 A.2d 573 at 578 (Conn. 1988) (finding elderly housing project not exempt when there had been no limits on wealth or income for the current residents).

⁸² *Job Haines Home for the Aged v. Township of Bloomfield*, 19 N.J. Tax 408 (N.J. Tax Ct. 2001).

⁸³ See *id.* at 419-20.

which is to be used again for exempt purposes after reconstruction, will not lose its exemption even though it may not be in actual use during the period of reconstruction.⁸⁴

Another exception to the “actual use” rule is that if some portion of the land is physically unusable for the organization’s charitable purposes, the unused land may nevertheless qualify for a property tax exemption so long as the organization is deriving as much charitable use out of property as is reasonably practicable. In a Washington State case, for example, an elderly housing complex satisfied the actual use requirement even though part of the attached property was not used to benefit the residents.⁸⁵ The favorable outcome of the case was based on the court’s observation that the institution got as much use out of the property as it reasonably could, considering that the land in question was virtually unusable to the residents due to its steep topography, and environmental conservation rules prevented the land from being modified.⁸⁶

§ 1-9. Exclusive Use

a. “Exclusive” Usually Means “Predominant”

The exclusive use requirement states that the property for which exemption is sought must be used “exclusively” for charitable purposes.⁸⁷ For purposes of this requirement, “exclusively” is usually interpreted to mean “primarily” or “predominately.”⁸⁸ Thus, the property may be used for non-charitable purposes, so long as they are merely incidental and minimal in comparison to the organization’s charitable

⁸⁴ *Id.*

⁸⁵ *Senior Housing Assistance Group v. Wash. Dep’t of Revenue*, No. 56827, 2002 WL 1307576 (Wash. Bd. Tax. App., Apr. 29, 2002).

⁸⁶ *Id.*

⁸⁷ *See, e.g.*, Cal. Rev. & Tax Code § 214 (2007).

⁸⁸ *See* 11-400 *California Real Estate Law & Practice* § 400.41 (MB 2006); *see also* case cited *supra* note 27.

activities.⁸⁹ In Florida, the statute itself uses the word “predominantly,” and states that the extent of the exemption is that which “the ratio that such predominant use bears to the nonexempt use.”⁹⁰

In *Smyth County Community Hospital v. Town of Marion*, Virginia’s highest court articulated a “dominant purpose test” for property tax exemption determinations.⁹¹ Under the dominant purpose test, real property owned by a charity is tax-exempt—“regardless of any revenue it produces incident to its use”—if the property “has direct reference to” the organization’s exempt purposes and “tends immediately and directly to promote those purposes.”⁹² Applying this test, the court found the property of a hospital-owned nursing home exempt.⁹³ The court reasoned that the dominant purpose of the revenue earned by the hospital (an exempt entity) was to insure that the nursing home did not have an adverse financial impact on the hospital, and to provide nursing services, which was one of the purposes of the hospital.⁹⁴ The court ruled in favor of exemption even though the nursing home had decreased the number of its Medicaid patients in order to ensure its financial health.⁹⁵

Courts frequently cite the exclusive (or predominant) use requirement as a starting point for a wide-ranging inquiry into all the facts and circumstances of a case. The exclusive use requirement is sometimes treated as indistinguishable from the “actual use” requirement, and at other times it is treated separately.

⁸⁹ *See id.*

⁹⁰ Fla. Stat. Ann. § 196.192(2) (West 2007).

⁹¹ *See* case cited *supra* note 27, at 404.

⁹² *Id.* The Virginia court noted that the dominant purpose test is also used to determine whether the organization itself is exempt. If the organization is not exempt, the property will not be exempt, and the court will not need to reach the question of what the dominant purpose of the property is.

⁹³ *Id.* at 405-06.

⁹⁴ *Id.* at 405.

⁹⁵ *Id.*

b. When some—but not all—Parts of the Property are Used Exclusively for Charitable Purposes.

Having an exempt purpose for *each part* of an organization’s activities can be important, especially in jurisdictions where tax authorities scrutinize each part of the property individually—rather than the entire operation as an integrated whole—to determine whether the property is used exclusively for charitable purposes. An example of such a jurisdiction is Idaho, where a multilevel care facility was denied a property tax exemption for its individual living quarters and common areas, even though its skilled nursing facility was exempt.⁹⁶ The exemption for the skilled nursing portion was based on the facility’s status as a “hospital” under Idaho’s statutory definition of the word.⁹⁷ The Idaho Supreme Court rejected the organization’s argument that the independent living units should also be exempt as part of the “hospital,” within a “continuum of care” comprised of both the nursing home and the independent living units, choosing instead to judge the nursing home and the independent living units separately.⁹⁸ The court further rejected the argument that individual living quarters were exempt on the basis that they served the special needs of the elderly, because the facilities (a) charged fees comparable to those of commercial retirement homes, (b) did not provide subsidized housing to any residents, and (c) the organization’s revenue regularly exceeded its expenses.⁹⁹ Similarly, an Iowa court held that the apartment division of an

⁹⁶ See case cited *supra* note 11.

⁹⁷ *Id.*

⁹⁸ *Id.* at 302-03.

⁹⁹ *Id.*

otherwise exempt nursing home was not exempt because its fees were not affordable for low-income residents.¹⁰⁰

However, as with many matters of state law, not every state is in accord regarding whether each part of a facility should be scrutinized independently; in some jurisdictions, courts examine and judge the property as a whole. For example, the Kansas Supreme Court held that a CCRC must be viewed as a whole to determine whether it qualifies for a property tax exemption.¹⁰¹ The independent living units of the CCRC in that case satisfied all the requirements for exemption when viewed as part of the whole CCRC (which included assisted living and nursing care units).¹⁰²

Similarly, in *Alliance Home of Carlisle, Pa. v. Board of Assessment Appeals*, Pennsylvania's Supreme Court reversed the decision of a lower court that had judged each of a CCRC's parts separately, rather than looking at the facility as a whole.¹⁰³ *Alliance Home* involved a CCRC that operated a nursing home and an assisted living compound on its property, both of which were exempt from real estate taxation.¹⁰⁴ When the organization sought to extend its real estate tax exemption to a parcel on which it operated an independent living apartment complex, however, the exemption was denied by local tax authorities and the lower courts.¹⁰⁵ The lower courts found that the mere fact that the independent living apartments were located on the same grounds as the nursing home and assisted living facility did not entitle the entire compound to an exemption.¹⁰⁶ Examining the independent living facility on its own merits, the lower courts found that

¹⁰⁰ *Holy Spirit Retirement Home, Inc. v. Bd. of Review of Sioux City, Iowa*, 543 N.W.2d 907 (Iowa Ct. App. 1995).

¹⁰¹ *In re Applications of Kansas Christian Home*, 2 P.3d 168 (Kan. 2000).

¹⁰² *Id.*

¹⁰³ *Alliance Home of Carlisle, Pa. v. Bd. of Assessment Appeals*, 919 A.2d 206, 226 (Pa. 2007).

¹⁰⁴ *Id.* at 208.

¹⁰⁵ *Alliance Home of Carlisle v. Bd. of Assessment Appeals*, 852 A.2d 428 (Pa. Commw. Ct. 2004).

¹⁰⁶ *Id.*

the independent living facility was not exempt from property taxation, primarily because the organization did not donate or render gratuitously a substantial portion of its services to the residents of the apartments.¹⁰⁷ The Pennsylvania Supreme Court reversed, applying what it called an “entire institution analysis”:

the individual parcels owned by a single qualifying institution of purely public charity are not to be evaluated as if the parcels represented separate institutions Our evaluation focuses on a corporation . . . not on parts of a corporation.”¹⁰⁸

Applying this test, the court held that the entire CCRC, including the independent living facility, was exempt from property taxation.¹⁰⁹ The court stated that “[a]lthough the independent living facility, if it were viewed in isolation or as a separate institution, might not on its own qualify as a purely public charity, its role in the comprehensive care scheme provided by [the CCRC] is consistent with, is tied to, and advances [the CCRC’s] charitable purpose.”¹¹⁰ The court emphasized the “unique nature” of CCRCs in their ability to offer “a measure of protection . . . against the uncertainties and challenges that attend the process of aging.”¹¹¹ The court further held that it was permissible for part of the independent living facility’s revenues to be used to offset expenses of the nursing and assisted living facilities, rejecting the lower court’s holding that revenues earned by a particular level of a CCRC must be used to provide subsidies to residents of that same level .¹¹²

¹⁰⁷ *Id.*

¹⁰⁸ *See* case cited *supra* note 103 at 224-225.

¹⁰⁹ *Id.* at 225-27.

¹¹⁰ *Id.* at 226.

¹¹¹ *Id.* The court quoted extensively from an amicus brief filed by the Pennsylvania Association of Nonprofit Homes for the Aging (PANPHA), an AAHSA state association. *See id.* at *13-14.

¹¹² *See* case cited *supra* note 103 at 220-22.

Even in states where each part of the property is viewed separately, a finding that one part of an organization's property is not exempt does not necessarily mean that the entire property will be denied an exemption. In many cases, a "separately identifiable portion" of the property (e.g., a nursing facility within a CCRC) used exclusively for exempt purposes may qualify for exemption even when some other portion (e.g., an independent living facility in a CCRC) does not qualify.¹¹³ In a Texas case, for instance, a facility was denied an exemption for its residential complex even though exemptions were granted for its hospital and nursing home.¹¹⁴ Similarly, a Vermont court held that a small amount of taxable income generated by a facility's data processing area and laboratories did not jeopardize the exemption of those areas of the property because the "primary purpose" of those portions of the property remained charitable.¹¹⁵ Despite the fact that the generation of such profits was unrelated to the facility's charitable purposes, it was small enough in quantity to be deemed "incidental" to the charitable purposes.¹¹⁶

Some states that allow for partial exemptions apply different tests. For example, a California statute grants property tax exemptions to certain elderly housing facilities, but requires that such facilities serve low and moderate-income residents. However, if a facility includes some housing for residents who are not low-or-moderate-income, the facility can still receive a partial exemption.¹¹⁷ The amount of the partial exemption is "equal to that percentage of the value of the property that is equal to the percentage that

¹¹³ See, e.g., Utah State Tax Comm'n, Prop. Tax Div., *Prop. Tax Exemptions: Standards of Practice 2.15.2* (Rev. May 2005), at <http://propertytax.utah.gov/standards/standard02.pdf> (last visited May 30, 2007).

¹¹⁴ See case cited *supra* note 65.

¹¹⁵ *Med. Ctr. Hosp. of Vt., Inc. v. City of Burlington*, 566 A.2d 1352, 1359 (Vt. 1989).

¹¹⁶ *Id.*

¹¹⁷ Cal. Rev. & Tax Code § 213 (West 2007).

the number of low- and moderate-income elderly and handicapped families occupying the property represents of the total number of families occupying the property.”¹¹⁸

c. The Nondistribution Constraint Applied to Property

The nondistribution restraint (discussed *supra* Chapter 1 § 1-4) does not apply only to organizations themselves; in the context of property tax exemption, it also applies to the use of property. Therefore, if property is used in a way that improperly benefits insiders of the organization, the property will likely be held non-exempt.¹¹⁹

Similarly, an organization may lose its property tax exemption if it uses property in a way that impermissibly benefits private parties, especially when the private parties are insiders (such as directors or managers) of the nonprofit. A nonprofit may violate this rule by entering into a contract that provides a “substantial” benefit to such a private party—even though the arrangement might also further charitable purposes.¹²⁰ For instance, in *Housing Pioneers, Inc. v. Commissioner*, a California nonprofit that provided housing for low-income and handicapped persons entered into a partnership with a for-profit company.¹²¹ The partnership agreement was structured to take advantage of California’s property tax laws: it arranged for the for-profit company to avoid paying state property taxes by virtue of its relationship with the nonprofit. In exchange for this benefit, the for-profit agreed to give part of its tax savings to the nonprofit to further its charitable mission. The Ninth Circuit upheld the Tax Court’s decision that such an arrangement would impermissibly “inure to private benefit”—even though charitable purposes would have been advanced by the agreement—because the for-profit partner

¹¹⁸ *Id.*

¹¹⁹ Cal. Rev. & Tax Code § 214 (West 2007).

¹²⁰ See *Housing Pioneers, Inc. v. Comm’r*, 58 F.3d 401 (9th Cir. 1995).

¹²¹ *Id.*

was also receiving a substantial benefit.¹²² The Ninth Circuit emphasized that some of the partners of the for-profit were also directors of the nonprofit.¹²³ Although the Tax Court's ruling was based on federal laws prohibiting exempt charities from benefiting insiders, the holding demonstrates that charities should take care whenever they use their property in ways that benefit for-profit entities.¹²⁴

Contracts that benefit private parties can lead to tax litigation even when the private parties are not insiders. In one case, for example, a struggling nonprofit organization entered into a fundraising contract that provided a large percentage of its revenues to a private fundraising company.¹²⁵ Although the court rejected the government's argument that the fundraiser's charges were so high that the fundraiser effectively controlled (and was thus an insider of) the charity, the court suggested that the charity could lose its exemption on the basis that it was being "operated to a significant degree for the private benefit of" the fundraiser.¹²⁶

Another type of contractual arrangement that can raise issues of impermissible private benefit is when a charity's contract with a private party contains a non-competition clause. However, although non-competition clauses may be looked upon with disfavor by some tax authorities, they are not necessarily fatal. For example, in *Wexford Medical Group v. Cadillac*, a health care organization inserted non-competition

¹²² *Id.* On remand, however, the jury concluded that the partnerships did not interfere with the nonprofit's exempt purposes.

¹²³ *Id.* at 404.

¹²⁴ See *Bethesda Barclay House v. Ciarleglio*, 88 S.W.3d 85 (Mo. App. 2002) ("[A] tax exemption will not be granted to property which houses a business operated for gaining profit, even if the profit is turned over to a parent organization to be used for a charitable purpose.").

¹²⁵ *United Cancer Council, Inc. v. Comm'r*, 165 F.3d 1173 (7th Cir. 1999). Note that this is a federal tax case.

¹²⁶ *Id.* at 1179.

clauses into its contracts with physicians.¹²⁷ The court held that the non-competition clauses did not negate the otherwise charitable nature of the institution, especially considering that the organization had never actually enforced any of the clauses.¹²⁸

D. Other Considerations

§ 1-10. A balancing of factors

Although a few jurisdictions have attempted to quantify what is required for a property tax exemption,¹²⁹ in most states the law is vague, and courts therefore resort to balancing “all the facts and circumstances” to determine whether the organization is indeed charitable and whether the property can be said to be “actually and exclusively used” for charitable purposes. Many jurisdictions have developed checklists of factors that courts and tax authorities look at to determine whether, on balance, the property should be exempted from taxation. The remainder of this manual examines factors to which authorities in multiple jurisdictions have accorded importance.

If one were to attempt to identify a common thread in all these factors, it might boil down to the following two considerations. First, since tax exemptions are often viewed as subsidies to the organizations that receive them, authorities want assurance that the community is getting its money’s worth by granting the exemption. In other words, the value of the unassessed tax dollars should not exceed the value of what the community gets in return from the work of the charity.¹³⁰ For the tax exemption to be worthwhile, the community should be better off giving the money to the organization

¹²⁷ See case cited *supra* note 22, at 748.

¹²⁸ *Id.*

¹²⁹ *E.g.*, Utah State Tax Comm’n, Prop. Tax Div., *supra* note 113, at Appendix 2D, Std. V.

¹³⁰ *E.g.*, *Utah County v. Intermountain Health Care, Inc.*, 709 P.2d 265, 269 (Utah 1985), described as “[t]he leading case in the area of state tax exemption” in Barry R. Furrow, et al., *Health Law* 42 (2d Ed. 2000).

through the tax exemption than keeping it in the government's coffers. This usually means filling a need that the government would otherwise be obligated to fill, or at least which the private sector would be unlikely to fill.¹³¹

Second, tax authorities often demand that nonprofit organizations present evidence to show how they are different from commercial businesses. Commercial businesses pay property taxes, and authorities demand more than mere proof that an organization is registered as a nonprofit organization to justify different treatment.

¹³¹ *See Id.*

CHAPTER 2: COMMERCIAL ACTIVITY, FEES, & AFFORDABILITY

A. Charities Distinguished from Commercial Businesses

§ 2-1. Generally

When courts and tax authorities revoke the property tax exemptions of nonprofit organizations, a frequently cited reason is that the activities of the nonprofit are indistinguishable from those of a commercial business.¹³² Because the burden is on an organization to prove that it deserves an exemption, if the organization is unable to proffer any convincing evidence to show how it differs from a commercial business, it will likely lose a case in which its charitable status is challenged.

An example of a case in which a nonprofit organization was denied a property tax exemption because it was indistinguishable from a commercial business is *Appeal of Town of Wolfeboro*.¹³³ The case involved a New Hampshire organization that operated both a nursing home and independent living units. The state's highest court held that the independent living units did not qualify for a property tax exemption because they were not sufficiently distinguishable from commercial rental units of the same type.

Explaining its decision, the *Town of Wolfeboro* court distinguished the independent living units in this case from those in another case *Senior Citizens Housing Development Corp. of Claremont v. City of Claremont*.¹³⁴ Both cases involved organizations whose property contained both nursing and independent living rental facilities. In *Senior Citizens Housing*, the independent living units were held exempt

¹³² E.g., case cited *supra* note 11, at 305 (“[T]here is nothing charitable in providing housing at the same or comparable rates as housing available from the private sector or commercial retirement centers.”).

¹³³ *In re Town of Wolfeboro*, 879 A.2d 1137 (N.H. 2005).

¹³⁴ *Senior Citizens Hous. Dev. Corp. of Claremont v. City of Claremont*, 453 A.2d 1307 (N.H. 1982).

because they “directly fulfilled the organization’s charitable purpose.”¹³⁵ The independent living units were deemed charitable rather than commercial because of the following facts:

- (1) they were used to generate money for charity care provided in the nursing homes;
- (2) rents were set as a percentage (25 percent) of residents’ incomes, and thus would not fluctuate with market rates;
- (3) rents were at below-market rates;
- (4) the housing had special accommodations for people with disabilities and the elderly, and there were no extra fees for such accommodations;
- (5) the organization had a policy of subsidizing rates for the poor; and
- (6) the organization had a standardized formula for determining who qualified for the subsidies.¹³⁶

In contrast, the independent living units in *Town of Wolfeboro* were deemed indistinguishable from commercial businesses for the following reasons:

- (1) rents were at close-to-market rates;
- (2) monthly rates varied with the size of the unit occupied; even though the units had some special accommodations for disabilities, these cost extra, as in commercial facilities; utilities cost extra;
- (3) even though the facility had a rent-subsidy policy and a no-eviction-for-inability-to-pay policy, such policies were not standardized so as to make it clear who qualified for the subsidies, and, in any case, the facility had never actually given anyone a subsidy, nor was there any allotted source for funding such subsidies; and
- (4) the rights of residents to be moved to nursing care or assisted living were *contractual*—as in a commercial arrangement.¹³⁷

The distinctions made between these two facilities by the New Hampshire Supreme Court are representative of the approach taken by courts in many jurisdictions.

¹³⁵ See case cited *supra* note 133, at 1141-43 (discussing *Senior Citizens Hous. Dev. Corp. of Claremont v. City of Claremont*, 453 A.2d 1307 (N.H. 1982)).

¹³⁶ See case cited *supra* note 133, at 1141.

¹³⁷ *Id.* at 1141-42.

§ 2-2. Profits

Although one of the hallmarks of commercial businesses is profit motive, a nonprofit organization will not ordinarily lose its property tax exemption solely because it has earned a profit.¹³⁸ Housing facilities serving the elderly are not required to “operate in the red.”¹³⁹ What really counts is the purpose for which any profit is earned, and what is done with the money.¹⁴⁰ Thus, under the prevailing approach, “[t]he critical inquiry is not whether taxpayer actually makes a profit—rather, the focus is on whether the activity “is conducted for the purpose of making a profit.”¹⁴¹

a. Profit Motive

Applying the “purpose of making a profit” test, the New Jersey Tax Court ruled that an assisted living facility was exempt from property taxation because it was not operated for the purpose of profit.¹⁴² The court stated that its approach to determining the true “purpose” of any profit-making would be “to trace cash flow:”

[I]f surplus inures to the benefit of individuals in the form of dividends or other similar distributions, the corporate purpose is to turn a profit. If, on the other hand, money is placed into an endowment fund or used to pay moderately priced salaries, the fact that the corporation may operate at a surplus is not relevant to obtaining an exemption.¹⁴³

¹³⁸ Standards like those of Connecticut, which state that exempt property “must produce no rent, profits or income” are the exception rather than the rule. *See also* case cited *supra* note 81 (citing Conn. Gen. Stat. § 12-81(7), and finding elderly housing facility not exempt when it charged a \$73,000 entrance fee and monthly fees of \$350, because such fees allowed the facility to be “self supporting.”).

¹³⁹ *See* case cited *supra* note 19, at 92.

¹⁴⁰ *E.g.*, case cited *supra* note 15, at 1357 (“[N]ot-for-profit institutions may generate revenues in excess of their expenses in order to maintain the organization, the criteria being only that such revenues not be passed through to shareholders as profits but put back into operating expenses.”) (citation omitted).

¹⁴¹ *See* case cited *supra* note 82, at 416 *C.f.* case cited *supra* note 22 (organization exempt even though its goal was to become profitable eventually, when any surplus would be invested back into the organization to further charitable purposes).

¹⁴² *See* case cited *supra* note 82, at 420-21.

¹⁴³ *Id.* at 416; *accord* case cited *supra* note 15.

Accordingly, the court held the facility exempt because all income from investments which exceeded the facility's operating budget was returned to an endowment fund, which, in turn, was used to cover satisfy operating expenses not covered by Medicare, Medicaid, or resident fees.¹⁴⁴

Similarly, the Kansas Supreme Court held that a nursing home was exempt, even though it had produced a net income five of the past ten years, because the production of net income was due to "good business practices" and "long-term planning needs."¹⁴⁵ The court stated that fees charged to residents must be considered "in relation to expenses, including indebtedness and reserves, and that profits are permissible when used to improve care, "retire indebtedness, subsidize any resident unable to continue making his monthly payments, or expand the facilities of the home where the needs of the community warrant such expansion."¹⁴⁶

Although profits are not absolutely prohibited, courts often view nonprofits that earn profits with suspicion.¹⁴⁷ This suspicion can be explained by observing that although the earning of a profit is not impermissible in itself, it can be evidence of profit *motive*, which is generally condemned. In one case, for example, a nursing home for the elderly lost its property tax exemption on the basis that it did not "operate free of the profit motive."¹⁴⁸ The court stated that factors suggesting a profit motive include (1) actual profits, (2) excessive salaries and fringe benefits paid to corporate officers, (3) the

¹⁴⁴ See case cited *supra* note 22, at 416.

¹⁴⁵ See case cited *supra* note 19, at 93.

¹⁴⁶ *Id.* at 92.

¹⁴⁷ *E.g.*, case cited *supra* note 11, at 305 ("We do not require a non-profit corporation to operate at a deficit, however, the accrual of *substantial* positive net revenue year after year, excluding donations, is suspect.") (emphasis in original).

¹⁴⁸ *Couriers-Susquehanna, Inc. v. County of Dauphin*, 693 A.2d 626, 631-32 (Pa. Commw. Ct. 1997).

provision of services to for-profit businesses, (4) making loans at market interest rates, and (5) owning for-profit subsidiary corporations.¹⁴⁹

b. Amount of Profits

When a nonprofit organization generates a profit, the amount of the profit can be relevant to whether there is a profit motive, as demonstrated by a comparison of several Iowa cases. In *Bethesda Foundation v. Board of Review of Madison County*, an Iowa appellate court held that an intermediate care facility's 9-10 percent rate of return was not so excessive as to show that it was operated "with a view to pecuniary profit."¹⁵⁰ The court cited earlier cases that had upheld tax exemptions for nursing homes that earned rates of return from 1-6 percent, and from 6-14 percent.¹⁵¹ In contrast, in *Evangelical Lutheran Good Samaritan Society v. Board of Review of Montgomery, Iowa*, the private-pay portion of a skilled nursing facility was denied an exemption when it generally saw a 10 percent rate of return.¹⁵² The 10 percent rate of return alone might not have been enough to support the finding that the facility operated with a profit motive, but the court also found that other facts also weighed against granting an exemption. For instance, the organization:

- (1) sent 4 percent of its revenue to its out-of-state national organization that accumulated assets and returned no funds to the local facility;
- (2) took and kept only those residents who qualified for government assistance that meets nearly 90 percent of their projected cost and others who pay in excess of their projected costs;
- (3) was in competition with and even charged more than even similar for-profit facilities in the county and state;

¹⁴⁹ *Id.* at 631.

¹⁵⁰ *Bethesda Fdn. v. Bd. of Rev. of Madison County, Iowa*, 453 N.W.2d 224, 228-29 (Iowa Ct. App. 1990).

¹⁵¹ *Id.* at 228.

¹⁵² *Evangelical Lutheran Good Samaritan Soc'y v. Bd. of Review of Montgomery, Iowa*, 688 N.W.2d 482 (Iowa App. 2004)

- (4) Received very little of its funding from gift contributions (financing was by debt and fees);
- (5) did not provide any charity care to the residents in the private-pay portion (even though residents in other portions of the facility did receive charity care); and
- (6) had no endowment to pay for private-pay residents who later became unable to pay.¹⁵³

The court held that the above “bad facts” outweighed the following “good facts:”

- (1) The facility was operated by a charitable organization;
- (2) It provided “some gratuitous care of the elderly;”
- (3) It provided “a level of care as opposed to just housing;”
- (4) Some of the excess money paid to the national organization was “sometimes loaned to other facilities;” and
- (5) part of the revenues from the private-pay facility were used to subsidize the care of public-pay patients.¹⁵⁴

One lesson of these cases is that although high rates of return can weigh against tax exemption, no specific rate of return can be identified categorically as “too much”—the rate of return is only one of many factors courts consider. Another lesson is that if an organization’s profit margins approach the ten percent mark, it may be in the “danger zone,” especially when other factors weigh against exemption.

Even charities that do operate at a loss cannot rely on that fact alone to establish absence of profit motive. For instance, the mere fact that a nursing facility in Texas operated at a loss did not weigh in favor of a tax exemption when the organization failed to show that its operating deficit was “the result of charitable work instead of an admitted inability to operate at full capacity.”¹⁵⁵

¹⁵³ *Id.* at 488-89.

¹⁵⁴ *Id.* at 488.

¹⁵⁵ *First Baptist/Amarillo Fdn. v. Potter County Appraisal Dist.*, 813 S.W.2d 192 (Tex. App. 1991) (superseded by rule on procedural grounds, *Vickery v. Comm’n for Lawyer Discipline*, 5 S.W.3d 241, 257 (Tex. App. 1999); accord *Appeal of Capital Extended Care*, 609 A.2d 896 (Pa. Commw. Ct. 1992) (operation at a loss by personal care home for the elderly did not weigh in favor of property tax exemption when the loss was due to the home’s failure to operate at capacity, not to charitable expenditures); see also case cited *supra* note 12.

Another consideration is that although excessive compensation constitutes evidence of profit motive, market-rate salaries—especially salaries that are comparable to those paid by other similar *not-for-profit* organizations—are deemed to be legitimate operating expenses.¹⁵⁶

c. Additional Considerations

Profits generated by exempt property are usually permissible when dedicated to charity, but such profits cannot be distributed to just *any* charity; they ordinarily must be dedicated to the same charitable purposes for which the property was granted its exemption. Thus, a nursing home and retirement facility operated by a religious organization were not exempt when profits were consistently earned (by charging market-rate fees), and the purpose was to earn a profit *for the religious organization* rather than to fund the charitable activities of the nursing home.¹⁵⁷ The court stated that qualification for exemption depends on the use of the property, not the use of funds generated by the property.¹⁵⁸

On the other hand, Pennsylvania’s highest court held that it was permissible for a CCRC to use part of the revenues from its independent living facility to offset expenses of its nursing and assisted living facilities.¹⁵⁹ The court viewed all the facilities within the CCRC as part of a single charitable institution.¹⁶⁰

B. Amount of Fees and Affordability

§ 2-3. A Sufficiently Indefinite Class

¹⁵⁶ See case cited *supra* note 15, at 1357.

¹⁵⁷ *Christian Research Inst. v. Town of Dover*, 5 N.J. Tax 376 (N.J. Tax Ct. 1983).

¹⁵⁸ *Id.* at 386.

¹⁵⁹ See case cited *supra* note 103, at 226.

¹⁶⁰ *Id.* at 225.

One factor courts frequently consider when determining whether a facility is distinguishable from commercial businesses is whether it serves “a sufficiently large or indefinite class so that the community is benefited by its operations.”¹⁶¹ To satisfy this requirement, a charity must not “offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services; rather, a [charity] serves any person who needs the particular type of charity being offered.”¹⁶² Courts frequently apply the “indefinite class” requirement to the question of whether a charity’s services are affordable to a large segment of the local population. Whether a facility is sufficiently affordable to the local population can depend on the amount of fees charged, the income levels of the residents, or both.

a. Amount of Fees & Affordability

In many jurisdictions, a facility can be denied a property tax exemption if its services are not affordable to a sufficiently large segment of the local population.¹⁶³ In an Illinois case, for example, certain independent living duplexes within a multi-level care facility were held not exempt in large part because the amount of the fees they charged imposed “an obstacle placed in the way of those seeking the benefits.”¹⁶⁴ Entrance fees for the duplexes ranged from \$65,000 to \$76,900.¹⁶⁵ Prospective residents who did not wish to pay the entrance fees had the option of choosing a tenancy based on monthly fees plus a security deposit of \$5,000.¹⁶⁶ The court implied that the duplexes might have been

¹⁶¹ *Jewish Geriatric Servs., Inc. v. Bd. of Assessors of Longmeadow*, 807 N.E.2d 194, 199 (Mass. App. Ct. 2004).

¹⁶² See case cited *supra* note 22, at 746.

¹⁶³ E.g., case cited *supra* note 11.

¹⁶⁴ See case cited *supra* note 59, at 252.

¹⁶⁵ *Id.* at 243.

¹⁶⁶ *Id.* at 243-44, 252.

exempt had the facility waived fees for those who were unable to pay.¹⁶⁷ However, although the organization’s bylaws provided for the waiver or reduction of fees, such subsidies had, in reality, almost never been provided.¹⁶⁸ Moreover, prospective residents were required to provide detailed financial statements, and residents could be evicted for failure to pay monthly fees (although this had never actually happened).¹⁶⁹

A pair of Massachusetts cases illustrates similar principals. In *Jewish Geriatric Services, Inc. v. Board of Assessors of Longmeadow* an assisted living facility was held not exempt because its services were available to only a “financially independent segment of [the] population”—not a sufficiently indefinite class.¹⁷⁰ The Massachusetts court based its conclusion on the following facts:

- (1) The facility charged monthly fees of \$1,890-\$5,280 and entrance fees of \$3,780-\$8,580;
- (2) it demanded that residents submit an agreement signed by a third party guaranteeing payment in the event that the resident failed to pay;
- (3) although the facility provided limited subsidies for 14-17 residents a year, only one resident had ever received more that \$15,000 in subsidies; and
- (4) residents who became unable to pay were likely to be evicted.¹⁷¹

The court likened the facts of *Jewish Geriatric Services*¹⁷² to those of *Western Massachusetts Lifecare Corp. v. Assessors of Springfield*, in which a CCRC was found not exempt when its assisted living facilities charged monthly fees between \$2,700 and \$3,500 and had high entrance fees (\$100,200-\$203,500)—even though the entrance fees were partially refundable, and even though residents could opt to enter the assisted living

¹⁶⁷ See *id.* at 252.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See case cited *supra* note 161, at 199.

¹⁷¹ *Id.* at 197-98.

¹⁷² *Id.*

facility without paying any entrance fee at all.¹⁷³ Moreover, the CCRC demanded detailed financial information from applicants.¹⁷⁴ Although the facility in *Jewish Geriatric* did not require detailed financial information from applicants, the court in that case found that the organization’s third party guarantor requirement operated “similarly to limit the pool of financially eligible applicants.”¹⁷⁵

In *Menno Haven*, a recent Pennsylvania case, skilled nursing facilities within a CCRC were held not exempt because they did not benefit “a substantial and indefinite class of persons *who [were] legitimate objects of charity*.”¹⁷⁶ The court reasoned that the facilities catered primarily to the “well-to-do elderly,” and that any subsidized care was provided only to those who were already residents of the CCRC—all of whom had been able to afford the entrance fees—rather than to need prospective applicants, who were effectively prevented from entering the door.¹⁷⁷ To enter the facility applicants were required to (1) demonstrate sufficient financial resources to pay for care for a particular amount of time, (2) be Medicare-eligible, or (3) apply at one of the (infrequent) times when the CCRC accepted people who were eligible for Medicaid from “day one.”¹⁷⁸ It remains to be seen what affect the CCRC-friendly case, *Alliance Home of Carlisle, Pa. v. Board of Assessment Appeals*¹⁷⁹ will have on *Menno Haven*.

Although much case law seems to discount the hardships facilities can face when they are not permitted to charge fees that will ensure their solvency, some courts have

¹⁷³ *Id.* at 200-01 (citing *W. Mass. Lifecare Corp. v. Bd. of Assessors of Springfield*, 747 N.E.2d 97 (Mass. 2001)).

¹⁷⁴ *W. Mass. Lifecare Corp. v. Bd. of Assessors of Springfield*, 747 N.E.2d 97, 99 (Mass. 2001).

¹⁷⁵ See case cited *supra* note 161, at 200.

¹⁷⁶ *Menno Haven, Inc. v. Franklin County Bd. of Assessment & Rev. of Taxes*, 919 A.2d 333, 342-43 (Pa. Commw. Ct. 2007) (emphasis added).

¹⁷⁷ *Id.* at 343; See also case cited *supra* note 32.

¹⁷⁸ See case cited *supra* note 176, at 341-43.

¹⁷⁹ See case cited *supra* note 103 (finding independent living units in CCRC exempt, and recognizing the “unique nature” of CCRCs) (discussed in Chapter 1 § 1-9b).

taken more pragmatic approaches. For example, the Michigan Supreme Court stated that the “indefinite class” requirement:

does not mean . . . that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought. Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group. The charitable institution’s reach and preclusions must be gauged in terms of the type and scope of charity it offers.¹⁸⁰

Not all courts agree, however, on whether the “particular group or type of person” can consist primarily of affluent elders, or whether it must necessarily include low-income people—and, if so, (a) whether it must include those who are poor at the time they first enter the facility, and (b) whether the organization must actively seek to attract low-income people. In the charity-friendly case *Southminster, Inc. v. Justus*, a North Carolina appellate court defined the relevant class of charitable beneficiaries of an independent living facility and an assisted living facility as “the rapidly growing class of elderly citizens of this state,” and found the facilities exempt even though their residents were generally affluent.¹⁸¹ The court reasoned that the “humane and philanthropic” endeavors of the facilities to aid and assist elders “certainly benefit the larger community which only recently has come to realize the problems associated with an aging population.”¹⁸²

b. Income Levels of Residents, and Financial Screening

In contrast to the *Southminster* case,¹⁸³ many courts have held that facilities did not serve a sufficiently indefinite class of elders when lower-income individuals were screened out in the application process (although not all such courts explicitly invoked

¹⁸⁰ See case cited *supra* note 22, at 745 (finding organization exempt).

¹⁸¹ *Southminster, Inc. v. Justus*, 459 S.E.2d 793, 795 (N.C. Ct. App. 1995).

¹⁸² *Id.* at 797.

¹⁸³ *Id.*

the term “indefinite class”). In many such cases, courts have found impermissible “screening” based (at least in part) on evidence that applicants were required to submit detailed information showing their financial health, when such information was used by the charities as a basis for rejecting low-income applicants.¹⁸⁴ Conversely, some courts have granted exemptions based, in part, of the fact that the organization in question did *not* require financial disclosures from applicants as a method of screening out low-income individuals.¹⁸⁵

In other cases, courts have found that, regardless of whether financial statements were required, low-income individuals were effectively screened out simply because they could not afford the fees.¹⁸⁶ For example, an Iowa nursing home’s apartment division was held to be inaccessible to low-income residents when it charged entrance fees of \$40,000-60,000, and monthly fees of \$481.¹⁸⁷ In another case, a West Virginia organization that

¹⁸⁴ See case cited *supra* note 2, at 392; see also case cited *supra* note 59, at 252 (independent living units not exempt); *Plymouth Place, Inc. v. Tully*, 370 N.E.2d 56, 58 (Ill. App. Ct. 1977) (nursing home not exempt. Applicants were required to submit “detailed statements as to their health, financial and personal history as a condition for acceptance.”); see also case cited *supra* note 100, at 908 (apartment division of nursing home not exempt when applicants were required to complete a “financial profile” to ensure that they had adequate financial resources); see also case cited *supra* note 124 (retirement facilities not exempt); *Cape Retirement Cmty., Inc. v. Kuehle*, 798 S.W.2d 201, 201 (Mo. Ct. App. 1990) (“life care retirement and nursing facility” not exempt); *Mich. Baptist Homes & Dev. Co. v. City of Ann Arbor*, 242 N.W.2d 749, 668-69 (Mich. 1976); *Passavant Health Ctr. v. Bd. of Assessment & Revision of Taxes of Butler County*, 502 A.2d 753, 757 (Pa. Commw. Ct. 1985) (retirement cottages not exempt. “A retirement village has no charitable purposes where financial security is a prerequisite to the admission of all residents and where there was no realistic prospect of a resident receiving a subsidy of the required charges.”); *Riverview Place, Inc. v. Cass County*, 448 N.W.2d 635, 637 (N.D. 1989) (elderly housing facility not exempt when applicants were required to complete a form detailing current financial condition and assets); see also case cited *supra* note 32 (CCRC not exempt when applicants were required to identify a source of funds, either from among their own assets or from those of a third-party guarantor, that would be adequate to pay for “the expected cost of lifetime care”).

¹⁸⁵ See case cited *supra* note 22, at 742-43 (organization exempt when it did not require financial statements); *Bethesda Fdn. v. Buffalo County Bd. of Equalization*, 640 N.W.2d 398, 405 (Neb. 2002) (assisted living facility exempt when it did not “prescreen the applicants for financial ability prior to admission”).

¹⁸⁶ E.g., case cited *supra* note 11; see also case cited *supra* note 100, at 910-911; see also case cited *supra* note 124.

¹⁸⁷ See case cited *supra* note 100, at 908 (stating that “[t]he apartments were designed to accommodate only those who could well afford to pay for the services provided”).

operated assisted living and independent living facilities was denied an exemption because it charged entrance fees of \$100,000-\$300,000 and monthly fees of \$1,325-\$3,500 (depending largely on the level of care needed).¹⁸⁸ The West Virginia Supreme Court found that because of the entrance requirements, the facility was not available to a sufficiently large segment of the population to qualify as a charity.¹⁸⁹ Such cases have generally indicated that despite any charity care that may be provided to current residents, facilities that screen out lower income individuals in the application process will be denied an exemption.¹⁹⁰ Moreover, some courts have held that an organization must obligate itself to accept some applicants who cannot pay.¹⁹¹

c. Targeting Subsidies and Sliding Scales

In jurisdictions that interpret the “indefinite class” requirement to mean that services must not be denied to the poor, the question remains whether organizations must simply open their doors to all in the community without discrimination as to wealth, or whether they must affirmatively target services to low-income people—and, if so, whether this means *screening out* wealthier individuals. Connecticut is an example of a jurisdiction with exceptionally strict standards on this point. Connecticut’s highest court held that an independent-living elderly housing complex was not exempt, in part because

¹⁸⁸ See case cited *supra* note 2, at 390.

¹⁸⁹ *Id.* at 391.

¹⁹⁰ *Id.* at 391 (citing with approval case cited *supra* note 100; *Cape Retirement Cmty., Inc. v. Kuehle*, 798 S.W.2d 201 (Mo. Ct. App. 1990)).

¹⁹¹ *Plymouth Place, Inc. v. Tully*, 370 N.E.2d 56 (Ill. App. Ct. 1977) (nursing home not exempt when the organization’s bylaws did not mandate acceptance of any applicants who could not afford the required fees—even though the home, in practice, did admit some indigents at its own discretion).

there were “no limits on wealth or income;” the only limit on who could become a resident was that applicants had to be sixty-two years old.¹⁹²

Somewhat less harsh are jurisdictions that do not require wealthy residents to be screened *out*, but which do require that at least some subsidized care be *targeted* at those who need it most and that facilities single out at least some needy individuals for preference in admission or other assistance.¹⁹³ Such jurisdictions generally favor charity care policies that use sliding-scale fees as a method of targeting subsidies to those who need them.¹⁹⁴ For example, Illinois “old people’s homes” seeking property tax exemptions must provide in their by-laws “for a waiver or reduction, *based on an individual's ability to pay*, of any entrance fee, assignment of assets, or fee for services.”¹⁹⁵ However, this requirement does not prohibit a facility from providing services for a fee to those who are not “poverty stricken.”¹⁹⁶

Finally, some courts have held that a facility’s “open door policy,” in which it neither discriminates in favor of nor against applicants based on their financial condition, but accepts all who walk through its doors, will weigh heavily in favor of tax exemption—even when the total dollar amount of charity care distributed is low.¹⁹⁷

When targeting free or subsidized care to the needy, organizations should not assume that those who are uninsured or underinsured are necessarily the neediest; the

¹⁹² See case cited *supra* note 81, at 577; *Accord Miriam Osborn Mem'l Home Ass'n v. Assessor of Rye*, 2006 NY Slip Op. 52461(U) 2006 WL 3836719 (Tb1.) (N.Y. Sup. Ct. Dec. 30, 2006).

¹⁹³ *E.g.*, case cited *supra* note 11, at 305-06 (stating that it is not enough to provide general discounts that are not targeted at the neediest residents).

¹⁹⁴ *E.g.*, case cited *supra* note 64.

¹⁹⁵ 35 Ill. Comp. Stat. 200/15-65(c) (2007) (emphasis added). Old peoples’ homes that qualify under National Housing Act § 202, however, are exempted from this requirement. *Id.*

¹⁹⁶ *Eden Retirement Ctr., Inc. v. Dep't of Revenue*, 821 N.E.2d 240, 251 (Ill. App. Ct. 2004).

¹⁹⁷ See case cited *supra* note 22; See also Tex. Tax Code Ann. § 11.18(d)(3) (2006) (“Providing support to elderly persons, including the provision of recreational or social activities... designed to address the special needs of elderly persons... without regard to the beneficiaries’ ability to pay” is a charitable purpose.”).

fastest-growing uninsured group is individuals making \$50,000 or more a year.¹⁹⁸ Nor should organizations rely solely on credit scores: an elderly person may have a good credit score but little income.¹⁹⁹

§ 2-4. Affordability as one Factor among many in the “Facts and Circumstances” Test

In analyzing legal standards for property tax exemption, it is rarely the case that any single factor is dispositive. Courts typically apply a “facts and circumstances” test, in which questions of whether a sufficiently “indefinite class” is served are not always distinguished from those of “exclusive use,” affordability, commercial activity, community benefit, and other inquiries. The test is usually one of balancing, and even though the legal standards often seem nebulous, the question usually seems to boil down to whether, on balance, the use of the property (1) is sufficiently distinguishable from similar activities of commercial businesses, and (2) whether it is being utilized in a way that provides something of value to society that (a) would not be provided by commercial businesses and (b) whose value is at least as high as that of the revenue the government is relinquishing by not taxing the property. The following Michigan cases illustrate how affordability is analyzed in conjunction with other factors.

In *Wexford Med. Group v. City of Cadillac*, Michigan’s highest court found an organization exempt because:

- (1) operating and maintenance costs were not covered by fees collected from residents;
- (2) the facility did not screen out residents based on physical or financial health;

¹⁹⁸ See *Experts Recommend Ways to Determine Self-Pay Ability and Increase Charity Care*, Exempt Organizations Reports, Issue 384 at 2,7 (CCH July 17, 2006).

¹⁹⁹ *Id.* at 7.

- (3) the facility had a charity care program that offered free and reduced-cost medical care to the indigent with no restrictions. (The charity care policy provided free and discounted health care to anyone whose income was up to twice the federal poverty level. Thirteen residents had benefited from the charity care policy within two years);
- (4) it had an open-access policy under which it accepted any patient who walked through its doors, with preferential treatment given to no one;
- (5) it sustained notable financial losses by not restricting the number of Medicare and Medicaid patients it accepted;
- (6) it sustained losses that were not fully subsidized by patients, but by petitioner's parent corporations, patients who can afford to pay, and, to some extent, by government reimbursements.²⁰⁰

The *Wexford* court found that the above “good facts,” on balance, outweighed the facts that the total dollar value of charity care subsidies *to individuals* over the course of 2 years was only \$2,400, and that the organization’s goal was to eventually become profitable (with any surplus to be invested back into the organization in accord with its statement of purpose).²⁰¹ Despite the arguments of local tax authorities, the court also refused to hold it against the organization that it included non-competition clauses in its physicians' contracts, when it had never enforced any such clauses, and when there was evidence that such clauses were necessary to attract physicians to the area.²⁰²

In *Wexford*, the Michigan Supreme Court distinguished an earlier case, *Michigan Baptist Homes & Development Co. v. Ann Arbor*, in which the existence of an elderly housing facility’s modest charity care (i.e., subsidized care) policy failed to outweigh the following “bad facts:”

- (1) the facility was funded entirely by loans, debentures, and resident fees;
- (2) residents paid a substantial up-front fee and monthly fees thereafter;
- (3) the facility would raise residents' fees if necessary to eliminate deficit;
- (4) the organization had neither solicited nor received any gifts;

²⁰⁰ See case cited *supra* note 22.

²⁰¹ *Id.* The organization actually sustained greater losses through its unrestricted acceptance of Medicaid patients.

²⁰² *Id.* at 748.

- (5) residents were hand-selected by the establishment after an application process that asked them to fully detail their financial and health status; and
- (6) the home did not "serve the elderly generally," but, rather, "provide[d] an attractive retirement environment for those among the elderly who have the health to enjoy it and who can afford to pay for it."²⁰³

Whereas the facility *Wexford* was granted and exemption, the facility in *Michigan Baptist Homes* was denied one. A comparison of the *Wexford* and *Michigan Baptist Homes* cases illustrates how the affordability analysis is often considered alongside other issues, like profitability (Chapter 2 § 2-2), community benefit (Chapter 3), and sources of funding (Chapter 4 § 4-1).

§ 2-5. Market Rates

Charities are sometimes denied a property tax exemption when they charge market rates for their services—especially when low-income individuals are not offered below-market rates.²⁰⁴ For example, a Minnesota assisted-living facility was denied a property tax exemption when residents paid market rates and did not receive any services for free.²⁰⁵ The court looked with disfavor on the fact that fees were set at level to make them “as affordable as possible while protecting the financial solvency of [the facility],” because this indicated that rents were based on costs of operation of the facility rather than on “charity.”²⁰⁶ Even though the facility maintained a fund to assist residents who became unable to afford rents, the fund had never been used because all residents were

²⁰³ See case cited *supra* note 22, at 742 (citing *Mich. Baptist Homes & Dev. Co. v. City of Ann Arbor*, 242 N.W.2d 749 (Mich. 1976)).

²⁰⁴ *E.g.*, case cited *supra* note 157; see also case cited *supra* note 11.

²⁰⁵ See case cited *supra* note 25.

²⁰⁶ *Id.* at 12-13.

able to pay, and the charity policy was not communicated to residents other than in the residency agreement.²⁰⁷

The Minnesota Supreme Court reached a similar result in another case, *Community Memorial Home at Osakis, Minn., Inc. v. County of Douglas*.²⁰⁸ In that case, an assisted living facility failed to present sufficient evidence that it provided housing at “considerably less than market value or cost” when it showed only that it was operating at a loss.²⁰⁹ The court reasoned that such losses could be attributable to other problems, such as unit vacancies, rather than charitable subsidies.²¹⁰ The court also rejected the facility’s argument that it provided housekeeping and other services at no charge when the facility’s own lease agreement stated that such services were included in the rent.²¹¹

In another case, *In re Town of Wolfeboro*, the New Hampshire Supreme Court compared two facilities, one of which was granted an exemption, while the other was not.²¹² The exempt facility provided benefits to the elderly and disabled that “did not depend upon fluctuating market costs.”²¹³ In contrast, the non-exempt facility had charged rents that were “close to market levels,” and the benefit provided to residents was “rent stability, not below-market rent.”²¹⁴ “The rents [of the non-exempt facility] were based upon the operating costs of the properties, and were increased as the operating costs increased.”²¹⁵ Under *In re Town of Wolfeboro*, an organization will be

²⁰⁷ *Id.*

²⁰⁸ *Cnty. Mem’l Home at Osakis, Minn., Inc. v. County of Douglas*, 573 N.W.2d 83, 87 (Minn. 1997).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *See* case cited *supra* note 133, at 1141.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

more likely to qualify for a property tax exemption if the fees it charges are below those charged by comparable commercial facilities.

CHAPTER 3: CHARITY CARE AND COMMUNITY BENEFIT

§ 3-1. To Which Types of Organizations Does the Community Benefit Requirement Apply?

Two of the most troublesome questions facing nonprofit elderly housing facilities are “what counts as charity care” and “how much charity care do we have to provide?”

Unfortunately, the answers to both questions are far from clear in most jurisdictions.

“Health care providers,” such as skilled nursing facilities, are sometimes scrutinized according to a “community benefit” line of cases that is, to a significant extent, historically distinct from case law judging other types of charities.²¹⁶ Under the “community benefit” line of cases,

a health-care provider must make its services available to all in the community *plus* provide additional community or public benefits. The benefit must either further the function of government-funded institutions or provide a service that would not likely be provided within the community but for the subsidy.²¹⁷

Although the community benefit requirement is most frequently applied in the context of health care organizations, some courts have imposed it on organizations claiming exemption on bases other than “promotion of health” as well.²¹⁸ However, tax authorities are most likely to apply the requirement—or at least more likely to invoke the term “community benefit”—in cases involving hospitals, nursing homes, and similar

²¹⁶ See generally Fishman & Schwarz, *supra* note 34, at 356-74.

²¹⁷ *IHC Health Plans, Inc. v. Comm’r*, 325 F.3d 1188 (10th Cir. 2003).

²¹⁸ See, e.g., *Church of Scientology of Cal. v. Comm’r*, 823 F.2d 1310, 1315 (9th Cir. 1987) (stating, in the context of a church, that “[o]rganizations seeking exemption from taxes must serve a valid public purpose and confer a public benefit.”); See also Gen. Couns. Mem. 37,101 (Apr. 26, 1977) (applying the community benefit requirement to an elderly housing facility).

health care providers.²¹⁹ At both the state and federal levels, even when tax authorities do not refer to a “community benefit requirement,” they often apply “charity care” standards that are equally, or even more, stringent.

All charities, whether health care providers or not, are subject to the general rule that a charitable organization must dispense “charity.”²²⁰ In some jurisdictions, this can include a requirement that the organization “donate or render gratuitously a substantial portion of its services.”²²¹ Other states have recognized that “the definition of ‘charitable organization’ need not be locked in the past,” and “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 receive the benefits.”²²²

It is often difficult to determine whether a case would have a different result if it were decided under one line of cases as opposed to the other, especially considering that courts often fail to make clear which standard they are applying. Community benefit requirements for nursing homes and other health care facilities tend to be somewhat more specific and quantifiable than the requirements applied to other retirement housing, but this is not always the case. In any case, the outcomes of cases do not ordinarily seem to depend on which analysis is used, and many courts treat the tests as non-distinct.

Regarding the question of what constitutes charity, it is uncontroversial, at least, that the provision of free services to the poor constitutes charity. However, the definition

²¹⁹ See Janet E. Gitterman and Marvin Friedlander, *Health Care Provider Reference Guide*, in IRS Exempt Organizations Continuing Professional Education Text for FY 2004, at 5, available at <http://www.irs.gov/pub/irs-tege/eotopic04.pdf>.

²²⁰ E.g. case cited *supra* note 15.

²²¹ See 10 Pa. Cons. Stat. § 375 (2006).

²²² See case cited *supra* note 15, at 1356 (quoting *In re Young Men’s Christian Ass’n Assessment v. Lancaster County*, 182 N.W. 593, 595 (Neb. 1921)).

of “charity” has expanded from this classical sense, and certain types of services provided to the elderly are regarded as charity by the IRS and by some state governments, regardless of whether the beneficiaries are poor. Other jurisdictions, on the other hand, require a showing that at least some low-income individuals are being served.

A. What Counts as “Charity Care” or “Community Benefit?”

§ 3-2. Collapsing the *Definition* of “Charity Care” with the *Amount* of Charity Care Required

Before attempting to determine how much charity care an organization must provide in order to qualify for a property tax exemption, it is necessary to determine what counts as “charity care.”²²³ The question is not easy to answer, especially because the question of what constitutes charity care is frequently conflated with the question of *how much* charity care is required. Such conflation occurs especially when courts accord more weight to traditional types of charity—i.e., free care to the poor—than to less traditional types (such as providing a comfortable place to live to elderly people for a reasonable fee). Even when a court recognizes both types of activities as “charity,” it may find that no amount of comfort and security provided to the elderly can satisfy the “charity care” requirement unless some free or subsidized care is also provided.²²⁴

§ 3-3. Approaches to Defining “Charity Care” and “Community Benefit.”

The state of Utah, more than most jurisdictions, has attempted to define precisely what counts as “charity care” or “community benefit” for purposes of determining whether an organization has satisfied its obligations to the community. The Utah definitions are aimed particularly at hospitals and nursing homes, but they reflect general

²²³ See, e.g., 210 Ill. Comp. Stat. Ann. 76/10 (West 2007).

²²⁴ E.g., case cited *supra* note 32.

principles recognized in other jurisdictions. In Utah, organizations must provide a “gift to the community,”²²⁵ which is identified:

either by a substantial imbalance in the exchange between the charity and the recipient of its services or in the lessening of a government burden through the charity’s operation.²²⁶

Pursuant to this definition, Utah enumerates specific types of “quantifiable activities and services [that] are to be counted towards the nonprofit entity’s total ‘gift to the community.’ For example, an organization may count:

[t]he reasonable value of the [facility]’s unreimbursed care to medically indigent patients. The term “medically indigent” refers generally to patients who are financially unable to pay for the cost of the care they receive. Measurement: The value of the institution’s unreimbursed care to patients, as measured by standard charges, reduced by the average of reductions afforded to all patients who are not covered by government entitlement programs, plus expenses directly associated with special indigent clinics.²²⁷

The following are specific types of contributions which courts, legislatures and tax authorities in Utah and other states have recognized as countable toward an organization’s charity care obligations.²²⁸

a. Monetary Donations to the Organization

The “value of monetary donations” to an organization may be counted as part of its total “gift to the community.”²²⁹ However, the organization should be able to show that the donations were actually used to further its charitable objectives.²³⁰

²²⁵ *Utah County v. Intermountain Health Care, Inc.*, 709 P. 2d 265, 269 (Utah 1985).

²²⁶ *Id.*

²²⁷ Utah State Tax Comm’n, Prop. Tax Div., *supra* note 113, at App. 2D, Std. V.

²²⁸ Note, however, that, as with nearly all rules in this manual, requirements may vary according to the particular jurisdiction.

²²⁹ *Id.*

For more on charitable donations to organizations, see § 4-1, *infra*.

b. Care provided to Medicare and Medicaid Residents

In Utah, an organization may count “[t]he reasonable value of unreimbursed care” provided to residents covered by Medicare or Medicaid. The measurement for such care is:

the “difference between (a) standard charges, as reduced by the average of reductions afforded to all patients who are not covered by government entitlement programs, and (b) actual reimbursement.”²³¹

The State of Illinois, in contrast, imposes stricter requirements: it defines “charity care” (in the context of hospitals) as “care . . . for which the provider does not expect to receive payment from the patient *or a third party payer*.”²³² Under this definition, provision of services to Medicaid patients constitutes charity care only to the extent that reimbursement is “less than the [facility]’s *cost* of providing the services.”²³³

The Catholic Health Association (CHA), which has published a detailed guide on the topic of quantifying community benefit, states that “[t]here is general consensus that traditional charity care should be reported in terms of **costs, not charges**.”²³⁴ The CHA also recommends that Medicare shortfalls be counted only when the following circumstances are present: (a) the Medicare shortfalls are due to specific subsidized programs developed not for marketing reasons, but to help improve the health status of the elderly; (b) losses are not due primarily to operational inefficiency; or (c) “[l]osses are

²³⁰ *Evangelical Lutheran Good Samaritan Soc’y v. Bd. of Equalization of Latah County*, 804 P.2d 299 (Idaho 1990).

²³¹ *Id.*

²³² 210 Ill. Comp. Stat. Ann. 76/10 (West 2007) (emphasis added).

²³³ *See id.*

²³⁴ Catholic Health Ass’n of the U.S., *Cnty. Benefit Reporting Guidelines & Standard Definitions for the Cnty. Benefit Inventory for Social Accountability*, at 12 (June 9, 2004), available at <http://www.lyonsoftware.com/downloads/Guidelines.doc> (last visited May 31, 2007).

material” (e.g., “greater than 5 percent or some threshold of that nature”).²³⁵ The CHA’s suggested limitations on counting Medicare shortfalls are based on, *inter alia*, the argument that:

[s]erving Medicare patients is not a true, differentiating feature of not-for-profit health care organizations, compared to [for-profits, because even for-profits] compete aggressively to attract Medicare patients to their facilities. This is not generally true of Medicaid and uncompensated or undercompensated care patients.²³⁶

c. Volunteer Hours

Volunteer hours may generally be counted as part of a nonprofit’s “gift to the community.”²³⁷ The value of volunteer hours is measured by “[v]olunteer hours times a reasonable rate for services performed.”²³⁸ However, as with donations of money, donations of time should be scrupulously documented to prove that the volunteer services actually benefited the residents. In one case illustrating this point, an assisted living facility was denied an exemption in part because it failed to present any evidence regarding how much of the volunteer labor actually benefited residents.²³⁹ The CHA cautions that an organization should not count volunteer hours provided by its own employees for community events, because such contributions belong to the volunteer as an individual rather than to the organization.²⁴⁰

d. Bad Debt

²³⁵ *Id.* at 31.

²³⁶ *Id.*

²³⁷ Utah State Tax Comm’n, Prop. Tax Div., *supra* note 113, at App. 2D, Std. V; *See also* case cited *supra* note 150, at 227 (facility held exempt because, *inter alia*, volunteer services played an important part in its operations). *But cf.* case cited *supra* note 148 (recognizing the value of volunteers’ contributions, but holding that the \$60,000 value of contributed volunteer labor was not enough to offset the fact that the only monetary donation received was one contribution of \$200,000).

²³⁸ *Id.*

²³⁹ *See* case cited *supra* note 208.

²⁴⁰ Catholic Health Ass’n of the U.S., *supra* note 234, at 27.

There is some disagreement over whether bad debt should be counted as community benefit. Some courts have indicated that when calculating how much charity is provided, an organization may count billings it is unable to collect on, even if it first attempts to collect the bills.²⁴¹ In other jurisdictions, only bad debt from those *unwilling* to pay may be counted; not bad debt from those who are *unable* to pay.²⁴² In 2004, Illinois tax authorities revoked the property tax exemption of a medical center when it “routinely used aggressive debt collection tactics against those who could not pay their bills.”²⁴³ Conversely, in *Bethesda Foundation v. Buffalo County Board of Equalization*, a Nebraska assisted living facility was granted an exemption based on a variety of “good facts,” one of which was that the facility had never filed a suit to collect delinquent accounts.²⁴⁴

The Catholic Health Association recommends that organizations not count bad debt (defined as “uncollectible charges excluding contractual adjustments, arising from the failure to pay by patients whose health care has not been classified as charity care”) as community benefit.²⁴⁵

e. Other Countable Benefits

²⁴¹ *E.g., Wilson Area School Dist. v. Easton Hosp.*, 708 A.2d 835, 840-41 (Pa. Commw. Ct. 1998) (holding hospital exempt), *aff’d* 747 A.2d 877 (Pa. 2000).

²⁴² See Ill. Hosp. Ass’n, *Community Benefits Reporting in Illinois: Definitions and Standards for Reporting* (rev. Aug. 2, 2005), at <http://www.ihatoday.org/issues/payment/charity/defin.html> (last visited June 6, 2007) (citing Illinois Community Benefits Act PA 93-0480); Jack Hanson, *Are We Getting Our Money’s Worth? Charity Care, Community Benefits, and Tax Exemption at Nonprofit Hospitals*, 17 Loy. Consumer L. Rev. 395, 412 (2005); 210 Ill. Comp. Stat. Ann. 76/10 (2007) (statute applies only to hospitals with more than 100 beds).

²⁴³ Jack Hanson, *Are We Getting Our Money’s Worth? Charity Care, Community Benefits, and Tax Exemption at Nonprofit Hospitals*, 17 Loy. Consumer L. Rev. 395, at 401 (2005).

²⁴⁴ *Bethesda Fdn. V. Buffalo County Bd. of Equalization*, 640 N.W.2d 398 (Neb. 2002).

²⁴⁵ Catholic Health Ass’n of the U.S., *supra* note 234, at 11-12.

Other community benefits that may be counted include “the reasonable value of volunteer and community service”²⁴⁶ and the value of “other critical services or programs that may not otherwise be offered in the community.”²⁴⁷ In *Bethesda Foundation v. Buffalo County Board of Equalization*, the Nebraska Supreme Court held an assisted living facility exempt, in part because it provided various services that met community needs, such as religious worship programs, games and exercise classes, around-the-clock nursing services, and transportation for residents.²⁴⁸

d. Other Non-Countable Benefits

The CHA warns against counting contributions that primarily benefit employees, rather than residents, such as certain employee wellness and health programs.²⁴⁹

B. How Much Charity Care is Required?

§ 3-4. Jurisdictions that do not Quantify

Some jurisdictions have expressly rejected the notion that not-for-profit charities must provide any specific dollar amount of free or subsidized care. In several of these jurisdictions, a facility can qualify for a property tax exemption *regardless of how much free care it dispenses* if the facility has an “open door” policy, accepting all who need its services, whether rich or poor, without regard to ability to pay.²⁵⁰

²⁴⁶ As measured by “unreimbursed expense.” “Unreimbursed’ expense” is defined as the identifiable costs and expenses incurred by an institution in performing a specific service, including any overhead attributable to the service, less any reimbursement for the service from recipients, government or any other source. Overhead does include any capital costs for buildings or equipment unless purchased or built solely for the activity in question. Community education does not include in-house training for employees.” Utah State Tax Comm’n, Prop. Tax Div., *supra* note 113, at App. 2D, Std. V.

²⁴⁷ *Id.*

²⁴⁸ See case cited *supra* note 244.

²⁴⁹ Catholic Health Ass’n of the U.S., *supra* note 234, at 19.

²⁵⁰ See case cited *supra* note 15, at 1355 (stating that a charity is not required “to dispense *any* free care” when it has an “open-door policy”) (emphasis in original); see also case cited *supra* note 22 (finding that an institution with an open-door policy was exempt even though it provided only \$2,400 in charitable

Other states mirror the Internal Revenue Service’s position that a charity “need not provide direct financial assistance to the elderly” if it meets other needs, such as “the need for health care, financial security, and residential facilities designed to meet specific physical, social, and recreational requirements of the elderly.”²⁵¹ For example, in North Carolina a 196-unit independent and common living facility (within a CCRC-type complex) was held exempt even though (a) it had financially assisted only three residents with the costs of the entrance fees and nine residents with monthly payments, (b) it had charged entrance fees of \$30,900-162,500 and monthly fees (for a single resident) of \$1,000-\$1,350, and (c) eighty-eight percent of its residents had net worth’s over \$200,000.²⁵² An assisted living facility in the same case was exempt even though it had never financially assisted any resident or applicant.²⁵³

Similarly, in *Wittenberg Lutheran Village*, an Indiana court held that an independent living complex within a CCRC was exempt from property taxation even though it did not provide any care to the indigent.²⁵⁴ Only applicants who were “financially sound and physically well” were accepted, and they “could be asked to leave should that physical or financial status change.”²⁵⁵ The court found that the use of the property was nevertheless charitable because “caring for the aged is a recognized benefit to the community.”²⁵⁶ The court explained:

subsidies to 13 individuals in 2 years); Tex. T.C. Ann. § 11.18(d)(3) (2006) (stating that the provision of support to address the special needs of the elderly, including recreational or social activities, “without regard to the beneficiaries’ ability to pay” is a charitable purpose.).

²⁵¹ See case cited *supra* note 181, at 796 (citing Rev. Rul. 72-124, 1972-1 C.B. 145 (1972); Rev. Rul. 79-18, 1979-1 C.B. 194 (1979); Rev. Rul. 75-198, 1975-1 C.B. 157 (1975));

²⁵² See case cited *supra* note 181, at 794-95.

²⁵³ *Id.*

²⁵⁴ *Wittenberg Lutheran Village Endowment Corp. v. Lake County Property Tax Assessment Bd. of Appeals*, 782 N.E.2d 483, 487 (Ind. T.C. 2003).

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 488.

the needs of senior citizens are not exclusively financial, nor are they merely health-related. Indeed, seniors also need a sense of community and involvement[,] . . . security and safety[,] . . . social interaction[, and] . . . supportive services that enable them to live more independently for a longer period of time . . . at active levels.²⁵⁷

The facility in *Wittenberg Lutheran Village* had met these needs of senior citizens by providing a “continuum of care” that made “a variety of services available . . . that are not available to individual elderly persons residing in their own homes,” such as grab bars, emergency pull cords, on-site cafeterias, nurses aides or L.P.N.s to assist with medications, an activities director, transportation services, and Sunday worship services.²⁵⁸

Another state that has recognized the difficulties inherent in compelling charities to quantify their total “gift to the community” is Kansas. Kansas law offers elderly housing facilities two different ways to qualify for property tax exemption: A facility will be exempt if it (a) charges residents “an amount . . . less than the actual cost of operation” or (b) provides services at the “lowest feasible cost,” as defined by the relatively permissive IRS standards.²⁵⁹ In *Presbyterian Manors, Inc. v. Douglas County*, a Kansas organization’s “adult care home and housing for the elderly facility” satisfied the “lowest feasible cost” requirement even though all residents were charged fees that were high enough to produce a net income for five out of ten years. The court emphasized that the “lowest feasible cost” test does not focus on the amount of fees charged or the amount of net revenues alone; it considers them in relation to the organization’s “expenses,

²⁵⁷ *Id.* at 489 (citations omitted).

²⁵⁸ *Id.* at 487-88.

²⁵⁹ Kan. Stat. Ann. § 79-201b second, fifth (2006); *see also* case cited *supra* note 19.

including indebtedness and reserves,” and the need to operate “according to sound business principles and practices” that take into account long-term planning needs.²⁶⁰

Similarly, when the Florida legislature attempted to quantify the amount of charity care elderly housing organizations must provide by specifying that a certain percentage of residents must have incomes below a certain amount, the state’s highest court held that such specific requirements violated the state constitution.²⁶¹ The court held that, under the Florida Constitution, incomes of residents could be considered only as one factor in determining exempt status. The correct test, the court held, is whether the property in question is used “predominantly” for charitable purposes.

“Predominantly” has been interpreted in other cases to mean “more than 50 percent.” However, if the property is used partly for non-exempt purposes, it will only be exempt “to the extent of the ratio that such predominant use bears to the nonexempt use.”²⁶²

§ 3-5. Jurisdictions that Quantify

a. Quantification by Dollar Amount of Charity Care Dispensed

A few jurisdictions have attempted to quantify the amount of charity care that is required. Some of these jurisdictions focus on the total dollar amount of charity care that an organization provides. In Utah, for example, a nursing home or hospital must give a

²⁶⁰ See case cited *supra* note 19, at 94-95.

²⁶¹ *Markham v. Evangelical Covenant Church of Am.*, 502 So. 2d 1239 (Fla. 1987).

²⁶² Fla. Stat. Ann. § 196.192(2) (West 2007). Note: Under Florida law, not-for-profit elderly housing facilities that do not qualify as “charitable” may nevertheless qualify for exemption under the state’s “homestead exemption.” The homestead exemption imposes limitations on residents’ incomes. See Fla. Stat. Ann. § 196.175 (West 2007); *Fairhaven S., Inc. v. McIntyre*, 793 So. 2d 110 (Fla. Dist. Ct. App. 2001). Alternatively, facilities may qualify as “proprietary continuing care facilities.” Such facilities can receive property tax exemptions on a per-apartment basis, but in such cases the residents must receive the *full* benefit derived from the exemption in the form of a credit to the unit’s monthly maintenance fees. Fla. Stat. Ann. § 196.1977 (West 2007). Any portions of the property used exclusively for medical or religious purposes qualify for an outright exemption. Fla. Stat. Ann. § 196.1975 (3) (West 2007).

“gift to the community”²⁶³ that “exceeds on an annual basis its property tax liability for that year.”²⁶⁴ In Texas, a charitable hospital has two options: it must provide charity care that is equal in value to either (1) 100 percent of the organization’s tax-exempt benefits or (2) generally, 4-5 percent of net patient revenue.²⁶⁵

Under Pennsylvania statutory law, a charity “must donate or render gratuitously a substantial portion of its services.”²⁶⁶ Pennsylvania courts have made clear that the “substantial portion” requirement does not mean that an institution must “forgo available government payments which cover part of its costs, or that it provide wholly gratuitous services to some of its residents.”²⁶⁷ Thus, a nursing that bore one third of the cost of care for half its residents was entitled to a property tax exemption.²⁶⁸ The Pennsylvania statute enumerates a complex list of alternative ways an organization can satisfy its “substantial portion” obligation.²⁶⁹ For example, an organization can do so by having a written, published policy that it will serve all without regard to ability to pay, and providing “uncompensated goods or services” equal to at least 75 percent of its net operating income (but not less than 3 percent of its total operating expenses).²⁷⁰ Alternatively, an organization can satisfy the “substantial portion” requirement if it charges fees on an income-based sliding scale formula and gives specified discounts to specified percentages of residents (as specified in the statute);²⁷¹ or if it provides

²⁶³ “Gift to the community” is defined in Chapter 3 § 3-3.

²⁶⁴ Utah State Tax Comm’n, Prop. Tax Div., *supra* note 113, at App. 2D, Std. V.

²⁶⁵ Tex. Tax Code Ann. § 11.1801(a) (Vernon 2007).

²⁶⁶ 10 Pa. Cons. Stat. § 375 (2007).

²⁶⁷ *See* case cited *supra* note 24, at 384.

²⁶⁸ *Id.* The facility also operated at a loss, was committed to serving all without regard to ability to pay, and over forty-eight percent of its residents were Medicaid beneficiaries for whom government payments covered only two thirds of their costs.

²⁶⁹ *See id.*

²⁷⁰ 10 Pa. Cons. Stat. § 375(d)(1)(i) (2007).

²⁷¹ 10 Pa. Cons. Stat. § 375(d)(1)(ii) (2007).

“[w]holly gratuitous goods or services to at least 5% of those receiving similar goods or services;”²⁷² or if it provides “uncompensated goods or services . . . equal to at least 5% of the institution’s costs of providing goods or services;” or satisfies one of several other tests.²⁷³

b. Quantification Based on Income Levels of Residents

In some states, the amount of charity care that is required depends, at least in part, on the income levels of the residents. In Washington State, for instance, exemption for nonprofit homes for the aging depends on the percentage of low-income residents in the facility.²⁷⁴ Generally, for a full exemption in Washington, at least 50 percent of the occupied units must be occupied by low-income residents.²⁷⁵ However, an elderly housing complex that has fewer than 50 percent of its units occupied by low-income residents may nevertheless qualify for a partial exemption.²⁷⁶

Some jurisdictions do not impose precise requirements regarding the income levels of residents, but they may nevertheless take residents’ income levels into account as one factor relevant to whether a facility deserves a property tax exemption. In Florida, for example, although income levels of residents may be one factor relevant to the

²⁷² 10 Pa. Cons. Stat. § 375(d)(1)(iii) (2007).

²⁷³ 10 Pa. Cons. Stat. § 375(d) (2007).

²⁷⁴ Wash. Rev. Code Ann. § 84.36.041 (West 2007).

²⁷⁵ *Id.* Generally, a resident is low-income if he or she has a “combined disposable income” (roughly the sum of the adjusted gross incomes of all residents in the household) of no more than \$22,000 or 80 percent of the median income adjusted for family size, whichever is greater. *See id.* Alternatively, a facility can qualify for exemption if it is subsidized by a federal Housing and Urban Development program. *Id.*

²⁷⁶ *Knights of Pythias Care Ctr. v. State of Washington Dep’t of Revenue*, Nos. 53723 & 53724, 1999 WL 1133172 (Wash. Bd. Tax App. 1999).

question of whether property is being used predominately for charitable purposes, an “income test” is not the “primary determinant.”²⁷⁷

In contrast, a New York court held that a CCRC was not exempt because, *inter alia*, the property’s use was not limited to “persons in need.”²⁷⁸ The court stated that charitable elderly housing facilities must be occupied by “large percentages” of residents receiving full subsidies from the charity, or by those who receive only S.S.I.²⁷⁹ Although the court did not unequivocally define “large percentage,” its citations of prior cases suggested that 75 percent would almost certainly meet the requirement, and 50-59 percent range may or may not qualify.²⁸⁰ The court held that the 6-11 percent of fully subsidized residents in the instant case clearly failed to reach the “large percentage” threshold, especially considering that the “health and wealth” of the private-pay residents was high, and that the organization was not struggling to meet its operating costs.²⁸¹

§ 3-6. Provision of Free or Subsidized Care to Applicants “at the Door” as Opposed to Providing it to Already-Admitted Residents

A key question that arises in connection with “what counts as charity care” and “how much charity care is required” is whether a facility—especially a CCRC—may restrict initial admissions to applicants with sound finances, while subsidizing the care of any residents who *later* become unable to pay the full cost of their care. Although a few

²⁷⁷ See case cited *supra* note 261, at 1240 (reasoning, in part, that a strict income test would constitute an “unjustifiable burden” on elderly housing facilities that were otherwise in compliance with the statutory standards for exemption).

²⁷⁸ *Miriam Osborn Mem’l Home Ass’n v. Assessor of Rye*, 2006 NY Slip Op. 52461(U) 2006 WL 3836719 (Tbl.) (N.Y. Sup. Ct. Dec. 30, 2006).

²⁷⁹ *Id.* at 19.

²⁸⁰ *Id.*; *Cf.* case cited *supra* note 65, at 946 n.6 (“An institution may have more paying patients than non-paying patients”).

²⁸¹ See case cited *supra* note 278, at 21.

courts have recognized that such practices can be charitable,²⁸² many facilities have been denied property tax exemptions when they screened out low-income applicants²⁸³—even though they may have provided subsidies to residents already living in the facilities pursuant to continuing care contracts.²⁸⁴ In Pennsylvania, facilities with Medicaid beneficiary populations of 61 percent have been held exempt,²⁸⁵ and those having Medicaid populations of 48.5 percent have been found exempt when most such residents were eligible for Medicaid at the time they applied for admission to the facility.²⁸⁶ In contrast, a Pennsylvania CCRC was denied an exemption when only 30 percent of its residents were Medicaid-eligible, especially because only “8% of the total admissions... were Day One Medicaid eligible from outside of the [CCRC] community.”²⁸⁷ *See also* Chapter 2 § 2-3b (Income Levels of Residents and Financial Screening).

²⁸² *E.g.*, case cited *supra* note 181.

²⁸³ Chapter 2 § 2-3b.

²⁸⁴ *E.g.*, case cited *supra* note 32.

²⁸⁵ *See* case cited *supra* note 241, at 840-41 (holding hospital exempt).

²⁸⁶ *See* case cited *supra* note 24, at 383.

²⁸⁷ *See* case cited *supra* note 176. *But see* case cited *supra* note 103 (finding CCRC exempt because, *inter alia*, it offered “a measure of protection to its residents against the uncertainties and challenges that attend the process of aging” and disapproving prior decisions “to the extent those decisions are inconsistent with our analysis and holding today”).

CHAPTER 4: ADDITIONAL CONSIDERATIONS

§ 4-1. Sources of Funding

Courts and tax authorities tend to look with disfavor on organizations whose funding is derived primarily from fees charged to residents. To a lesser extent, revenues derived from debt²⁸⁸ or from investments of net revenues²⁸⁹ are also scrutinized. Conversely, courts look with favor upon organizations that are funded primarily by charitable contributions, or, to a somewhat lesser extent, by payments from government programs such as Medicare or Medicaid. The general policy rationale for these distinctions is that a nonprofit organization that is funded primarily by fees, debt, or investments is indistinguishable from a commercial business (unless other countervailing factors distinguish it).

The question of whether a charity is “supported by donations and gifts in whole or in part,” though not dispositive,²⁹⁰ is one factor tax authorities consider in determining whether the facility deserves a property tax exemption.²⁹¹ In some jurisdictions, “this factor can be satisfied even with minimal contributions. In determining whether this factor is met, donations of service as well as donations of money and property are to be

²⁸⁸ *E.g.*, case cited *supra* note 152 (finding private pay portion of skilled-nursing facility not exempt, in part because the facility was financed primarily by debt and fees, rather than by charitable contributions).

²⁸⁹ *E.g.*, case cited *supra* note 11 (independent living portions of multilevel care facility not exempt because, *inter alia*, excess revenue was used for investments rather than to decrease costs for residents) *But cf.* case cited *supra* note 82 (assisted living facility acted appropriately when it used invested income from its endowment fund to cover some of its operating expenses when all investment income not needed for operating expenses was returned to the endowment fund); *Accord Gundry v. R.B. Smith Mem. Hosp. Ass’n*, 291 N.W. 213, 213 (Mich. 1940) (cited with approval in *Wexford Med. Group v. City of Cadillac*, 713 N.W.2d 734 (Mich. 2006)).

²⁹⁰ *See* case cited *supra* note 208.

²⁹¹ *See* case cited *supra* note 15 (finding hospital exempt, and holding that although the source of funding is a factor, there is no strict requirement that the majority of a charity’s income be derived from charitable sources).

considered.”²⁹² In *Chapel View, Inc. v. Hennepin County*, a Minnesota assisted-living-like facility was found to have just barely satisfied the “supported by donations” factor when it received (1) cash contributions equal to four percent of its total revenues for the facility in question, (2) personal property, such as a van for transporting residents, and (3) a minor amount of volunteer services in the woodworking and ceramics rooms.²⁹³ The *Chapel View* court also noted with approval that the organization’s directors were not compensated.²⁹⁴ However, demonstrating that a charity’s source of funding is only one factor among many, the *Chapel View* court found that the facility’s lack of affordability for low-income persons outweighed the “good fact” that it was funded in part by contributions.²⁹⁵ The court thus found that, considering all the facts and circumstances, the facility did not deserve an exemption.²⁹⁶

In another Minnesota case, an assisted living facility was held not exempt because, *inter alia*, it had received virtually no charitable donations.²⁹⁷ The court refused to recognize an interest-free loan the organization had received from a member organization as a charitable contribution.²⁹⁸ Courts in other jurisdictions too have denied property tax exemptions to facilities whose funding was derived primarily from fees, debt, and/or investments rather than from charitable donations.²⁹⁹

²⁹² *Chapel View, Inc. v. Hennepin County*, No. TC-5686, 1988 WL 70657 (Minn. T.C., June 29, 1988) (quoting *Inter-Faith Soc. Servs., Inc. v. County of Carlton*, No. C-84-708 (Minn. T.C., Dec. 20, 1984), *aff’d*, 376 N.W.2d 687 (Minn. 1985)).

²⁹³ *Chapel View, Inc. v. Hennepin County*, No. TC-5686, 1988 WL 70657 (Minn. T.C., June 29, 1988)

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ See case cited *supra* note 25.

²⁹⁸ *Id.*

²⁹⁹ See case cited *supra* note 81, at 578-79 (elderly housing units not exempt when supported primarily by fees rather than donations, notwithstanding a minor amount of work contributed by volunteers); see also case cited *supra* note 196, at 251 (exemption denied when “funds were derived primarily from nursing home fees [and] independent living [facility] rent, and not charitable contributions”); see also case cited

Even though some charities may not be successful in securing large amounts of donated funds, it is to a charity's advantage to at least make an effort to solicit them. For instance, in one case a Michigan facility was denied an exemption because, *inter alia*, it and "had neither solicited nor received any gifts" and "was funded entirely by loans, debentures, and resident fees."³⁰⁰ Similarly, in a Pennsylvania case, the court held that although a nursing home may qualify for a tax exemption even though it derives "substantial" funding from debt, the facility in question was not exempt because (a) virtually 100 percent of its purchase price had been financed by government and for-profit lenders; (b) operating costs were financed almost entirely by fees and government benefits (a single \$200,000 donation was deemed insufficient); (c) there was no charitable endowment fund; and (c) the \$60,000 value of volunteer hours contributed to the facility was not large enough considering the overall operating costs and lack of other charitable contributions.³⁰¹

In some jurisdictions, an organization that receives a large percentage of its funding from government programs—especially Medicaid—may be deemed charitable even though it does not receive many charitable donations from private donors.³⁰²

supra note 50 (nursing home not exempt when, *inter alia*, initial capitalization consisted entirely of debt, and did not include contributions of money, goods, or services); *Hattiesburg Area Senior Servs., Inc. v. Lamar County*, 633 So. 2d 440, 446 (Miss. 1994) (facilities not exempt when, *inter alia*, they relied mainly "upon rental receipts to meet all their expenses, including repayment of . . . quite substantial loans procured to improve their properties . . . without any reliance upon contributions").

³⁰⁰ *Mich. Baptist Homes & Dev. Co. v. City of Ann Arbor*, 242 N.W.2d 749 (Mich. 1976) (discussed in case cited *supra* note 22, at 742).

³⁰¹ See case cited *supra* note 148.

³⁰² See case cited *supra* note 22 (suggesting that an organization could qualify for exemption even if received 99 percent of its revenues from government programs, when residents did not pay "full value for the services") (citing *Huron Residential Servs. for Youth, Inc. v. Pittsfield Charter Twp.*, 393 N.W.2d 568 (Mich. Ct. App. 1986); see also case cited *supra* note 150, at 227 (facility exempt even though it received few monetary donations, when it received contributions of volunteer labor and 50 percent of care was paid for by government entitlements).

Services provided to Medicaid residents can also help a charity to establish that it satisfies the “relief of governmental burdens” factor, discussed *infra* § 4-2.

§ 4-2 Relief of Governmental Burdens

In many jurisdictions, one factor in property tax exemption determinations is whether the use of the property in some way alleviates burdens that the government or society.³⁰³ Jurisdictions have differed on what exactly qualifies as “relieving the burdens of government.”

Some courts have interpreted the requirement strictly, tying it closely to questions of whether services are provided to low-income individuals. For instance, Massachusetts’ highest court held that a CCRC was not exempt because its fees made it inaccessible to a large segment of the community and did not relieve any government burdens.³⁰⁴ The CCRC had monthly fees from \$2,700-\$3,500 and high entrance fees.³⁰⁵ Similarly, another Massachusetts court held that an assisted living facility did not relieve the burdens of government because the residents were wealthy enough to pay for their own care.³⁰⁶ The residents would therefore not be forced to resort to public assistance in the absence of the facility’s services.³⁰⁷ Again, an elderly housing facility in Connecticut failed to prove that its activities “would make it less likely that the residents would become burdens on society.”³⁰⁸ The facility was open only to elderly persons who could

³⁰³ *E.g.*, case cited *supra* note 196, at 248; *Jackson v. Phillips*, 96 Mass. 539, 556 (Mass. 1867); *Rio Vista Non-Profit Hous. Corp. v. County of Ramsey*, 277 N.W.2d 187, 191 (Minn. 1979) (cited in *Volunteers of Am. Assisted Living v. County of Hennepin*, No. TC-24677, 1999 WL 200684 (Minn. T.C. 1999) (denying exemption to assisted living facility, in part because it could not show that it lessened the burdens of government)); *By and Through the County Bd. of Equalization of Utah County v. Intermountain Health Care, Inc.*, 709 P. 2d 265, 269 (Utah 1985).

³⁰⁴ *See* case cited *supra* note 174.

³⁰⁵ *Id.*

³⁰⁶ *See* case cited *supra* note 161.

³⁰⁷ *Id.*

³⁰⁸ *See* case cited *supra* note 81, at 579.

afford a down payment of \$73,000, a monthly fee of \$350, and were “able to take care of themselves.”³⁰⁹

In a strict construction of the “relief of governmental burdens” factor, a Texas appellate court denied an exemption to a multi-level care facility when, even though some of the independent-living residents had received waivers of entrance fees, there was no evidence that those residents would have qualified for Medicaid or other government subsidies in the absence of the waivers.³¹⁰ A Missouri court reached a similar result when it found that the residents of a retirement facility were financially sound and were “in no danger of becoming public charges.”³¹¹ The facility was denied a property tax exemption.³¹²

a. Relieving Governmental Burdens through Service to Public-Pay Residents

Although care provided to public-pay residents would seem to be an obvious way to satisfy the “relief of government burdens” factor, this is not always the case. For example, a New Jersey court held that a nursing home did not sufficiently relieve the burdens of government even though 55 percent of its residents were Medicaid beneficiaries, because the fees it charged private-pay residents were adjusted to compensate for the facility’s Medicaid shortfalls.³¹³

On the other hand, a Michigan health care facility was granted an exemption when only 50 percent of its patients utilized Medicaid *or Medicare*.³¹⁴ The court recognized that “relieving bodies from disease or suffering *is* lessening the burden of

³⁰⁹ *Id.*

³¹⁰ *First Baptist/Amarillo Fdn. v. Potter County Appraisal Dist.*, 813 S.W.2d 192, 195 (Tex. App. 1991).

³¹¹ See case cited *supra* note 124, at 95.

³¹² *Id.* at 96.

³¹³ See case cited *supra* note 157; See also case cited *supra* note 32, at 505 (CCRC not exempt when it did not accept Medicaid—or even Medicare—at all). Cf. Chapter 3 § 3-3b.

³¹⁴ See case cited *supra* note 22, at 737; See also case cited *supra* note 24 (nursing home exempt when approximately 48 percent of residents received Medicaid).

government,” regardless of the amount of free or subsidized care a facility distributes.³¹⁵

The Michigan court’s decision also relied on the fact that the facility had an open-door policy, placing no limits on the number of Medicare and Medicaid patients it would accept.³¹⁶

Another case in which a facility survived a challenge by local tax authorities who claimed it was not sufficiently committed to the service of public-pay patients is *Smyth County Community Hospital v. Town of Marion*.³¹⁷ In that case, the Virginia Supreme Court found a hospital-owned nursing home exempt even though it had considered decreasing the number of Medicaid patients it served.³¹⁸ The court recognized that the nursing home might have a legitimate need to reduce the number of Medicaid residents in order to assure its own financial health and to avoid draining the resources of the hospital.³¹⁹

§ 4-3. Intent of the Benefactors who Established the Charity

One factor courts may consider is the purposes for which the organization was established. In a New York case, for example, a CCRC was held not exempt because, *inter alia*, its purposes had diverged too much over the years from those of the testatrix who had donated the funds to establish the facility—even though the will had been executed nearly 120 years earlier.³²⁰ The testatrix’s will indicated a desire to serve

³¹⁵ See case cited *supra* note 22, at 748.

³¹⁶ *Id.*

³¹⁷ See case cited *supra* note 27.

³¹⁸ *Id.* at 405

³¹⁹ *Id.*

³²⁰ See case cited *supra* note 278.

indigent elderly persons, but the court found that only a small percentage of the CCRC's residents needed and received a "substantial charitable benefit."³²¹

§ 4-4. Marketing and Advertising

An organization's marketing practices may be taken into account in exemption determinations. If an organization is marketed as a luxury facility, it is less likely to be considered charitable. For example, when the advertising brochures of a Missouri retirement facility described it as a "premier retirement facility" with "fine amenities," the court deemed the advertisements to be evidence that the facility did not have charitable purposes.³²²

Jurisdictions are not in agreement regarding whether a charity must advertise its charity care policy to the public. According to the IRS³²³ and some state courts,³²⁴ it need not do so. According to other courts, however, it must.³²⁵

§ 4-5. Extra Charges for Services

A few courts have seemed to view with disfavor facilities that charge extra for special accommodations, utilities, or other services. For instance, in *In re Town of Wolfeboro*, the New Hampshire Supreme Court determined that certain independent living apartments were not exempt, one relevant factor being that the facility charged extra for certain services, including utilities.³²⁶ The court distinguished an earlier case, in which a facility was granted an exemption, one relevant difference being that it did not

³²¹ *Id.*

³²² See case cited *supra* note 124, at 89, 95.

³²³ Elizabeth Kastenber and Joseph Chasin, *Elderly Housing*, IRS Exempt Organizations Continuing Professional Education Text for FY 2004, at 5, available at <http://www.irs.gov/pub/irs-tege/eotopicg04.pdf>.

³²⁴ E.g., *Randolph Street Gallery v. Zehnder*, 735 N.E.2d 100, 107 (Ill. App. Ct. 2000).

³²⁵ See case cited *supra* note 65, at 941-42 (facility not exempt because, *inter alia*, it never advertised its services as being available to the community regardless of financial status).

³²⁶ See case cited *supra* note 133.

charge extra for such services.³²⁷ Apparently applying similar principals, the Nebraska Supreme Court held an assisted living facility exempt in part because the facility did not charge extra for any utilities except telephone service.³²⁸ None of these courts elaborated on their reasons for considering extra charges as a relevant fact.

Not all courts, however, accord such weight to extra charges. In *Pratt-Stanton Manor Corp. v. Parish of Orleans*, for example, a Louisiana appellate court held an assisted living facility exempt even though it charged extra for personal assistance and other services, when the extra charges were necessary to help cover the costs of operating the facility because rental fees did not do so.³²⁹

³²⁷ *Id.* See also *Passavant Health Ctr. v. Bd. of Assessment and Revision of Taxes of Butler County*, 502 A.2d 753, 757 (Pa. Commw. Ct. 1985) (facility not exempt when, *inter alia*, the facility had subsidized the utilities, bills, and service fees of only one resident).

³²⁸ See case cited *supra* note 244.

³²⁹ *Pratt-Stanton Manor Corp. v. Parish of Orleans*, 821 So. 2d 748 (La. Ct. App. 2002).